Volume 2

"The Slum Tenant and the Common Law:
A Comparative Study"

by

James Isaac Reynolds LL.B.

Contains pamphlet

in back pocket

Part IV

The Rights of the Slum Tenant in Tort

Chapter 14

The Landlord's Liability In Tort - United States

Introduction

Unlike the law relating to the landlord's liability to his tenant in the law of contract, the American law is relatively settled on the question of his liability in tort. There is a general rule and a number of exceptions to that rule. There are certainly vigorous movements in the law on the question of acceptance of these exceptions but their existence is well-established. One or two further exceptions have been suggested but the law of torts lacks the ferment found in its contractual counter-part. This relative calm means that the law has been well written up[1] in standard works[2] and in articles and annotations.[3] The following account will, therefore, seek to draw attention to the most important points and to illustrate them by reference to recent cases. It is hoped that such a discussion will provide a foundation for certain suggestions made in a later chapter to reform the English law of tort.

The Landlord's Immunity In Tort

The general rule in the American law, as in the English, is that the landlord who lets defective premises is subject to no liability intort.[4] However, unlike the English, several general exceptions to this general immunity have appeared and there are other

exceptions in particular jurisdictions.

Numerous illustrations of the general absence of a duty of care can be found.[5] For instance, the Appellate Court of Illinois recently rejected an action brought by tenants to recover damages for injuries sustained in a fall down an unprotected stairway on the demised premises.[6] The Court observed,

> "As a general rule of law, a landlord is not liable for injuries on premises leased to a tenant and under the tenant's control --- The evidence in the case at bar does not place the plaintiff within any of the exceptions stated, therefore the general rule must apply since the premises in question were under the plaintiff's and her husband's control." 7

In another case,[8] the Appellate Division of the California Superior Court applied the general rule of "no liability upon the landlord either to a tenant or others for defective condition of the demised premises whether existing at the time of the lease or developing thereafter" and dismissed an action by the tenant's two year old visitor who had suffered injuries in a fall through a window equipped with a defective screen.

The rationale usually given for this general immunity is based upon the concept of a lease as a conveyance of an estate in land.[9] As explained by the Restatement,

> "When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the land for the term of the lease. The lessee acquires an estate in the land and becomes

> for the time being the owner and occupier, subject to all the liabilities of one in possession, both to those who enter the land and those outside of it. Therefore, as in the case of the vendor, it is the general rule that the lessor is not liable to the lessee, or to others on the land, for injuries occurring after the lessee has taken possession, even though such injuries result from a dangerous condition existing at the time of the transfer." 10

The criticism of the conveyance concept which were made in the context of the discussion on the absence of an implied warranty of habitability are equally relevant here and the reader is referred back to that discussion.[11]

Alternative grounds for the general rule have recently been suggested by the Supreme Court of Oregon. In Jensen v Meyers,[12] the Court considered that, "the property concept standing alone is not a satisfactory explanation for immunizing the lessor from liability" and that "the immunity of the lessor may be rested upon grounds other than the mere transfer of property interest to the lessee."[13] These grounds were that the landlord should not be liable if "the nature of the defect (is) such that the landlord would reasonably expect that the tenant would take steps to remedy the defect or otherwise to safeguard persons entering there at his invitation."[14] Liability, in fact, should depend "upon the well accepted principle that one is liable for reasonably foreseeable harm."[15] It was by this principle that the exceptions to the landlord's general immunity could be explained; in such cases, it

was unlikely that the defect would be remedied by the tenant hence the landlord became liable. This new rationale is not really convincing. Given the tenant's limited interest in the property and possibly a lack of finance, it would often be foreseeable that he would not remedy the defect[16] and yet the general rule of no liability on the part of the landlord is applied. Again, in the case of exceptions to this general rule, it is often reasonably foreseeable that the tenant will attempt to remedy the situation and yet the landlord is still held liable if these attempts fail to prevent harm.

Dissatisfaction with the general rule protecting the landlord from liability[17] has led to the suggestion that it be replaced by a rule based upon the general tort principle that "he who owns or is in a position to control or is responsible for things or persons has the duty to prevent their harming others."[18] Statutory intervention has gone some way to implementing this suggestion by imposing a duty of care on landlords.[19] Judge made law has also tended to shift the responsibility to the landlord. This has been done by the creation of various exceptions to the general rule rather than by adopting a fundamentally different theory as to the landlord's duties.[20] Indeed, one commentator concludes that, "In the last ninety years or so there has been a discernable shift from the rule

of lessor's immunity to an approach which makes the landlord primarily responsible for the safe condition of his premises."[21] It is proposed to consider each such exception in turn and then discuss two possible exceptions and some matters common to all the exceptions.

Duty To Disclose Known Latent Defect

A well-established exception to the landlord's tort immunity under American law is that "the lessor, like a vendor, is under the obligation to disclose to the lessee concealed dangerous conditions existing when possession is transferred of which he has knowledge."[1] It should be observed at the outset that the duty relates to concealed or latent defects; there is no duty to warn of obvious or patent defects.[2] For example, in a recent case,[3] the Court of Appeals of North Carolina dismissed an appeal brought by a tenant who had sustained injuries in a fall down a stairway. It noted that,

> "A landlord does not normally have a duty to warn his tenant about patent defects in the demised premises. -- The condition of the stairs was patent and obvious. In fact, plaintiff admitted that she observed the condition of the stairs and made a mental note not to use them again. As such,it was proper for (the trial judge) to conclude, as a matter of law, that the defendant was not liable to the plaintiff here." 4

Latent defects have been defined by the Supreme Court

of New Jersey as "those the existence and significance of which are not reasonably apparent to the ordinary prospective tenant"[5] whilst the Court of Appeals of Georgia has defined it as "one which could not have been discovered by inspection".[6] Whether a particular defect is latent or patent has been held to be a question of fact for the jury.[7]

Where the defect is latent, the landlord may be under a duty to warn the tenant of the existence of such defects and if he conceals the presence of such defects he will be liable for personal injuries to the tenant and those claiming under him. Many recent cases from various parts of the United States illustrate this rule. For instance, the Supreme Court of New Mexico affirmed judgement for a tenant who had suffered injury when he was struck by plaster falling from a bedroom ceiling.[8] The Court held that the landlord knew or should have known that the plaster was not properly applied whereas the tenant did not have such knowledge or reason to know of the defect. The Court of Appeals of Georgia reached a similar decision in a case in which the tenant had sustained injuries in an explosion caused by a gas pipe being left exposed and unplugged.[9] In a case from West Virginia,[10] the landlord was held liable for injuries suffered when defective floor-boards gave way and a Missouri landlord was considered to be in breach of his legal duty by his failure to disclose the existence of abandoned electricity cable

which caused the death of the tenant's child.[11] The duty of disclosure extends to the situation where there has been an infectious disease in the premises.[12] It has also been decided that the landlord must explain to his tenant how to use apparatus which may be unsafe if used incorrectly.[13] Liability may flow from defects in parts of the premises under the landlord's control as well as in parts demised if the tenant is entitled to make use of such parts.[14]

Before the landlord can be in breach of his duty of disclosure, he must have knowledge of the defect and be aware that it is dangerous. Courts differ on the type of knowledge required but all agree that a complete absence of knowledge, actual or constructive, is a good defence.[15] An Oregon decision[16] provides an example.[17] The landlord was held not liable for injuries suffered by the tenant when struck by a falling light fixture where there was no evidence of any knowledge of the defect. It is not sufficient that the landlord knows only of the defect, he must also have knowledge, actual or constructive, that it is dangerous.[18] As the Supreme Judicial Court of Massachusetts has explained, "it is not enough that the landlord knows of the source of danger, unless also he knows, or common experience shows, that it is dangerous. He is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would

not warn him, and which only a specialist would appreh nd."[19] For instance, the Missouri Court of Appeals rejected the tenant's action in respect of personal injuries sustained as a result of termite spraying operations.[20] The landlord in this case could not reasonably be expected to know of the toxicity of the pesticide used.

The most stringent standard of the lan lord's knowledge of the defect is that only actual knowledge is sufficient for liability.[21] Many Courts have held that he is only liable if he actually knows of the defect no matter how negligent he may be in failing to realise that such defects exist.[22] This rule was recently applied by the Appellate Division of the Connecticut Circuit Court [23] to deny the tenant a remedy under the latent defect tort even though it was found by the Court that the defect concerned, a worn sash cord, had existed for a sufficient length of time to charge the landlord with constructive knowledge of it.

As long ago as 1898, the Tennessee Court in Willcox v Hines vigorously criticised those cases requiring actual knowledge,

> "The logic of this position is that a landlord is under no obligation to know anything about the condition of his premises - whether they are dangerous or safe, whether habitable or nuisance - and so long as he keeps himself ignorant, either intentionally or negligently, he cannot be held liable for any damages resulting from the dangerous condition of his property when leased; but if, by accident or examination, he becomes aware

> that a secret defect does exist, then he is liable, if he fails to disclose it. Under this ruling, the landlord is placed in the better condition, the more negligent and inattentive he is, and a premium is put upon his ignorance." 24

The view of the writers of a leading textbook on the law of torts is also that the requirement of actual knowledge is too strict.[25]

A recent California decision[26] suggests, however, that the requirement of actual knowledge may not be too strictly applied in practice. The tenant had been injured when a bathroom sink gave way from the wall. At the time the apartment was leased, the landlord's agent did not know that this particular sink was unsafe but she did know that similar sinks in the house were defective. The California Court of Appeals held that the landlord had actual knowledge through his agent, "three or four experiences throughout the building should have demonstrated the fact that the defect was general. It was a hidden defect. As we view it, that knowledge <u>was</u> actual."[27]

The most lenient interpretation of the requirement of knowledge on the part of the landlord is that adopted by the Tennessee Courts which holds him responsible for any latent defects that an inspection would have revealed.[28] This rule was first stated in the leading case of <u>Hines</u> v <u>Willcox</u>,

> "We think that the great weight of authority is that if a landlord leases premises

> which are, at the time, in an unsafe and dangerous condition, he will be liable to his tenant for damages that may result if he knows the fact and conceals it, or if by reasonable care and diligence, he could have known of such dangerous and unsafe condition, provided reasonable care and diligence is exercised by the tenant on his part." (emphasis added) 29

Despite a highly critical reception by Courts of other jurisdictions, Tennessee Courts still require a duty of inspection on the part of the landlord.[30]

The Tennessee rule has been assailed by other Courts. No less a judge than Mr. Justice Holmes flatly refused to adopt that rule as part of Massachusetts law, "the views expressed (in Hines v Willcox) do not command our assent".[31] An Ohio Court was more biting in its criticism,

> "(The Hines case) is not reconcilable with the principles of law, nor with the decided cases which are entitled to be recognised as authoritive. It is attractive only as a suggestion of the intellectual repose which one may enjoy when he determines the liabilities of the parties according to his individual notions of personal duty, instead of seeking the grounds of decision in the rules which have been approved by the composite judgement of those who have established our system of jurisprudence."[32]

In a subsequent Tennessee case,[33] such criticisms were considered and rejected. Hines was said to be "unshaken" and "timely" and in keeping with the upward trend in this country toward the betterment of tenenemt houses and leased premises. "Commentators have described the decision as somewhat in advance of its time"[34] and establishing "a liberal and desirable rule".[35] Certainly it represents an early example of judicial activism in the field of unfit dwellings. Before

leaving this topic, it should be noted that the duty of inspection does not impose the extreme duty of constant care and inspection, the duty is one of reasonable care only.[36]

In states other than Tennessee, there is no general duty on the landlord to inspect the premises for latent defects.[37] Indeed, not only is there no general duty of inspection but he is not liable for negligently failing to discover defects in the course of a gratuitous inspection.[38] Some jurisdictions, however, require him to either disclose his suspicions or make an inspection to disprove them if he has reason to suspect that defects do exist.[39]

Many Courts follow a middle course between the rule requiring actual knowledge and the Tennessee rule; the landlord is held liable for non-disclosure of those defects of which he ought reasonably to have had knowledge.[40] The Supreme Court of Minnesota has recently adopted this rule and expresely overruled previous cases suggesting that actual knowledge was required.[41] Prosser maintains that it is not necessary for the lessor to believe the condition to be unsafe or even that to have definite knowledge of its existence before he becomes liable for non-disclosure. "It is enough that he is informed of facts from which a reasonable man would conclude that there is danger; and the decisions run the gamut of 'reasonable notice', 'reason to know' or 'should have

known'. If he has such information, and it would lead a reasonable man to suspect the existence of an unreasonable risk of harm, it is his duty to communicate at least that suspicion."[42] As another commentator puts it, "he cannot close his eyes to facts that would lead reasonable men to act".[43] This more liberal view of the requirement of lessor's knowledge of the defect found acceptance in the Second Edition of the Restatement where it is said that the lessor is liable if he "knows or has reason to know of the condition and realises or should realise the risk involved".[44]

The time that the landlord acquired knowledge and the time that the defect arose are both important. Some courts hold that there is no duty to disclose defects discovered after the letting[45] but others consider the duty of disclosure to be a continuing one.[46] For instance, in a Michigan case[47] the landlord had leased premises which at the time of the demise were defective in that the drinking well was polluted by the carcass of a dog. Thetenant's family became ill and recovery was permitted even though the landlord did not know of the defect at the time the tenant took possession. Such knowledge came after the demise. The time that the defect occurred is also a crucial consideration because there is only liability for those defects in existence at the commencement of the lease.[48] For instance, the Supreme Court of Missouri recently held

that the landlord could not be liable for injuries to the tenant's invitee when the lease had commenced sixteen years before the time of the accident and there was no evidence to warrant a finding that the premises were in a dangerous condition at that time.[49]

So far we have considered the requirement of liability that the landlord must have some knowledge of the defect, it should also be observed that the tenant's knowledge may constitute a defence to such liability. Clearly, if the tenant has actual knowledge of the defect, he cannot recover for the landlord's non-disclosure.[50] A decision of the Superior Court of Delaware[51] provides an illustration. Tenants brought an action to recover for injuries sustained when earth caved in. The Court rejected the action on the grounds that, at the time of the accident, they knew of the danger. "The landlords were not required to perform the useless task of informing the tenants of a dangerous condition of which the tenant had already been warned."[52] The landlord is also not liable if the tenant should have discovered the defect by the exercise of reasonable care.[53] Indeed, he is held to be under a duty to inspect the premises before leasing them and is charged with such knowledge as an inspection would have revealed.[54] The Circuit Court of Connecticut noted in one case, "the defendant contends that the defect, if any, could have been discovered by the plaintiff on reasonable inspection.

If that was true and the evidence was unassailable on that point, then clearly there could be no recovery.[55] This duty of inspection does not extend to parties other than the tenant himself.[56]

As with the landlord,[57] knowledge of the defect is not sufficient in itself, there must also be an awareness of its dangerous condition.[58] The Court of Appeals of Georgia has said, "Knowledge of a defect does not in and of itself constitute knowledge of danger inherent in the defect."[59] In that case, the Court decided that the tenant's knowledge of a defective porch roof which allowed water to leak through the roof and ceiling did not constitute a knowledge of the danger that the ceiling might fall upon her.

There is a divergence of opinion on the theory of liability for non-disclosure of a latent defect; some Courts hold the action to be based on fraud whilst others view it as an action in negligence. Prosser argues, "there is --- something like fraud in a failure to give warning of a known hidden danger"[60] and Chief Justice Holmes said that "as the landlord makes no contract concerning the condition of the premises at the time (of the demise) the only ground on which he can be held liable is that he unconscionably is leading the other party into a trap."[61] Commentators have suggested that this distorts the law of deceit; for example, liability is extended to per-

sons other than the tenant and the landlord cannot be held to mislead them.[62] The alternative theory is that liability arises under the law of negligence.[63] An early Massachusetts case[64] noted, "While the failure to reveal such defects may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs." One commentator has observed that "in the typical action under the rule the elements of negligence - a duty owed by the defendant, a breach of that duty, causation, injury, and due care by the plaintiff - are present."[65] But others have noted that the duty imposed is less than that under traditional negligence concepts; the landlord need do no more than inform the tenant of the defect.[66]

It has been suggested that policy considerations explain the limited nature of the landlord's duty merely to give notice of latent defects. This exception to his general immunity in tort "was given a grudging and constrictive construction by Courts under the flourishing myth that overborne tenants were omnicompetent people, dealing at arms length on a plane of legal parity, who might be expected to give the premises an intensive examination before renting them."[67] Another commentator suggests that, "historical considerations provide the reason for such a limited duty. Positive duties of inspection

and repair were deemed burdensome to the favoured landowner. An exception was engrafted on the caveat emptor rule only where the inconvenience to the landowner was slight and there was a great likelihood of injury to a tenant."[68]

In practice, it is normally unimportant which theory of liability is adopted. The only real difference is in the defence open to the landlord. In an action based upon negligence, contributory negligence is a good defence but where the action is based upon fraud then contributory negligence is no defence and the landlord must show that the tenant was not misled, for example, that he already knew of the danger.[69]

It is difficult to assess the value of the latent defect tort to the tenant. Courts differ widely in their interpretation of what is a latent defect,[70] how much knowledge by the landlord is required[71] and how much is required of the tenant.[72] Some Courts have taken a liberal approach, for example, the Tennessee rule requiring the landlord to inspect for latent defects.[73] Others have taken a most restrictive approach.[74] One Massachusetts Court[75] decided, for instance, that a tenant could not recover for injury sustained due to a stair tread which had been partly sawed through, painted over and situated in a stairway which was "not well lighted". Despite the

deceptive nature of the stairs, the Court concluded that the defect was discoverable by the tenant. A more recent example comes from a Washington case which held that a difference in floor levels was a "deceptive condition" but not a "latent defect" because it was not physically concealed.[76]

The low-income tenant is likely to derive least benefit of all from the rule. The protection conferred upon the prospective tenant by the rule is two-fold: (a) he can decide not to rent premises once he is aware of the defects, (b) if he does decide to rent then he can take precautions against the danger they pose.[77] As regards the first point, the low income tenant may not have the freedom of choice it presupposes. Given his limited bargaining position,[78] the only alternative to one house with latent defects may be another house also with defects either latent or defect. As regards the second point, sheer necessity may force the tenant to use parts of the premises and appliances known to be defective. For example, a family may be forced to run the risk of defective floor-boards collapsing although they have been informed of the danger, their need for space may be so desperate. Indeed, the duty of the landlord to reveal defects may in some cases serve only to increase the bitterness and frustration of the low income tenant and his family. Their lack of power, of bargaining

position, of freedom of movement, is glaringly illustrated by their enforced acceptance of premises which are known to be unfit for decent habitation.

Landlord's Liability For Negligent Repairs

Under the American law, "if a lessor -- undertakes to make repairs, alterations or improvements on the premises and the job is done carelessly with resultant injury to the lessee, the lessor is liable for the damages so caused to the lessee."[1] A recent decision of the Supreme Court of South Carolina[2] illustrates this rule. An elderly tenant had fallen on the defective floor of her apartment, judgement in her favour was upheld by the Court on the grounds of the landlord's failure to use care in making repairs.[3] The landlord's liability for negligent repairs extends to damage to goods as well as personal injuries.[4] It applies also to improvements.[5] The rationale of the rule is said to be that the landlord's covenant to repair and the subsequent carrying out of works of repair imply a representation that the premises are safe.[6] Liability flows from breach of this representation. It is said to be derived not from the defendant's standing in the capacity of landlord but from the responsibility of any person who creates a dangerous condition on land.[7]

All jurisdictions except Massachusetts hold the landlord responsible for repairs gratuitously undertaken as well as for repairs made under a covenant.[8] In a recent Mississippi case,[9] for example, the Supreme Court upheld judgement for the tenant who had been injured by a fall through the rotten boards of the porch of the demised premises. Shortly before

the accident, the landlord had hired a carpenter to repair the porch. He was held liable for the negligent nature of these repairs, "Here the landlord voluntarily repaired and is responsible for the want of due care in the execution of the work based upon negligence without regard to an expressed or implied contract or without regard to consideration."[10] Massachusetts draws a distinction between repairs made gratuitously and those made under covenant. In the former case, gross negligence must be shown.[11]

Liability for gratuitous repairs is said to rest on misfeasance not nonfeasance, on negligence not on an implied duty to repair.[12] It also rests upon the general principle that a volunteer must not negligently perform the work he undertakes.[13] As the Appellate Court of Illinois explained, "(The landlords) are charged with liability because, having chosen to perform, they have thereby become subject to a duty in respect to the manner of performance."[14] Courts differ on three possible qualifications to the landlord's liability for gratuitous repairs. First, some hold that he is not liable unless the tenant can show some reliance upon the making of the repairs.[15] If he had no knowledge that repairs had been undertaken or if he knew of their inadequacy, he cannot show reliance and so cannot recover for any injury.[16] The second qualification imposed by some Courts is that the

landlord's repairs must have rendered the premises more dangerous than they were before the repairs.[17] This rule is supported by the Restatement[18] but many Courts reject it.[19] The third and final qualification is that the repairs must give a deceptive appearance of safety before the landlord is liable.[20] This qualification has also been rejected by some authorities.[21]

The authorities are in conflict on the question of the landlord's liability for the negligent repairs of an independent contractor doing the work on his behalf. It is difficult to formulate general rules[22] and many factors have to be taken into account though the general trend is in favour of liability.[23] Some decisions hold the landlord to be as responsible for the negligence of an independent contractor as if he had done the work himself ie he cannot delegate his duty of care.[24] Other Courts apply a general rule that the landlord is not to be held responsible for an innependent contractor.[25] All Courts seem agreed that the landlord will be liable if he employs an incompetent contractor[26] or if the works involved are inherently dangerous.[27] They also seem agreed that if the damage results from any act of the contractor which is merely collateral to the act of repair and does not naturally flow from it then the landlord is not to be held responsible.[28] Two other factors are sometimes considered by the Courts in

deciding liability; whether the landlord retained control over the part of the premises being repaired[29] and whether the repairs are made pursuant to contract.[30] If an affirmative answer is given to either question, then he is held liable.

In the final analysis, the question of liability may be dependent on public policy.[31] The United States Court of Appeals, District of Columbia Circuit,[32] has suggested that landlords are generally more stable financially than independent contractors and so should be held responsible. It pointed out that insurance would lessen this burden. A further point in favour of liability is that the tenant has no right to intervene in the selection of the contractor and so must rely on the landlord's judgement.[33] On the other hand, it has been argued that placing the burden upon the landlord will tend to discourage investment in the ownership of real estate or cause rents to increase. Furthermore, imposition of liability in these cases tends to discourage gratuitous repairs on the part of the landlord and this will harm the tenant in the long run.[34]

It should be noted that the landlord is not liable in the absence of negligence.[35] The following Pennsylvania decision[36] provides an example. Tenants brought an action against their landlords for the death of their two year old child who allegedly died as a result of ingestion of lead base paint which had

peeled from the woodwork of the apartment. The Supreme Court of Pennsylvania held that use of lead paint did not, in these circumstances, constitute actionable negligence in view of the defendant's lack of knowledge of the dangers of this type of paint; "Were we to conclude otherwise, we would be required to asribe to the appellees a knowledge and expertise not ascribale, at least at the time of this incident, to people without special training or experience." The Supreme Court of Alabama has observed that "if the repairs are made inefficiently, and not negligently, by (the landlord) or his servant, he is not liable for injuries resulting to the tenant."[38] Another point to note is that before the landlord can be held responsible, it must be shown that his negligent repairs caused the injury.[39] The Supreme Judicial Court of Massachusetts recently rejected a tenant's action because there was no showing of any connection between the landlord's repairs and the tenant's injury.[40]

Landlord's Liability In Negligence For Breach Of Covenant To Repair[1]

The traditional view of the American Courts has been that the tenant's only remedy for breach of the landlord's covenant to repair is an action in contract.[2] This approach was recently applied by the Supreme Court of South Carolina to deny a remedy to a tenant's child

who had suffered personal injuries when his father tripped on a metal stake in the darkened yard of their trailer home.[3] As the Court explained, "the basis upon which the respondant brought this action was the failure of the appellants to perform their agreement to replace the burned out lights and to remove the metal stakes from the yard of the trailer. --- An action ex delicto will not lie for the breach of a mere contractual duty to repair because a tort is a civil wrong other than a breach of contract, that actionable negligence is the neglect to perform a legal duty as distinguished from the failure to perform a mere contractual duty. -- It is our conclusion, therefore, that for the breach of the landlord's duty to repair, under the facts of the case, the remedy was by an action on the contract under which damages for personal injury may notbe recovered."[4] The last sentence reveals the shattering effect of the traditional doctrine; the tenant is denied any recovery for personal injuries because most Courts have held such injuries to be too remote to be recovered in an action for breach of contract.[5] The traditional view was justified on the grounds that a landlord should be under no greater liability than a carpenter who breaks his control.[6]

In recent years, the traditional view has been challenged and possibly overtaken by the view that tort liability should attach to the landlord's failure to

repair. This more modern view is known as the "minority" or "Restatement" position. It appears as Section 357 of that work,

> " A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee had taken possession if;
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract." 7

There is a deep division of opinion between the Courts that adopt this Restatement rule and those that follow the traditional rule. Although jurisidctions are about equally divided on the question, there is a trend in favour of tort liability.[8] Commentators differ on the exact number of jurisdictions following the Restatement;[9] some consider it still to be followed by a minority,[10] others now believe it to be the majority rule.[11] Recent states to adopt the new approach include Pennsylvania,[12] Rhode Island,[13] Kansas[14] and Nebraska.[15]

Ingenious theories have been advanced to justify the Restatement rule. The most popular one is that under the agreement to repair the landlord retains the privilege to enter and supervise the condition of the property and so is in "control" of it, and therefore

subject to the same duties as an occupier.[16] As the leading case from Minnesota put it, "where the landlord agrees to repair and keep in repair the leased premises, his right to enter and have possession of the premises for that purpose is necessarily implied, and his duties and liabilities are in some respects similar to those of an owner and occupant."[17] But this theory of control has come under severe criticism both from commentators[18] and Courts including those upholding the Restatement rule on other grounds. An example of the latter was provided by the Supreme Court of New Jersey which described the control theory as a fiction; "Here the question is simply one of policy, whether such liability in a landlord for breach of a covenant to repair, would advance justice, Men may readily differ in their answer but nothing is gained by searching for and pretending to find a power of control in the landlord when obviously it does not exist."[19] Other Courts have applied a test derived from the English law[20] and decided that a landlord does not have the necessary power of control because he has no power to exclude persons from the premises.[21] A further argument against the control theory is put by Prosser[22] who feels that it becomes quite threadbare when tort liability is extended, as some courts have extended it, to the breach of an agreement to heat the premises.[23]

Another theory put forward is that, by promising to do the repairs, the landlord lulls the tenant into a false feeling of security and dissuades him from carrying out repairs himself. Hence the landlord should be held responsible for the consequences of this reliance.[24] The difficulty with this justification is that recovery is normally denied in the case of gratuitous promises to do repairs where it would appear that the tenant is no less misled.[25] The third and perhaps most convincing justification is simply to state that the landlord has brought himself into a certain relationship with his tenant by means of the covenant and that liability in tort can be grounded on a negligent failure to perform a duty arising from this relationship.[26] But even this is not really a satisfactory justification; no action would lie in tort for a wilful breach of contract, it seems strange that it should lie for a negligent breach.[27]

A few states have declined to accept either the traditional or the Restatement rules and have adopted various intermediate positions.[28] Massachusetts[29] and Illinois[30] Courts have held that breach of a covenant to keep premises safe leads to liability in tort but not breach of a mere covenant to repair. The distinction seems to be based on the argument that a covenant of safety gives the landlord a right to

enter to look for defects and so gives him the requisite "control" but that a covenant to repair does not.[31] As a practical matter, the distinction may be difficult to apply.[32] Complex developments in New York case law[33] appear to have led to the position that actual repairs[34] or an express right to enter to do repairs[35] are evidence of sufficient control to render the landlord liable but a mere breach of covenant is not enough. Missouri seems to have come to a similar conclusion.[36]

Mississippi has distinguished between a general covenant to repair and a covenant to repair a specific defect; the latter is considered to give the necessary "control" whilst the former is not.[37]

Limitations on the landlord's liability must be noted. He is not an insurer, the plaintiff must show some negligence in the failure to perform the covenant.[38] As the Appellate Division of the Connecticut Circuit Court has observed, "The duty of the landlord in this respect is not absolute, he is not a guarantor."[39] Again, the Supreme Court of Pennsylvania has said, "Negligence, not simply the breach of the agreement to repair is the gist of the action in tort."[40] One factor to be taken into account in finding negligence is whether the landlord had, or ought to have had, knowledge of the defect. Without such knowledge,actual or constructive, he is not liable.[41] But some Courts hold the landlord to be under a duty to inspect the

premises before the demise and charge him with the knowledge that such an inspection would have revealed.[42] In a recent case, the Appellate Division of the Connecticut Circuit Court held a landlord liable for injuries suffered by a tenant when an allegedly defective storm window fell and struck him as he was washing another window. It was found that there was sufficient evidence for the jury to conclude that by a reasonable inspection the defendants would have learned of the defective condition.[43]

Commentators have differed in their support for the Restatement rule. Those disapproving of it have done so for mixed reasons. Some find no merit in the supposed justifications and, in particular, the control theory.[44] Others oppose it on policy grounds: "If he (the landlord) has made a contract to repair, justice surely demands that his liability should be limited to the contract. Here, as in other situations, departure from fundamental principle results in positive injustice."[45] Again, "He should be held liable under the covenant for the expense of repairs, but not in tort for personal injuries resulting from the disrepair. The tenant should not be able to permit the premises to become and remain in an unsafe condition and then subject the landlord to actions for damages for any injuries he or his invitees might suffer."[46]

Against such opinions can be contrasted those of commentators in favour of the Restatement rule on

policy grounds.[47] "It cannot be denied that the states following the minority view pursue a more equitable course. The tenant who takes the premises without a contract on the part of the landlord to make repairs takes them subject to any defects that may arise. To protect himself from the operation of the general rule of caveat emptor, he exacts covenants whereby the landlord is to repair the premises. In doing so he entrusts the landlord with the faithful performance of that agreement. The obligation thus assumed by the landlord should be no different in effect from one expressly imposed by law. The relationship which exists between the landlord and tenant is hardly distinguishable from other relationships where the law imposes a duty, as for example in the case of bailor or bailee."[48] As a Connecticut case has said, to deny recovery to the tenant "where the want of repair is such as to make more likely a personal injury to the plaintiff would be often to deny him the very protection from injury for which he has bargained and which has come about from the defendant's breach of an obligation which he must have reasonably known to have been intended to prevent that injury."[49]

The real objection to the Restatement rule is that it will be of little benefit to low-income tenants. Such tenants do not have the bargaining power to demand a covenant to repair from the prospective landlord.[50] One writer has been led to the conclusion that adoption of the Restatement rule will not, therefore, materially assist these tenants.[51]

Breach Of A Statutory Duty

In both this country and in the United States, the desperate plight of the tenant living in slum housing had led the Legislature to pass statutes requiring landlords to remedy the more glaring defects or conferring powers upon local government bodies to achieve this end. The question naturally arises, therefore, whether the tenant who suffers injury by reason of the landlord's failure to comply with his statutory duty is able to recover damages for breach of that duty. There is a deep division on this point in the American law.

The position of the American slum tenant will depend upon the State in which he lives. In some States, the law is quite clear for the Statute expressly gives him a right to sue in tort in the event of a lessor's breach of its provision. This has long been so in the civil law influenced States of Georgia[2] and Louisiana.[3] A recent Michigan statute[4] is to the same effect. The difficulty which has arisen in the occurs greater number of States where the Statute does not expressly give the tenant any right to sue for its breach. The problem for the Courts to decide is whether the Legislature intended to alter the private law rights of landlord and tenant or whether the Statute was to be strictly construed as having no more effect than a close reading would allow.[5]

The California Courts early held that statutes

deviating from the common law must be strictly construed and the remedies limited to those exclusively granted in the statute.[6] Other Courts have reached similar conclusions, adding that the omission of a private remedy by the legislature must be taken as evidence of an intent by the Legislature that no such remedy should be available.[7] The Connecticut case of Chambers v Lowe[8] is a leadingexample of this line of argument. The plaintiff, who lived with her parents in a tenement house owned by the defendant, was injured by the falling of plaster from the ceiling of a room in which she was sleeping. She rested her right to recover solely upon a statutory provision that, "each building used as a tenement, lodging or boarding house and all parts thereof shall be kept in good repair (by the owner)." It was held that the Statute gave her no right of action, the Court saying,

> "We would hesitate to attribute to the legislature an intent to make such a drastic change in the established relationship of landlord and tenant unless the statute clearly evinced the intent." 9

Courts in Indiana,[10] Iowa,[11] Massachuestts,[12] Missouri[13] and North Carolina[14] have reached similar decisions.

Other Courts, dealing with substantially similar statutes, have reached the opposite conclsion. The reasoning underlying such decisions is that the legislative aim was to protect the tenant from injuries resulting from disrepair and that a most effective

method of carrying out this purpose is to permit the tenant an action for tort.[15] The leading case is that of the Court of Appeals of New York in Altz v Leiberson[16] delivered by Cardozo J. As in Chambers v Lowe, the plaintiff was injured by parts of the ceiling falling. The statute relied upon was similar in terms but the Court came to quite a different decision. Holding the tenant entitled to recover, Cardozo J. said,

> "The right to seek redress if not limited to the city or its officers. The right extends to all whom there was a purpose to protect." 17

The decision was recently applied by the New York Supreme Court in Stolicker v Crandell[18] where a tenant recovered for injuries sustained by a defective clothesline which was said to have contravened the Multiple Residence Law requiring a landlord to keep a dwelling in good repair.

Many States have reached a like conclusion. In Whetzel v Jess Fisher,[19] the U.S. Court of Appeals, District of Columbia Circuit, decided that housing regulations requiring premises to be substantially sound altered the common law immunity of a landlord for defects developing during the term. This case was recently followed when a tenant suffered injuries as a result of a fall over a door sill left in a dangerous state by reason of the landlord's failure to comply with the regulations.[20] Massachusetts has lately adopted this view of liability based on breach of statutory duty[21] and a Maryland County Housing Ordinance

providing that every dwelling shall be constructed of durable material and in safe repair was held to create a duty on the part of the landlord to maintain apartment premises in such a condition that the ceiling would not collapse on apartment occupants.[22] Iowa has recently distinguished past decisions to adopt the rule[23] and Connecticut now appears to follow it[24] as do Florida,[25] Kentucky,[26] Michigan[27] and New Jersey.[28]

The limitations imposed by some jurisdictions recognising the right to sue in tort need to be noted. This right is restricted to cases where the lessor is shown to have either actual or constructive notice of the need for repair.[29] The requirement of notice has been strictly applied even where the defect is latent and so not reasonably discoverable by the tenant.[30] On the other hand, some Courts have held the landlord to be under a duty to inspect the premises.[31]

Another point to note is that some Courts hold that housing code violations do not per se create an actionable wrong for which the victim may collect damages. Rather, breach of the code gives a cause of action in negligence and is evidence of negligence only.[32] This limitation was illustrated in the New York case of Beauchamp v New York Housing Authority.[33] An infant was injured when he fell from an open window in a vacant building owned by a local housing agency and which was due to be demolished. A provision in the Administrative Code of the municipality required such

dwellings to be taken down or made safe and secure. A judgement in favour of the infant was reversed owing to the trial judge's failure to instruct the jury that the duty to secure the premises was not absolute and that violation of the code did not create liability per se. Not all courts hold housing code violations to be only prima facie evidence of negligence. For example, in Panaroni v Johnson, the Supreme Court of Connecticut said that, "the violation of an ordinance enacted for the protection of the public is negligence as a matter of law."[34]

Of course, the defendant must be in breach of the housing statute before he becomes liable in tort. Recent cases provide illustrations of this rule.[35] The Superior Court of New Jersey upheld a trial Court's decision in Ellis v Caprice[36] to exclude from the jury's consideration an alleged breach of the Tenement House Law. This Law was not intended to apply retrospectively and so the landlord of a building built before its enactment was held not to be subject to its provisions. Again, the California District Court of Appeal rejected a contention that the defendant was in breach of an ordinance requiring two stairways in certain premises upon evidence that he had been granted a variance.[37] It should also be observed that statutes place duties not solely on landlords but also on tenants. In Golden v Gray,[38] the New Supreme Court dismissed an action brought by tenants for tortious breach of statutory

duties on the grounds that the relevant ordinance required tenants to vacate unfit dwellings. Furthermore, the usual defences of contributory negligence and assumption of risk apply.[39]

Nuisance

Like his English counterpart,[1] the American landlord is liable in nuisance for defects in the demised premises[2] if those defects existed at the commencement of the lease[3] or if he has covenanted to repair.[4] Liability clearly extends to neighbouring occupiers and members of the public affected outside of the premises.[5] The question which concerns us is whether it also extends to persons injured on the premises; that is, can the tenant or his family and guests bring an action in nuisance?[6]

The view with most authority to support it is that the landlord is not liable to his tenant in nuisance. Holding him liable in such circumstances would seem to be contrary to the principle of the nuisance doctrine that liability is dependent on harm to those outside the premises.[7] As a leading authority on the law of torts has said, "It is wholly alien to the underlying conception of the theory of nuisance and its development in the common law, to refer to a condition or activity which can only be injurious to a person who goes upon the land on which it exists, as a nuisance."[8]

There are many cases denying liability in these circumstances.[9] A leading case from Pennsylvania declared, "The doctrine of 'condition amounting to a nuisance' is confined to third persons or strangers to the premises -- The word 'nuisance' as used in the law implies the transmission of the effects beyond the boundaries of the land upon which the objectionable condition exists."[10] Recent cases from many jurisdictions add weight to this orthodox approach.[11]

A minority of Courts have extended nuisance to cover injuries to the tenant and his family and guests[12] though, on closer examination, their authority is not very great. The Supreme Court of Oregon, for example, has held the landlord liable in nuisance for injuries suffered by the tenant's guests as a result of a fall down an unprotected basement stairway, this defect having been in existence at the time of the lease.[13] However, to arrive at this conclusion the Court relied for authority on a Kansas decision that was later reversed[14] and misquoted an earlier New York decision.[15] Other decisions have also been reversed[16] or can be distinguished on the grounds that statement on the law of nuisance were merely obiter dicta[17] or came within the public use exception to the landlord's tort liability.[18]

Where the defect exists not in the demised parts of the dwelling but in parts retained under the land-

lord's control, then many Courts have properly held him liable to the tenant in nuisance.[19] In these circumstances, the tenant is, strictly speaking, outside the premises in which the nuisance exists. The Connecticut Superior Court drew this distinction recently, "However, while a tenant cannot bring an action on nuisance with respect to premises demised to him and completely within his control -- the Harris case[20] is not authority for the proposition that a tenant cannot maintain an action based on nuisance with respect to injuries sustained on a common stairway under the landlord's control, and in which the tenant has a property interest."[21] Liability is not restricted to injuries sustained on the common stairway but extends also to the harmful effects of defects in common parts which affect the tenant in his use of demised parts; for example, water overflowing from a water closet under the landlord's control which causes harm to the tenant's property.[22] Furthermore, the landlord may also be liable in nuisance for defects in parts of the premises leased to other tenants which cause damage to the tenant.[23] In such cases, the tenant sues in the capacity of a neighbouring occupier.

Slumlordism As A Tort

Two American lawyers have suggested that the very act of leasing a slum dwelling should be actionable as a tort.[1] Put in other words, that "where all (the poor) can get is indecent housing, they are entitled to get a lawsuit along with it." [2]

This argument is based on three ingredients: professional incompetence, breach of statutory duty and an extension of the intentional infliction tort. This latter element is derived from cases in which damages have been awarded against a person for intentionally inflicting indignities upon another,[3] the classic case is that of spitting into somebody's eye in order to humiliate him.[4] The writers maintain that letting a slum dwelling is equivalent to subjecting the tenant to humiliation and outrage arguing that, "the indecency of his condition inheres in the fact that the outrage to which he is being subjected has become an ingrained part of his life and an accepted fact of life to the surrounding community".[5] The standard to be applied to gauge what degree of indignity is sufficient for the tort would be found in the housing codes by selecting those violations which are of sufficient gravity that failure to comply with them can be viewed as outrageous and thus tortious.[6] Reinforcing this argument for extending the intentional infliction tort is a further proposition,

> "that one who undertakes to perform a service for his own economic benefit but who performs it in a way both inconsistent with those standards which represent minimum social goals as to decent treatment and in a manner that itself is violation of the law, under circumstances where the victim has no meaningful alternative but to deal with him, commits a tort for which substantial damages ought to lie." 7

The measure of damages suggested is the cost of enabling the tenant to obtain the benefits of standard housing for some period such as five years.[8] The lessor would have some defences; he could show that the conditions were the result of tenant misconduct,[9] that he did not have adequate notice or that there was no proper opportunity to remedy the situation.[10]

The suggestion of making slumlordism a tort has been severely criticised on several grounds,

> "We would strongly advise the judiciary not to create a new tort of slumlordism. Such a tort would rest on weak historical foundations; its rationale would spread far beyond the problem with which the tort is intended to deal; it would call for putting to the jury an almost unmanageable question; it would leave us with numerous fringe problems and paradoxes; and above all, it is unlikely to move us very far, or in the right direction, in improving housing conditions in urban slums." 11

Another commentator has suggested that if slumlordism per se be made a tort then a new tort of slum tenantism should be created to encompass a tenant's activities that violate the landlord's rights.[12]

Although raised several times in tenant complaints,[13] only one reported case seems to have adjudicated on the

merits of the claim that slumlordism is itself a tort. The tenants in Golden v Gray[14] alleged as causes of action that their landlord was liable for the tort of intentional infliction of emotional distress and for the intentional tort of slumlordism. More specifically, that the defendant had "for his own economic benefit rented a dwelling that failed even to meet Building Code standards of decency" and made as few repairs as possible to "maximize his profit". Ark J. of the New York Supreme Court granted the motion by the defendant to dismiss the complaint on the ground that no cause of action was stated. He said it was for the Legislature "to alter existing law to meet sociological needs of present day urban living."[15]

The Landlord's Liability To The Tenant's Family And Guests[1]

Although Courts have often classified the tenant's family and guests as either mere licensees[2] or as invitees,[3] the landlord's liability does not depend upon such a classification.[4] Instead, the general rule is applied that third persons claiming under the tenant are placed in his shoes and the landlord is liable to such persons to the same extent as he is liable to the tenant.[5]

More specifically, the general rule has been applied so that the landlord is normally under no

duty in tort as regards defective premises. The principle of caveat emptor applies to the tenant's family and guests as well as to the tenant.[6] Likewise, the exceptions to the landlord's general immunity in tort apply to such persons. He owes a duty to keep parts in his control reasonably safe for their use.[7] He must disclose the existence of latent defects[8] though it has been held that this duty is satisfied once he has made such disclosure to the tenant.[9] As one commentator has observed, "when the landlord warns the tenant of existing dangers he has given as much warning as is possible. He cannot stand guard at the entrance of the premises during the term of the lease and repeat the warning to every person who goes upon the land."[10] Breach of statutory duty is another tort open to those claiming under the tenant[11] as is the tort based upon the landlord's breach of covenant to repair.[12] In the latter case, liability is imposed to avoid circuity of actions.[13] Most jurisdictions hold the landlord liable to such persons for negligently making repairs, whether made gratuitously[14] or under covenant.[15] Massachusetts, however, does not normally extend liability for negligent gratuitous repairs to persons other than the tenant himself.[16] In one instance, the landlord's liability to third persons may be greater than to the tenant himself; that is, if the third person is an infant.[17]

Although, the landlord owes the same duties to

third persons as to the tenant, the defences available against the tenant are not normally available against such persons.[18] For instance, the tenant's knowledge of the dangerous condition of the premises[19] will not usually be imputed to them nor will his contributory negligence. In a recent case,[20] an action was brought against the landlord for injury to the tenant's three year old child. There was some evidence of negligence by the child's parents which may have contributed to the child's injury. The Court of Appeals of Georgia held that such evidence could not be imputed to the child who was legally incapable of negligence. Again, the Supreme Court of Appeals of Virginia has recently decided that although an exculpatory clause would be a defence to an action brought by the tenant himself, it did not exonerate the landlord from liability to the tenant's child.[21]

Contributory Negligence As A Defence To Landlord's Liability[1]

Some Courts hold that if the tenant continues to use the premises after knowledge of their defective condition then he is contributorily negligent as a matter of law.[2] For instance, in a recent Georgia case,[3] tenants brought an action against the landlord for injuries sustained in an explosion of a hot water heater caused by his failure to repair it. The

Court of Appeals of Georgia dismissed the action on the grounds that "it was the tenant's duty to abstain from using that part of the rented premises the use of which would be attended with danger" and that continued use was "a failure to use ordinary care for his own safety and will bar the tenant's recovery even though the landlord was negligent in failing to make the necessary repairs".[4] Likewise, an action for breach of statutory duty was rejected by the Court of Appeals of North Carolina because the tenant had "voluntarily continued to occupy the premises after she learned of the violations" and so was held to have assumed the risk.[5]

Continued use of premises is not always held to be contributory negligence. It is held by some Courts that the tenant can still use premises even with knowledge of a defect if it appears reasonably safe to do so.[6] Again, contributory negligence may be negatived by the landlord's promise to repair which induces the tenant to remain.[7] As the Supreme Court of Connecticut has observed, "where there is an agreement to repair, the ordinary rules as to the assumption by the tenant of the risk of known or obvious defects in the leased premises do not necessarily apply."[8] A further justification for the tenant to remain would be if he did not have full knowledge of the extent of the defect and the danger it posed.[9] In a recent Maryland case, the tenant had continued to use a porch even though she

knew it to be defective. The Court of Appeals of Maryland[10] reversed a judgement for the landlord on the rounds that there was evidence from which the jury could have found that such use was not unreasonable under all the circumstances; "They could have properly found that she knew that the porch was defective but did not know, nor would a person of reasonable prudence know, under the circumstances then existing, that the boards were likely to give way when she walked on them in pursuance of her normal household duties."[11]

An important question is whether a lack of meaningful choice is an answer to a defence of assumption of risk or contributory negligence. Once again, the Courts are divided. Some take a very strict line.[12] The Court of Appeals of Georgia has held that a tenant who knew of the unsafe condition of a back porch could not recover for her injuries even though it was necessary for her to walk across the porch to reach the only source of drinking water on the premises.[13] The Court quoted an earlier judgement to the effect that she "could either have moved out and sued the landlord for damages for failure to keep the premises in repair, or, if the repairs were necessary to render the house tenantable, she could have caused the necessary repairs to have been made, and then set them off against the landlord's claim for rent. Her continuance in the house for so long a time after the house was rendered untenantable and the landlord had refused to repair constitutes

such negligence as bars her of recovery."[14]

Other Courts hold that continued use of the premises is not evidence of contributorily negligence if the tenant has no real choice in the matter.[15] A Maryland Case[16] provides an example. The tenant was injured when she fell from a defective toilet seat in her apartment. Affirming judgement in her favour, the Court of Appeals of Maryland said, "we cannot accept (defendant's) contention that, as a matter of law, (plaintiff) was contributorily negligent or assumed the risk when she continued to use the defective toilet seat -- In cases like the one before us, where a landlord's negligent failure to repair has made it impossible for the tenant to use a portion of the demised premises without exposing himself to the risk of bodily harm, the tenant is not contributorily negligent unless he acts unreasonably."[17] Some Courts have been willing to take into account the housing problem in determining whether continued use was reasonable or not.[18] A Texas Court held that tenants were not necessarily negligent in continuing to use premises in the knowledge that a water heater was leaking gas. Among other factors, the Court noted that the time of year was late December and took judicial note of "the acute housing shortage then existing, as a matter of common knowledge."[19]

In determining what particular acts amount to contributory negligence or assumption of risk, it is

necessary to have regard to all the circumstances[20] but some illustrations may be instructive. In the following cases, the plaintiff was found to have either been contributorily negligent or to have assumed the risk as a matter of law: use of unlit passage;[21] walking down hallway backwards engaged in conversation;[22] stepping backwards and catching heel of shoe in hole when ordinary care would have avoided this;[23] lighting gas heater when there was a smell of gas[24] and stepping upon a defective floorboard when a child had fallen through the same board about a week before.[25] On the other hand, the following acts were not held to be contributory negligence or assumption of risk as a matter of law: use of unlit passage;[26] failure to use handrail or bar to prevent fall;[27] slight touching of porch railing which gave way;[28] momentary forgetfulness of a known danger;[29] failure to remove fuse from fusebox to cut off danger from exposed electric wiring where the plaintiff did not know of source of electricity[30] and use of window sill as a resting place to free paper bag tangled on plaintiff's foot.[31]

These defences apply to all the grounds on which the landlord may be held liable in tort for defective premises: failure to keep parts in his control reasonably safe;[32] non-disclosure of latent defects;[33] breach of statutory duty to repair;[34] breach of covenant to repair[35] and negligent carrying out of repairs.[36]

2 49 Am. Jur. 2d s 771 et seq
52 C.J.S. s 417 et seq
2 Harper and James s 27.15 et seq
Powell s 238 p 251
Prosser s 63 et seq
Restatement of Torts (2d) Chapter 13, topic 3

3 The following articles deal with the topic;
Burton, 1 South Carolina L.R. 119 (1948) (South Carolina Law)
Binns, 39 Washington L.R. 345 (1964) (Washington)
Calandriello, 29 Georgetown L.J. 1046 (1941)(General)
Comment, 62 Harv. L.R. 669 (1948) (General)
Latimer, 23 Tenn. L.R. 219 (1954) (Tenn)
Ford, 14 Missouri L.R. 219 (1949) (Missouri)
Grimes, 2 Valparaiso U.L.R. 189 (1968)(General)
Harkrider, 26 Mich. L.R. 260 (1927) (General)
Jacobs, 15 Conn. Bar J. 315 (1941) (Conn)
James, 28 Conn. Bar J. 127 (1954) (Conn)
Kaner, 10 South Carolina L.R. 307 (1957) (General)
Rosenwald, 6 U. of Kansas City L.R. 119 (1938) (Missouri)
Schlegel, 19 Chicago-Kent L.R. 317 (1941) (Illinois)
Taylor, 3 Alabama L.R. 335 (1951) (Alabama)
Thompson, 1952 U. Ill. L.F. 417 (Illinois)
Trumbower, 10 Drake L.R. 132 (1961) (Iowa)

4 49 Am. Jur. 2d s 771 pp. 711-713
Binns, 39 Wash. L.R. 345, 352
Calandriello, 29 Georgetown L.J. 1046, 1047
Comment, 20 Georgetown L.J. 521, 526
" 62 Harv. L.R. 669
" 7 Virginia L.R. 643, 644
52 C.J.S. s 417 (3) pp 32-35
Ford, 14 Missouri L.R. 219, 220
Grimes, 2 Val. U.L.R. 189, 196, 209
Harkrider, 26 Mich. L.R. 260, 260-263
2 Harper and James s 27.16 p. 1506
Kaner, 10 South Carolina L.R. 307
Noel, 30 Tenn. L.R. 368
Noonan, 48 Oregon L.R. 287, 288
Prosser, s 63 pp. 399-400
Restatement Torts 2d ss 355-356
Rosenwald, 6 U. of Kansas City L.R. 119, 123
Schlegel, 19 Chi-Kent L.R. 317, 328
Thompson, 195 2 U. Ill L.F. 417
Trumbower, 10 Drake L.R. 132

5 The following are a few of the recent cases:

Del Pino v Gualtieri (1968) 71 Cal.Rptr. 716
Roseman v Wilde (1969) 106 Ill App. 2d 93
245 NE 2d 644
Hunter v Cook (1971) 274 NE 2d 550 (Ind)
Parson v Whitlow (1970) 453 SW 2d 270 (Ky)
Crabtree v Vescio's Inc. (1970) 20 Mich.App.578
174 N.W.2d 295
Davis v Jost (1967) 412 S.W. 2d 498 (Mo)
Floyd v Lusk (1966) 190 So. 2d 451 (Miss)
Roan v Bruckner (1966) 180 Neb. 399
143 N.W. 2d 108
Jensen v Meyers (1968) 441 P. 2d 604
George v City of Fort Worth (1968) 434 S.W. 2d
903 (Texas)

6 Thorson v Aronson (1970) 127 Ill. App. 2d 156
258 NE 2d 33

7 Ibid 34

8 Gustin v Williams (1967) 62 Cal. Rptr. 838

9 Comment, 62 Harv. L.R. 669
52 C.J.S. s 417 (3) p. 35
Maher, 10 South Carolina L.R. 307
Prosser s 63 p. 399-400
Schlegel, 19 Chi-Kent L.R. 317, 328
See generally on this concept. Supra.

10 Restatement of Torts 2d s 356 comment (a)

11 Supra 168

12 (1968) 441 P.2d 604

13 Ibid 605

14 Ibid 605-606 quoting Webel v Yale University
(1939) 125 Conn. 515, 524
7 A 2d 215

15 Ibid 605

16 Cf. Restatement of Torts 2d s 356 Comment (a)

17 For a criticism of this rule, see infra 654

18 Comment, 62 Harv. L.R. 669, 678-679

19 See generally, supra. For the effect of such statutes on tort liability, infra 560

20 Comment, 62 Harv. L.R. 669, 671

21 Schwartz, 13 Amer. Trial Lawyers L.J. 122

Duty To Disclose Known Latent Defect

1 Prosser s 63 p. 401
See also, 88 A.L.R. 2d 586
49 Am. Jur 2d ss 788-792 pp.736-744
52 C.J.S. s 417 (3) pp. 35-40
4 Frumer pp. 698 - 700
2 Harper and James s 27.16 pp.1507-1510
2 Powell s 234 (2) pp. 333-334
Restatement of Torts 2d edition s 358
2 Walsh s 163 pp. 222-224, s 167 pp. 239-241

The following are the more important articles and notes;
Calandriello, 29 Georgetown L.J. 1040, 1049-1054 (1941)
Comment, 35 Indiana L.J. 361
Dehler, 23 Tenn. L.R. 219, 219-222
Geller, 17 U. of Detroit L.J. 98
Griggs, 49 Mich. L.R. 1082
Huff, 8 Arkansas L.R. 181
McCarthy, 2 St. Louis U.L.J. 409
Noel, 30 Tenn. L.R. 368, 373

2 4 A.L.R. 1453, 1461
34 A.L.R. 711, 712
49 Am. Jur. 2d s 788 pp. 736-740, s 791 p. 742
36 C.J. p. 205 n 59
52 C.J.S. s 417 (3) p. 35
Dehler, 23 Tenn. L.R. 219
Huddleson, 37 North Dakota L.R. 297, 298
Huff, 8 Arkansas L.R. 181, 182
Maher, 10 South Carolina L.R. 307, 314
Noel, 30 Tenn. L.R. 368, 369
Prosser, s 63 p. 402
Rhynhart, 20 Maryland L.R. 1, 141
Taylor, 3 Ala. L.R. 335, 336

3 Sawyer v Shackleford (1970) 8 N.C. App 631
175 S.E. 2d 305

4 Ibid 309-310

For other recent cases, see;

Davis v Marr (1966) 413 P 2d 707 (Colo)
Hearn v Barden (1967) 115 Ga. App 708
155 SE 2d 649
Barzemore v Burnet (1968) 117 Ga. App. 849
161 SE 2d 924
Stover v Fechtman (1966) 222 NE 2d 281 (Ind)
Tillotson v Abbott (1970) 205 Kan. 706
472 P 2d 240
Good v Jones (1969) 184 Neb. 454
168 N.W. 2d 520
Goldstein v Corrigan (1966) 405 S.W.2d 425 (Tex)

5 Reste Realty Corp v Cooper (1968) 53 N.J. 444
251 A 2d 268

6 Hyde v Bryant (1966) 114 Ga. App. 535
151 SE 2d 925

7 Halliday v Green (1966) 53 Cal. Rptr. 267, 271

8 Barhan v Baca (1969) 80 N.M. 502
458 P.2d 228

9 Barzemore v Burnet (1968) 117 Ga. App. 849
161 SE 2d 924

10 Cowan v One Hour Valet Inc. (1967) 157 S.E.2d 843

11 Knox v Sands (1967) 421 S.W. 2d 497

For cases from other jurisdiction, see

Baughman v Cosler (1969) 459 P 2d 294 (Colo)
Anderson v Hamilton Gardens Inc. (1966)
4 Conn Cir. 255
229 A. 2d 705
Buntin v Carter (1970) 234 So. 2d 131 (Fla)
Eggers v Wright (1968) 240 N.E. 2d 79 (Ind)
Wright v Peterson (1967) 146 N.W. 2d 617 (Iowa)
Tillotson v Abbott (1970) 205 Kan. 706
472 P 2d 240
Cherity v Yates (1968) 237 NE 2d 3 (Mass)
Hamilton v Fean (1966) 422 Pa 373, 221 A 2d 309

12 Minor v Sharon (1873) 112 Mass 477
Cutler v Hamlen (1888) 147 Mass 471
Cesar v Karutz (1875) 60 N.Y. 229
Carle v Kuklo (1953) 26 N.J. Super 471
98 A 2d 107
26 A.L.R. 1265
49 Am. Jur. 2d s 792 p. 743
Comment, 20 Mich. L.R. 551
" 22 Mich. L.R. 847, 848
" 30 Mich. L.R. 158
36 C.J. p. 207 n 80
52 C.J.S. s 417 (3) p. 40 n 28
Geller, 17 U. of Detroit L.J. 98, 99
Huff, 8 Arkansas L.R. 181, 182
McCarthy, 2 St. Louis U.L.J. 409, 410
Pound, 13 N.A.A.C.A. L.J. 222

13 Shaeffer v Investors Co. (1935) 15 Or. 16
41 P 2d 440
97 A.L.R. 216

14 Eggers v Wright (1968) 240 NE 2d 79 (Ind)
Smith v Green (1970) 260 NE 2d 656 (Mass)
49 Am. Jur. 2d s 818 p. 783 n 20
Comment, 18 Harv. L.R. 316
There is, however, no duty to disclose the existence of defects in parts of the premises let to other tenants;
Harbison v Jeffreys (1961) 353 S.W.2d 65 (Tex)
52 C.J.S. s 417 (3) p. 40

15 Calandriello, 29 Georgetown L.J. 1046,1052
Comment, 30 Mich. L.R. 158, 159
" 3 Va. L.R. 243
Maher, 10 South Carolina L.R. 307, 314
2 Powell, s 234 (2) p. 334
Taylor, 3 Ala. L.R. 335, 337

16 Macomber v Cox (1967) 435 F 2d 462

17 See also, Baughman v Cosler (1969) 459 P 2d 294
(Colo)
Kowinko v Selecky (1969) 5 Conn.Cir 657
260 A 2d 892
Wright v Hayes (1970) 29 Conn.Sup.96
272 A. 2d 786

continued.....

Bozemore v Burnet (1968) 117 Ga. App. 849
161 S.E. 2d 924
Phillips v Stowe Mills (1969) 5 N.C. App.190
167 S.E. 2d 817
Jinio v Goshorn (1970) 437 Pa 224
270 A 2d 203

18 Comment, 35 Indiana L.J. 361, 362-364
Restatement, 2d Torts s 358 (1) (b)

19 (1970) 260 NE 2d 656, 659

20 Hampton v Loper (1966) 402 S W 2d 825
Cf. Bransetter v Robbins (1955) 178 Kan 8
283 P 2d 455
Cutler v Hamlen (1888) 147 Mass 471
18 NE 397
Kolojeski v John Deisher Inc. (1968) 429 Pa 191
239 A 2d 329

21 88 A.L.R. 2d 586, 587
Comment, 35 Indiana L.J. 361, 363
" 19 Tenn. L.R. 853
52 C.J.S. s 417 (3) p. 39
Harkrider, 26 Mich. L.R. 260, 267 n 25
2 Harper and James s 27.16 p.1508
Hoddleson, 37 North Dakota L.R. 297
Huff, 8 Arkansas L.R. 181, 182
McCarthy, 2 St. Louis U.L.J. 409, 412
Noel, 30 Tenn. L.R. 368, 374
Restatement s 358 (1) (b) 1 st ed 1934
Rickert, 11 Cornell L.Q. 253, 255
Taylor, 3 Ala. L.R. 335, 337
Thompson, 1952 U. Ill. L.F. 417, 424

22 Jefferson Standard Life Ins. v Watson (1942)
242 Ala. 181
5 So. 2d 639
Boulton v Williams (1947) 81 Cal. App.2d 70
183 P.2d 325
Hendricks v Socony Mobil Oil Co. (1963)
45 Ill.App. 2d 44
195 N.W. 2d 1

23 Kowinko v Salecky (1969) 5 Conn. Cir 657
260 A 2d 892

24 (1898) 100 Tenn. 538, 547-548
46 S.W. 297, 299

25 2 Harper and James s. 27.16 p. 1508

26 Anderson v Shuman (1968) 64 Cal.Rptr. 662

27 Ibid 665

28 88 A.L.R. 2d 586, 591
49 Am. Jur. 2d s 790 p. 741
Calandriello 29 Georgetown L.J. 1046, 1049
Comment, 16 Harv. L.R. 70
" 35 Indiana L.J. 361, 367
" 19 Tenn. L.R. 853
" 60 U. of Pa. L.R. 455
Dehner, 23 Tenn. L.R. 219
Griggs, 49 Mich. L.R. 1082, 1083
2 Harper and James s 27.16 p. 1509
Huff, 8 Arkansas L.R. 181, 182
Noel, 30 Tenn. L.R. 368, 374
Prosser s 63 p.401
Rickert, 11 Cornell L.Q. 253, 255

29 (1896) 96 Tenn. 148, 160
33 S.W. 914, 916

30 Naylor v Magill (1950) 181 F. 2d 179
Roberts v Tennessee Wesleyan College (1969)
450 SW 2d 21
Chandler v Nassa (1969) 415 F. 2d 560

31 O'Malley v Twenty Five Associates (1901)
178 Mass 555, 559
60 N.E. 387, 389

32 Shinkle, Wilson & Kries Co. v Birney & Seymour
(1903) 68 Ohio 328
67 NE 715
See also, Franklin v Tracey (1904) 117 Ky 267, 273
77 S.W.1113

33 Solvent Savings Bank v Vance (1917) 7 Tenn.Civ.App.
383

34 Noel, 30 Tenn. L.R. 368, 378

35 2 Harper and James s 27.15 p. 1509 n 17

36 Glassman v Martin (1954) 196 Tenn. 594
269 S.W. 2d 908

37 Shotwell v Bloom (1943) 60 Cal.App. 2d 303
140 P. 2d 728
Kosinko v Salecky (1969) 5 Conn. Cir. 657
260 A 2d 892
Howard v Washington Water Power Co. (1913)
75 Wash 255
134 P. 927
88 A.L.R. 2d 586, 590-591
49 Am. Jur. 2d s 789 p. 739 n 10
Binns, 39 Wash. L.R. 345, 353
Calandriello, 29 Georgetown L.J. 1046, 1054
Comment, 60 U. of Pa. L.R. 455
" 3 Va L.R. 243
36 C.J. p. 208 n 89
52 C.J.S. s 417 (15) p. 90 n 26
Prosser s 63 p. 401
Restatement 2d s 358 Comment b

38 Stumpf v Leland (192-) 242 Mass 168
136 NE 399
Angevine and Taube, 52 Mass. L.Q. 205,209

39 Cummings v Prater (1963) 95 Ariz. 20
386 P. 2d 27
Anderson v Hamilton Gardens Inc. (1966)
4 Conn. Cir 255
229 A 2d 705
Meade v Montrose (1913) 173 Mo. App. 722
160 S.W. 11

40 88 A.L.R. 2d 586, 593
49 Am. Jur. 2d s. 788 p. 739
Calandriello, 29 Georgetown L.J. 1046, 1053
Comment, 35 Indiana L.J. 361, 363 n 10
" 30 N.A.C.C.A. L.J. 71, 73
" 19 Tenn. L.R. 853
" 62 U. of Pa. L.R. 573
36 C.J. p. 220
52 C.J.S. s 417 (3) p. 39
Ford, 14 Missouri L.R. 219, 221
Griggs, 49 Mich. L.R. 1082, 1083
Harkrider, 26 Mich. L.R. 260, 266-269
2 Harper and James s 27.16 p. 1508
Huff, 8 Arkansas L.R. 181,182
Huddleson, 37 North Dakota L.R. 297
McCarthy, 2 St. Louis U.L.J. 409, 411
Noel, 30 Tenn. L.R. 368, 378
Prosser s 63 p. 401
Restatement 2d s 358 (1) (b) Comment b
Rhynhart, 20 Maryland L.R. 1, 41
Rickert, 11 Cornell L.Q. 253, 255
Taylor, 3 Ala. 335, 337

41 Johnson v O'Brien (1960) 105 N.W. 2d 244

42 Prosser s 63 p. 401

43 Harbridger, 26 Mich. L.R. 268, 269

44 Restatement of Torts 2nd ed (1965) s 358 (1)(b) and comment b.

45 Shute v Mills (1905) 191 Mass 433
78 NE 96
Corcione v Ruggieri (1958) 87 R.I. 182
139 A 2d 388
49 Am. Jur. 2d s 789 p. 740 n 16
52 C.J.S. s 417 (15) p. 91, s 423 (3) p. 166
Thompson, 1952 U. Ill. L.F. 417, 424

46 49 Am. Jur. 2d s 789 p. 740 n 16
Calandriello, 29 Georgetown L.J. 1046, 1053
Comment, 35 Ind. L.J. 361, 362 n 3
52 C.J.S. s 417 (15) p. 91

47 (1889) 78 Mich. 135
43 NW 1052
Cf. Grimmeisen v Walgreen Drug Stores (1950)
229 S.W. 2d 593 (Mo)

48 Calandriello, 29 Georgetown L.J. 1046, 1053
Dehner, 23 Tenn. L.R. 219
Ford, 14 Missouri L.R. 219, 221
Huff, 8 Arkansas L.R. 181, 182
Schlegel, 19 Chi-Kent L.R. 317, 329
Taylor, 3 Ala. L.R. 335, 336

49 Horstman v Glatt (1969) 436 S.W. 2d 639
Cf. Kowinko v Salecky (1969) 5 Conn. Cir. 557
260 A 2d 892
Corcionne v Ruggieri (1958) 87 R.I. 182
139 A 2d 388

50 Binns, 39 Wash. L.R. 345, 353
Eldredge, 84 U. of Pa. L.R. 467, 472
Griggs, 49 Mich. L.R. 1082, 1083
Huff, 8 Arkansas L.R. 181, 182
Baker, 10 South Carolina L.R. 307, 314
Noel, 30 Tenn. L.R. 368, 380

continued.....

2 Powell s 234 (2) p. 334
Prosser, s 63 p. 401
Restatement 2d s 358 (1) (a)
Taylor, 3 Ala. L.R. 335, 336

51 Brandt v Yeoger (1964) 199 A 2d 768

52 Ibid 772.
See also Roseman v Wilde (1969) 106 Ill.App 2d 93
245 NE 2d 644
Wright v Peterson (1967) 146 N.W. 2d 617
(Iowa)

53 Hyde v Bryant (1966) 114 Ga. App. 535
151 S.E. 2d 925
Horstman v Glatt (1969) 436 S.W. 2d 639 (Mo)
Binns, 39 Wash. L.R. 345, 353
Comment, 35 Indiana L.J. 361, 363
" 66 U. Pa. L.R. 455
" 62 U. Pa. L.R. 573, 574
52 C.J.S. s 417 (13) p. 39
Dehler, 23 Tenn. L.R. 219, 221
Griggs, 49 Mich. L.R. 1082, 1084
Grimes, 2 Val. L.R. 189, 215
Prosser s 63 p. 402
Restatement 2d s 358 (1) (a) comment b.
Taylor, 3 Ala. L.R. 335, 336

54 Ibid

55 Anderson v Hamilton Gardens Inc. (1966)
4 Conn. Cir. 255
229 A. 2d 705
See also Powell v Stivers (1952) 238 P. 2d 35
Hendricks v Socany Mobil Oil Co. (1963)
45 Ill. App. 2d 44
195 N E 2d 1
McAuvic v Siles (1959) 190 Pa. Super 24
151 A 2d 662

56 Shotwell v Bloom (1943) 60 Cal. App. 303
140 P 2d 728
Cart v Coal Creek (1957) 153 F. Supp 330
Grimes, 2 Val. U.L.R. 189, 215
But see Wilson v Lamberton (1939) 102 F.2d 506

57 Supra 536

58 Comment, 35 Indiana L.J. 361, 362
Restatement, 2d s 358 (1) (a)

59 Confield v Howard (1964) 109 Ga. App 566
136 S.E. 2d 431
Cf. Maryland, for use of Pumphrey v Manor Real Estate & Trust Co. (1949) 176 F. 2d 414

60 Prosser s 63 p. 411
Cf. Glanville Williams 5 M.L.R. 194, 197 (1942)

61 O'Malley v Twenty-Five Associates (1901)
178 Mass 555
60 NE 387
See also, Hendricks v Socany Mobil Oil Co; (1963)
45 Ill.App. 2d 44
195 NW 2d 1
Hobzhaurer v Sheeney (1907) 31 Ky L.R.1238
104 S.W. 1034
Branham v Fordyce (1957) 103 Ohio App.379
143 NE 2d 471

62 Comment, 35 Indiana L.J. 361, 365
Harkrider, 26 Mich. L.R. 260, 274

63 Calandriello, 29 Georgetown L.J. 1046, 1052
Comment, 35 Indiana L.J. 361, 365
Griggs, 49 Mich. L.R. 1082, 1083
2 Harper And James s 27.16 p. 1507
McCarthy, 2 St. Louis U.L.J. 409, 412

64 Cowan v Sunderland (1887) 147 Mass 363
14 NE 117, 118
See also Buntin v Carter (1970) 234 So 2d 131 (Fla)
Powers v Planters National Bank & Trust Co. (1941) 219 N.C. 254
13 S.E. 2d 431

65 Comment, 35 Indiana L.J. 361, 365-366

66 Binns, 39 Wash. L.R. 345, 353
2 Harper and James s 27.16 pp. 1509 - 1510

67 Comment, 32 Amer. Trial Lawyers J. 389, 392

68 Binns, 39 Wash. L.R. 345, 353

69 Calandriello, 29 Georgetown L.J. 1046, 1052
Cf. Schlegel, 19 Chicago-Kent L.R. 317, 329

70 Supra 534

71 Supra 536

72 Supra 542

73 Supra 538

74 Calandriello, 29 Georgetown L.J. 1046, 1054
Maher, 10 So. Carolina L.R. 307, 314
2 Powell s 234 (2) p. 333

75 Dowe v Hunking (1883) 135 Mass 380

76 Hughes v Chehalis School Dist. No. 302 (1963)
61 Wash 2d 222
377 P 2d 642

77 Binns, 39 Wash. L.R. 345, 353

78 Supra 190

Landlord's Liability For Negligent Repairs

1 "Powell On Property" Vol 2 (Recomp. ed. 1967)
S 234 (2) p. 342

For treatment of this topic in other standard texts, see

29 ALR 736
90 ALR 50
150 ALR 1373
162 ALR 111
163 ALR 300, 317
78 ALR 2d, 1238, 1258
49 Am. Jur. 2d ss 793-798, pp.744-751
ss 874-876 pp.844-849
52 C.J.S. s 417 (12) pp. 78-85
4 Frumer, "Personal Injury" 709-710
2 Harper and James s 18. 6 p. 1045
s 27. 16 p. 1514
Prosser s 63 pp. 342-344
Restatement of the Law of Torts 2d s 362
p. 315 Appendix

The following are the more important articles and notes,

Bohle , 35 Harv. L.R. 633
Calandriello, 29 Geo. L.J. 1046, 1054-1056
Comment, 21 N.Y.U.L.Q.R. 151
" 87 U. of Pa. L.R. 728
Davis, 18 Boston U.L.R. 458
Harkrider, 26 Mich. L.R. 260, 404-409
Kopald, 19 Southern Calif. L.R. 141
Schneider, 15 U. of Miami L.R. 412
Taylor, 3 Ala. L.R. 335, 346-349

2 Connor v Farmers And Merchants Bank (1963)
132 S.E. 2d 385

3 See also eg

Youngset Inc. v Five City Plaza Inc. (1969)
156 Conn. 22, 237 A 2d 366
Jordan v Savage (1967) 88 Ill.App. 2d 251
232 NE 2d 580
Continental Oil Co. v Ryan (1964) 392 P.2d
492 (Okl)
Green v Independent Oil Co. (1964) 414 Pa 477
201 A 2d 207

4 15 A.L.R. 971, 974
49 Am. Jur. 2d s 796 p. 748
eg Youngset Inc. v Five City Plaza Inc. Supra

5 36 C.J. p. 218 n 30
52 C.J.S. s 417 (12) p. 80 n 60

6 Bohlen, 35 Harv. L.R. 633, 654-660
52 C.J.S. s 417 (12) p. 82
2 Harper and James s 18.6 p. 1045
Bartlett v Taylor (1943) 174 S.W.2d 844 (Ma)
Rubin v Girard Trust Co. (1944) 154 Pa. Super 257
35 A 2d 601
Woods v Forest Hill Cementary (1946) 183 Tenn. 413
192 SW 2d 987

7 Harkrider, 26 Mich. L.R. 260, 405
Prosser, s 63 p. 411
Taylor, 3 Ala. L.R. 335, 346
Riley v Lissner (1894) 160 Mass. 330
35 NE 1130

8 Allen, 14 So. Calif. L.R. 479
150 A.L.R. 1373
49 Am. Jur. 2d s 795 p. 746
Binn, 39 Wash. L.R. 345, 358
Calandriello, 29 Geo. L.J. 1046, 1054
Comment, 5 N.Y.U.L.R. 80
36 C.J. p. 218 n. 37
52 C.J.S. s 417 (12) p. 81
2 Harper and James s 18.6 p.1045
Preston, 38 North Carolina L.R. 403, 410
Prosser, s 63 p. 410
Rosenwald, 6 U. of Kansas City L.R. 119, 120
Taylor, 3 Ala. L.R. 335, 346
Trumbower, 10 Drake L.R. 132. 135
Weinberg, 4 Wisc. L.R. 463, 464

9 Kassis v Parronne (1968) 209 So. 2d 444

10 Ibid 447
Cf. Hutchings v Anderson (1970) 452 S.W. 2d 10,15

11 Carney v Bereault (1965) 348 Mass 502
204 NE 2d 448
150 ALR 1373, 1381
49 Am. Jur. 2d s 795 p. 748 n. 19
Bohlen, 35 Harv. L.R. 633
Comment, 62 Harv. L.R. 669, 670 n. 12
" 5 N.Y.U.L.R. 80
36 C.J. p. 218 n. 38
52 C.J.S. s 417 (12) p. 82 n 78
Preston, 38 North Carolina L.R. 403, 410
Prosser, s 63 p. 410 n 38

12 15 A.L.R. 971, 972
150 AL.R. 1373, 1376-1377
49 Am.Jur. 2d s 795 p. 746 n. 7
Calandriello, 29 Geo. L.J. 1046, 1055
Comment, 5 N.Y.U.L.R. 80, 81
" 12 Texas L.R. 93
52 C.J.S. s 417 (12) p. 82 n. 72.5
Maher, 10 South Carolina L.R. 307, 315
2 Powell s 234 (2) p. 344
Jordan v Savage (1967) 88 Ill. App. 2d 251
232 NE 2d 580, 585
Kassis v Perronne (1968) 209 So 2d 444, 446
(Miss)

13 Allen, 14 So. Calif. L.R. 479
49 Am. Jur. 2d s 795 p. 747 n. 8
Bohlen 35 Harv. L.R. 633, 651
Comment, 5 N.Y.U.L.R. 80, 81
52 C.J.S. s 417 (12) p. 82 n 72
Harkrider, 26 Mich. L.R. 260, 406

14 Sims v Black (1968) 94 Ill.App. 2d 215
236 NE 2d 572, 575-576
See also Janofsky v Garland (1941) 42 CA 2d 655
109 P 2d 750
Grugan v Hotels Finance Corp. (1941)
126 NJL 257
18 A 2d 29
Jordan v Savage (1967) 88 Ill.App. 2d 251
232 NE 2d 580,585

15 eg Bauer v 141-149 Cedar Lane Holding Co. Ltd.
(1957) 24 N.J. 139, 130 A. 2d 833
150 ALR 1373, 1379
49 Am. Jur. 2d s 795, p. 747 n 15 - 17
52 C.J.S. s 417 (12) p. 82 n. 75
Noel, 30 Tenn. L.R. 368, 389
Preston, 38 North Carolina L.R. 403, 410

16 Ibid

17 eg Kearns v Smith (1943) 55 Cal App 2d 532
131 P. 2d 36
Bohlen, 35 Harv. L.R. 633, 651
Comment, 5 N.Y.U.L.R. 80
" 87 U. of Pa. L.R. 728, 736
Prosser s 63 p. 411
Preston, 38 North Carolina L.R. 403, 410
Taylor, 3 Ala. L.R. 335, 347

18 Restatement of the Law of Torts 2d ed. s 362
p.315
Appendix

19 Marks v Nanbil Reality Corp. (1927) 245 NY 256
157 NE 129
followed in Bartlett v Taylor (1943) 351 Mo. 1060
174 S.W.2d 844
Janofsky v Garland (1941) 109 Pac.
2d 750 (Cal)
See also Malon v Service and Management Co.
(1967) 416 S W 2d 44 - Mo.
Allen, 14 So. Calif. L.R. 479-480
150 A.L.R. 1373, 1378
49 Am. Jur. 2d s 795 p. 747 n 14
Comment, 62 Harv. L.R. 669, 670 n 12
" 5 N.Y.U.L.R. 80
52 C.J.S. s 417 (12) p. 82 n 74
2 Harper and James, s 18.6 p. 1045,
s 27.16 p. 1514
Prosser, s 63 p. 411

20 Keanns v Smith (1943) 55 C.A. 2d 532
131 P 2d 36
Golden v Peters (1946) 249 Wis. 39
23 N.W. 2d 458
Allen, 14 So. Calif. L.R. 479, 480
Bohlen, 35 Harv. L.R. 633, 654
Comment, 87 U. of Pa. L.R. 728, 736
52 C.J.S. s 417 (12) p. 82 n 76
Harkrider, 26 Mich. L.R. 260, 407
Prosser, s 63 p. 411

21 Bartlett v Taylor (1943) 351 Mo. 1060
174 S.W. 2d 844
Malon v Service and Management Co. (1967)
416 SW 2d 44 (Mo)
52 C.J.S. s 417 (12) p. 82 n 77
Prosser s 63 p. 411

22 29 ALR 736, 766
90 ALR 50
162 ALR 1111
49 Am. Jur 2d s 874 p. 844 n 15
Comment, 21 N.Y.U. L.R. 151, 153
52 C.J.S. s 417 (12) p. 83
Davis, 18 Boston U.L.R. 458, 462
2 Powell s 234 (2) p. 344
Schneider, 15 U. of Missouri L.R. 412, 413

23 90 ALR 50
162 ALR 1111
49 Am. Jur. 2d s 874 p. 844 n 16
Comment, 21 N.Y.U.L.R. 151, 154
Prosser s 63 p. 412
Schneider, 15 U. of Missouri L.R. 412, 413

24 Bailey v Zlotnick (1945) 149 F 2d 505
80 U.S. App D.C. 117
Kroger Co. v Roy Crosby Co. (1965) 393 SW 2d 843
Bernstein v El-Mar Painting and Decorating Co.
(1963 245 NYS 2d 772
195 NE 2d 456
29 ALR 736, 767-770
90 ALR 50
162 ALR 1111
49 Am. Jur. 2d s 875 p. 846 n 7
Comment, 13 Harv. L.R. 307
" 6 U. of Cinncinnati L.R. 97
" 78 U. of Pa. L.R. 119
" 87 U. of Pa. L.R. 728, 735
36 C.J. p. 219 n 50
52 C.J.S. s 417 (12) p. 84 n 85
Kopald, 19 So. Calif. L.R. 141, 142
Noel, 30 Tenn. L.R. 368, 389
Prosser s 63 p. 412
Rosenwald, 6 U. of Kansas City L.R. 119, 121
Schneider, 15 U. of Miami L.R. 412, 413
Taylor, 3 Ala. L.R. 335, 348

25 Berman v Greenburg (1943) 314 Mass 556
50 NE 2d 773
Martin v Wentz (1941) 145 Pa. Super 424
21 A 2d 444
29 A.L.R. 736, 776
90 A.L.R. 50, 53-54
162 A.L.R. 1111, 1112-1115
26 A.L.R. 2d 1044, 1052
49 Am. Jur. 2d s 875 p. 847 n 12
Comment, 78 U. of Pa. L.R. 119
" 87 U. of Pa. L.R. 728, 735
36 C.J. p 219 n 46
52 C.J.S. s 417 (12) p. 83 n 84
Kopald, 19 So. Calif. L.R. 141, 143
Schneider, 15 U. of Miami L.R. 412, 413
Thompson, 1952 U. Ill L.R. 417, 425

26 eg Berg v Parsons (1898) 156 N.Y. 109
50 NE 957
Kopald, 19 So. Cal. L.R. 141, 143
Schneider, 15 U. of Miami L.R. 412, 413

27 eg Rietze v Williams (1970) 458 S.W. 2d 613,618 (Ky)
Ferguson v Ashkenazy (1940) 307 Mass 197
29 NE 2d 828
Sallan v Brindsley Realty Co. (1936)
247 App Div 382
287 NYS 383
29 ALR 736, 775
90 ALR 50, 52
162 ALR 1111, 1114
25 ALR 2d 364, 363,
49 Am. Jur. 2d s 874 p. 845 n 1
Calandriello, 29 Geo. L.J. 1046, 1056
36 C.J. p. 219 n. 50
52 C.J.S. s 417 (12) p. 84 n 86
Davis, 18 Boston U.L.R. 458, 461
Kopald, 19 So. Calif. L.R. 141, 142
Maher, 10 South Carolina L.Q. 307, 315
Schneider, 15 U. of Miami L.R. 412, 413
Taylor, 3 Ala. L.R. 335, 348

28 Eg Bailey v Zlotnich (1945) 149 F.2d 505
80 U.S. App.D.C.117
29 A.L.R. 736, 781
90 A.L.R. 50, 53
162 A.L.R. 1111, 1114
49 Am. Jur. 2d s 875 p. 847 n 15
Comment, 87 U. of Pa. L.R. 728, 737
52 C.J.S. S 417 (12) p. 84 n 88
Davis, 18 Boston U.L.R. 458, 466
Kopald, 19 So. Calif. L.R. 141, 143
Prosser s 63 p. 411 n 49

29 29 A.L.R. 736, 772
esp. Comment 87, Pa. L.R. 728
Prosser s 63 p. 411
Schneider, 15 U. of Miami L.R. 412, 413

30 15 A.L.R. 971, 979
29 A.L.R. 736, 777-778
49 Am. Jur. 2d S 876 p. 848 n 20

31 Comment, 21 N.Y. U.L.R. 151, 154
" 87 U. of Pa. L.R. 728, 737-738
Kopeld, 19 So. Cal. L.R. 141, 143

32 Bailey v Zlotnick (1945) 149 F 2d 505, 507
criticised, Kopald, 19 So. Cal. L.R. 141, 143

33 Comment, 87 U. of Pa. L.R. 728, 737

34 Ibid 738

35 49 Am. Jur. 2d s 794 p. 745 n 1
52 C.J.S. s 417 (12) p. 80
Taylor, 3 Ala. L.R. 335, 347

36 Kolojeski v John Deisher Inc. (1968)
429 Pa 191
239 A 2d 329
See also, Alston v Kahn (1967) 411 S.W. 2d 659 (Ala)
Malon v Service And Management Co. (1967)
416 S.W.2d 44 (Mo)
Hutchings v Anderson (1970) 452 SW 2d 10
(Tex)

37 Id 331

38 Southern Apartments Inc. v Emmett (1959)
269 Ala. 584
114 So 2d 453

39 150 A.L.R. 1373, 1380
83 A.L.R. 2d 743, 747 n 4
49 Am. Jur. 2d s 794 p. 745 n 18 - 20
52 C.J.S. s 417 (12) p. 80 n 65

40 Berger v Stone (1970) 259 NE 2d 774

Liability In Negligence For Breach Of Covenant To Repair

1 There has been a great deal of literature on this topic. For the standard works, see

8 A.L.R. 765 (1920)
68 A.L.R. 1195 (1930)
163 A.L.R. 300 (1946)
78 A.L.R. 2d 1238 (1961)
49 Am. Jur. 2d ss 850-853 pp. 817-823
52 C.J.S. s 417 (4) pp. 40 - 45
4 Frumer pp. 704 - 706
2 Powell s 234 (2) pp. 345 - 348
Prosser s 63 pp. 403-410
Prosser, "Selected Topics on the Law of Torts" (1954) 380, 394-400
2 Restatement of Torts 2d s 357
2 Walsh (1947) pp. 212-214, 255-256

The following are only the more important articles;

Button, 16 Clev.-Mar. L.R. 319
Calandriello, 29 Georgetown L.J. 1046,1056-1062 (1941)
Comment, 21 Albaney L.R. 86 (1957)
" 1 Minnesota L.R. 339 (1917)
Globensky, 26 Notre Dame Lawyer 345 (1950)
Harkrider, 26 Mich. L.R. 383, 392 - 400 (1928)
Humann, 1 Washburn L.J. 605 (1962)
Karr, 18 De Paul L.R. 822 (1969)
Lambert, 16 N.A.C.C.A. L.J. 330 (1955)
Murphy, 1 Syracuse L.R. 80 (1949)
Myers, 48 Mich. L.R. 689 (1950)
Walker, 42 Temple L.Q. 199 (1969)

2 Horstman v Glatt (1969) 436 S.W. 2d 639 (Mo)
Wigin v Kent McCray of Dover Inc. (1969) 109 NH 342 252 A 2d 418
Yaeger v Parkgate Realty Co. (1962) 88 Ohio L.Abs.385 179 NE 2d 156
Conner v Farmers & Merchants Bank (1963) 243 S.C. 132 132 SE 2d 385
Payton v Rowland (1967) 208 Va 24 155 SE 2d 36

3 Sheppard v Nienow (1970) 173 S.E. 2d 343

4 Ibid 345

5 8 A.L.R. 765, 779
68 A.L.R. 1195, 1204
163 ALR. 310, 331
78 ALR. 2d 1238, 1266
49 Am. Jur. 2d s 850 p. 818 n 20
Comment, 14 Virginia L.R. 61 (1927)
Hatfield, 40 Mich. L.R. 313
Preston, 38 North Carolina L.R. 403, 406
Schlegel, 19 Chi-Kent L.R. 317, 325
eg Thompson v Shoemaker (1970) 7 N.C. App. 687
173 SE 2d 627

A minority of Courts have allowed recovery for personal injuries in a contract action,

Hart v Coleman (1917) 201 Ala 345
78 So 201
Busick v Home Owners Loan Corp (1941) 91 NH 257
18 A 2d 190

See Hatfield, 40 Mich. L.R. 313
Prosser, s 63 p. 409 n 17
Sergerson, 49 Mich. L.R. 1080, 1081
Taylor, 3 Alabama L.R. 335, 341-346

6 Calandriello, 29 Georgetown L.J. 1046, 1058 n 48
Comment, 32 Amer. T.L.J. 393
" 62 Harv. L.R. 669, 673
Gray, 6 Montana L.R. 44, 46
Noel, 30 Tenn. L.R. 368, 370
Prosser, s 63 p. 409

eg Tuttle v Gilbert Mfg. Co. (1887) 145 Mass 169,175
13 N E 465,467
Jacobson v Leventhal (1930) 128 Me. 424
148 A 281

7 Restatement of Torts 2 nd ed. Vol 2 s. 357.

8 163 A.L.R. 300
78 A.L.R. 2d 1238
Comment, 32 Amer. T.L.J. 393
" 80 U. of Pa. L.R. 1029, 1030
Globensky, 26 Notre Dame Lawyer 345, 346
2 Harper & Jones s 27.16 p. 1515
Humann, 1 Washburn L.J. 605, 608
Maher, 10 South Carolona L.R. 119, 317
Myers, 48 Mich. L.R. 689, 693
Noel, 30 Tenn. L.R. 368, 371
Powell, s 234 (2) pp. 346 - 347
Preston, 38 North Carolina L.R. 403, 407
Taylor, 3 Ala. L.R. 335, 342

9 For a list of cases which have adopted the Restatement rule, see Humann, 1 Washburn L.J. 605, 607 n 20

10 Button, 16 Clev-Mar. L.R. 319, 323
Dillman, 7 Duquesne L.R. 163, 164
Restatement 2d S 357 Comment (a)

11 Karr, 18 De Paul L.R. 822, 824
Prosser (4th ed 1971) s 63 p. 409
Walker Raymond, 42 Temple L.Q. 199, 212

12 Reitmeyer v Sprecher (1968) 431 Pa. 284
243 A 2d 395

13 Rampone v Wanskuck Buildings Inc. (1967)
227 A 2d 586

14 Williams v Davis (1961) 188 Kan. 385
362 P. 2d 641

15 Zuroski v Estate of Strickland (1964) 176 Neb 633
126 NW 2d 888

16 Comment, 12 Texas L.R. 236, 237
" 18 Texas L.R. 99
German, 30 Texas L.R. 131, 133
Jacobs, 15 Conn B.J. 315, 326
McMichael, 10 North Carolina L.R. 397, 399
Purzycki, 9 Catholic U.L.R. 108
Servera, 5 Cornell L.Q. 477

17 Baron v Leidloff (1905) 95 Minn. 474, 475
104 N.W. 289, 290

See also eg Kowinko v Salecky (1969)
5 Conn. Cir 657
260 A 2d 892
Propper v Kesner (1958) 104 So 2d 1
(Fla)
Underwood v Moloney (1965) 397 SW 2d 18
(Mo)

18 Comment, 62 Harv. L.R. 669, 673
Harkrider, 26 Mich. L.R. 383, 394
Karr, 18 De Paul L.R. 822, 825
Preston, 38 North Carolina L.R. 403, 408
Walker Raymond, 42 Temple L.Q. 199, 201

19 Michaels v Brookchester Inc. (1958) 26 N.J. 379
140 A 2d 199
Cf Reitmeyer v Sprecher (1968) 431 Pa 284
243 A 2d 395

20 Cavalier v Pope (1906) A.C. 428 infra

21 eg Cullings v Goetz (1931) 256 Ny 287
176 NE 397
Artman v Cities Service Oil Co. (1960) 83 Ohio L.Abs 123, 164 NE 2d 750
Button, 16 Clev - Mar L.R. 319, 322
Comment, 21 Albany L.R. 86, 88
" 62 Harv. L.R. 669, 672

22 Prosser s 63 p. 410

23 52 C.J.S. s 417 (4) p. 43 n 40
Harkrider, 26 Mich L.R. 383, 396

24 Reitmeyer v Sprecker (1968) 243 A 2d 395
Merchant's Cotton Press & Storage Co. v Miller (1916) 135 Tenn. 187, 186 SW 87
Lambert, 16 NACCA 330, 332

25 Moldenhauer v Krynski (1965) 62 Ill.App. 2d 382
210 NE 2d 809
Underwood v Moloney (1965) 397 SW 2d 18 (Mo)
78 ALR 2d 1238, 1251
49 Am. Jur. s 851 p. 8 21 n 19
Button, 16 Clev - Mar. L.R. 319, 325
52 C.J.S. s 417 (4) p. 44 n 48-49
Dillman, 7 Duquesne L.R. 163, 167
Karr, 18 De Paul L.R. 822, 826
Prosser s 63 p. 410
Restatement 2d s 357 Comment (b) (1)
Walker Raymond, 42 Temple L.Q. 199, 212

26 Noel, 30 Tenn. L.R. 368, 372
Watkins, 3 Missouri L.R. 322, 324
Edelman v Monouydas (1946) 186 Md. 479
47 A 2d 41
Reitmeyer v Sprecker (1968) 431 Pa. 284
243 A 2d 395

27 Comment, 16 Colum. L.R. 593, 594
" 1 Minn. L.R. 339, 343

28 52 C.J.S. s 417 (4) p. 44
Segerson, 49 Mich. L.R. 1080 (1951)

29 Trainor v Keane (1939) 304 Mass 466
23 NE 2d 1015
Flynn v South Middx Co-Op Bank (1944) 316 Mass 659
56 NE 2d 602
Bohen, 50 Harv. L.R. 725, 747

30 Alaimo v Du Pont (1955) 4 Ill App 2d 85
123 NE 2d 583
Gula v Gawel (1966) 71 Ill. App. 2d 174
218 NE 2d 42

31 Comment, 62 Harv. L.R. 669, 674 n 40

32 Ibid

33 See Comment, 21 Albaney L.R. 86, 90 - 91
Murphy, 16 Insurance Counsel J. 217
" 1 Syracuse L.R. 80
Murphy and Bundy, 8 Syracuse L.R. 50 - 52
Myers, 48 Mich. L.R. 689, 694-697

34 Scudero v Campbell (1942) 288 NY 328
43 NE 2d 66
Atonsen v Bay Ridge Savings Bank (1944)
292 NY 143
54 NE 2d 338
Noble v Marx (1948) 298 NY 106, 81 NE 2d 40.

35 De Clara v Barber Steamship Lines (1956)
309 NY 620
132 NE 2d 871
Montgomery Ward & Co. v New York Central Railroad
Co. (1968) 389 F 2d 556

36 Lem v Gould (1968) 425 SW 2d 190
Cf. Horstman v Glatt (1969) 436 SW 2d 639
See also Panaroni v Johnson (1969) 158 Conn 92
256 A 2d 246

37 Rich v Swalm (1931) 161 Miss 505
137 So. 325
Hodges v Hilton (1935) 173 Miss. 343
161 So. 686
Ford v Pythion Bondholders Protective Committee
(1955) 223 Miss 630
78 So 2d 743
78 ALR 1238, 1249
163 ALR 300, 305
Comment, 37 Virginia L.R. 324, 325
52 C.J.J. s 417 (4) p. 44
Preston, 38 North Carolina L.R. 403, 407
Bergerson, 49 Mich. L.R. 1080, 1081

38 8 ALR 765, 770
163 ALR 300, 314
49 Am. Jur. 2d s 851 p. 819 n 6
2 Harper & James s 27. 16 p. 1515
Noel, 30 Tenn. L.R. 368, 373
2 Restatement 2d s 357 (b) (c)
Rhynhart, 20 Maryland L.R. 1, 42

39 Kowinko v Salecky (1969) 5 Conn. Cir 657
260 A 2d 892, 897

40 Reitmeyer v Sprecker (1968) 431 Pa 284
243 A 2d 395, 397

41 McNally v Ward (1961) 14 Cal. Rptr. 260
Bentley v Dynarski (1962) 150 Conn. 147
186 A 2d 791
Sacks v Pleasant (1969) 251 A 2d 858 (Md)
Lemm v Gould (1968) 425 S.W. 2d 190 (Mo)
Rampone v Banskunk Bldg. Inc (1967) 227 A 2d
586 (R.I.)

42 Binns, 39 Washington L.R. 345, 354
Comment, 91 U. of Pa. L.R. 364, 365

43 Kowinko v Salecky (1969) 5 Conn. Cir 657
260 A 2d 892
Cf. Lemm v Gould (1968) 425 S.W. 2d 190 (Mo)
Johnson v Dye (1924) 131 Wash 637
230 P. 625
Contra, Glassman v Martin (1954) 196 Tenn 695
269 S.W.2d 908

44 Comment, 8 Colum. L.R. 666
" 16 Colum. L.R. 593, 594
" 1 Minn. L.R. 339, 343-346
" 8 N.Y.U. L.Q.R. 692, 693
" 3 Texas L.R. 107, 108
" 91 U. of Pa. L.R. 364, 365
" 7 Virginia L.R. 643
" 17 Virginia L.R. 599

45 William Walsh, "Commentaries On The Law of Real Property" Vol 2 (1947) p. 256

46 Comment, 17 Virginia L.R. 599, 600 (1930)

47 Binns, 39 Wash. L.R. 345, 354
Button, 16 Clev - Mar. L.R. 319, 326

continued .....

Calandriello, 29 Georgetown L.J. 1046, 1061
Comment, 21 Mich. L.R. 811, 812
Globensky, 26 Notre Dame Lawyer 345, 349
Humann, 1 Washburn L.J. 605, 609
Husang, 14 Notre Dame Lawyer 136, 138
Lambert, 16 NACC A.L.J. 330, 332-333
Pound, 15 NACCA L.J. 352 - 354
Powell, s 234 (2) p. 347

48 Calandriello, 29 Georgetown L.J. 1046, 1061

49 Dean v Hershowitz (1935) 119 Conn. 398
177 A. 262

50 Supra 190

51 Karr, 18 De Paul L.R. 822, 827
Cf. Comment, 62 Harv. L.R. 669, 674

Breach of Statutory Duty

1 For treatment of this topic in the standard texts, see

93 A.L.R. 778
17 A.L.R. 2d 708
49 Am. Jur. 2d s 772 pp. 713-715
52 C.J.S. s 417 (5) pp. 45-50
Prosser, s 63 p. 400

The most important articles are,

Fuerstein and Shestock, 45 Ill. L.R. 205
Harkrider, 26 Mich. L.R. 260, 383-391

See also,

Comment, 28 Harv. L.R. 111
" 62 Harv. L.R. 669, 674-676
" 36 Mich. L.R. 675, 676-677
" 30 N.A.C.C.A. L.J. 115
" 11 N.Y.U.L.Q. 650
" 26 Ohio State L.J. 512,513-514
Grimes, 2 Valparaiso U.L.R. 189,217-219
Maher, 10 South Carolina L.R.307, 310-313
Parsell, 7 Cornell L.Q. 386
Preston, 38 North Carolina L.R. 403, 405-406
Thompson, 1952 U. Ill. L.R. 417, 427
Trumbower, 10 Drake L.R. 132. 136

2 See generally on the Georgia and Louisianno law,
93 A.L.R. 778, 780-781
17 A.L.R. 2d 704, 713-721
49 Am. Jur. 2d s 772 p. 714
Comment, 62 Harv. L.R. 669, 675
" 11 NYU. L.Q. 650, 651
52 C.J.S. s 417 (5) pp. 46-48
Fuerstein and Shestock, 45 Ill. L.R. 205,210
Globensky, 26 Notre Dame Lawyer 345, 349
Maher, 10 South Carolina L.Q. 307, 313
Parsell, 7 Cornell L.Q. 386, 387
Preston, 38 North Carolina L.R. 403, 405

3 eg Reed v Classified Parking System (1970)
232 So 2d 103
Tewis v Zurich Insurance Co. (1970)
233 So 2d 357

4 Mich. C.L. 1948 ss 125. 401 - 125. 519 as amended by P.A. 286

5 Fuerstein and Shestock, 45 Ill. L.R. 205, 209-210

6 Van Every v Ogg (1881) 59 Cal. 563
For a recent case, see Gustin v Williams (1967)
62 Cal Rptr. 838

7 eg Bush v Baker (1915) 51 Mont. 326
152 Pac. 750
See generally on holdings that "repair and deduct" statutes infra do not impose a duty in tort;

93 ALR 778, 782
17 ALR 2d 704, 721
49 Am. Jur. 2d s 772 p. 714 n 11
Comment, 62 Harv. L.R. 669, 675
" 11 N.Y.U. L.Q. 650, 651 n 5
36 C.J. p. 211 n 28
52 C.J.S. s 417 (5) p. 46 n 58
Fuerstein and Shestack, 45 Ill. L.R. 205, 208
Maher, 10 South Carolina L.Q. 307, 311
Parsell, 7 Cornell L.Q. 386, 388
Preston, 38 North Carolina L.R. 403, 405

8 (1933) 117 Conn. 624
169 Atl. 912 Noted 11 N.Y.U.L.Q. 650 (1934)
But see now Panaroni v Jonnson (1969) 158 Conn. 92
256 A 2d 246
infra

9 Ibid 628, 169 Atl. 912, 914

10 Fechtman v Stover (1964) 199 NE 2d 354 in which the Court said at p. 358, "If the legislature wants to abolish common law concepts, enlarge upon those already existent or create rights and remedies that did not heretofore exist, it may do so as the elected body representing the people but we will not do so by judicial legislation."
See also Stover v Fechtman (1966) 222 NE 2d 281,284

11 Johnson v Carter (1934) 218 Iowa 587
255 NW 864
But see now Montgomery v Engel (1970) 179 NW 2d
478 infra

12 Stapleton v Cohen (1967) 353 Mass 53
228 NE 2d 64
Cert. den. 391 U.S. 968
But see now Dolan v Suffolk Franklin Savings Bank
(1969) 246 NE 2d 798 infra

13 Corey v Losse (1937) 297 S.W. 32

14 Clarke v Kerchner (1971) 11 N.C. App. 454
181 S E 2d 787

15 Fuerstein and Shestack, 45 Ill. L.R. 205,
209 - 210
Cf. Comment, 62 Harv. L.R. 699, 675-676

16 (1922) 233 N.Y. 16
134 NE 703

17 Ibid

18 (1968) 31 A.D. 2d 682
295 NYS 2d 942
See also Melodee Lane Lingerie Co v American
District Telegraph Co. (1966) 271 NYS 2d 937
218 NE 2d 661
Garcia v Freeland Realty Inc. (1970)
63 Misc. 2d 937
314 NYS 2d 215

19 (1960) 108 U.S. App. D.C. 385
282 F. 2d 943

20 Kanelos v Kettler (1968) 406 F 2d 951
See also Clarke v O'Connor (1970) 435 F 2d 104

21 Dolan v Suffolk Franklin Savings Bank (1969)
246 NE 2d 798 which restricted a line of cases
ending with Stapleton v Cohen (1967) 228 NE 2d
64 Supra to situations where common areas are
involved.

22 McCoy v Coral Hill Associates (1970) 264 A 2d 896

23 Montgomery v Engel (1970) 179 NW 2d 478 Distinguishing
Johnson v Carter (1934) 255 NW 864 Supra on
the grounds of announced legislative purpose.

24 Panaroni v Johnson (1969) 158 Conn. 92
256 A 2d 246
Cf. Chambers v Lowe (1933) 117 Conn. 624
169 Atl. 912 Supra

25 Braxton v McBrid e (1970) 241 So 2d 716

26 Rietze v Williams (1970) 458 S W 2d 613

27 Conners v Benjamin I. Magrid (1958) 353 Mich.628
91 N.W. 2d 875
(This case which involved breach of a statute requiring the landlords to keep premises free of vermin was especially sad: a five month old child had "been bitten - nay, gnawed and eaten upon by rats.) See also
Bravo v Chernick (1970) 28 Mich. App 210
184 N.W. 2d 357

28 Morrocco v Felton (1970) 112 N.J. Super 226
270 A 2d 739

29 17 A.L.R. 2d 704, 722-726
49 Am. Jur. 2d s 772 p. 715 n 18
Comment, 62 Harv. L.R. 669, 674
" 11 N.Y.U. L.Q.R. 650, 652
36 C.J. p. 222 n 90
52 C.J.S. s 417 (17) p. 95
Fuerstein and Shestock, 45 Ill. L.R. 205, 212
Maher, 10 South Carolina L.R. 307, 312
eg Clarke v O'Connor (1970) 435 F 2d 104 (D.C.)
Pease v Nichols (1958) 316 S W 2d 849 (Ky)
Annis v Britton (1925) 205 N W 128 (Mich)

30 Fuerstein and Shestock, 45 Ill. L.R. 205, 214

31 McNally v Ward (1961) 192 Cal. App 2d 871
Whetzel v Jess Fisher Management Co. (1960)
282 F 2d 943 (D.C.)
Panaroni v Johnson (1969) 158 Conn. 92
256 A 2d 246

32 52 C.J.S. s 417 (5) p. 48 n 79
Poverty Law Reporter para 2350

33 (1963) 12 NY 2d 400
See also, Kanelos v Kettler (1968) 406 F 2d 951 (D.C)
Montgomery v Engel (1970) 179 NW 2d 478
(Iowa)
McCoy v Coral Hills Associates Inc.
(1970) 264 A 2d 896 (Md)
Dolan v Suffolk Franklin Savings Bank
(1969) 246 NE 2d 798 (Mass)

34 (1969) 158 Conn. 92, 256 A 2d 246, 253.
See also, Comment, 62 Harv. L.R. 669, 674
Rietze v Williams (1970) 458 S W 2d 613
(Ky)
Crawford v Palomer (1967) 7 Mich.App. 21
151 N.W. 2d 236

35 17 A L R 2d 704, 712-713

36 (1967) 96 N.J. Super 539
233 A 2d 654

37 Halliday v Green (1966) 53 Cal. Rptr. 267
See al o, Gustin v Williams (1967) 62 Cal.Rptr.838
Del Pino v Gualtieri (1968) 71 Cal.Rptr.716
Horne v Adams (1966) 218 A 2d 513 (D.C.)
La Salle National Bank v Feldman (1966)
223 NE 2d 180 (Ill)

38 (1971) 372 N.Y.S. 2d 458

39 Fuerstein and Shestack, 45 Ill. L.R. 205, 215-216

Nuisance

1 Infra 632, 647

2 See generally,
110 A.L.R. 756
25 A.L.R. 2d 598, 619
39 A.L.R. 2d 973
Comment, 37 Mich. L.R. 1332
52 C.J.S. s 422 (1) pp. 152-154
Eldredge, 84 U. of Pa. L.R. 467
Frohmayer, 11 Oregon L.R. 201
James, 28 Conn. Bar. J. 127, 153
Luton, 25 Texas L.R. 427
Schoshinski, 54 Geo. L.J. 519, 538
Slade, 15 Boston U.L.R. 625

3 Algyer, 9 Wash. L.R. 217, 218
39 A.L.R. 2d 973
49 Am. Jur. 2d s 903, p. 882
Comment, 9 Mich. L.R. 160
" 29 Mich. L.R. 940
" 30 Mich. L.R. 470
" 5 Va. L.R. 289
52 C.J.S. s 431 p. 194, s 433 p. 203
Grimes, 2 Val. U.L.R. 189, 222
2 Harper and James s 27.21 p. 1528
James, 28 Conn. B.J. 127, 156
Luton, 25 Texas L.R. 427
Noel, 30 Tenn. L.R. 368, 393

continued .....

Prosser, s 63 p. 402
Restatement 2d s 379
Rhynhart, 20 Maryland L.R. 1, 43
Schlegel, 19 Chi-Kent L.R. 317, 335
Slade, 15 Boston U.L.R. 625, 626
Taylor, 3 Ala. L.R. 335, 338
Threlkeld, 37 Kentucky L.J. 322
Thompson, 1952 U. Ill. L.F. 417, 425

4 Algyer, 9 Wash. L.R. 217, 219
Comment, 3 Colum. L.R. 284
" 30 Mich. L.R. 470
" 6 Ohio St. L.J. 229, 232
52 C.J.S. s 427 p. 189
2 Harper and James s 27.21 p. 1529
James, 28 Conn. B.J. 127, 156
Luton, 25 Texas L.R. 427, 428
Noel, 30 Tenn. L.R. 368, 393
Restatement 2d s. 378
Schlegel, 19 Chi-Kent L.R. 317, 336
Slade, 15 Boston U.L.R. 625, 627
Threlkeld, 37 Kentucky L.J. 322, 324

5 Ibid

6 For English law, infra 632, 647.

7 49 Am. Jur. 2d s 898 p. 878
Comment, 36 Mich. L.R. 675, 676
" 37 Mich. L.R. 1332
" 22 Va. L.R. 354
Eldredge, 84 U. of Pa. L.R. 467, 474
Frohmayer, 11 Oregon L.R. 201

8 Eldredge, 84 U. of Pa. L.R. 467, 474
See also Eldredge, "Modern Tort Problems" (1941) p. 124

9 110 A.L.R. 757
49 Am. Jur. 2d s 780 p. 724
36 C.J. p. 206
52 C.J.S. s 422 (1) p. 153
Eldredge, 84 U. of Pa. L.R. 467, 473
Schlegel, 19 Chi - Kent L.R. 317, 336
Thompson, 1952 U. Ill L.F. 417, 426

10 Harris v Lewistown Trust Co. (1937) 326 Pa 145, 191 A 34
Noted Comment, 36 Mich. L.R. 675

continued.....

Comment 85 U. of Pa. L.R. 745

Overruled on another point, Reitmeyer v Sprucher (1968) 431 Pa 284, 243 A 2d 395

See also Bailey v Kelly (1915) 93 Kan.723, 145 P.556
Jackson v Public Service Co. (1932) 86 N.H. 81 163 A. 504
Miller v Morse (1959) 9 App.Div 188, 192 NYS 2d 571
Burdick v Cheadle (1875) 26 Ohio St. 393

11 Baughman v Cosler (1969) 459 P. 2d 294 (Colo)
Bentley v Dynarski (1962) 150 Conn. 147 186 A 2d 791
Roseman v Wilde (1969) 106 Ill App 2d 93 245 NE 2d 644
Stover v Fechtman (1966) 222 NE 2d 281 (Ind)
Stone v Shepherd Building Corp. (1966) 221 N.E. 2d 878 (Mass)
Jellison v Gleason (1967) 77 N.M.445 423 P. 2d 876

12 Cases collected 110 A.L.R. 756, 760
25 A.L.R. 2d 598, 619
49 Am. Jur 2d s 780 p. 724 n 16
52 C.J.S. s 422 (2) p. 154
2 Powell s 239 p. 273

13 Saner v Bannewolf (1932) 139 Ore 93 6 P. 2d 240

14 Bailey v Kelly (1912) 86 Kan. 911, 122 P.1027
rev'd (1915) 93 Kan. 723, 145 P. 556

15 Edwards v N.Y. & H.R.R.Co. 98 NY 245, 50 Am.Rep.659
For criticism of Saner, see: Eldredge, 84 Pa. L.R.476
Frohmayer, 11 Oregon L.R. 201

16 Deutsch v Max (1935) 318 Pa. 450, 178 A. 48
Noted; Comment, 22 Va. L.R. 354
Eldredge, 84 U. Pa. L.R. 467
overruled by Harris v Lewistown Trust Co. (1937) 326 Pa. 145 191 A. 34

17 Mckenzie v Chestham (1891) 83 Me. 543, 22 A. 469
State of Maryland v Manor Real Estate & Trust Co. (1949) F. Supp 91
rev'd on other grounds (1949) 176 F. 2d 414
Ames v Brandvold (1912) 119 Min 521, 138 NW 786
Eyer v Jordan (1892) 111 Mo. 424, 19 S.W. 1095
Staples v Senders (1940) 164 Or. 244, 101 P. 2d 232
Rossiter v Moore (1962) 370 P 2d 250 (Or)
Hair v American Trust & Banking Co. (1936) 19 Tenn. App. 656 94 S.W. 2d 59

18 eg Tuengal v City of Sitka (1954) 14 Alaska 546 118 F. Supp 399

19 Algyer, 9 Wash. L.R. 217, 221
49 Am. Jur. 2d s 914 p. 894
Comment, 6 Ohio St. L.J. 229, 232
2 Harper and James s 27. 20 p. 1526
James, 28 Conn B.J. 127, 153
Noel, 30 Tenn. L.R. 368, 393
Schlegel, 19 Chi-Kent L.R. 317, 335
Schoshinski, 54 Georgetown L.J. 519, 540

20 Harris v Lewistown Trust Co. (1937) 326 Pa. 145 191 A 34 Supra

21 Jubb v Maslanka (1961) 22 Conn. Sup. 373 173 A. 2d 604, 606
Followed Fonseca v Lavado (1970) 28 Conn.Sup.509 268 A. 2d 415
See also, Reiman v Moore (1939) 30 Cal.App.2d 306 86 P. 2d 156
Weidner v Schottenstein (1960) 111 Ohio App. 376, 169 N.E. 2d 304
Contra: Demoss v Coleman (1966) 216 N.E. 2d 861 (Ind)

22 Marshall v Cohen (1871) 44 Ga. 489 9 Am. Rep. 170
York v Steward (1898) 21 Mont. 515 55 P. 29
Harris v Boardman (1902) 68 App.Div. 436 73 N.Y.S. 963
26 A.L.R. 1044, 1053
49 Am. Jur. 2d s 881 p. 857

23 Ingwersen v Rankin (1885) 49 N.J.L.481,10 A 545
Citron v Bayley (1899) 36 App.Div. 130,55 N.Y.S.382
Colclough v Niland (1887) 68 Wis 309,32 NW 119
26 A.L.R. 2d 1044, 1062-1064
49 Am. Jur. 2d s 883 p. 859
36 C.J. pp. 233-235

continued .....

52 C.J.S. s 423 (4) pp. 169, 173

There may also be a right of action in nuisance against the other tenant;

eg American Electronics Inc v Christo Poulas & Co. (1964) 250 NYS 2d 738

Slumlordism As A Tort

1 Sax and Hiestand, 65 Mich. L.R. 869
See also, Byrn, 160 N.Y.L.J. No. 81 (1968)
Comment, "Trial" Magazine August/September 1969 p. 24
Fallick, 58 Ill. B.J. 204

2 Ibid 911

3 See generally on this tort,
Fallick, 58 Ill. B.J. 204
Magruder, "Mental and Emotional Disturbance in the Law of Torts" 49 Harv. L.R. 1033 (1936)
Prosser, "Insult and Outrage" 44 Calif. L.R.40 (1956)
Restatement (2d) Torts s 46 (1965)

4 Alcorn v Mitchell (1872) 63 Ill. 553
See also Nickerson v Hodges (1920) 146 La 735 84 So 37 (practical joke)

5 Sax and Hiestand, 65 Mich. L.R. 869, 882

6 Ibid 907

7 Ibid 890

8 Ibid 913

9 Ibid 904

10 Ibid 910

11 Blum and Dunham, 66 Mich. L.R. 451, 461
See reply by Sax, 66 Mich. L.R. 463
and Fallick,58 Ill. B.J. 204

12 Kirshner, 76 Case and Comment 39

13 eg Zaragoza v Skyway Realty (1968) 12 Welfare Law Bulletin 8 (Cal)
Mendoza v Gonzale z (1969) Poverty Law Reporter para 9416 17 Welfare Law Bulletin (Cal)
Littlefield v Rice (1969) Poverty Law Reporter para 10, 524 (Ma)
Canda v Walls (1968) Poverty Law Reporter para 9484 (Ma)
Braggs v Proctor (1969) Poverty Law Reporter para 9437 (Wash)

14 (1971) 327 N.Y.S. 2d 458

15 Ibid 464

The Landlord's Liability To The Tenant's Family and Guests

1 See generally,

110 A.L.R. 756
25 A.L.R. 2d 598, 601,616
20 A.L.R. 3d 1127, 1150
Anderson, 13 Oregon L.R. 262
Binns, 39 Wash. L.R. 345, 351-352
Comment, 20 Ill. L.R. 730
" 54 N.W.U.L.R. 61, 63
" 12 Texas L.R. 93
" 12 Texas L.R. 236
" 62 U. of Pa. L.R. 573
" 23 Yale L.J. 184
" 32 Yale L.J. 742
52 C.J.S. s 418 p. 110, s. 419, p. 135
Frohmayer, 11 Oregon L.R. 201, 203
Grimes, 2 Val. U.L.R. 189, 220-221
Harkrider, 26 Mich. L.R. 260, 410-411
McCoy, 16 Ala. L.R. 189
Schlegel, 19 Chicago-Kent L.R. 317, 330-352

2 Roseman v Wilde (1969) 106 Ill. App 2d 93
245 N.E. 2d 644
Roan v Bruckner (1966) 180 Neb. 399
143 N W 2d 108
Jellison v Gleason (1967) 77 N.M. 445
423 P. 2d 876
Comment, 12 Texas L.R. 93, 94
Schlegel, 19 Chi-Kent L.R. 317, 331

3 Anderson, 13 Oregon L.R. 262
Comment, 12 Texas L.R. 93, 94
" 32 Yale L.J. 742
Schlegel, 19 Chi-Kent L.R. 317, 330

4 eg Levine v Katz (1968) 407 F 2d 303, 305 per
Bazelon Ch.J.
Binns, 39 Wash. L.R. 345, 351

5 Gustin v Williams (1967) 62 Cal.Rptr. 838 (Guest)
Black v New Holland Baptist Church (1970) 122 Ga.
App 606, 178 SE 2d 571 (Guest)
Roseman v Wilde (1969) 106 Ill App 2d 93
245 N.E. 2d 644 (Guest)
Roan v Bruckner (1966) 180 Neb. 399
143 N W 2d 108 (Family)
Jellison v Gleason (1967) 77 N.M. 445
423 P 2d 876 (Family)
Sheppard v Nienow (1970) 173 S.E. 2d 343 (Family)
(S.C.)
Cowan v One Hour Valet Inc. (1967) 157 S.E. 2d 843
(Guest) (W.Va)
110 A.L.R. 756
25 A.L.R. 2d 598, 601, 616
20 A.L.R. 3d 1127, 1150
49 Am. Jur. 2d s 780 p. 722, s 810 p. 769
Binns, 39 Wash. L.R. 345, 351
Comment, 20 Ill. L.R. 730
" 62 U. Pa. L.R. 573, 574
" 32 Yale L.J. 742
52 C.J.S. s 418 (1) p. 110 (Guests), s 419 p.135
(Family)
Frohmayer, 11 Oregon L.R. 201, 204
Grimes, 2 Val. U.L.R. 189, 220

6 Schwartz v McGraw & Edison Co. (1971) 92 Cal Rptr.776
Crabtree v Vescio's Inc. (1969) 20 Mich. App. 578
174 N.W. 2d 295
Floyd v Lask (1966) 190 So. 2d 451 (Miss)
110 A.L.R. 756
25 A.L.R. 2d 598, 601, 616

49 Am. Jur. 2d s 780 p. 723
Comment, 62 Harv. L.R. 669
52 C.J.S. s 419 p. 135
Grimes, 2 Val. U.L.R. 189, 220

7 Hardin v Elvitsky (1965) 42 Cal. Rptr. 748
Levine v Katz (1968) 407 F 2d 303
132 U.S. App. D.C. 173
Saunders v Romanos (1969) 245 NE 2d 757 (Mass)
Terry v Sweeney (1967) 420 SW 2d 368 (Mo)
Coleman v Steinberg (1969) 54 N.J. 58
253 A 2d 167
Geesing v Pendergrass (1966) 417 P. 2d 322 (Okla)
Taylor v Virginia Constr. Corp. (1968) 209 Va.76
161 S.E. 2d 73 2

Cases collected:

25 A.L.R. 1273, 1286-1292
39 A.L.R. 294, 298 - 299
58 A.L.R. 1412, 1415-1416
75 A.L.R. 154, 160 - 161
97 A.L.R. 220, 224-226
84 A.L.R. 2d 1143, 1149
84 A.L.R. 2d 1190, 1205-1208
86 A.L.R. 2d 791, 799-802, 804-806
86 A.L.R. 2d 838, 840

8 Knox v Sands (1967) 421 SW 2d 497 (Mo)
Hamilton v Fean (1966) 422 P. 373
221 A 2d 309
Roberts v Tenn. Wesleyan College (1969) 450 S.W.
2d 21 (Tenn)
25 A.L.R. 2d 598, 618
49 Am. Jur. 2d s 788 p. 738 n 20
Calandriello, 29 Georgetown L.J. 1046, 1052
Comment, 62 Harv. L.R. 670, 671
52 C.J.S. s 418 (2) p. 117 n 12, s 419 p. 137 n 54
Ford, 14 Missouri L.R. 219, 220
Gellier, 17 U. of Detroit L.J. 98, 99
Noel, 30 Tenn. L.R. 368, 374
Prosser s 63 p. 401
Thompson, 1952 U. Ill. L.F. 1046, 1052

9 Shotwell v Bloom (1943) 60 Cal. App. 303
140 P 2d 728
Baum v Freeman (1958) 103 So. 2d 654 (Fla)
Elbers v Standard Oil Co. (1947) 331 Ill.App. 207
72 NE 2d 874
49 Am. Jur. 2d s 788 p. 738
Calandriello, 29 Georgetown L.J. 1046, 1051 n 17
Eldredge, 84 U. of Pa. L.R. 467, 473
Harkrider, 26 Mich. L.R. 260, 531 n 205
2 Harper and James s 27.16 p. 1509
Noel, 30 Tenn. L.R. 368, 380
Thompson, 1952 U. Ill. L.F. 417, 423

10 Eldredge, 84 U. Pa. L.R. 467, 473
But see reply by Harper and James s 27.16 p. 1509

11 Halliday v Green (1966) 53 Cal. Rptr. 267
Clarke v O'Connor (1970) 435 F 2d 104 (D.C.)
Braxton v McBride (1970) 241 So 2d 716 (Fla)
Rietze v Williams (1970) 458 S.W. 2d 613 (Ky)
Crawford v Palomar (1967) 7 Mich. App. 21
151 NW 2d 236
Fuerstein and Shestock, 45 Ill. L.R. 205, 211

12 Lemm v Gould (1968) 425 SW 2d 190 (Mo)
Rampone v Wanskuck Buildings Inc. (1967) 227 A 2d
586 (R.I.)
Traveler's Insurance Co. v United States (1968)
283 F. Supp 14 (Tex)

Cases collected;

8 A.L.R. 765, 772
68 A.L.R. 1195, 1201
163 A.L.R. 300, 313
25 A.L.R. 2d 598, 617-618
78 A.L.R. 2d 1238, 1255
52 C.J.S. s 419 p. 140 n 65

Early New Jersey law extended liability only to the tenant:
Clyne v Helmes (1898) 61 N.J.L. 358, 39 A. 767
This was overruled by Faber v Creswick (1959)
31 N.J. 234
156 A 2d 252
See also, Comment, 12 Texas L.R. 236, 237
" 91 U. Pa. L.R. 364, 365
" 23 Yale L.J. 184
Sergerson, 49 Mich. L.R. 1080, 1081

13 Comment, 16 Colum. L.R. 593, 594
" 1 Minn. L.R. 339, 346
" 12 Minn. L.R. 303, 304
Globensky, 26 Notre Dame Lawyer 345, 348
Schlegel, 19 Chi-Kent L.R. 317, 326
Thompson, 1952 U. Ill. L.R. 418

14 150 A.L.R. 1373, 1383
25 A.L.R. 2d 598, 618
49 Am. Jur. 2d s 797 p. 750 n 15
Comment, 29 Harv. L.R. 226
" 12 Texas L.R. 93
Rosenwald, 6 U. of Kansas City L.R. 119,120

15 74 A.L.R. 2d 894, 897
78 A.L.R. 2d 1238, 1259
49 Am. Jur. s 793 p. 745, s 797 p. 749
Bohlen, 35 Harv. L.R. 633. 665

continued . . .

Comment, 29 Mich. L.R. 939
36 C.J. p. 217 n 27
52 C.J.S. s 417 (12) p. 80, s 419 p.141
Maher, 10 South Carolina L.Q. 307, 314
Noel, 30 Tenn. L.R. 368, 388
Prosser, s 63 p. 411
Rosenwald, 6 U. of Kansas City L.R. 119, 120

16 Carney v Bereault (1965) 348 Mass. 502
204 NE 2d 448

150 A.L.R. 1373, 1384
25 A.L.R. 2d 598, 617
49 Am. Jur. 2d s 797 p. 750
Bohlen, 35 Harv. L.R. 633
Comment, 29 Harv. L.R. 226
" 12 Texas L.R. 93, 94
" 64 U. of Pa. L.R. 526
36 C.J. p. 219 n 40
52 C.J.S. s 417 (12) p. 83 n 80
Preston, 38 North Carolina L.R. 403, 410

17 20 A.L.R. 3d 1127

18 Webel v Tale University (1939) 125 Conn. 515
7 A 2d 215, 217

25 A.L.R. 1273, 1291
25 A.L.R. 2d 598, 616
49 Am. Jur. 2d s 811 p. 772
Anderson, 13 Oregon L.R. 262, 263
Binns, 39 Wash. L.R. 345, 351
52 C.J.S. s 418 (6) p. 131
Grimes, 2 Val. U.L.R. 189, 220

19 eg Rogers v Columbus Bank & Trust Co. (1965)
111 Ga. App. 792
143 SE 2d 438

20 Carter v Brannon (1970) 122 Ga. App 812
178 S.E. 2d 755
Cf. Clarke v O'Connor (1970) 435 F 2d 104 (D.C.)

21 Taylor v Virginia Construction Co. (1968) 209 Va.76
161 SE 2d 732

Contributory Negligence

1 See generally; 49 Am. Jur. 2d s 772 p. 714
Comment, 62 Harv. L.R. 669,677-678
" 75 U. Pa. L.R. 572
" 22 Va. L.R. 354
52 C.J.S. s 417 (19) pp.101-105
s 417 (20) pp.105-110
Dehler, 23 Tenn.L.R. 219,227-228
Fuerstein and Shestock, 45 Ill.L.R. 205, 215
Rhynhart, 20 Maryland L.R. 1, 44
Thompson, 1952 U. Ill.L.F. 417,429
Trumbower, 10 Drake L.R. 132,318-139
Schlegel, 19 Chi-Kent L.R. 317,332-334

2 49 Am. Jur. 2d s 853 p. 822
Comment, 62 Harv. L.R. 669, 677
" 75 U. Pa. L.R. 572
" 22 Va. L.R. 354
52 C.J.S. s 417 (20) p. 105
Dehner, 23 Tenn. L.R. 219, 227 - 228
Fuerstein and Shestock, 45 Ill. L.R. 205, 215
Schlegel, 19 Chi-Kent L.R. 317, 333

3 Mullinax v Cook (1967) 115 Ga. App. 201
153 S.E. 2d 924

4 Ibid 926

5 Thompson v Shoemaker (1970) 7 N.C. App 687
173 S.E. 2d 627

6 Harrell v Johnson (1970) 242 So 2d 648 (La)
Roman v King (1921) 289 Mo. 641
233 S.W. 161
49 Am. Jur. 2d s. 816 p. 779
52 C.J.S. s 417 (20) p. 107

7 49 Am. Jur. 2d s 853 p. 822
52 C.J.S. s 417 (20) p. 109
Dehner, 23 Tenn. L.R. 219, 227

8 Panaroni v Johnson (1969) 158 Conn. 92
256 A 2d 246, 256
See also Edelman v Monouydas (1946) 186 Md.479
47 A 2d 41
Sacks v Pleasant (1969) 253 Md. 40
251 A. 2d 858

9 52 C.J.S. s 417 (20) pp. 107-108
Rhynhart, 20 Md. L.R. 1, 44.
Trumbower, 10 Drake L.R. 132. 139

10 Ensor v Ortman (1966) 243 Md. 81
220 A 2d 82
Followed in Windsor v Goldscheider (1967)
248 Md. 220
236 A 2d 16

11 Ibid 82
See also; Kowinko v Salecky (1969) 5 Conn.Cir.657
260 A. 2d 892
Wolk v Bucj (1970) 231 So 2d 228(Fla)
Carmack v Oglethorpe Co. (1966)
114 Ga. App 512
151 S.E. 2d 799
rev'd on other grounds 153 S.E. 2d 541

12 Schlegel, 19 Chi-kent L.R. 317, 332

13 Taylor v Boyce (1962) 105 Ga. App. 434
124 S.E. 2d 647
Followed by Hearn v Barden (1967) 115 Ga. App.708
155 S.E. 2d 649

14 Clements v Blanchard (1941) 141 Ga. 311
80 S.E. 2d 1004, 1005

15 Comment, 62 Harv. L.R. 669, 677
" 75 U. Pa. L.R. 572
52 C.J.S. s 417 (20) p. 107
O'Brien, 38 Georgetown L.J. 497, 498
Prosser s 68 p. 451

16 Sacks v Pleasant (1969) 253 Md. 40
251 A 2d 858

17 Ibid 862
See also; Kanelos v Kettler (1968) 132 U.S.App.D.C.133
406 F. 2d 951
Conway v Briley (1966) 191 So 2d 601 (Fla)
Edelman v Monouydas (1946) 186 Md. 479
47 A. 2d 41
Guerra v Ginevra (1967) 27 A.D. 2d 697
276 N.Y.S. 2d 939

18 See generally supra 88

19 Lang v Henderson (1948) 215 S.W. 2d 585, 587
See also, State of Maryland v Manor Real Estate & Trust Co. (1949) 176 F. 2d 414
Notes; O'Brien, 38 Georgetown L.J. 497
See generally; Comment, 62 Harv. L.R. 669,677

20 Coenen v Buckman Bldg. Corp. (1967) 153 N.W.2d 329 (Minn)
Echert v Reichardt (1926) 243 N.Y. 72
152 N.E. 469
Fuerstein and Shestack, 45 Ill. L.R. 205, 216

21 Houchin v Willow Avenue Realty Co. (1970) 453 S.W. 2d 560 (Ky)
Bennett v District Heights Apartments (1969) 252 Md. 655
25 1 A. 2d 215
Campbell v Francis (1964) 378 S.W. 2d 790 (Tenn)
Yarborough v Smith (1965) 66 Wash. 2d 365
402 P. 2d 667
25 A.L.R. 1273, 1335
39 A.L.R. 294, 305
58 A.L.R. 1411, 1422
75 A.L.R. 154, 171
97 A.L.R. 220, 242
163 A.L.R. 587
25 A.L.R. 2d 496, 543-558, 563
49 Am. Jur. 2d s 817 p. 781
Comment, 32 Tenn. L.R. 323
52 C.J.S. s 417 (20)

22 Hill v Gaetner (1958) 92 N.W. 2d 810 (Minn)

23 Richter v Koffman (1969) 223 So 2d 876 (La)

24 Mullinax v Cook (1967) 115 Ga. App. 201
153 S.E. 2d 924

25 Harrell v Johnson (1970) 242 So. 2d 648 (La)

26 Workman v Goldford (1967) 86 Ill. App. 2d 403
230 N.E. 2d 574
Coenan v Buckman Bldg. Corp. (1967) 153 N.W. 2d 329 (Minn)
Pierpont v Busa (1967) 27 App. Div. 2d 881
278 N.Y.S. 2d 43
See also Annotations listed n 21 Supra.

27 Workman v Goldford (1967) 86 Ill App 2d 403
230 N.E. 2d 574
Walker v Niemeyer (1965) 386 S.W. 2d 87 (Mo)

28 Hamilton v Fean (1966) 422 Pa. 373
221 A. 2d 309

29 Pigg v bloom (1970) 22 Mich. App 325
177 N.W. 2d 441

30 Knox v Sands (1967) 421 S.W. 2d 497 (Mo)

31 Madison v Reaben (1970) 128 Ill.App. 2d 11
262 N.E. 2d 794

32 Roberts v Barkette (1971) 245 So. 2d 134 (Fla)
Bersuder v Employers Liability Assurance Corp
(1968) 210 So 2d 525 (La)
Labreque v Holmes (1963) 159 Me. 122
189 A 2d 380
Cases collected;

49 Am. Jur. 2d s 816 p. 778
13 A.L.R. 837, 849
25 A.L.R. 1273, 1328
26 A.L.R. 1254, 1257
39 A.L.R. 294, 304
43 A.L.R. 1292, 1302
52 A.L.R. 864, 868
58 A.L.R. 1412, 1422
75 A.L.R. 154, 170
97 A.L.R. 220, 239
25 A.L.R. 2d 364, 382 et seq
25 A.L.R. 2d 444, 478
26 A.L.R. 2d 468, 494, 568
84 A.L.R. 2d 1143, 1151 et seq
84 A.L.R. 2d 1190, 1200 et seq
Comment, 32 Tenn. L.R. 323, 324
52 C.J.S. s 417 (19) p. 102 n 76
2 Powell s 234 (2) (b) p. 340
Prosser s 63 p. 421
Restatement 2d s. 360 Comment b

33 Hamilton v Fean (1966) 422 Pa. 313
221 A. 2d 309
49 Am. Jur. 2d s 792 p. 743 n 3 -5
Comment, 35 Indiana L.J. 361, 366
52 C.J.S. s 417 (19) p. 103 n 79
McCarthy, 2 St. Louis U.L.J. 409, 411

34 Clarke v O'Connor (1970) 435 F. 2d 104, 110
Thompson v Shoemaker (1970) 7 N.C. App. 687
173 S.E. 2d 627
Stanforth v Smith (1946) 79 Ohio App. 158
71 NE 2d 739
93 A.L.R. 778, 782
17 A.L.R. 2d 704, 730-735

continued .....

49 Am. Jur. 2d s 772 p. 714 n 12
Comment, 11 N.Y.U. L.Q.R. 650, 652
" 62 Harv. L.R. 669, 678
52 C.J.S. S417 (19) p. 102 n 75
Fuerstein v Shestack, 45 Ill. L.R. 205, 215-220
Grimes, 2 Val. U.L.R. 189, 218

35 8 A.L.R. 765, 781
68 A.L.R. 1194, 1205
163 A.L.R. 300, 332
78 A.L.R. 2d 1238, 1268
49 Am. Jur. 2d s 853 p. 822
52 C.J.S. s 417 (20) p. 109

36 Miller v Howard (1955) 206 Md. 148
110 A. 2d 683
Bartlett v Taylor (1943) 351 Mo. 1060
174 S.W. 2d 844
49 Am. Jur. 2d s 798 p. 751 n 2
Maher, 10 South Carolina L.R. 307, 315
2 Powell s 234 (2) p. 344

Defects In Existence At Time Of Demise And Created By Lessor's Negligence

In Bottomley v Bannister, Scrutton L.J. said that a landlord owes no duty for defects in an unfurnished house "even if he has constructed the defects himsslf".[1] Although that dictum went beyond the facts of that case[2] and could not be justified on the then existing case-law,[3] it must be conceded that the present weight of authority is in its support.

The defendant in Otto v Bolton,[4] was the builder - vendor of a new house. As found by Atkinson J. at the trial, the house was constructed in a negligent manner and,as a result,the plaintiff was injured when part of the ceiling fell upon her. After a review of the scope of Donoghue v Stevenson,[5] Atkinson J. held that that case had not changed the law as declared by Scrutton L.J. in Bottomley v Bannister and that the defendant owed no duty of care towards the plaintiff. In this case the defect was clearly due to the negligence of the defendant before the sale.

A more difficult case is that of Davis v Foots.[6] The cause of the defect was clearly due to the negligence of the lessor in that his son acting as his agent had negligently removed a gas fire and so caused a leak which killed the tenant and made his wife very ill. The difficulty arises in deciding whether the negligence occurred before or after the demise.[7] Counsel for the landlord contended that it occurred before the demise

whereas counsel for the tenant rested his case on the basis that it occurred after the demise,

> "The distinction between the present case and Bottomley v Bannister is that in the present case the misfeasance took place after the contract of tenancy was entered into, while in that case the act complained of took place before the contract of tenancy was entered into." 8

This difficulty arose because of disagreement as to the date of the demise. It was not cleared up by the Court though MacKinnon L.J. did say,

> "the defendants, the landlords, let this house to the plaintiff with a disconnected pipe from which gas could escape when the gas was turned on at the meter." 9

Unfortunately, it is not clear if "let" is used here to describe a single act at the commencement of the demise or a continuing act throughout the term. Assuming the Court to have decided that the defect was in existence at the time of the demise, this case is good authority for the view that no liability attaches to a landlord for defects existing at the time of demise even if he has negligently created them.

The cases of Otto v Bolton and Davis v Foots were followed by Lewis J. in Travers v Gloucester Corp.[10] The defendant landlord in this case had installed what was held to be an unsatisfactory and dangerous gas geyser. Owing to the defective nature of the installation a lodger in the house was gassed and his mother brought this action under the Fatal Accidents Acts. Lewis J. summed up the case by saying,

> "Here the complaint is against the landlord of the house who let the house unfurnished to the tenant in a dangerous condition by reason of faulty gas installation which he had negligently caused to be put in." 11

He went on, however, to hold that he was bound by Bottomley v Bannister, Otto v Bolton and Davis v Foots to declare that the defendant had been under no duty of care towards the lodger regarding the installation of the geyser.

Defects Existing At Time of Demise Of Which The Lessor Is Aware

In his dictum in Bottomley v Bannister, Scrutton L.J. also said that the immunity of landlords for defects in an unfurnished house applied "even if he -- is aware of their existence."[12] If the defect is quite apparent then there is no doubt that this is indeed the law but in the case of latent defectsof which the landlord is aware, but which the tenant cannot reasonably be expected to know of, the law is not so clear and it is submitted that no cases conclusively establish the lessor's immunity.

Patent Defects

Keates v Cadogan,[13] decided by the Court of Common Pleas in 1851, is clear authority for the proposition that a landlord is under no liability for failure to

disclose all types of defects known to him. When the defendant demised premises to the plaintiff it was in a dangerous state and this fact was known by him but he did not communicate it to his tenant. During the tenancy part of the premises fell down and were no longer habitable. The plaintiff now sought special damages on the grounds that the defendant had neglected his duty by failing to inform him of the state of the premises. It was contended on behalf of the tenant,

> "The facts here stated show a good cause of action. A person letting a house to another knowing that the other takes it for the purpose of residence, and knowing that it is in a dangerous state and likely to fall down, and that the other takes it not knowing that it is in this state, gives a cause of action to the party taking the house." 14

It was held by the Court that this was not so,

> "It is not contended by the plaintiff that any misrepresentation was made, nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house; or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgement, there being no obligation on the defendant to say anything about the state of the house, and no allegation of deceit. It is an ordinary case of letting." 15

Whether this case is authority for the proposition that the landlord is under no duty to disclose <u>any</u> defects known to him is discussed later;[16] at present, it is enough to say that the case supports the view that a landlord is under no duty to disclose <u>all</u> defects known to him.

Subsequent cases have followed Keats v Cardogan. In Bromley v Mercer,[17] the defendant landlord knew when he demised the premises that a wall upon it was in a dangerous state. It fell and injured a child but the landlord, despite his knowledge, escaped liability because the Court of Appeal held that he owed no duty to persons on the demised premises. Similar decisions were reached in Otto v Bolton[18], Davis v Foots,[19] and Sleafer v Lambeth Borough Council[20] where the landlord's knowledge was again treated as irrelevant.

Duty Of Landlord To Disclose Known Latent Defects?

It is submitted that a rule similar to that which has long prevailed in American law[21] is open to English courts. On the one hand, there are no authorities directly preventing such a result but only some very wide dicta.[22] On the other, the law relating to chattels provides a strong argument in support and dicta, both recent and old, can also be used in favour of such an argument.

The decided English cases do not prohibit the development of a duty upon the landlord to disclose latent defects known to him. The strongest case against such a development appears to be Keates v Cadogan.[23] This decision can be distinguished from the rule now contended for on the grounds that there was no showing that the defect was latent. Counsel for the tenant

merely tells us that his client did not know of the defect, we are not told whether it was apparent to a person using reasonable care. The reference to "investigations"[24] in the judgement suggests that the defect was one which might have been reasonably discoverable upon inspection.

The point does not appear to have been squarely raised in any other case though dicta can be found against liability. For example, in Bottomley v Bannister[25] Scrutton L.J. said that a lessor of an unfurnished house is not liable for defects rendering it dangerous or unfit "even if he -- is aware of their existence".[26] Greer L.J. referred to cases "which deal with the liability of a vendor of some chattel, which is dangerous in itself, who gives no warning to the purchaser" but said that such cases did not apply as between landlord and tenant.[27] Romer L.J. came to a like conclusion. But such comments are clearly obiter in view of the fact that the Court found that; (a) the burner in that case, the cause of injury, was not dangerous if properly regulated ie there was no latent defect; (b) the tenants must have tampered with the regulator ie they had knowledge of the defect or should have had and (c) the landlord himself had no knowledge of the defect and there was no reason for him to suspect it.

The other cases on the landlord's immunity are

likewise not in point. In Lane v Cox[28] there was no evidence that the landlord knew of the defect; in Cavalier v Pope[29] the tenant clearly did; the defect in Otto v Bolton "was not hidden or latent; the blobs were there plainly to be seen";[30] so too in Davis v Foots, "this was not a latent defect, it was quite apparent on examination -- One would have said that it was inevitable that it would be noticed"[31]; the landlord's knowledge in Travers v Gloucester Corp[32] came after the demise and there was also ample opportunity for the plaintiff to inspect; finally, in Ball v L.C.C.[33] the defective boiler was not installed until after demise and there is no evidence that the landlord knew of the defect.

Summarising the above, it can be said that there is no binding authority against finding the landlord liable for the consequences of undisclosed known latent defects. Even if the view is taken that the landlord can never owe a duty of care in negligence to his tenant,[34] liability could remain on the grounds of fraud.[35] A dictum in the case of Cook v Waugh[36] decided by Sir John Stuart V.C. in 1860 can be urged in support of liability on these grounds. In that case, the defendant-tenants had vacated the demised premises when the district surveyor had declared them to be in a dangerous state by reason of a defective wall which required re-building. The plaintiff-lessor now soughr specific performance of the lease. Judgement

was given for the landlord on the grounds that the defects "were of a kind to arouse the vigilence of any intending lessee and to make him see that it was necessary for a great deal to be done before the house could be safely inhabited."[37] The defendants were therefore unable,

> "to bring their case within the principle of that doctrine, which is very well established and which I hope will never be weakened - that if a vendor or a lessor is aware of some latent defect and does not disclose it, the Court will consider him acting in bad faith." 38

Unfortunately, no authority was given for this "very well established" doctrine and counsel for the tenant cited only one case directly in point, being that of Shirley v Strutton[39] in which the Court of Chancery refused specific performance of an agreement for the purchase of an estate when it appeared that there had been "an industrious concealment" of the state of repair of a river-wall. Whether "industrious concealment" connotes something more than mere non-disclosure is not clear from the report.[40]

More modern dicta in support of the suggested rule is also available. In McIntosh v Wilson[41] in the Manitoba Court of Appeal, Cameroun J.A. considered the relevant American law and concluded that "there is much in the view to be commended "though he went on to say that the distinction between liability for latent and patent defects was not recognised by the English authorities which he was bound to follow. It is

respectfully submitted that whilst the distinction may not have been generally recognised, there is nothing to prevent a court following English law from doing so. It may be that Lord Justice Phillimore was doing precisely that in the recent case of Brew Bros v Snax.[42] Whilst dealing with the liability of a landlord for nuisance which affected a neighbouring occupier, he said,

> "Here -- the landlords ought to have known of the danger when they let the premises and must be treated as if they had actually known of it. If they had, they would clearly have been under a duty to warn the tenants so as to ensure that proper steps were taken to investigate and remove the danger without delay. It was, on the facts of this case, open to the learned judge to find that the landlords had failed equally with the tenants to take reasonable care and were thus liable for the nuisance and its consequences." 43

The exact scope of the landlord's duty of disclosure is not clear. It may be that, in view of the context, the landlord's duty was owed not to the tenant but only to the neighbouring occupier. It may be, on the other hand, that the learned judge was merely recognising what is surely only the very least that one can expect in justice; that a person who parts with possession of a dangerous house ought to warn the recipient of the danger.

Such a duty of disclosure would bring the law of landlord and tenant into line with what has long been the law in the sale of chattels. An instructive example is Clake v Army and Navy Co-Operative Society Ltd.[44] A trader sold to a customer a tin of disinfectant powder knowing that it was likely to be dangerous if

it was not opened with special care. No warning of the danger was given and, when the customer opened the tin, she was injured by the powder which flew into her eyes. The Court of Appeal held the trader liable in damages as he should have given a warning of the probable danger. Collins M.R. explained the basis of the decision,

> "It seems to me that, independently of any warranty, a relation arises out of the contract of sale between a vendor and purchaser, which imposes on the former a duty towards the latter; namely a duty, if there is some dangerous quality in the goods sold, of which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precaution in the way of warning the purchaser that special care will be requisite." 45

There is no good reason why the tenant should be subjected to a greater risk than a customer.

A law which permits a landlord who knows of a latent defect to conceal his knowledge from a tenant and so passively consent to the risk of injury clearly has nothing to recommend it. It comes as little surprise to see that the Law Commission, recommended in its Report on Defective Premises that,

> "a vendor or lessor of premises should in respect of defects known to him be under a duty to all persons who may reasonably be expected to be affected by those defects; that this duty should be to take reasonable care to see that such persons are reasonably safe from personal injury or damage to their property caused by the defects; and that the duty should not be discharged merely by a warning given to the transferee unlessthe warning was adequate to enable the latter to take remedial action both to protect himself and his property and to discharge his duty of care in respect of the state of the premises towards other persons." 45

It is greatly to be hoped that this recommendation will be implemented.

Known Defects At Time of Demise - Lessor's Liability In Nuisance

It has long been the law that a lessor who lets premises in a ruinous condition is liable to passers-by on the highway and to adjoining occupiers for injuries suffered as a result. Is he equally liable to persons on the demised premises who suffer injury? Unfortunately, the law seems quite settled that there is no such liability; the lessor's liability in nuisance extends only to those outside the demised premises.

If a landlord knowingly lets premises in a defective condition he will be liable to passers-by and neighbouring occupiers under the tort of nuisance. This was clearly established by the case of Todd v Flight.[47] The defendant demised premises to his tenant although he knew that the chimneys were in a dangerous condition. During the demise, they fell and injured the plaintiff's property, the plaintiff being an adjoining occupier. The Court of Common Pleas held the defendant liable although he was not in possession because he had knowingly let dangerous premises. This rule was recently applied by the Court of Appeal in Brew Bros Ltd. v Snax[48] where it was made clear that actual knowledge need not be

shown, it is sufficient if the lessor ought to have known of the nuisance when granting the lease.

The above law does not, however, apply where the person injured is on the demised premises. This was pointed out by Lopes L.J. in Lane v Cox[49] and is illustrated by subsequent cases. The leading case is that of Cameron v Yong[50] decided by the House of Lords an appeal from the Court of Sessions.[51] The tenant and his family had suffered from typhoid owing to the defective state of the drains in the house let to them by the defendant. He had compromised his claim by the time it reached the House of Lords and that of his family was rejected by their Lordships. Lord Robertson gave a judgement in which all the other members of the Court concurred. He said,

> "The argument for the appellants has indeed rested on invoking principles of the law of neighbours which have nothing to do with the rights of the inhabitants of the house. -- These principles have no application at all to persons who are within the house, for they have and can have no right to be there except by the licensee of the owner, given by the owner, on certain terms, to the persons with whom he chooses to contract." 52

Bromley v Mercer[53] was a particularly sad case. The defendants were the owners of a house and yard abutting on a highway and seperated therefrom by a wall which was in such a destructive state of repair as to constitute a public nuisance. At the time of the demise the wall was to the knowledge of the defendants in a dangerous condition. The plaintiff was

a child of nine years of age who was visiting the tenant. Whilst playing in the yard, she was severely injured by a heavy stone which fell from the wall upon her. The Court of Appeal rejected her claim for damages on the grounds that the liability of the landlords for the nuisance extended only to persons on the highway. Scrutton L.J. said,

> "There is nothing in the case to show that an invitee upon private premises is entitled to damages for an injury caused by something which is a public nuisance to an adjoining public highway. 54

A Canadian case which suggests that the lessor's liability for nuisance may extend to those on the demised premises needs to be noted. A visitor to the tenant in Elgetti v Smith[55] was injured when a railing on the demised premises gave way causing him to fall to the ground. Giving judgement in the British Columbia Court of Appeal, McPhillips J.A. referred to Todd v Flight and other cases on the landlord's liability for nuisance and, having found that the premises were let with a nuisance on them and that the lessor was in breach of his covenant to repair, he concluded that "it is a case of patent liability on the lessor". Whilst one can sympathise with this decision, it is respectfully submitted that it is incorrect as being contrary to Cameron v Young and Bromley v Mercer.[56]

Landlord's Liability For Defects Which He Neither Created Nor Knew About

The liability of the landlord for defects which he has created[57] or of which he knew[58] has been discussed and, with the possible exception of latent defects,[59] it has been seen that the landlord is not responsible. Naturally, therefore, we would expect to find the lessor immune from liability for those defects which he did not create and did not know about. This is indeed the case.

The plaintiff in Lane v Cox[60] was a workman who came upon the premises at the request of the tenant in order to move some furniture. Whilst so employed, he was injured owing to the defective state of the staircase. There was evidence that at the time that the house was let the staircase was in an unsafe condition. The plaintiff brought this action to recover damages for his injuries. The Court of Appeal rejected his claim holding, in the words of Lopes L.J. that,

> "A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to the customers of guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair." 61

Bottomley v Bannister[62] was another very sad case. The tenant and his wife were found dead due to poisoning from a gas burner which had been improperly regulated. It was found by the Court of Appeal that the lessor had no knowledge of the defect nor had he created it and he was found not liable. It was in this

context that Scrutton L.J. formulated the following much-quoted proposition,

> "Now it is at present well established English law that in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant -- for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence." 63

A similar decision was reached by the Ontario High Court on substantially the same facts in Reid v Union Gas Co. of Canada Ltd. 64

Negligent Repairs Carried Out After The Demise

One writer on the law of torts has argued,

> "if, apart from any contractual obligation to do so, a landlord after the commencement of a lease, does something upon the premises (such as effecting repairs) which is done negligently and injury is thereby caused, either to the tenant himself or to anyone lawfully upon the premises (such as a member of the tenant's family or a guest) then the landlord will be held responsible." 65

Though there is no direct English authority on this point, it is submitted that the above statement accurately reflects the law.

Before dealing with these cases directly in point, it is necessary to briefly explain why certaincases are not relevant. At first sight, the broad dictum by Scrutton L.J. in Bottomley v Bannister to the effect that a landlord of an unfurnished house is not liable for defects "even if he has constructed the defects

himself[66] seems a conslusive objection to the view advanced here. But the dictum, despite its width, is not relevant because the defect in that case was one in existence at the commencement of the lease and we are here concerned with defects brought into existence after the demise. The distinction was recognised by Greer L.J. in another dictum which gives support to the present argument,

> "If the landlord instead of doing the work himself before he sold the house, had done it afterwards as a contractor to Mr. Bottomley, he would have been liable if there was sufficient evidence that it was negligence on his part to have installed the Halliday boiler without a flue." 67

The cases of Otto v Bolton[68] and Travers v Gloucester Corporation[69] can be likewise distinguished.[70]

A difficult case is Davis v Foots[71] because it is not clear whether the Court viewed the defect in that case as arising before the tenancy commenced or after.[72]

Assuming, however, that the defect was considered as one arising during the term by reason of the landlord's negligence, it is still necessary to consider the basis of the holding against liability on this point. This was explained by Du Parcq L.J.,

> "If somebody chooses to undertake an obligation, even gratuitiously, to do a service to another person and does it negligently, he may well render himself liable. But here -- there is no question of the defendants doing a service for the plaintiff or her husband at all." 73

Thus it would seem that the Courtwas not conferring a blanket immunity upon the landlord who negligently does repairs. If he had agreed to do the repairs as a service,whether the agreement is supported by consideration or not, then he would be liable. The distinction needs to be noted though it is rather puzzling, why should a landlord who acts on his own initiative be less responsible than one who has agreed to repair as a favour or concession to the tenant? [74]

We come now to those cases which have held that the lessor is not liable for the consequences of his negligent repairs. The defendant in Malone v Laskey[75] had repaired a water tank on the demised premises by fitting iron brackets to support it. The brackets were not sufficiently secure and, owing to vibrations coming from a neighbouring premises, they fell injuring the tenant's wife. The Court of Appeal dismissed her action for negligence. The exact grounds of the decision are not clear. Sir George Barnes, President, said,

> "There is no ground for saying that the defendants undertook any duty towards the plaintiff -- the defendants, although under no obligation to do so, as a matter of grace sent their plumbers to remedy the defect, that was an entirely voluntary act on their part, and was not done in discharge of any duty which they owed to the defendants." 76

Fletcher Moulton L.J. gave a similar decision,

> "There was no obligation upon the defendants to do any repairs to the premises -- The repairs to the cistern which they, in fact, did were done by them gratuitously." 77

Kennedy L.J., however, felt doubt as to whether the defendants were liable or not but decided in their favour on other grounds. The decision of the majority would seem to rest on the grounds that, as the repairs were gratuitously done, there was no duty upon the defendants to use care.

Such a view is contrary to long and well-established line of cases stretching back to at least the decision of Lord Holt in Coggs v Bernard.[78] As Willes J. said in Skelton v L. & N.W. Ryl. Co, "if a person undertakes to perform a voluntary act, he is liable if he performs it improperly".[79]

Malone v Laskey implies that if the repairs were carried out pursuant to contract then the landlord may have been liable to the tenant's wife; in other words, an application of the distinction recognised by the Courts of Massachuestts seems to underline the decision.[80] It should also be noted that nowhere is there in Malone v Laskey a suggestion that the defendant's immunity rested on his position as landlord, it seems that the decision would have been the same if he had been an independent contractor working gratuitously.[81]

Malone v Laskey was followed by the Court of Appeal in Ball v L.C.C.[82] The defendant-lessor had installed a defective boiler during the tenancy which burst during a frost and injured the tenant's daughter. The Court of Appeal rejected the girl's claim and held that the lessor owed her no duty of care in installing

the boiler. It is necessary to consider the reasoning behind the decision. Counsel for the tenant had argued that there was no authority which establishes that, once a landlord has let premises, the mere fact that he happens to be a landlord absolves him from the duties which would attach to him as a contractor called in to do works. Tucker L.J. said he was prepared to accept that as a correct statement of the law and continued,

> "There is, certainly, no authority for the proposition that the immunity which attaches to a landlord in respect of the condition of the premises before a lease continues as some sort of magic protection to him at all times subsequent to the lease. I think, therefore, it is necessary to look at the actions of the defendants in the present case, regardless of the fact that they happen to have been the landlords, and to see what their duties are simply as persons who come in, gratuitously it may be, but none the less at the request of the tenant, to carry out an operation on the premises." 83

Evershad L.J. said,

> "I entirely agree with (counsel for tenant) that in the circumstances of this case it is an irrelevant consideration that the L.C.C. who did the work in question were the landlords." 84

What the case therefore decided was that a contractor who does work on premises owes no duty of care to those whom he can reasonably foresee will be injured by his acts. His only liability would be that as a person who instals a dangerous thing[85] and the Court came to the decision that the boiler was not a dangerous thing. If the law relating to the liability of contractors was later to develop then Ball v L.C.C. would have to

be seen in the light of that development. In fact, the law has developed considerably and Ball v L.C.C. has been overruled in this context by no less an authority than the House of Lords.

Both Malone v Laskey and Ball v L.C.C. were overruled in Billings v Riden,[86] a decision of the House of Lords. The defendants in that case were contractors who had negligently obstructed a means of access and so caused injury to the plaintiff who had been visiting the occupants of the premises. The House of Lords came to the conclusion "that a person executing works on premises -- is under a general duty to use reasonable care for the safety of those whom he knows or ought to know may be affected by -- his work."[87] Having reviewed the cases, Lord Reid decided that the only cases inconsistent with this view were Malone v Laskey and Ball v L.C.C. and he felt that, in so far as these cases dealt with negligence, they ought to be overruled.[88]

It thus appears that the lessor who negligently does repairs is liable for the consequences of his acts: Ball v L.C.C. decided that the immunity granted to the defendant in that case depended not upon his position as landlord but upon his position as a contractor, Billings v Riden robbed that decision of its foundation by depriving the contractor of his immunity. Even if the view were taken that Ball v L.C.C. was

wrong in rejecting immunity based solely on the defendant's position as landlord and that Billings v Rider does not cover this point, then there would remain only Malone v Laskey and (possibly) Davies v Foots in support of immunity conferred by the position as landlord. The limited scope of these decisions has already been noted;[89] at the very most the landlord would only escape liability if he did the repairs gratuitously or without having agreed to do them.

Although there appear to be no reported English decisions holding the lessor liable for his negligence in doing repairs, the Court of Appeal of British Columbia held a landlord liable in these circumstances in Fraser v Pearce.[90] The case was summed up by Gallicher J.A.,

> "The defendant admits that he contracted with the tenant to do reasonable repairs. In effecting repairs to the porch of the house in question, he did so in such a negligent manner as to create what can in my opinion, be termed a trap by reason of which the plaintiff met with the injury. This, as the jury have found, ought to have been known to the defendant and was not known to the plaintiff, nor did the defendant in any way advise her of it. Under such circumstances, the defendant is liable." 91

Macdonald C.J.A. felt that it was "a case of tort pure and simple".[82]

In conclusion, it is submitted that the modern scope of the lessor's duty was that laid down by the House of Lords in Billings v Riden and explained by Lord Denning in Miller v South of Scotland Electricity Board,

> "We are concerned with the duty of care that is owed by a person doing work - or anything else - on land and that duty is today best found by resort to the general principle enunciated by Lord Atkin in Donoghue v Stevenson. Such a person - be he occupier, contractor, or anyone else - owes a duty to all persons who are so closely and directly affected by his work that he ought reasonably to have them in contemplation when he is directing his mind to the task." 93

Liability In Negligence For Breach Of Covenant To Repair

The decision of the House of Lords in Cavalier v Pope[94] is a direct rejection of the view advanced in the Restatement.[95] The plaintiff in this case was the tenant's wife. Soon after entering into occupation the couple complained to the landlord's agent of the defective nature of the kitchen floor and ceiling and threatened to leave if no repairs were done. The agent agreed to repair and the couple stayed on but, in fact, no repairs were done. Whilst the plaintiff was standing on a chair in the kitchen, the legs of the chair went through the floor and she was seriously injured. Her claim for damages was rejected by their Lordships. Liability in contract was dismissed on the simple grounds that she was not a party to the agreement to repair. As Lord Loreburn L.C. pointed out,

> "The Husband has sued successfully for breach of contract, but the wife was not a party to any contract." 96

The argument which has found favour in some American Courts that, by reserving the right to do repairs, the

landlord retains some control over the premises and so is liable as someone in control of premises[97] was also vigorously rejected by Lord Atkinson in a passage which deserves to be quoted in full,

> "It was insisted upon by the appellant's counsel that the premises were under the control of the landlord because of his agreement to repair. I have been unable to follow the reasoning by which that conclusion has been arrived at. Miller v Hancock 98 and Hargroves 99 v Hartop are instances of cases where the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than the right of liability to repair the premises. It implies the power and the right to admit people to the premises, and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out the work but nothing in the shape of control." 1

The English common law has therefore rejected by the highest authority in the land a right to damages in tort for breach of the lessor's covenant to repair.

The British Columbia Court of Appeal reached a different conclusion in Elgetti v Smith.[2] A visitor to the tenant was injured when a railing on the demised premises gave way. It was found by Fisher J, the judge at first instance, that the landlord had agreed to make repairs and that the railing was a concealed danger. In his judgement, which was upheld by a majority of the Court of Appeal,[3] he said,

> "I am firmly of the opinion that the circumstances here create a liability and that even with respect to a visitor who is a mere licensee the owner who has undertaken with a tenant to make all necessary repairs on the leased premises, owes a duty, even though not in occupation or exclusive control thereof, to so use any measure of control or authority he has over the premises to avoid injury to such a person from concealed danger which exists to his knowledge at the time he leases the premises." 4

In so far as this passage renders the lessor liable for concealed defects in existence at the time of the demise and of which he failed to warn the tenant then it can be supported.[5] But in so far as it grounds the landlord's liability in tort on the measure of control reserved by him under his agreement to repair then it seems to flatly contradict Cavalier v Pope.[6]

The common law rule of Cavalier v Pope was reversed by Parliament in 1957 by Section 4 of the Occupier's Liability Act of that year.[7] Section 4 (1) of the Act provides,

> "Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were the occupier of the premises and those premises and those persons or their goods were there by his invitation or permission (but without any contract)."

To find out the duty of the landlord as "constructive occupier" we turn to section 2 (2) of the Act where it is defined as "a duty to take such care as in all the circumstances of the case is reasonable to see

that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there". This definition is amplified by a number of further provisions in the same section.

Unfortunately the practical usefulness of the above provision was severely limited by subsection (4) of the section which provides,

> "For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier."

Since a landlord is not liable to his tenant under an express covenant to repair or under the statutory implied covenants unless he has been given notice of the defect,[8] the right to sue in tort was likewise restricted by the need for notice to be given. This restriction was criticised by the Law Commission which recommended its abolition.[9] The effect of section 4(2) of the Defective Premises Act 1972 is to implement this recommendation.

Lessor's Covenant To Repair - Liability For Disrepair In Nuisance

In recent years, there has been a remarkable development in the law of nuisance and courts have greatly extended the liability of landlords for the consequences of nuisance which they permit on the demised premises where they are obliged to repair and even where they merely reserve the right to repair.[10] Unfortunately, as in the case of a nuisance existing on the premises at the time of demise and to the lessor's knowledge,[11] such liability does not extend to pereons on the demised premises.

The landlord is liable to passers-by and neighbouring occupiers where he has agreed to repair the premises. This was established in the old case of Payne v Rogers[12] where the plaintiff was injured by the defective condition of a house as he walked along a pavement. He sued the landlord of the house and was successful because the defendant was in breach of a covenant to repair. Heath J. explained the decision on the grounds that, "if we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord."[13] The last forty years have seen further development in this law.[14] It was held by Goddard J. in Wilchick v Maks and Silverstone[15] that the landlord would be liable even where he had not covenanted

to repair providing he had reserved the right to do so. Pringe v Cohen,[16] a decision of the Court of Appeal, made it clear that it was not necessary to show that the landlord knew of the defect. Mint v Good[17] extended the liability by holding that an implied right to enter to do repairs would also provide a basis for liability and that such a right was to be implied in weekly tenancies.

The law of nuisance does not, however, extend to injuries suffered by persons on the demised premises. Authority for this general proposition is found in the decisions of the House of Lords in Cameron v Young[18] and the Court of Appeal in Bromley v Mercer[19] which have already been discussed.[20] The rule was expressly adverted to in the present context by Goddard J. in giving judgement in Wilchick v Marks and Silverstone. He said,

> "Clearly if the plaintiff had been a visitor to the premises she would have had no cause of action against the landlords as no duty was owed to visitors by the landlord any more than to the tenant." 21

Thirteen years later, the learned judge repeated his dictum in the case of Howard v Walker.[22] The tenant was in occupation under a lease whereby the landlord reserved the right to enter and do repairs. He carried on business as a shopkeeper and one day a customer was injured by the defective condition of the forecourt. She brought an action against both the

shopkeeper and his landlord. Lord Goddard C.J. (as he now was) held the tenant liable but not the landlord. Having established that the plaintiff was on part of the demised premises and not upon the highway, his lordship felt bound to reject her claim. He was aware that the law may not be satisfactory on this point and that a layman would find it difficult to see why a person who is injured as he walks along the highway may recover from the landlord but not a person who is still on the demised premises though endeavouring to get on the road.[23] But he felt obliged by authority to find in favour of the landlord's immunity.

Landlord Did Not Create Defect Nor Was He In Breach Of Covenant To Repair

It has been seen that the lessor is not responsible in tort for defects occurring during the term when he has contracted to repair but has negligently failed to carry out that obligation.[24] A fortiori therefore, he is not responsible where he does not covenant to repair and is not guilty of misfeasance.

The defendant-landlord in Nelson v The Liverpool Brewery Co.[25] had negligently allowed the demised premises to fall into disrepair and, as a result, an employee of the tenant was injured. The Court of Common Pleas decided against the plaintiff on the basis that the lessor owed him no duty to use care to ensure that the

premises were reasonably safe. The Court of Appeal was faced with a like claim in Sleafer v Lambeth Borough Council.[26] A council tenant was leaving his flat when, owing to a long-standing defect in the door which caused it to jam, he had to use force to close it by pulling upon the letter-box knocker which was the only external handle. The knocker came off and he fell backwards against an iron balustrade causing injuries to his back. The tenant's main claim was in contract[27] but it was also contended on his behalf that,

> "(he) has a claim independent of the contract in that the landlords, knowing the condition of this door, failed in their common law duty to take steps to prevent an accident of this kind happening -- The landlord has to avoid that which may injure his neighbour, who is here the tenant." 28

This argument was swiftly rejected by the Court which did not even pause to consider the authorities. Their lordship were unable to see how any duty in tort was owed to the tenant. Omerod L.J., for example, said,

> "For my part also, I cannot see how in this case any duty can arise onthe landlords independently of the duties, if any, which may be imposed on them by the terms of the tenancy." 29

Breach of Statutory Duty

Can we give an affirmative answer to the following question posed by one writer,

> "It is possible that some of our housing and public health legislation might impose a statutory duty on landlords towards tenants or occupiers as a class, conferring upon them rights of an action in tort in respect of the infringement of such duty?" 30

He suggests that such a duty might well be imposed. Unfortunately, there is a large hurdle in the path of the tenant placing reliance on this argument. This will become apparent if we examine the example given to support such a duty. Section 92 of the Public Health Act 1936 permits a local authority to deal summarily with "any premises in such a state as to be prejudicial to health or a nuisance." The next section directs the authority when satisfied of the existence of the nuisance to serve an abatement notice "on the person by whose act, default or sufferance the nuisance arises or continues" and by section 94 failure to comply is made punishable by Courts of summary jurisdiction. Having outlined these provisions, the writer continues,

> "Suppose that the owner of an empty house which is in such a state as to be prejudicial to health lets it, by an agreement silent on the question of fitness, to a man for occupation by him and his family. If he and they fell ill in consequence, can he and they recover damages for breach of statutory duty" 31

He then points out that there are no cases against their right to succeed and concludes that they do have such a right of action.

But what duty has the lessor broken? The Act does not say that it is an offence to let a house which is a nuisance. What it does is to place a duty upon the local authority to serve an abatement notice and make failure to comply punishable. Until the

authority has served the notice, the lessor is under no duty to abate the nuisance and hence cannot be liable to his tenant. Since all housing and public health legislation seems to adopt a similar scheme of granting powers to authorities to order things rather than making a direct command to the lessor, the tenant will only be able to show breach of duty if a notice has been served and the landlord has not complied. A prerequisite to the tenant's private law action against his landlord appears to be the exercise by the authority of their power.[32]

Even if this first hurdle is cleared, the tenant has a long way to go. The Canadian case of McKinlay v Mutual Life Assurance[33] shows one problem in his way. The plaintiff was a member of a club which rented the fourth floor of an office building of which the defendant had become owner under foreclosure proceedings. He was injured as a result of falling down stairs owing to the defendant's failure to light them. One of the grounds on which he sought damages was that the defendants were in breach of a city by-law imposing upon them the duty of keeping the premises well lit. This contention was rejected on the grounds that the statute was passed to prevent injury of another type,

> "I do not read (the by-law) as having any other object than to protect the public from danger in case of fire, and people hurrying to escape and therefore under the authority of Carris v Scott,[34] I do not think the section can be invoked for a different purpose. Her it is sought to protect a person whoprefers to descend a staircase at night, not to escape

> fire but for his own convenience and I do not see that the section was passed for that purpose." 35

It may be that the Courts would construe much public health and housing legislation as passed more to protect the general public than the tenant in particular.[36] Moreover, the scheme of much of this legislation suggests that the penal provisions are intended to provide the only sanction.[37]

The Tort Of Slumlordism?

There seems little chance of using the argument that slumlordism is itself a tort[38] in English law. In Wilkinson v Downton,[39] Wright J. applied a rule somewhat like the intentional infliction of an outrage rule to a practical joker who had told a wife that her husband was involved in an accident. It is unlikely that a judge would treat a slum landlord who had recklessly let a defective house as comparable to that practical joker. Letting a substandard house cannot really be equated to "wilfully (doing) an act calculated to cause physical harm to the plaintiff"[40] and, further, can a tenant who takes such a house be said to suffer an outrage at the landlord's hands when his plight is also the result of many reinforcing social problems for which the lessor cannot be held responsible?[41] It might be agreed that if the existing law of torts does not give the tenant a remedy then a new tort of slumlordism should be created on the grounds that no person

should be harmed recklessly without just cause or excuse. Unfortunately, this view does not appear to represent the general attitude of the judiciary. A law which does not regard eviction as a tort[42] and which permits a lessor to punish a tenant for having lawfully given evidence against him without granting redress[43] is unlikely to look with favour upon a suggestion that slumlordism per se is a tort.

Criticism Of The Law

With only one fairly clear exception[44] and with one possible exception,[45] the landlord is not responsible for the defective nature of the demised premises even when he has been guilty of negligence. This results from the decision of the Common law that the landlord owes no duty of care towards the tenant, his family or guests. As was said by Lord Atkinson in Cavalier v Pope,

> "It is well established that no duty is at law cast upon a landlord not to let a house in a dangerous or dilapidated condition, and, further, that if he does let it while in such a condition he is not thereby rendered liable in damages for injuries, which may be sustained by the tenant, his (the tenant's) servants, guests, customers or others invited by him to enter the premises by reason of the defective condition." 46

This holding seems absolute, applying even if the landlord has created the defect before the demise,[47] where he knows of it,[48] or where he covenants to repair.[49] The landlord's liability for defects

which he creates after the demise[50] is not really an exception because it is grounded not on his position as landlord but rather as a contractor and the other possible exception, where he fails to disclose latent defects, is perhaps better based on fraud than negligence.[51]

The landlord's immunity is one shared by very few others. It is a clear exception to Lord Atkin's celebrated statement of principle in Donoghue v Stevenson.

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." 52

That statement has been applied in many circumstances and to many types of defendants. For example, the manufacturer of an article of food or other commodity is under a legal duty to take reasonable care that the article is free from any defect likely to injure the purchaser or consumer.[53] The landlord is under no such duty to take care. Yet, as one leading authority on the law of torts has asked,

> "What conceivable difference is there between negligently putting in circulation unwholesome food and putting on the market a house so negligently built as to be likely to cause death or grave injury." 54

Although it was at one time thought that the lessor's immunity was part of a wider immunity whereby all operations on land were excluded from the general duty

of care,[55] it is now clear that this is not so. As we have seen,[56] the duty of care owed "by a person doing work -- on land -- is today best found by resort to the general principle enunciated by Lord Atkin in Donoghue v Stevenson".[57] The immunity of the lessor of dangerous premises is thus an exception to the general rule of liability applied equally to land and chattels, it is "a rock which has escaped the flood-tide of liability released by Donoghue v Stevenson."[58]

Why does the lessor of substandard and perhaps slum housing enjoy such an exalted position in the eyes of the law?[59] Clearly the unusual position of the lessor in contract has had a strong influence and many of the factors responsible for his contractual privileges are thus indirectly responsible for his tortious immunity eg the common law concept of a lease as a conveyance,[60] the social pressures of an agricultural and feudal age.[61] Cases on contract and tort are often lumped together in a way which pays little heed to conceptual clarity.[62] One of the factors which has reinforced the lessor's immunity in tort is a reflection of this conceptual confusion on a wider scale. Cases have held that the tenant, his family and guests have no cause of action in tort against the landlord because the tenancy is the result of a contract between tenant and landlordand no duty of

care is implied in such a contract. This type of reasoning is illustrated by the judgement of Lord Esher M.R. in Lane v Cox,

> "It has been held that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger."[63]

The conclusion reached in the last sentence is surely a non sequitur. The existence or non-existence of a contract between landlord and tenant is irrelevant in determining whether the landlord is liable in tort to his tenant.[64] Moreover, the law has refused to allow a stranger to the contract to rely upon terms tending to his benefit such as a covenant by the lessor to repair.[65] Why should he now be deprived of the duty owed to him under the general law of negligence by reason of such a contract? If the contract cannot increase his rights against the landlord then it should not be allowed to decrease them.

Another factor common to the lessor's privileged position in both contract and tort is that of the tenant's ability to inspect. One of the justifications advanced in contract cases for permitting a landlord to let a substandard house was that the tenant had a right of inspecting the premises before taking them and if he was dissatisfied them he should go elsewhere.[66] Similar arguments have been used to defend the lessor's

immunity in tort. Thus it was held by Atkinson J. in Otto v Bolton[67] that even if Donoghue v Stevenson applied to land then it would not apply if the tenant had an opportunity of inspecting the premises before the lease. Similar arguments were advanced by Du Parcq L.J. in Davis v Foots[68] and by Lewis J. in Travers v Gloucester Corp.[69] As applied to the most likely victim of substandard housing, the low-income tenant, this argument flies in the face of social reality. The low-income tenant has very little choice in what housing he is to take, and is often forced by a desperate need for shelter to take anything offered. Knowledge of the substandard nature of the premises is often only too-easily imparted in the form of rotting steps and damp walls yet it is of little use to him. He has no alternative and his knowledge merely reinforces his misery.[70]

Perhaps the strongest justification for the lessor's immunity is based upon control. The landlord is not liable for defects on the demised premises because he is not in possession and hence has no control over them. Lord James of Hereford said in Cavalier v Pope,

> "It was ably argued at the Bar that as the premises belonged to the defendant he must be taken to be in possession of them and that, therefore, a duty arose to maintain them in a condition that would not cause injury to any one who came upon them. But there seems to be a failure in this argument. The defendant was not in actual possession of the house in question and did not occupy it. The plaintiffs were the occupiers and the statement of claim so alleges." 71

As applied to a long lease this argument is partially

convincing. It is the tenant who is best able to observe the premises and to take early preventive action to prevent them getting into disrepair. Further, unless the landlord expressly reserves the right, he has no right of entry to do repairs and is guilty of trespass if he enters against the tenant's wishes. But even in the case of long leases the argument breaks down when the defect occurred not during the time when the tenant is in control but before the demise and also when the responsibility for repairs is placed by the contract upon the lessor. In the case of the low-income tenant with a short lease, the argument is totally unconvincing. He has neither the skill nor the money to make repairs and the benefit of them would soon pass from him as his period of "control" is short. If the lessor does not repair, no one will.

There is also an inconsistency in the attitude of the courts towards the question of the lessor's control of the demised premises. The tenant, his family and guests are denied a remedy from the lessor because the latter is not in possession or control. Yet the liability of the lessor towards passers-by and neighbouring occupiers is expressly based on the lessor's control of the demised premises. In the recent case of Brew Bros v Snax, Sachs L.J. said of a landlord's liability in nuisance,

> "If the nuisance arises after the lease is granted, the test of an owner's duty to his

> neighbour now depends on the degree of control exercised by the owner in law or in fact for the purpose of repairs. -- As regards nuisances of which he knew at the date of the lease, the duty similarly arises by reason of his control before that date." 72

If the lessor is sufficiently in control of the premises before the demise to render him liable in nuisance for defects occurring at that time and is also sufficiently in control after the demise to the extent that he repairs (or has an express or implied right to enter to do repairs), then he is sufficiently in control to owe a duty of care in negligence towards those on the demised premises.

The law of nuisance is instructive in other ways. Dealing with the lessor's liability to a passer-by, Denning L.J. said in Mint v Good,

> "The law has shown a remarkable development on this point during the last sixteen years. The three cases of Wilchick v Marks and Silverstone, Wringe v Cohen and Heap v Ind Coope & Allsopp Ltd. show that the courts are now taking a realistic view of these matters. They recognise that the occupying tenant of a small dwelling house does not in practice do the structural repairs, but the owner does; and that if a passer-by is injured by the structure being in dangerous disrepair, the occupier has not the means to pay damages, but the owner has, or, at any rate, he can insure against it. If a passer-by is injured by its falling upon him, he should be entitled to damages from someone, and the person who ought to pay is the owner because he is in practice responsible for the repairs. This practical responsibility means that he has de facto control of the structure for the purpose of repairs and is therefore answerable in law for its condition." 73

These reasons for the lessor's liability in nuisance to a passer-by are just and sound. Why should they not

apply equally to those injured on the demised premises? Why should the last three words have such a talismanic influence? The artificial nature of the present law does it no credit. If a child is playing on the pavement and a garden wall falls and injures her, she is entitled to sue the lessor if, at the time of the demise, he knew of the danger or if he had an express or implied right to do repairs. But if the same child is invited into that magical world, the demised premises by the tenant and is injured by the same wall then the lessor is not liable under any circumstances.[74]

The Law Commission has recommended some reforms.[75] The lessor's present immunity from the consequences of his own negligent acts should be abolished. "A person who does work on his own land, just as a person who does work on someone else's land, will be liable for injury or damage which can properly be attributed to his negligent act, subject to the usual defences, such as contributory negligence, which are generally applicable."[76] The Commission also recommends that a lessor "should be under the general duty of care in respect of defects which may result in injury to persons or damage to property and which are actually known to him at the date of the -- letting."[77] The third and last of the recommendations relevant in this context is that, "a landlord who is under a repairing obligation or has a right to do repairs to premises let

should be under the general duty of care in relation to the risk of injury or damage arising from a failure to carry out that obligation or exercise that right with proper diligence."[78]

To the extend that these recommendations would correct specific defects in the law they are greatly to be welcomed. But they do not go far enough. The easiest and yet most effective reform would have been to apply the general law of negligence to the landlord and tenant relationship. The Courts would then have a vast reservoir of past decisions to draw upon and present anomalies could be removed.[79] But the Law Commission was against this proposal,

> "There is much to be said for imposing on the transferor of premises a general duty to exercise reasonable care in respect of defects existing at the time of the transfer of which he ought reasonably to have known, whether or not he in fact knew of them. But in the light of our consultations we do not feel able to make such a proposal, having regard to the undesirability of increasing the cost of the transfer of real property and the fact that the third party will normally have a remedy against the transferee or occupier. Moreover, our investigations suggest that at the present time it would be difficult for a vendor to obtain satisfactory insurance cover against "open-ended" liabilities after he has disposed of the property." 80

This argument reflects the basic weakness of the Report; its failure to distinguish between the sale of premises and the leasing thereof and the failure to see that the most likely victims of defective premises, the low income tenant, deserves special treatment. Obliging landlords to exercise reasonable care to render their premises safe should not unduly increase costs and it

is difficult to see why a good landlord should find insurance difficult to obtain. The right of third parties to sue the tenant will not be of much practical significance. In legal terms, he is a man of straw unable to pay the substantial damages that may be awarded against him. In any event there may be cases, as the Law Commission recognises,[81] when a third party cannot recover from the occupier because the latter was not at fault. He may have exercised the "common duty of care"[82] towards his visitors and yet injury may have occurred through the negligence of the lessor. For example, it may be reasonable to expect that certain defects should have been known and remedied by a lessor who has had some experience of housing maintenance but not to the average tenant or the lessor may have had possession of the house for a long time before the demise and should have known of the defect whereas the tenant had only just taken the lease at the time of the accident.

The Law Commission's argument is also wrong on principle. Why should the negligence of the tenant excuse that of his landlord? When one considers the relative positions of the two parties; a low-income tenant as against someone with at least some assets, then the argument becomes unjust as well as impractical. Why should the liability of the person less able to bear the cost of damages be used to protect the stronger party from liability? Why should the tenant be res-

ponsible for the consequences of defects existing at the time of demise? Why should he pay for their repair? Why should he find insurance cover easier to obtain? The Law Commission's argument is one sided and weighted against the weak and vulnerable if it is applied to the average occupier of substandard housing. It may well be justified if applied to the sale of dwellings for then the purchaser should employ a surveyor to locate defects and can refuse to buy if there is evidence of the lessor's negligence. The low income tenant has neither the money to pay the surveyor[83] nor the freedom of choice to go elsewhere.[84] The Law Commission does not deny this, they simply ignore such persons altogether and yet these are the most likely victims of defective premises. The Commission's awareness of the law is only broadly acceptable[85] but its lack of awareness of the social problem involved is utterly deplorable.

A good case can be made out for imposing liability upon the lessor in excess of that for negligence only. Proof of negligence is often difficult to show and it is not right to deny an injured person recovery simply because of bad luck in the forensic lottery.[86] More specifically the tenant and his family might find their damages either reduced or disallowed on the grounds that, by continuing to use premises known to contain a defect, they had either consented to run the risk of injury or had been contributory negligent. Such has

often been the holding in American cases[87] though other Courts have said that such a holding is not automatic and that all the circumstances must be taken into account.[88] One cannot rely upon the English Courts appreciating that a tenant's desperate need for housing may rob him of all choice in the matter of whether he should rent substandard housing or not. Imposing strict liability upon the landlord would place the burden of injuries arising from defective premises on the person who takes the benefits of those premises and who can insure against such losses.[89] If private insurance bodies will not give cover then the State should take over to safeguard the public. Consideration might also be given to a system of State payments for victims of accidents similar to industrial injuries payments.

In conclusion, it may be said that the law is in a mess, anomalous and unjust; the time has come for a root and branch reform and not merely for the removal of two or three specific defects which is all the Law Commission suggests.

1 (1932) 1 KB 458, 468

2 It was found by the Court that the landlord had not installed a dangerous thing and had no reason to know of the defect, Ibid 468 per Scrutton L.J. For this case, see infra.

3 The only reported case of a defect caused by the landlord's negligence seems to have been Malone v Laskey (1907) 2 KB 141 and this was a case of negligence occurring after the demise, see infra.

4 (1936) 2 KB 46
Noted; 182 L.T. 445 (1936)
Winfield, 52 L.Q.R. 313 (1936)

5 (1932) AC 562, see infra

6 (1940) 1 KB 116

7 See Supra 113

8 (1940) 1 KB 116, 119-120

9 Ibid 121

10 (1947) 1 KB 71

11 Ibid 86

12 (1932) 1 KB 458, 468

13 (1851) 10 C.B. 591
20 L.J.C.P. 76

14 Ibid 20 L.J.C.P. 76, 77

15 Ibid 79

16 Infra 626

17 (1922) 2 KB 126

18 (1936) 2 KB 46

19 (1940) 1 KB 116

20 (1960) 1 QB 43

21 Supra 534

22 Cf Glanville Williams, 5 M.L.R. 194, 197 (1942)

23 (1851) 10 C.B. 591
20 L.J.C.P. 76 Supra

24 Ibid, 20 L.J.C.P. 76, 77. Supra

25 (1932) 1 KB 458

26 Ibid 468. Quoted in the following cases;
Davis v Foot (1940) 1 KB 116, 121 by Mackinnon L.J.
Otto v Bolton (1936) 2 KB 46, 54 by Atkinson J.

27 Ibid 477

28 (1897) 1 Q.B. 415

29 (1906) A.C. 428

30 (1936) 2 KB 46, 58 per Atkinson J.

31 (1940) 1 KB 116, 124 per Du Parcq L.J.
Cf. Mackinnon L.J. at 120

32 (1947) 1 KB 71

33 (1949) 2 KB 159

34 Infra 654

35 An alternative theory of liability in the American Law, Supra 543

36 (1860) 2 Giff 201
66 E.R. 85

37 Ibid 206, 66 E ER 85, 87

38 Ibid 207-208, 66 ER 85, 87-88

39 (1785) 1 Bro. C.C. 440
28 E.R. 1226

40 See; Note, 77 Sd. J. 7 (1933)

41 (1913) 14 D.L.R. 671

42 (1970) 1 Q.B. 612, (1970) 1 AER 601

43 Ibid (1970) 1 AER 601, 606

44 (1903) 1 KB 155

45 Ibid 164-165

46 The Law Commission, "Civil Liability of Vendors and Lessors For Defective Premises" (1970) para 54 p. 19.

47 (1860) 9 C.B. (NS.) 377
30 L.J. (C.P.) 21
See also R v Pedley (1834) 1 Ad & E. 822
3 L.J.M.C. 119
St.Anne's Brewery v Roberts (1928)
140 L.T. 1, 44 T.L.R. 703
Spicer v Smee (1946) 1 AER 489

48 (1970) 1 QB 612

49 (1897) 1 QB 415, 418

50 (1908) A.C. 176

51 Although a Scottish case, Lord Robertson who gave the opinion of their Lords said it was to be decided "on principles common to the laws of Scotland and England". (Ibid 179)

52 Ibid 180-181

53 (1927) 2 KB 126

54 Ibid 131

55 (1937) 3 WWR 114

56 See also the cases on the other aspect of the landlord's liability for nuisance on the demised premises ie where he has covenanted to repair or has reserved the right of entry for this purpose, infra 647

57 Supra 622

58 Supra 624

59 Supra 626

60 (1897) 1 Q.B. 415

61 Ibid 417

62 (1932) 1 KB 458

63 Ibid 468

64 (1961) 27 D.L.R. (2d) 5

65 James, "General Principles of the Law of Torts" 3rd ed, 1964, p. 180
Cf. Note, 65 L.Q.R. 10 (1949)

66 (1932) 1 KB 458, 468

67 Ibid

68 (1936) 2 KB 46

69 (1947) KB 71

70 For the landlord's liability for defects existing at the time of the demise and which are due to his negligent acts, see Supra.

71 (1940) 1 KB 116

72 Supra 622

73 Ibid 123-24

74 The distinction would be very difficult to apply in practice. It will be necessary for the landlord to gain the tenant's consent to the repair unless he has reserved a right of entry or be liable in trespass. Hence there must be some agreement between the parties. The test seems to be the purpose behind the repair: if, as in the instant case it was done for the landlord's benefit then he is permitted to be negligent. If for the tenant's benefit, he is under a duty of care. The problem of repairs which benefit both parties, which are perhaps the majority, would need to be dealt with.

75 (1907) 2 KB 141

76 Ibid 152

77 Ibid 154

78 (1703) 2 Ld Raym. 909
See also Shiells v Blackbourne (1789) 1 H.Bl.158
Elsee v Gatwood (1793) 5 T.R. 143
Dartnell v Howard and Gibbs (1825)
4 B & C 345

79 (1867) 2 C.P. 631, 636

80 Supra 549

81 See infra 641

82 (1949) 2 K.B. 159
For note of first instance decision; Note,
65 L.Q.R.10 (1949)
93 Sol J. 385 (1949)

83 Ibid 167

84 Ibid 175

85 Ibid 170

86 (1958) AC 240

87 Ibid 263-264 per Lord Somervell

88 Ibid 253 - 254

89 Supra 638-640

90 (1928) 2 D.L.R. 54
39 B.C.R. 338
See generally; Williams, "Notes On The Canadian Law Of Landlord And Tenant" (3rd ed. 1957) p.372

91 Ibid 55

92 Ibid 54. McPhilips J.A. concurred. Martin J.A. and Macdonald J.A. dissented.

93 (1958) S.C. (H.L.) 20, 37

94 (1906) AC 428
75 L.J.K.B. 609

95 Supra 554

96 (1906) 75 L.J.K.B. 609, 610

97 Supra 554

98 (1893) 2 QB 177 infra 686

99 (1905) 1 KB 472 infra 692

1 (1906) 75 L.J.K.B. 609, 612

2 (1937) 1 W.W.R. 346

3 (1937) 3 W.W.R. 114. McQuarrie J.A. Specifically adopted his reasoning. Martin J.A. advanced a similar argument. The judgement of McPhilips J.A. based the landlord's liability on nuisance - see supra. Whilst Macdonald C.J.B.C. dissented on the grounds that, on the facts, there was no agreement to repair.

4 (1937) 1 W.W.R. 346, 348-349

5 Supra 626

6 Fisher J. purported to distinguish Cavalier v Pope on the grounds that there was no trap in that case. For a criticism of Elgetti v Smith, see Williams, "Notes On The Canadian Law Of Landlord And Tenant" (3rd ed 1957) pp. 368-371.

7 Implementing Law Reform Committee Report Cmnd 9305 (1954) para 95B.

See generally; Newark 12 N.I.L.Q. 203 (1958)
North, "Occupier's Liability" (1971)
Odgers (1957) C.L.J. 39
Payne, 21 M.L.R. 359 (1958)

8 Supra 395

9 The Law Commission; "Civil Liability Of Vendors and Lessors For Defective Premises" (1970) p.20. It is of interest to observe that the Occupiers Liability (Scotland) Act 1960 contained no such limitation, see North, 29 Conv. 207, 290, 309.

10 See generally; Blundall, 5 Conv. 100, 167, 261 (1940)
Walford, 11 Conv. 27, 28 (1946)

11 Supra 632

12 (1794) 2 H. Bl. 350
26E.R. 590

13 Ibid 351

14 See Mint v Good (1951) 1 K.B. 517 per Denning L.J.

15 (1934) 2 KB 56. Approved by the Court of Appeal in Heap v Ind Coope and Allsopp Ltd. (1940) 2 KB 476, and Brew Bros. Ltd. v Snax (1970) 1 QB 612

16 (1940) 1 KB 229
Followed in Spicer v Smee (1946) 1 A.E.R. 489

17 (1951) 1 KB 517

18 (1908) A.C. 176

19 (1922) 2 KB 126

20 Supra 633

21 (1934) 2 KB 56, 66-67

22 (1947) 1 KB 860

23 For a criticism of this distinction, see infra 661

24 Supra 643

25 (1877) 2 C.P.D. 311

26 (1960) 1 Q.B. 43

27 Supra 117

28 (1960) 1 Q.B. 43, 49-50

29 Ibid 61. See also Morris L.J. at p. 58 and Willmer L.J. at p. 62.

30 Note, 89 Sol J. 313, 314 (1945)

31 Ibid 337

32 Cf. Supra 322 as to statutory illegality.

33 (1918) 3 W.W.R. 1002
43 D.L.R. 259
See also; Holman v Ellsmar Apartments Ltd. (1963) 40 D.L.R. (2d) 657

34 (1874) L.R. 9 Ex 125.

35 (1918) 3 W.W.R. 1002, 1008

36 Cf. Popular Catering Co. v Romagnoli ( )
Noted, 182 L.T. 464 (1936)

37 Supra 322

38 For such an argument based on the American Law, see supra 568

39 (1897) 2 Q B 57
Cf. Janvier v Sweeney (1919) 2 KB 316

40 Ibid per Wright J.

41 For some of the causes of substandard housing, see supra 21

42 Perera v Vandijar (1953) 1 W.L.R. 672, Supra 370

43 Chapman v Honig (1963) 2 Q.B. 502

44 Where the landlord negligently carries out repairs after the demise, supra 636

45 Where the landlord fails to disclose latent defects known to him, supra 626

46 (1906) 75 L.J. KB 609, 612. Cf. Supra 530 on the general rule of no duty of care in the American law.

47 Supra 622

48 Supra 624

49 Supra 643

50 Supra 636

51 Supra 628

52 (1932) A.C. 562, 579

53 The actual facts of the case.

54 Winfield, 52 L.Q.R. 313, 315 (1936)

55 Bottomley v Bannister (1932) 1 K.B. 458, 474 per Scrutton L.J.
Otto v Bolton (1936) 2 KB 46, 54-55 per Atkinson J.
See also, Law Commission, "Civil Liability Of Vendors And Lessors For Defective Premises" (1970) at 13 - 14.

56 Supra 641

57 Miller v South of Scotland Electricity Board (1958) S.C. (H.L.) 20, 37 per Lord Denning.

58 Salmond, "Torts" (15th ed. 19) p. 378

59 A position befitting that other darling of the law, the barrister: Rondel v Worsley (1969) 1A.C. 191

60 Supra 168

61 Supra 220

62 See, for example, the authorities cited by Scrutton L.J. to support his famous dictum in Bottomley v Bannister (1932) 1 K.B. 458, 468 and Atkinson J. in Otto v Bolton (1936) 2 KB 46. For the coverse see supra 112.

63 (1897) 1 Q.B. 415, 417
See also Wilchick v Marks and Silverstone (1934) 2 KB 56, 66-67 per Goddard J.

64 This type of reasoning seems to owe its origin to dicta in Winterbottom v Wright (1842) 10 M. & W. 109, See Winfield, 52 L.Q.R. 313, 315 (1936)

65 Supra 393

66 Supra 188

67 (1936) 2 K.B. 46, 58

68 (1940) 1 K.B. 116, 124

69 (1947) 1 K.B. 71, 90

70 Cf. Supra 190

71 (1906) 75 L.J.K.B. 609, 611. See also Bromley v Mercer (1922) 2 K.B. 126,129 per Lord Sterndale M.R. Ibid 131 per Scrutton L.J.

72 (1970) 1 Q.B. 612, 638-639.
See also, Wringe v Cohen (1940) 1 KB 229,233 per Atkinson J.
Mint v Good (1951) 1 KB 517, 527 per Denning L.J.

73 (1951) 1 KB 517, 527

74 See Bromley v Mercer (1922) 2 KB 126 Supra and Howard v Walker (1947) 1 KB 860, 866-867
In Spicer v Smee (1946) 1 AER 489, Atkinson J. refused to distinguish between the duty in nuisance

continued .....

owed to a passer-by and that owed to a neighbour; "It would be indeed strange if a man standing in his own doorway had no remedy for the collapse upon him of his neighbour's house, while he would have had a remedy if he had taken one step into the highway." Ibid 496

75 The Law Commission, "Civil Liability Of Vendors and Lessors For Defective Premises" (Report No. 40) 1970.

76 Ibid para 46 p. 16

77 Ibid para 70 p. 25

78 Ibid. The Commission exempts from this recommendation the situation where the landlord's right to repair only arises when the tenant has made default in carrying out an obligation which is primarily placed on him. In such a case the landlord should not become liable to the tenant himself for the consequences of a defect arising substantially from his own default.

79 Comment, 62 Harv. L.R. 669, 671-679 (1949) Nedovic and Stewart, 7 M.U.L.R. 258, 271 (1969)

80 Para 50 pp. 17-18

81 The Report speaks of the third party "normally" having a right against the occupier, of his being "not necessarily without a remedy" - para 50 at pp. 17-18.

82 Under the Occupier's Liability Act 1957 s 2 (1)

83 See Supra 408

84 See Supra 190

85 Eg a) their willingness to accept the sweeping assertion that there is no implied warranty of fitness in the letting of unfurnished houses. Para 11 at p. 3

Cf. Supra 124 continued.....

b) the citation of Robbins v Jones (1863) 15 C.B. (N.S.) 221 as a case on the lessor's immunity in tort when it concerned the liability of a lessee in nuisance.
Para 42 at p. 14

c) Citation of dicta in Bottomley v Bannister (1932) 1 KB 458 at p. 468 as if it were authoritative.
Para 42 at p. 15 Cf Supra 622

d) Assumption that lessor is under no liability for concealed defects known to him when there seems no decided case on this precise point. Para 51 at p. 18
Cf. supra 626

86 It is interesting to compare the situation in personal injury litigation generally. Mr. P. Atiyah has estimated that only 10 to 20 per cent of the total number of accident victims successfully effect a recovery of damages; Report Of The Conference on "Personal Injuries - Social Insurance or Tort Liability" held at University College, London, on October 11, 1969.

87 Supra 572

88 Supra 573

89 See Mint v Good (1951) 517. per Lord Denning quoted Supra 660

Part V
Parts Retained in the Landlord's Control

Lessor's Liability For Parts Under His Control

Introduction

Although many houses let to one household are in very bad condition, some of the very worst living conditions are those to be found in houses let to more than one household[1] and, indeed, the Milner Holland Committee[2] regarded multi-occupation per se as a symptom of housing stress. Some idea of the state of such houses is conveyed by this description drawn by Audrey Harvey,

> "Far too many people, sometimes thirty or more have to share a single w.c. and there is rarely a bathroom, a hot-water system or any place to store perishable food. Cookers are often placed on landings or inside rooms where families live and sleep in company with slop-buckets. There may be only a couple of dustbins permanently overflowing. The last thing one can expect to find is a fire escape."3

The "practice of putting separate houses one above the other" was referred to as a comparatively new phenomenon by Jessel M.R. in 1881,[4] and in 1924 Scruton L.J. made reference to the "habit of living in flats".[5] It is not surprising that the problem of multi-occupation posed considerable difficulty to a law which was fashioned in an almost completely rural society.[6] But with some exceptions,[7] the law which has evolved to deal with this situation is quite satisfactory.

For legal purposes we can divide a multi-occupied house into four parts; the part demised to a particular

tenant, the parts demised to other tenants, the parts used by all the tenants in common and which they are entitled to use and finally those parts, if any, which the tenants are not permitted to use. Taking a common example, A, B and C are all tenants of a house owned by X. A rents a basement flat, B three rooms on the ground floor and C one room on that floor and the whole of the first floor. They all share the path leading to the house but A has a separate entrance while B and C both use the front door. B and C also share a hall-way to get to their rooms and a bathroom and toilet. None of the tenants are permitted to use the loft because it is dangerous. In this example we take the rooms of any of the tenants as the demised part and the rooms let to the others as another part. The path, entrance, hallway, toilet and bathroom are all shared in common and the loft is a part which the tenants are not permitted to use. It is important to keep these divisions in mind because the legal rights of someone affected by a defect on the property will depend on what part of the house it occurs in.

The landlord's liability for defects in the demised part is not very extensive. This has been dealt with at length and it is sufficient to say at this stage that the common law did not imply any warranty of fitness[8] and that the lessor owed no duty of care towards persons on the demised premises.[9] On both points,[10] statute has modified the rigour of the common law. If a passer-by or a neighbouring occupier is injured

as a result of a defect in the demised part then the lessor might be liable in nuisance.[11] The second division, those parts demised to other tenants, is important from the tenant's point of view because he is a neighbouring occupier of such premises and may have rights in nuisance against the lessor, this point is considered later.[12]

The remaining parts are those retained in the lessor's control. This is clearly the case where he has refused permission to the tenants to use parts of the house. A person who disregards this instruction becomes a trespasser and cannot complain if he is injured by the natural condition of the premises.[13] On the other hand if there is an escape of some matter from such parts which causes harm to persons lawfully using other parts of the house then the lessor may be liable.[14] The final division is that part of the house which the lessor permits his tenants to use in common. English and Canadian cases[15] have included such things as roofs, staircases, paths, steps leading to the house, a balcony, an elevator and a clothes-line. American cases[16] have also included appliances such as a heating plant, heating system or washing machine.

It seems an elementary fact that if a landlord lets parts of a house for tenants to use exclusively but sets aside other parts which are to be used in common then these common parts must be said to be

retained in his control. He has not demised such parts and the tenants do not have control so it must still be in the landlord.[17] In the New Zealand case of Nicholls v Lyon,[18] however, Barrowclough C.J. reached a different conclusion in his dissenting judgement. He felt that the lessor did not have sufficient control to be liable for common parts unless he had a reasonable opportunity of observing more or less from day to day the state of repair thereof and this opportunity had to exist in fact as well as law. It is submitted that this would leave a lacuna in the law and is too strict a test. The test applied by the majority is much to be preferred; that if a lessor is able to grant new tenants a right to use premises then he is sufficiently in control to be held liable for any defects.

The common law imposes certain obligations upon the lessor for defects occurring in those parts kept under his control. It is to the nature of such obligations that the discussion now turns. Following the method adopted for defects arising in the demised premises, these obligations are discussed under the two headings of tort and contract. A tenant can be affected by defects under the lessor's control in two ways; he may be injured whilst he is actually using that part of the premises or he may suffer damage by the intrusion of such defects into those parts demised to him. The topic is thus arranged to deal with these possibilities in turn.

Apart from theoretical considerations for placing these duties on the lessor arising from considerations of control in law, there are also good practical reasons and these were aptly summarised by Harkerider,

> "If the duty of repairing the common passages and hallways were placed upon the several tenants great confusion and inconvenience would result. Each tenant would be sure to do no more than his share of the work and would be unable to agree with the others as to what and when repairs were needed. As a result the repairs either would not be made at all or would not be sufficiently made. The law, therefore, has wisely placed this duty to repair upon the landlord." 19

1 Supra 16-18

2 "Report Of The Committee On Housing in Greater London" Cmnd 2605 (1965) p. 70

3 Harvey, "Tenants In Danger" (1964) p. 127

4 Yorkshire Fire And Life Insurance Co. v Clayton (1881) 8 Q.B.D. 421

5 Cockburn v Smith (1924) 2 KB 119

6 Supra 220

7 For example 1) refusal to apply statutory warranty of fitness to common parts - supra 411

2) The classification by the common law of the tenant, his family and guests as mere licensees whilst on such parts, infra 694

3) Attempt to extend law relating to demised premises to common parts, infra 702

8 Supra 118

9 Supra 654

10 Housing Act 1957 s 6 Supra 380
Housing Act 1961 s.32 Supra 457
Occupiers Liability Act 1957 s 4 Supra 645

11 Supra 632, 647

12 Infra 735

13 The law relating to trespassers is too large a topic to be dealt with in this account of a landlord's liability. See for an example of persons living on demised premises being treated as trespassers with regard to some other parts of the house; Thyken v Excelsior Life Ass'ce Co. (1917) 34 D.L.R. 533, 11 ALR 344 (Alberta Supreme Court).

14 Infra 692

15 Infra 689

16 Infra 719

17 See Miller v Hancock (1893) 2 Q.B. 177 overruled on another point in Fairman v Perpetual Investment Building Society (1923) AC 74.
P.M. North, "Occupiers' Liability" (1971) p.17

18 (1955) N.Z. L.R. 1097

19 Harkrider, 26 Mich. L.R. 260, 402 (1927)

Implied Warranty that Parts in Landlord's Control Are Safe For Tenant's Use

In multi-occupied houses, there are parts of the premises which are not demised to any tenant but shared in common.[1] Such parts remain in the landlord's possession and control and special obligations attach to them.

It has been suggested that the lessor's liability for parts in his control rests not upon contract but only in tort. The Court of Appeal considered this point in Cockburn v Smith[2] but preferred to reserve the question, this point was also reserved by Du Parcq J. in Bishop v Consolidated London Properties Ltd.[3] It is, however, respectfully submitted that these doubts are misplaced.[4] The lessor's liability to his tenant, whilst it also derives from principle of the law of torts,[5] is a direct application of the law long applied to contracts whereby one person is given the right to enter and use the premises of another.[6] This law was summarised by McCarchie J. in Maclean v Segar.

> "Where the occupier of premises agrees for a reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them." 7

The first case to have applied the general rule above to parts in the landlord's control seems to have been Miller v Hancock[8] though, in view of the fact that the plaintiff was not the tenant but his visitor,

the statements doing so are obiter. The defendant was the owner of a building in the city which he let out to different tenants in floors, access being gained to each apartment by means of a staircase which remained in the defendant's control. The plaintiff, who had in the course of business called upon the tenant of one of the floors, fell down the staircase owing to its defective condition. The Court of Appeal upheld his claim. An implied warranty that the staircase was safe was vigorously asserted by Bowen L.J.,

> "It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary case of business with the tenants. -- It seems to me that it would render the whole transaction inefficacious and absurd if an implied undertaking were not assumed on the part of the landlord to maintain the staircase so far as might be necessary for the reasonable enjoyment of the demised premises." 9

Lord Esher M.R. also considered that the landlord was an implied obligation to his tenants.[10]

The cases differed as to the standard of care which the lessor impliedly undertakes to exercise. On the one hand, it was held by Scrutton J. in Hart v Rogers[11] that the lessor was liable even in the absence of negligence because he had entered into an

absolute obli ation to keep a roof under his control in proper repair. But on the other hand in Dobson v Horsley the Court of Appeal expressed the view obiter that the lessor's only obligation was not to expose his tenant to a trap,

> "Where the lessor simply offers to the tenant the right to use a particular sort of approach such as it is - say a plank with no handrail across a stream or steps protected only by a coping eight inches high. The tenant using it is not trapped in any way; he knows perfectly well that there is no handrail or railing, and he accepts the risk of using the access in the form in which it is provided." 12

Both the above standards of care were rejected by Luck J. in Dunster v Hollis,[13] After a careful review of the authorities, he concluded that the lessor was under no absolute duty but nor was the visibility of the danger necessarily a good defence, The lessor's duty was to take reasonable care to keep the parts in his control, here a flight of steps, reasonably safe.

Fortunately the controversy is now no longer of any practical importance in view of section 5 of the Occupiers Liability Act 1957 which provides,

> "Where persons enter or use -- any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care."

The common duty of care is defined in section 2 (2) as,

> "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

The implied warranty of fitness has been held to apply to defects in several parts of the house. In recent Canadian cases it has been held to apply to paths used for access to and from the demised premises.[14] Steps leading to the tenant's flat or room are clearly covered. In Dunster v Hollis[15] the tenant recovered for injuries sustained owing to the defective condition of a common flight of steps leading to his two rooms and the tenant recovered on similar facts in the New Zealand case of Nicholls v Lyon.[16] The tenant who was injured by the dangerous state of a balcony used as an entrance was awarded damages by the Alberta Supreme Court in McPherson v Credit Fancier Franco Canadien[17] and in Macleod v Harbottle[18] the rule was extended to a defective elevator. The decision of the Supreme Court of New Brunswick in Frampton v Lackman[19] is of special importance. A tenant in an apartment building had the use of a clothes line on the roof of the building as an incident of her lease. She was injured whilst opening a heavy door giving access to the roof by reason of an awkward step. The Court held her entitled to recover as the lessor had failed to see that a reasonably safe means of access to the roof was provided. This case is important in that it shows that the tenant's protection extends not only to parts of

of the premises used to gain access to the tenant's own premises but also to parts used ancilliary to the demise. Thus it should extend to toilets, bathrooms, drying cupboards and gardens if the tenant is entitled to use them.

Under the implied warranty, the lessor is obliged to repair those parts which have got out of repair. Thus if railings on a balcony become insecure the lessor is liable if he does not fix them.[20] If an elevator ceases to operate the lessor should remedy the defect.[21] The duty of maintenance may also extend to removing hazards caused by the elements such as ice on a pathway.[22] But a curious exception has crept into the law. In Devine v London Housing Society,[23] the demised flat was on the seventh floor of ablock of flats, To gain access the tenant had to use a staircase which at the time of the accident was unlighted although it was night-time. The tenant claimed damages for breach of contract on the grounds that the lessor's implied warranty that the staircase was reasonably safe included a reasonable provision of lighting. Croom-Johnson J. of the King's Bench Division rejected her claim on the grounds that in no circumstances could there be an implied duty on the landlord to provide any lighting,

> "My difficulty in the present case which is not a case of repair -- is to decide what sort of obligation I am to imply. I am asked to imply an obligation to light the staircase at reasonable hours. Who is to be the judge of that? As I see it, the obligation must be

> something which is certain. It might vary from tenant to tenant. The landlord letting a block of flats would have to see whether his obligation as regards each individual was to leave lights on all night, or until four o'clock, twelve o'clock, or ten o'clock. I see the greatest difficulty in implying any such obligation." 24

As has been observed,[25] this raises the need for certainty to an unusually high degree. If it is possible to determine what constitutes a reasonable state of repair then it ought to be possible to determine what constitutes a reasonable degree of lighting. To permit the lessor to leave the staircase in total darkness is to invite injury to the tenant, his family and guests especially in the winter months.

One important point about this implied warranty of fitness should be noted. Unlike covenants to repair the demised premises,[27] there is no need for the tenant to give notice to the landlord of the defect. This was decided by the Divisional Court in Melles v Holmes.[28] Damage was caused to the tenant when a gutter retained in the possession of the landlord was choked with foreign matter causing water to overflow. The lessor, who had covenanted to keep the roof in good and tenantable repair, disputed liability on the grounds that the tenant had given him no notice of the blockage. This contention was rejected by the Court,

> "The roof was in the possession and control of the defendants, not of the plaintiffs. Therefore there is no justification for saying that they cannot enforce the covenant in the absence of notice." 29

This reasoning would apply equally to the implied

covenant.

Implied Warranty that Lessor's Premises Will Not Interfere With The Demised Premises

Allied to the implied warranty that parts under the lessor's control are safe for the tenant's use,[30] there may be a further warranty that those parts will be kept in such a condition as not to interfere with the tenant's use of the demised premises.

One of the earliest cases discussing this implied warranty was Carstairs v Taylor[31] in 1871. The plaintiffs hired from the defendant the ground floor of a warehouse, the upper part of which was occupied by the defendant himself. Water was collected by the defendant in a box and escaped when a rat gnawed through it. The tenant's goods were damaged in consequence. His claim was rejected by the Court of Exchequer because there was no evidence of negligence. Had there been negligence, the decision would clearly have gone the other way and one justification suggested by Kelly C.B. for the lessor's liability was the possibility of "an implied contract by the landlord so to maintain the part of the premises in his possession as not to permit damage to happen to the tenant through any ordinary cause."[32]

The Court of Appeal was faced with a similar case in Hargreaves v Hartapp[33] except that here negli-

gence was shown. The plaintiffs were tenants of a floor in a building of which the defendants were landlords. A rainwater gutter in the roof, which was retained in the possession and control of the lessor, became stopped up owing to their neglect and the overflowing water damaged the plaintiffs. The Court of Appeal held the plaintiffs entitled to recover though it is not clear if the lessor's duty to use reasonable care arose from contract or tort. This last point was expressly left open by the same Court in Cockburn v Smith,[34] another case of water escaping from a defective gutter under the lessor's control and for which he was held liable as having failed to exercise reasonable care.

It is submitted that such an implied term will certainly satisfy normal contractual principles.[35] In practice, however, the point is purely academic as the landlord is clearly liable for failure to exercise reasonable care if parts in his control interfere with the demised premises and whether it is said to arise from contract or tort is of little importance in this context.

Lessor's Liability As Occupier To Persons Lawfully on Parts Retained In His Control

With regard to those parts of the premises which he retains in his control, the lessor is occupier and owes the normal duties of an occupier towards lawful

visitors. At common law, these duties were extremely complex but fortunately since 1957 the law is considerably easier to understand.[36]

At common law the rights of a visitor as against the occupier depended on whether he was classified as an invitee, a licensee or a trespasser. Broadly speaking, the trespasser could expect only that he would not be purposely harmed, a licensee that he would not be exposed to a concealed danger or trap and an invitee that the occupier would take reasonable care to prevent damage from unusual danger.[37] Only a couple of English cases had to apply these categories to persons who came upon parts of the premises retained by the lessor though Canadian Courts had to tackle the problem more often. The result of the cases seems to have been that the tenant,[38] his family,[39] lodger,[40] guests[41] and employees[42] were all regarded as mere licensees and the only duty of the lessor towards them was not to expose them to a concealed danger or trap.[43] Thus in Dobson v Horsley[44] the tenant's child, who was injured by the defective condition of steps which the landlords retained in their control, was unable to recover damages because the defect "was obvious to persons using the steps, it was no trap by the lessor".[45] The House of Lords rejected a claim by a lodger in Fairman v Perpetual Investment Building Society[46] for similar reasons.

Since 1957, the obligations of the lessor towards persons lawfully on the premises have been both clari-

fied and extended. The Occupiers liability Act 1957 has fused the two common law categories of invitees and licenseees into the single category of "visitor".[47] Towards such persons, the lessor owes "a common duty of care" which is defined in section 2(2) as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." In short, the tenant, his family and guests, formerly regarded as mere licensees are now regarded as "visitors" of the landlord while they are on the common staircase or any other part of the premises occupied or controlled by the landlord and he owes them the "common duty of care" to use reasonable care to keep them safe.[48]

Can the landlord exclude or modify the common duty of care?[49] The answer to this question requires a distinction to be made between the tenant on the one hand and his family and guests on the other. Before the 1957 Act, it was clear that if a person entered another's premises by virtue of a contract then the occupier could modify or exclude the duty which he would otherwise have owed by the insertion of an exclusion clause in the contract.[50] It was also held in Ashdown v Samuel Williams & Sons Ltd.[51] that an occupier could exclude liability towards licensees by conditions aptly framed and adequately made known to such persons. Taking first the tenant, the 1957 Act has not changed his

position. In so far as the duty of care towards him is owed by contract then it can still be modified or excluded and, in so far as it rests in tort, the Act specifically leaves the occupier free to "restrict, modify or exclude" it.[52] The tenant's family and guests, however, enjoy a special position. It is provided by section 3 (1) of the Act,

> "Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes them as his visitors cannot be restricted or excluded by the contract, but (subject to any provision to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty."

Since it is an implied term of the tenancythat the tenant's family and guests shall use common parts of the premises so far as reasonable, this provision prevents the lessor from excluding or modifying his duty of care to them by any clause in the agreement with the tenant. On the other hand, contractual obligations entered into with the tenant since the commencement of the Act will, if they exceed the statutory duty and subject to any provision of the contract to the contrary, ensure to the benefit of the tenant's visitors also.

Lessor's Liability As Occupier of Common Parts For Defects Thereon Which Interfere With the Tenant's Use of the Demised Premises

As an occupier of premises, the lessor owes certain obligations to his neighbours under the law

of torts. Despite some dicta to the contrary,[53] it is submitted that these obligations exist even though his neighbours also happen to be his tenants. It is proposed to deal with the lessor's liability under three torts; negligence, nuisance and Rylands v Fletcher.[54]

The highest obligation of an occupier towards his neighbour is that of Rylands v Fletcher which imposes upon an occupier to whom it applies strict or absolute liability.[55] Rylands v Fletcher laid down the rule,

> "that a person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief it if escapes must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."[56]

This salutory principle has been applied to water (including sewage),[57] fire,[58] gas[59] and electricity.[60] Naturally one wonders if a lessor who has pipes in his possession which burst causing damage to the demised premises or who is in possession of a cistern which overflows is responsible to the tenant even in the absence of negligence. But liability under Rylands v Fletcher is by no means as strict or as absolute as a reading of that case itself would suggest and the doctrine is unlikely to aid the tenant.

In the first place there is no liability under the doctrine for damage caused by the natural or ordin-

ary user of land. This was made clear by the Privy Council in Richards v Lothian,

> "It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community." 61

In that case the defendants were landlords of a building in whichthe plaintiff rented offices. Owing to the malicious act of some third person in blocking up a lavatory retained in the lessor's possession, water overflowed into the plaintiff's premises and caused damage. The Privy Council held the defendants not liable because they were not responsible for the acts of third party and also because storing water for use in a lavatory was an ordinary user of land,

> "The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. -- Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even where there has been no negligence." 62

Lord Moulton, giving the opinion of the Court, went on to say that similar considerations would apply to a lessor who brings gas onto the premises for normal domestic purposes.[63]

The second barrier in the path of the tenant is

that Rylands v Fletcher is not applicable to the escape of things brought or kept upon his premises by the defendant with the consent of the plaintiff. This principle has often been applied to the situation where a lessor brings water to a house for the common benefit of all the tenants.[64] If it escapes and injures the tenant or his property, he is confronted with the defence that he has impliedly consented to its presence. So in Blake v Woolf, it was said by Wright J.,

> "In this case the plaintiff, by taking these premises with water laid on to them and accepting his supply of water from the defendant's cistern must be taken to have asserted to water being kept onthe premises by the defendant." 65

As was observed by the Court of Appeal in Peters v Prince of Wales Theatre,

> "The contractual relationship between landlord and tenant, or the willingness of the plaintiff to take a lease of part of a house so constructed that at the time when he takes his lease other occupiers are being supplied with water, removes the case from the common law doctrine of Rylands v Fletcher."66

The tenant who seeks to place reliance on Rylands v Fletcher is thus likely to be met with two hurdles; that the landlord's use of his land was quite natural and so not within the doctrine and, further, that the tenant has impliedly consented to this use. Few tenants will be able to surmount both these hurdles though a recent Canadian case[67] shows a tenant doing just that. A landlord, who also ran a garage, allowed carbon monoxide fumes to escape to his tenant's apartment. Stak J. of the Ontario High Court allowed the tenant's claim, there being

neither a natural use of the land nor consent by the plaintiff.

The lessor as occupier of land is under a duty not to create a nuisance whereby substantial interference is caused to neighbouring property.[68] In D'Arcy v Royal Cinemas Ltd.[69] the defendants had let a flat over their cafe to the plaintiff. Whilst carrying out work on the cafe, they dislodged a number of cockroaches which migrated to the plaintiff's flat causing dermatitis. It was found by the jury that by leaving food refuse in the cafe the defendants had set up a nuisance and McCardie J. held the tenant entitled to recover. In this case the lessor had, as it were, attracted the vermin to his premises and so caused the nuisance. Similar actions were dismissed in Bernard v Cherdos Court Mansions[70] and Belbridge Property Trust v Wilton[71] because there was no evidence that the lessor had attracted the nuisance. It is no defence to an action in nuisance that the plaintiff came to it so in D'Arcy's case a submission that there was no case to answer because the cockroaches were present when the tenant entered into occupation was overruled.

Though there is dicta to the contrary,[72] it appears that the lessor is also liable in negligence if he fails to exercise reasonable care in his management of parts under his control and damage is thereby caused to the demised premises or persons on the demised premises. Liability for negligently failing to keep a roof secure was discussed in Carstairs v Taylor[73] but not decided because there was no evidence of negligence. In

Har reaves

v Hartapp,[74] the lessor was held liable for failure to use reasonable care so as to prevent water escaping from a gutter but it is not clear if this liability arose from contract or tort and in Cockburn v Smith[75] the point was expressly reserved though the Court of Appeal discussed liability under both heads.

The first case directly on the present point seems to have been Cheater v Cater.[76] The Court of Appeal held that a landlord who demised a part of his land which was overhung by a yew tree growing upon land retained by him was not responsible to his tenant for the loss ofcattle which were poisoned by eating the overhanging branches. The basis of the decision was explained by Sargant J.,

> "The tenant could have seen that the yew trees overhung the demised land in such a way as to be accessible to cattle, and having taken the land in that state he cannot afterwards complain of damage arising from his mare having eaten of the branches." 77

The case therefore decided nothing more than that the tenant must be considered to have run the risk of danger arising from defects existing at the time of the demise and of which he knew, ie the volenti non fit injuria rule applied.

Cunard v Antiyre[78] is the leading authority on the landlord's liability for negligence. The defendants were head landlords to the plaintiff's husband. The effect of the various leases,as the Court held, was that the main roof and guttering were vested in the defendants as occupiers. The demised flat

included a kitchen with a glass roof projecting outwards. Owing to the defendant's neglect to repair, a heavy piece of guttering fell from the main roof of the building through the glass roof of the plaintiff's kitchen causing broken glass to strike and injure her. The Divisional Court held her entitled to succeed on the broad principle that,

> "Anyone in occupation and control of something hung over a place, in which people may be expected lawfully to be, is bound to take reasonable care that it does not fall and injure them." 79

This duty was owed to all persons who should have been in the occupier's reasonable contemplation as persons closely and directly affected by his conduct. The fact that such persons might also be the occupier's tenants was irrelevant.

The last case was considered by the Court of Appeal in Shirvell v Hackwood Estates Ltd.[80] A branch fell from a tree which the occupying owner of the land knew to be in a defective condition and injured the employee of a tenant to whom he had demised the adjoining land. At the time of the lease the risk of the branches falling was substantially the same as when the accident actually occurred.[81] so the decision was very similar to Cheater v Cater. Moreover, Mackinnon L.J. held that there was no evidence of negligence and expressly reserved his opinion as to the position if such could be shown.[82] Greer L.J. however, went further and cast doubt on the correctness of Cunard v Antifyre

by pointing out that the attention of the Divisional Court was not called "to the distinction which in law exists between the liability of the occupier of property to an adjoining owner and his invitees or licensees and the liability of such an owner to his tenant."[83] Then he continued,

> "I do not think the case can be relied upon as in any way inconsistent with Robbins v Jones 84 and Cavalier v Bope85. If it is so inconsistent the decision was wrong." 86

Note that he does not say that Cunard v Antifyre was wrong only that it would be if it were inconsistent with cases holding that the lessor is not liable for defects on the demised premises. But why should there be any inconsistency? Cunard v Antifyre was concerned not with the demised premises but with premises retained in the lessor's possession and control which is quite another matter.[87]

The confusing and unnecessary statements in Shirwell's case were severely criticised by leading writers on the law of torts. C.A. Wright wrote of the decision,

> "It is difficult enough to be forced to accept the incongruity of decisions like Otto v Bolton 88 -- with the principle laid down in Donoghue v Stevenson. 89 It is even more difficult to realise that an occupier of land may not be under any duty of care to persons outside his premises simply because they happen to be on property demised to a tenant."90

P. Winfield noted the practical effects of the decision,

> "Apparently a prospective lessee must now

> send engineers to inspect his lessor's adjoining house to determine whether the overhanging roof is safe, an investigation which may require a long and expensive investigation."91

Harrison, on the other hand, found the decision so muddled that it was authority for very litte,

> "It is respectfully suggested that Shirvell v Hackwood Estates can safely be taken as authority only for the proposition that upon all the facts of the case the plaintiff, for reasons upon which the Court could not agree failed to persuade the Court that he was entitled to the remedy he was claiming." 92

In Taylor v Liverpool Corp,[93] Stable J. was confronted with the problem of deciding what importance to give to Shirvell's case. The defendant in this case was a local authority which had acquired certain properties for demolition. At the time of the accident people were still living there because no alternative accommodation could be found. The plaintiff was the daughter of the tenant and she was injured when a brick fell from a roof retained in the defendant's control and struck her. It was held that she was entitled to damages. Stable J. gave two reasons for this decision. In the first place, the yard in which the plaintiff was at the time of the accident was not part of the demised premises hence cases such as Cavalier v Pope had no application. Secondly, even assuming that the above holding was wrong and that the yard had been demised to the plaintiff's father, the defendants were still liable under the authority of Cunard v Antifyre. The learned judge felt it to be his duty to follow the decision of the Divisional Court which was directly

in point rather than dicta in Shirvell's case.

Cheater v Cater was distinguished,

> "because the basis of that decision was that the tenant had to take the demised premises as he found them -- The whole trouble (in the present case) was not that the brick at the time of the accident was where it was at the commencement of the tenancy. The whole trouble was caused by reason of the fact that it was not. It had moved. It had become dislodged. It had fallen off the chimney stack and hit (the plaintiff) on the head." 94

In short, the ordinary principles of tort applied and it was irrelevant that the plaintiff was on demised premises or on the highway or on the property of an adjoining owner.

1 Supra 682

2 (1924) 2 KB 119, 131 per Banker L.J.; at p. 133 per Scrutton L.J.; at p. 134 per Sargant L.J.

3 (1933) 102 L.J. K.B. 257

4 See generally; Holmes, 7 Aust. L.J. 218 (1933)
Macintyre, 1956 J.P.L. 389

5 Infra 693

6 Francis v Cockrell (1870) L.R. 5Q B.501
Cf Sinclair v Hudson Coad & Fuel Oil Ltd. (1965) 2 O.R. 519, 522 per Ferguson J. rev'd on other grounds (1966) 2 O.R. 256

7 (1917) 2 KB 325, 332

8 (1893) 2 Q B 177; overruled by the House of Lords on another point in Fairman v Perpetual Investment Building Society (1923) AC 74. In the later case, which was not concerned with the landlord and tenant relationship, Lord Buckmaster expressly recognised that an implied obligation of care might exist between landlord and tenant. Ibid 83. See further; Macintyre 1957 J.P.L. 389, 392.

9 Ibid 181. See also Dunster v Hollis (1918) 2 KB 795, 802 per Lush J; "A lessor who lets rooms to a tenant and provides a common staircase which the tenant must use, must come under an implied contractual obligation to keep the access in a reasonably safe condition, otherwise the tenant cannot enjoy the use of the rooms which he has contracted to take."

10 Ibid 179

11 (1916) 1 KB 646

12 (1915) 1 KB 634, 640 per Buckley L.J.
See also Watt v Adams Bros Manufacturing Co. Ltd. (1927) 3 W.W.R. 580
King v Meinello (1941) 1 W.W.R. 288

13 (1918) 2 KB 795
See also Frampton v Lackman (1958) 16 D.L.R. (2d)45

.. . .. continued

Sinclair v Hudson Coal & Fuel Oil Ltd.
(1966) 56 D.L.R. (2d) 484

14 Richardson v St. James Court Apartments (1963) 40 D.L.R. (2d) 297

15 (1918) 2 KB 795

16 (1955) N.Z.L.R. 1097

17 (1930) 1 D.L.R. 179

18 (1913) 11 D.L.R. 126

19 (1958) 16 D.L.R. (2d) 45
See also Reid v Breman (1957) 21 W.W.R. 668
Horne v Moulds (1927) 2 D.L.R. 839

20 McPherson v Credit Fancier Franco Canadien
(1930) 1 D.L.R. 179

21 Macleod v Harbottle (1913) 11 D.L.R. 126
See generally for liability in the case of lifts; Note, 80 Sol J. 811 (1936)

22 Cf. Richardson v St. James Court Apartments
(1963) 40 D.L.R. (2d) 297
Sinclair v Hudson Coal & Fuel Oil Ltd.
(1966) 56 D.L.R. (2d) 484

23 (1950) 2 AER 1173
See also Irving v L.C.C. (1965) 109 Sol J.157
Holmar v Ellsmar Apartments Ltd. (1963) 40 D.L.R. (2d) 657.
Huggett v Miers (1908) 2 KB 278
and generally;
Macintyre, 1957 J.P.L. 389, 393.
But see Steer v The St. James' Residential Chambers Co. (1887) 3 T.L.R. 500 (duty to light passage owed to tenant's invitee in tort). For the American law, see infra716

24 Ibid 1177

25 Note, 67 L.Q.R. 22 (1951)

27 Supra 395

28 (1918) 2 KB 100

29 Ibid 104. See also Bishop v Consolidated London Properties Ltd. (1933) 102 L.J.K.B.257

30 Supra 686

31 (1871) L.R. 6 Exchеq. 217

32 Ibid

33 (1905) 1 KB 472

34 (1924) 2 KB 119

35 Such a term is required to give the contract of tenancy "business efficacy" within the test established in The Moorcock (1889) 14 P.D. 64.

36 See generally; P.W. North, "Occupiers' Liability" (1971)

37 See Read v Lyons (1947) A C 156, 184-185 per Lord Uthwatt.

38 Watt v Adams Bros. Harness Mfg. Co. Ltd. (1927) 3 W.W.R. 580
23 Atta. L.R. 94 (Alberta Supreme Court)

King v Mainella (1941) 1 W.W.R. 288
(1940) 2 W.W.R. 187
(Manitoba Court of Appeal)

39 Anderson v The Guiness Trust (1949) 1 AER 503
Dobson v Horsley (1915) 1 KB 634
Heake v City Securities (1932) 2 D.L.R. 193
S.C.R. 250
(Supreme Court of Canada)
Cf. Mazur v Santomski (1952) 3 D.L.R. 333

40 Fairman v Perpetual Investment Bldg. Soc. (1923) A.C. 74
Cf. Dankowski v Orre (1963) 43 D.L.R. (2d) 747 (British Columbia Supreme Court)

41 Jacobs v L.C.C. (1950) AC 361
Huggett v Miers (1908) 2 KB 278
Haseldine v Daw (1941) 58 T.L.R. 1 noted Friedman 5 MLR 242 (1942) (British Columbia Court of Appeal
McLeod v Fuoco (1951) 4 W.W.R. (N.S.) 94 (British Columbia Court of Appeal)
Cf. Lewis v Toronto General Trusts Corp. (1941) 2 W.W.R. 65.

42 Erickson v Traders Bldg. Assocn. (1916) 33 W.L.R. 372 9 W.W.R. 989

43 See, however, Macintyre, 1957 J.P.L. 389

44 (1915) 1 KB 634

45 Ibid 640 per Buckley L.J.

46 (1923) A.C. 74

47 Section 1 (2). For Commentaries on the Act, supra. Anumber of Commonwealth Countries have legislation modelled on the English statute; see P.M. North; "Occupiers' Liability" (1971) pp. 13- 14

48 This implements the recommendation of the Law Reform Committee Report Cmnd 9305 (1954) para 95 A (3)

For cases decided under Section 2, see
Turner v Waterman (1961) 105 Sol J. 1011
Moloney v Lambeth B.C. (1966) 64 L.G.R. 440
Irving v L.C.C. (1965) 193 E.G. 539
Turner v Central Equipment Ltd. (1966) 197 E.G.17
Richards v Land Revenue Trust Ltd. (1966) 198 E.G. 29
and generally; North op cit n 47

49 See generally on exclusion clauses, infra and North, op citn 47 pp. 149-154.

50 Salmond "Torts"

51 (1957) 1 Q.B. 409

52 Section 2 (1)

53 Infra 703

54 (1868) L.R. 3 H.L. 330

55 See generally
Clerk and Lindsell, "Torts" 11th ed, 1954 p 616

56 (1866) L.R. 1 Ex 265 at p. 279
L.R. 3 H.L. 330

57 eg Abelson v Brockman (1890) 54 J.P. 119

58 Jones v Festinog Ryl. (1868) L.R. 3 Q.B. 733

59 Goodbody v Poplar Borough Council (1915) 84 L.J.K.B. 1230

60 National Telephone Co. v Baker (1893) 2 Ch 186

61 (1913) AC 263, 280

62 Ibid 281-282
Cf. Crown Diamond Paint Co. Ltd. v Acadia Ltd. (1952) 2 D.L.R. 541

63 Ibid 282
Cf Miller v Addie & Sons Collieries (1934) S.C. 150

64 Anderson v Oppenheiner (1880) 5 Q.B.D. 602
Blake v Woolf (1898) 2 Q.B. 426
Rickards v Lothian (1913) AC 263
Kiddle v City Business Properties (1942) 1 KB 269
Peters v Prince of Wales Theatre (1943) 1 KB 73

65 (1898) 2 Q.B. 426, 428

66 (1943) 1 KB 73 at p. 78

67 Federic v Perpetual Investments Ltd.
(1969) 1 O.R. 186
2 D.L.R. (3d) 50

68 See Note, 83 L.J. 359 (1937)
88 L.J. 99 (1939)
178 L.T. 90 (1934)

69 "Times" March 20, 1929

70 "Times" March 17, 1934, See also Note, 178 L.T. 90 (1934)

71 "Times" June 23, 1934

72 Infra 703

73 (1871) L.R. 6 Exch. 217 Supra

74 (1905) 1 KB 472 Supra

75 (1924) 2 KB 119 Supra

76 (1918) 1 KB 247

77 Ibid

78 (1933) 1 KB 551
Note, 79 Sol J. 431 (1935)

79 Ibid 562

80 (1938) 2 KB 577

81 Ibid 595 per Greer L.J.
at p. 602 per Bennett J.

82 Ibid 596-597

83 Ibid 594

84 (1863) 15 C.B. (N.S.) 221, Supra 112

85 (1906) AC 428 Supra 643

86 (1938) 2 KB 577, 594-595

87 Supra for distinction 680

88 (1936) 2 KB 46 Supra 622

89 (1932) AC 562 Supra 655

90 C.A. Wright, 16 Can. B.R. 738, 742 (1938)

91 Winfield, 54 L.Q.R. 459, 461 (1938)

92 Harrison, 2 M.L.R. 215 (1938)
Also noted, 7 Camb. L.J. 151 (1939)

93 (1939) 3 K.B.D. 329

94 Ibid 337

Landlord's Liability For Parts In His Control - The American Law

The liability of the American landlord is summarised in section 360 of the Restatement of Torts,

> "A possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe." 1

There have been many recent cases illustrating this duty of care. Landlords have been found liable in the following situation; a child fell down a stairway used by all the tenants in common because of a lack of balusters,[2] elderly tenant recovered for injuries suffered in fall caused by wet, slippery uneven floor and inadequate lighting in shared bathroom,[3] tenant's child recovered when spring on door to common hallway was faulty and trapped his finger;[4] another tenant's child recovered damages for injuries sustained due to excessively hot water heater retained in landlord's control in basement used by all tenants.[5] Liability is imposed not only for personal injuries as in these cases but also for damage caused to the tenant's property[6] or that of his family and guests.[7]

Before the landlord can be found liable, there must be evidence that he had knowledge, actual or

constructive of the defect.[8] A recent illustration of this requirement was provided by a decision of the Supreme Court of Pennsylvania where the tenant's action for personal injuries allegedly caused by a defective radiator under the landlord's control was unsuccessful because of failure to show such knowledge on the landlord's part.[9] But the knowledge need not be actual.[10] If the defect has been in existence for a considerable period, the landlord may be deemed to have knowledge.[11] He may also be expected to anticipate dangerous conditions, such as slippery floors due to rainy weather, and take precautions.[12] In such cases, notice from the tenant is not required. Some courts have gone further and have held that the landlord is under a duty to inspect common areas periodically[13] but others have denied that there is any general duty of inspection.[14]

The standard of care normally demanded is that the landlord must use reasonable care to keep those parts in his control safe for those who use them.[15] Massachusetts cases have established a different standard; the landlord need only use reasonable care to keep such parts in as good a condition as that in which they were at the commencement of the tenancy.[16] The apparent premise behind this rule is that the tenant impliedly agrees to run the risk of any dangers in existence at the creation of the tenancy.[17]

Commentators have found this unrealistic given the tenant's inability to get the landlord to assume responsibility.[18] Furthermore, they point to the anomalies created by the rule.[19] For instance, if there is a defect on the common stairway which was therewhen tenant number 1 moved in but not when tenant number 2 moved in then only tenant number 2 could recover for injury even if both tenants were injured by the same defect. A similar anomaly would incur if the injured parties were not the tenants themselves but guests to whom the date of commencement of the tenancy is purely accidental.

In all states, liability is based upon negligence.[20] The landlord is not an insurer of his tenant's safety and liability is not strict. For instance, in one recent Maryland case, the tenant's son was held not to be entitled to recover for injuries caused by broken glass on premises in the landlord's control in the absence of evidence that such injuries were the result of lack of ordinary care and diligence on the part of the landlord.[21] Again, the Supreme Court of Iowa held that a landlord was not liable under the common law for injuries suffered by a tenant in a fall down stairs shared with the landlord. Evidence that the linoleum on the stairs was worn a little bit was not sufficient evidence of negligence.[22] It has been stated by the United States Court of Appeals, District of Columbia Circuit, that "a landlord's duty of care must be measured by a flexible standard, that reflects

community expectations and meets the need of contemporary urban life."[23] Some courts have been willing to measure the duty owed by reference to housing codes[24] but othershave refused to do this.[25] The scope of the duty of care does not extend to changing the mode of structure of the dwelling.[26]

A peculiar exception to the general duty of care has been accepted by the majority of jurisdictions; the landlord is under no general obligation to keep passageways well lighted.[27] The rationale for this exception is not clear though it has been suggested that it arose at a time when there were no lighting devices which would enable the landlord to carry out a duty to light at reasonable expense.[28] But since the first glow of Edison's incandescent lamp on October 21, 1879, the law has lost its historical justification.[29] Aware of this, a minority of Courts have been prepared to find a general duty to light common passageways.[30] Others have made some large exceptions to the majority rule; if the passageway poses unusual danger in absence of lighting then a duty to light is imposed[31] or if the landlord has assumed the duty of providing lighting, then he must use reasonable care in continuing to provide such illumination[32] though, in this latter case, he can give notice to discontinue his assumed duty.[33] Of course, statute may also intervene to impose a duty to light.[34] In an action brought on the grounds of failure to

light commonparts, the landlord may be able to defend successfully on the grounds that use of unlit premises by the plaintiff was evidence of assumption of risk or contributory negligence[35] though Courts are often reluctant to reject claims on these grounds.[36] In the case of the landlord's liability for dangerous conditions caused by ice and snow, a division of opinion similar to that in the case of lighting prevails.[37]

There is a division of opinion on the question whether the landlord's liability rests on contract or tort. The majority view would seem to be that liability results from his position as occupier of the common parts and is based on the obligation of such an occupier under the law of torts and not on the contractual obligations of a landlord.[38] One leading Wisconsin case summarised the effect of several decisions and concluded, "that there is a duty resting on the landlord in such a situation, to not cause injury to his tenant and to prevent such injury, has been held in many jurisdictions in actions grounded on negligence. But there is no authority worthy of our consideration to support the idea that the duty is one resting on contract."[39] On the other hand, a Massachusetts Court declared in a case concerned with the duty owed by a landlord to a tenant's visitor who was injured on a platform in his possession, "the duty of the defendant to keep the platform safe for the tenant and for those claiming under him grew out of the contract of hiring.

It was a part of the contract that the platform should be kept reasonably safe for the tenant for use in connection with his tenement. --- The defendant owed the plaintiff the duty which arose from the contract in favour of those who were acting by express authority of the tenant in the tenant's right."[40] It has been suggested that the true reason for placing the duty of repair upon landlords is more practical than theoretical; if the landlord does not repair then it is unlikely that the tenants will do so.[41]

Whether the landlord has retained control of particular parts of the premises and so owes a duty of care may be a difficult question to decide.[42] It has been held that this is forthe jury or trier of facts to determine in the light of all the circumstances.[43] In a recent case before the Supreme Court of Connecticut, the issue was whether the landlord had retained control over an interior stairway. The Court declared that, "Retention of Control is essentially a matter of intention to be determined in the light of all the significant circumstances -- The question of control was clearly placed in issue and became a question of fact to be resolved by the jury under all the circumstances. -- The plaintiff offered evidence that the landlady cleaned and inspected the stairs leading from the first to the second floor, that she replaced light bulbs in the second floor hallway, that she put and kept curtains there, and also that she cleaned the

windows. There was ample evidence before the jury -- from which they could reasonably conclude that the defendant retained control of the stairway."[44] It is normally presumed that the landlord has retained control over premises used in commonby different tenants.[45]

The parts of the premises held to be included in the landlord's control are many and varied.[46] Stairways, halls, steps and porches are normally presumed to be in the landlord's control if used in common.[47] Indeed, a stairway or passageway will be within his control even if, in fact, only one household uses it providing it is intended to be used in common.[48] Yards,[49] roofs,[50] elevators, doors, walls and foundations[51] have all been held to be within the landlord's duty of care. So too have appliances used in common[52] and various services such as electrical systems,[53] heating systems[54] and plumbing.[55] There are a number of very interesting cases holding that control of installations providing such services remains in the landlord even though they are located in the demised premises.[56] For example, in one case from Missouri,[57] the tenant had been killed by an explosion caused by a leakage of gas from a defective water heater situated in a bathroom rented exclusively by him. The Supreme Court held the landlord liable because the gas supply system remained under his control. It was not reasonable to say that occupancy of the flat and use of the heating appliances carried with it

control over the gas supply system which still remained with the landlord.[58] As an earlier District of Columbia Court noted, "Plumbing, heating and electrical fixtures are not isolated either in use or maintenance. They must be maintained and used, if at all, in conjunction with the system of which they are parts. -- The law should follow custom and convenience in classifying such fixtures among the things that the landlord controls."[59]

The liability of the landlord is dependent upon the status of the plaintiff. He is not liable if the persons bringing the action was a mere trespasser or licensee;[60] he must have been using the premises for a permitted purpose.[61] In several recent cases, Courts have rejected actions brought on behalf of infant plaintiffs on the grounds that the accident happened whilst the infant was merely a trespasser or licensee. For example, the Supreme Judicial Court of Massachusetts rejected an action for injuries sustained by the tenant's nine year old son when he fell from the roof of a shed.[62] The defendant had previously told the boy not to play there. The Court held him to be a trespasser. The only duty on the landlord was to refrain from wilful, wanton or reckless conduct. In another case, a child had left the play area of the premises and gone to the clothes drying area.[63] Whilst there, she was injured as a result of a defect in a chain link fence. Her action was also unsuccessful

Another common situation has been injury caused during use of a fire escape for a purpose for which it was not intended;[64] for example, to gain access to another tenant's apartment.[65] In such cases, the landlord is not bound to keep the fire escape safe for usess to which it was not meant to be put. But, providing the plaintiff was using the premises for their intended purpose, he may recover if he can show that he is a guest of the tenant[66] or a member of his family.[67] Of course, if it is shown that he was contributing negligent or assumed the risk, his action may fail fail for these reasons.[68]

Parts In The Landlord's Control

1 Restatement 2d Torts S 360, see also s 361 and Appendix 296-300

For treatment of this topic in other standard texts, see
52 C.J.S. ss 417 (6) - 417 (11) pp. 50-78
2 Frumer, "Personal Injury" 85
2 Harper and James s 27.17 pp. 1516-1518
2 Powell s 234 (2) (b) pp. 334-342
Prosser s 63 pp. 405-408

Numerous articles on the landlord's liability in tort deal with the topic. The following are only the more important;

Chapman, 33 U. Detroit L.J. 231 (1956)
Hardy, 31 Missouri L.R. 319 (1966)
Harkrider, 26 Mich. L.R. 260,401-404 (1927)
Mouber, 38 U.M.K.C. L.R. 126 (1969)
Noel, 30 Tenn. L.R. 368, 385-388
Sweeney, 37 Geo. L.J. 119 (1948)

2 Meiners v Moyer (1970) 119 Ill App 2d 94
255 NE 2d 201

3 Vezina v Amoskeog Realty Co. (1969) 260 A 2d 115

4 Taylor v Virginia Construction Company (1968) 161 SE 2d 732 (Va)

5 Conway v 10 Brewster Ave Corp. (1967) 97 N.J. super 75
234 A 2d 415

6 Boynton, 37 Mich. L.R. 826, 827
36 C.J. p.232
52 C.J.S. s 423 (4) p. 167
Keller-Loup Constr. Co. v Gestner (1970)
476 P 2d 272 (Colo.)
Daltex Inc. v Western Oil & Fuel Co. (1967)
148 NW 2d 377 (Minn)
Franklin Drug Stores Inc. v Gur-Sil Corp (1967)
269 NC 169 152 SE 2d 77
Boe v Healy (1969) 168 NW 2d 710 (S.D.)

7 52 C.J.S. s 424 p. 183 (guest), s 425 p. 184 (family)
Levine v Bachiaro (1948) 137 NJL 215
59 A 2d 224

8 25 ALR 1273, 1294-1295
39 ALR 294, 300
43 ALR 1292, 1301
58 ALR 1412, 1416
75 ALR 154, 162
97 ALR 220, 227
25 ALR 2d 364, 390, 400, 418
49 Ann. Jur. 2d s 815 p. 776
Comment; 8 Temple L.Q. 550
" 20 U. Cinn. L.R. 140
" 21 Yale L.J. 627
" 25 Yale L.J. 84
36 C.J. p. 221
52 C.J.S. s. 417 (16) p. 92
Denlinger, 20 U. Cinn. L.R. 140
Grimes, 2 Val. U.L.R. 189, 212
2 Powell s 234 (2) (b) p.339
Prosser s 63 p. 407
Schlegel, 19 Chi-Kent L.R. 319
Thompson, 1952 U. Ill. L.F. 417, 419

Harris v H.C. Smithy Co. (1970) 429 F 2d 744 (D.C.)
Marlo Investments Inc v Verne (1969) 227 So. 2d 58 (Fla)
Stokes v Old Colony Trust Co. (1968) 242 NE 2d 853 (Mass)
Coenen v Buckman Bldg. Corp. (1967) 153 NW 2d 329 (Min)
Kozlowski v Modern Litho Inc. (1967) 182 Neb. 270, 154 NW 2d 460
Doyle v Streifer (1970) 310 NYS 2d 165
Smith v M.P.W. Realty Co. Inc. (1967) 423 Pa. 536, 225 A 2d 227.
Buggs v Memphis Housing Authority (1969) 450 SW 2d 596 - (Tenn)

9 (1967) 423 Pa. 536
225 A 2d 227
Cf Marlo Investments Inc. v Verne (1969) 227 So 58 (Fla)

10 49 Ann. Jur 2d s 815 p. 777
36 C.J. p. 221
52 C.J.S. s 417 (16) p.93
Noel, 30 Tenn. L.R. 368, 386
Harris v H.G. Smithy Co. (1970) 429 F. 2d 744 (.D.C.)
Eggers v Wright (1968) 240 N.E. 2d 79 (Ind)
Lipsitz v Schechter (1966) 377 Mich. 685 142 NW 2d 1
Coleman v Steinberg (1969) 54 N.J. 58 253 A 2d 167
MacArthur v Coxen Real Estate Corp. (1967) 284 NYS 2d 560

11 Windsor v Goldscheider (1967) 236 A 2d 16 (Md)
Boe v Healy (1969) 168 NW 2d 710 (S.D.)

12 Harris v H.G. Smithy Co. (1970) 429 F 2d 744 (D.C.)

13 Comment, 23 Tenn. L.R. 323
36 C.J. p. 222
52 C.J.S. s 417 (16) p. 94
Denlinger, 20 U. Cinn. L.R. 140, 141
Grimes, 2 Val. U.L.R. 189, 212
2 Harper & James s 27, 17 p. 1516
Maher, 10 South Car. L.R. 307, 316
Noel, 30 Tenn. L.R. 368, 385
2 Powell s 234 (2) (b) p. 339
Prosser s 63 p. 407

Di-Mare v Cresci (1962) 23 Cal Rptr. 772, 373 P 2d 860
Geislinger v Village of Watkins (1964) 269 Minn. 116, 130 NW 2d 62
Lopez v Gukenback (1958) 391 Pa. 359, 137 A 2d 771
Devine v Hollander (1960) 192 Pa. Super 642, 161 A 2d 911

14 Kozlowski v Modern Litho Inc. (1967) 182 Neb. 270, 154 NW 2d 460

15 See authorities listed supra n 1

16 25 ALR 1273, 1297
39 ALR 294, 300
58 ALR 1412, 1416
75 ALR 154, 163
97 ALR 220, 229
25 ALR 2d 364, 387, 402, 422
25 ALR 2d 444, 450
49 Ann Jur 2d s 818 p. 782
Angevine & Taube, 52 Mass L.Q. 205, 209-210
Branch, 11 B.U.L.R. 309
Chapman, 33 U. Detroit L.J. 231, 232
Comment, 41 Colum. L.R. 349
" 28 Harv. L.R. 329
" 62 Harv. L.R. 669, 670 n. 16
" 12 Howard L.J. 137, 139
" 49 Mass. L.Q. 77
" 23 Mich. L.R. 419
" 27 Mich. L.R. 821
" 25 Yale L.J. 84
36 C.J. p. 213
52 C.J.S. s 417 (6) p. 55
Grimes, 2 Val. U.L.R. 189, 212
2 Harper & James s 27, 17 p. 1516
2 Powell s 234 (2) (b) p. 338

Prosser s 63 p. 406 n 88
Robinson, 29 B.U.L.R. 423
Schwartz, 47 Mass. L.Q. 247, 264

Crea v Stunzenas (1962) 344 Mass 265, 182 NE 2d 141
Regan v Nelson (1963) 345 Mass. 678, 189 NE 2d 516
Campbell v Romanos (1963) 346 Mass. 361, 191 NE 2d 764
Stapleton v Cohen (1967) 228 NE 2d 64, 353 Mass. 53
Saunders v Romanos (1969) 245 NE 2d 757
Dolan v Suffolk Franklin Sav. Bank (1969) 246 NE 2d 798

17 Comment, 41 Columbia L.R. 349, 351

18 Ibid

19 Angevine and Taube, 52 Mass. L.Q. 205, 209
Chapman, 33 U. of Detroit L.J. 231, 233
Comment, 27 Mich. L.R. 821
Schwartz, 47 Mass L.Q. 247, 264-265

20 49 Ann. Jur. 2d s 814 p. 774
Comment, 8 Temple L.Q. 550, 551
" 21 Yale L.J. 627
52 C.J.S. s 417 (16) p. 53
Harkrider, 26 Mich. L.R. 260, 402
Prosser, s 63 p. 419
Sweeney, 37 Georgetown L.J. 119, 121
Trumbower, 10 Drake L.R. 132, 137

Davis v Burlington (1966) 101 Ariz 506, 421 P 2d 525
Winthrop v 1600 16th St. Corp (1965) 208 A 2d 624 (D.C.)
Greenlee Bros. & Co. v Rockford Chair & Furniture Co. (1969) 107 Ill. App 2d 326, 246 NE 2d 64
Montgomery v Engel (1970) 179 NW 2d 478 -(Iowa)
Arshank v Carl M. Freeman Associates Inc. (1971) 260 Md. 269,272 A 2d 30
Krasnow v Fenway Realty Co. (1967) 227 NE 2d 501 (Mass)
Coenan v Buckman Bldg. Corp (1967) 153 NW 2d 329 (Minn)
Rowsen v Ellerbrake (1967) 423 SW 2d 14 - (Mo)
Bacon v Attamount Farms Inc. (1969) 33 AD 2d 708 304 NYS 2d 1017
Smith v Monmaney (1969) 255 A 2d 674 - (Vt)
Wagman v Boccheciampe (1965) 206 Va. 412, 143 SE 2d 907

21 Arshank v Carl M. Freeman Associates Inc. (1971) 260 Md 269, 272 A 2d 30

22 Montgomery v Engel (1970) 179 NW 2d 478

23 Harris v H.G. Smithy (1970) 429 F 2d 744, 746

24 Edmonds Inc. v Vojka (1964) 118 U.S. App. D.C.109
Smith v Jung (1970) 241 SO 2d 874 (Fla)
Coleman v Steinberg (1969) 54 N.J. 58
253 A 2d 167

25 Coleman v Hall (1968) 161 NW 2d 329 (Iowa)
Ellis v Caprice (1967) 96 N.J. Super 539
233 A 2d 654

26 49 Am. Jur 2d s 818 p. 783
Chapman, 33 U. Detroit L.J.
Comment, 12 Howard L.J. 187, 189
52 Corpus Juris Secundus s 417 (6) p. 56
Harkrider, 26 Mich. L.R. 260, 403

Lindsey v Kentucky Development Co. (1942)
291 Ky 253, 163 SW 2d 499
Thompson v Frankus (1955) 115 A 2d 718 (Me)

27 25 ALR 1273, 1312
39 ALR 294, 302
58 ALR 1411, 1419
75 ALR 154, 166
97 ALR 220, 232
25 ALR 2d 496, 500
49 Am. Jur. 2d s 824 p. 790
Bates, 1950 Ins. L.J. 233
Comment, 2 Dakota L.R. 402
" 3 Dakota L.R. 276
" 17 Minn. L.R. 819, 820
" 21 Yale L.J. 627
36 C.J. p. 214
52 C.J.S. s 417 (7) p.64
Harkrider, 26 Mich. L.R. 260, 404
2 Harper & James s 27. 17 p. 1517
Prosser s 63 p. 407

Hardigree v Housing Authority of City of Atlanta
(1963) 107 Ga. App. 406, 130 SE 2d 275
Stapleton v Cohen (1967) 353 Mass 53, 228 NE 2d
64. Cert den. 88 S Ct. 2040, 391 US 968
20 L Ed. 2d 881
Nelson v Surburban Plumbing Supply (1969) 283 Minn
223, 167 NW 2d 37.
Sherman v Bobrecker (1959) 322 SW 2d 898 - (Mo)
Tremblay v Donnelly (1961) 103 NH 498, 175 A 2d 391
Verzina v Ameskeog Realty Corp. (1969) 260 A 2d
115 - (N.H.)

28 W.E. Shipley, 25 A.L.R. 2d 496, 503 (1952)

29 Dodge v Parish of the Church of the Transfiguration (1969) 259 A. 2d 843, 845-6
Cf. Kay v Cain (1946) 154 F 2d 305, 306

30 25 ALR 2d 496, 503
52 C.J.S. s 417 (7) p. 65

White v De Vito Realty Co. (1935) 120 Conn. 331, 180 A 461
Smerinlio v Conn. Sav. Bank (1942) 129 Conn. 461, 29 A 2d 443
Jade v Yale University (1943) 129 Conn. 615, 30 A 2d 545
Rio v Rio (1960) 22 Conn. Supp. 181, 164 A 2d 546
Philips v Capital Invt. & Guaranty Co. (1942) 32 A 2d 249 (.DC.)
Kay v Cain (1946) 81 App. D.C. 24, 154 F 2d 305
Beitch v Mishkin (1957) 184 Pa. Super 120, 132 A 2d 703

31 25 ALR 1273, 1314
39 ALR 294, 302
58 ALR 1411, 1419
75 ALR 154, 166
97 ALR 220, 232
25 ALR 2d 496, 512-517
49 Am. Jur. 2d s 824 p.790
Comment, 17 Minn. L.R. 819, 820
" 21 Yale L.J. 627
52 C.J.S. s 417 (7) p. 65
Prosser, s 63 p. 407
Thompson v Frankus (1954) 150 Me. 196, 107 A 2d 485
Nelson v Surburban Plumbing Supply Co. (1969) 283 Minn. 223, 167 NW 2d 37
Ullrich v Kintzele (1957) 297 SW 2d 602 (Mo)
Tremblay v Donnelly (1961) 103 NH 498, 175 A 2d 391
Vezina v Ameskeog Realty Co. (1969) 260 A 2d 115
Panama Canel Co. v Wagner (1956) 234 F 2d 163

32 25 ALR 1273, 1315
39 ALR 294, 302
58 ALR 1411, 1419
75 ALR 154, 166
97 ALR 220, 232
25 ALR 2d 496, 505
49 Am. Jur. 2d s 824 p.791
Comment, 17 Minn. L.R. 819, 820
36 C.J. p. 214
52 C.J.S. s 417 (7) p.66

Coan v Adams (1955) 332 Mass. 654, 127 NE 2d 198
Nelson v Surburnan Plumbing Supply Co. (1969) 167 NW 2d 37 (Minn)
Sherman v Bobrecker (1952) 322 SW 2d 898 (Mo)

33 25 ALR 2d 496, 509
49 Am. Jur. 2d s 824 p. 791
36 C.J. p. 214
52 C.J.S. s 417 (7) p. 66

Reinagel v Walnuts Residence Co. (1946)
239 Mo App 701
194 SW 2d 229
Triggiani v Olive Oil Soap Co. (1951)
12 N.J. Super 227
79 A 2d 471

34 25 ALR 1273, 1315
39 ALR 294, 302
58 ALR 1411, 1419
75 ALR 154, 166
97 ALR 220, 232
132 ALR 863, 880
25 ALR 2d 496, 517
49 Am. Jur. 2d s 825 p. 792
Comment; 17 Minn. L.R. 819, 820
36 C.J. p. 214
52 C.J.S. s 417 (7) p. 67
Rio v Rio (1960) 22 Conn. Supp. 181, 164 A 2d 546

35 25 ALR 1273, 1335
39 ALR 294, 305
58 ALR 1411, 1422
75 ALR 154, 171
97 ALR 220, 242
163 ALR 587
25 ALR 2d 496, 543-558, 563
49 Am. Jur. 2d s 817 p. 781
Comment, 32 Tenn. L.R. 323

Bennett v District Heights Apt. (1969)
252 Md. 655, 251 A 2d 215
Ellis v Drab (1953) 373 Pa. 189, 94 A 2d 189
Campbell v Francis (1964) 378 SW 2d 790 (Tenn)
Yarborough v Smith (1965) 66 Wash. 2d 365, 402
P 2d 667

36 25 ALR 2d 496, 543
49 Am. Jur. 2d s 817 p. 782
Workman v Goldford (1967) 86 Ill App 2d 403,
230 NE 2d 574
Coenen v Buckman Building Corp. (1967)
153 NW 2d 329 (Minn)
Pierpont v Busa (1967) 27 App Div 2d 881,
278 NYS 2d 43

37 More Important Articles.

Comment, 41 Colum. L.R. 349
Gareau, 16 Cleveland-Mar L.R. 301
Paulsen, 5 Washburn L.J. 300
W.E. Shipley, 26 ALR 2d 610

See also,

25 ALR 1273, 1301
39 ALR 294, 301
58 ALR 1412, 1417
75 ALR 154, 164
97 ALR 220, 230
49 Am. Jur. 2d s 822 p. 787
Binns, 39 Wash. L.R. 345, 362
Comment, 31 Chi-Kent L.R. 271
" 35 Ill. L.R. 886
" 25 Maryland L.R. 81
" 13 Minn. L.R. 155
" 29 N.A.C.C.A. L.J. 70
" 8 Temple L.Q. 550, 551
" 29 Tenn. L.R. 307
36 C.J. p. 220
52 C.J.S. s 417 (13) p. 85
2 Harper & James, s 27. 17 p. 1516
Noel, 30 Tenn. L.R. 368, 386-387
Prosser, s 63 p. 407
Stewart, 8 Wm. & Mary L.R. 697

38 49 Am. Jur. 2d s 805 p. 762
Comment, 35 Chi - Kent L.R. 159
" 9 Colum. L.R. 85
" 12 Howard L.J. 137, 138
" 6 Texas L.R. 390, 391
" 62 U. Pa. L.R. 301
52 C.J.S. s 417 (6) p. 53
Prosser s 63 p. 406
Schlegel, 19 Chi-Kent L.R. 317
Taylor, 3 Ala. L.R. 335, 349

Sackett v Gottlieb (1960) 187 Cal.App. 2d 760, 9 Cal. Rptr. 831
Landsay v Cahn (1959) 220 Md. 24, 150 A 2d 739
Snyder v I. Jay Realty Co. (1959) 30 NJ 303, 153 A 2d 1 78 ALR 2d 95.
Jackson v Land (1964) 391 P 2d 904 (Okl)
Garafano v Neshobe Beach Club Inc. (1967) 126 Vt. 566, 238 A 2d 70
Taylor v Virginia Constr. Corp. (1968) 209 Va. 76, 161 SE 2d 732

39 Kuhn v Sd Heavearich Co. (1902) 115 Wis. 447
91 NW 994, 995
See al o, Nash v Searcy (1934) 256 Ky. 234
75 S.W. 2d 1052
Boe v Healy (1969) 168 N.W. 2d 710 (S.D.)
Woods v Forest Hill Cementary (1946)
192 SW 2d 987 (Tenn)

40 Coupe v Platt (1899) 172 Mass 458
52 NE 526
See also, Bissell v Lloyd (1881) 100 Ill. 214
Toole v Beckett (1878) 67 Me 544
24 Am Rep. 54
Cf. Morrocco v Felton (1970) 270 A 2d 739 (N.J.)

41 Comment, 10 Temple L.Q. 187, 188
Harkrider, 26 Mich. L.R. 260, 403
Jacobs, 15 Conn. B.J. 315, 322
Cf. Supra 684

42 25 ALR 1273, 1278-1285
39 ALR 294, 295-296
58 ALR 1411, 1413-1414
75 ALR 154, 155-158
97 ALR 220, 221-223
25 ALR 2d 364- 368
25 ALR 2d 444, 447
26 ALR 2d 468, 479, 547, 576
49 Am. Jur. 2d s 806 p. 762
Binns, 39 Wash. L.R. 345, 362
52 C.J.S. s 417 (6) p. 57
Jacob, 15 Conn. B.J. 135, 320-321

43 Comment, 5 Mich. L.R. 216
" 8 Temple L.Q. 550, 551
Fantacone v McQueen (1961) 196 Cal. App. 2d 477
16 Cal Rptr. 630 stairway.
Campagna v Cozzi (1965) 207 NE 2d 739 - porch
Gula v Gawel (1966) 71 Ill. App. 2d 174, 218 NE
2d 42 - stairway.
Paytan v Rowland (1967) 208 Va. 24, 155 SE 2d
36 - porch

44 Dinnan v Jozwiakowski (1968) 242 A 2d 747 (Conn)
Cf. Gula v Gawel (1966) 71 Ill. App. 2d 174
218 NE 2d 42

45 Primus v Bellevue Apartments (1950) 241 Iowa
1055, 44 NW 2d 347, 350

46 49 Am. Jur. 2d s 808 p. 765
Comment, 12 Howard L.J. 137, 138
" 8 Temple L.Q. 550
" 32 Tenn. L.R. 323, 324
" 12 Texas L.R. 236
German, 30 Taxas L.R. 131, 132
Harkrider, 26 Mich. L.R. 260, 404
2 Harper & James s 27. 17 p. 1517 - 1518
Maher, 10 South Carolina L.R. 307, 316
Noel, 30 Tenn. L.R. 368, 388
2 Powell s 234 (2) (b) p. 335 - 338
Prosser s 63 p. 420 - 421
Restatement 2d s 360 comment d
Robinson, 29 Boston U.L.R. 423, 424
Schlegel, 19 Chi-Kent L.R. 317, 318-319
Thompson, 1952 U. Ill L.R. 417, 419

47 25 ALR 1273
39 ALR 294
58 ALR 1411
75 ALR 154
97 ALR 220
25 ALR 2d 444, 447
36 C.J. p. 213
52 C.J.S. s 417 (7) p. 58
Noel, 30 Tenn. L.R. 368, 385
2 Powell s 234 (2) p. 336
Schlegel, 19 Chi-Kent L.R. 317, 318

48 11 ALR 106
25 ALR 1273, 1279
58 ALR 1411, 1414
75 ALR 154, 156
97 ALR 220, 221
49 Am. Jur. 2d s 806 p. 763
Harkrider, 26 Mich. L.R. 260, 403-404
Jacobs, 15 Conn. B.J. 315, 322
Schlegel, 19 Chi-Kent L.R. 317, 318

49 26 ALR 2d 468, 532

50 26 ALR 2d 468, 576
43 ALR 1292

51 43 ALR 1292, 1298
26 ALR 2d 468, 595
49 Am. Jur. 2d s 880 p. 863
36 C.J. p. 217
52 C.J.S. s 417 (10) p. 74
2 Powell s 234 (2) p. 335

There are some jurisdictions which exclude these from the landlord's control, see continued.....

Comment, 12 Howard L.J. 137, 139
6 Texas L.R. 390, 391
eg. Miles v Tracey (1906) 28 Ky. L.R. 621
89 S.W. 1128

52 25 ALR 2d 576
49 Am. Jur. 2d s 878 p. 849
36 C.J. p. 217
52 C.J.S. s 417 (11) p. 76
Prosser s 63 p. 421

53 86 ALR 2d 838

54 13 ALR 837, 837-839, 844-849
26 ALR 1254, 1256-7
52 ALR 864, 865-8
86 ALR 2d 791, 798 - 806

55 4 ALR 1453, 1471
84 ALR 2d 1143, 1149-1164

56 84 ALR 2d 1190, 1205
49 Am. Jur. 2d s 880 p. 854
Comment, 9 Colum. L.R. 85
" 12 Howard L.J. 137, 139
Hardy, 31 Missouri L.R. 319, 320-322
Mouber, 38 U.M.K.C. L Rev. 126
Sweeney, 37 Georgetown L.J. 119, 120-121
Taylor, 3 Ala. L.R. 335, 350

Iowa Apt. House Co. v Herschel (1911) 36 App D.C. 457
O'Hanlon v Grubb (1912) 38 App. D.C. 251
Wardman v Hanlon (1922) 52 App. D.C. 14, 280F 988, 26 ALR 1249
Gladden v Walker & Dunlop (1948) 83 US App DC 224, 168 F 2d 321
Marentette v Luechtelfeld (1954) 268 5 W 2d 44 - Mo.
Thompson v Paseo Manor South Inc. (1959) 331 SW 2d 1 - Mo.
Green v Kahn (1965) 391 SW 2d 269 - Mo.
Minton v Hardinger (1968) 438 SW 2d 3 - Mo.
Coleman v Steinberg (1969) 54 NJ 58, 253 A 2d 167
Lang v Henderson (1948) 147 Tex 353, 215 SW 2d 585
Cf. Smith v M.P.W. Realty Co. (1967) 423 Pa 536, 225 A 2d 227
Cowan v One Hour Velet Service (1967) 157 SE 2d 843 - W. Va.

Contra
Yuppa v Whittaker (1958) 145 A 2d 255 - R.I.

57 Minton v Hardinger (1968) 438 S.W. 2d 3

58 Ibid 7

59 Gladden v Walker and Dunlop Inc. (1948) 168 F 2d 321, 322

60 58 ALR 1433, 1434
49 Am. Jur. 2d s 803, p. 756
52 C.J.S. s 417 (6) p. 54
Noel, 30 Tenn. L.R. 368, 387
Prosser s 63 p. 419
Rhynhart, 20 Maryland L.R. 1, 40.
Thompson, 1952 U. Ill. L.F. 417, 422-423

61 25 ALR 1273, 1285
30 ALR 1390
39 ALR 294, 297
49 ALR 564
58 ALR 1411, 1414
75 ALR 154, 158
97 ALR 220, 223
25 ALR 2d 444, 483
26 ALR 2d 468, 483
49 Am. Jur. 2d s 807 p. 764 - 765
Prosser s 63 p. 421

62 Reardon v Baker (1967) 231 NE 2d 548

63 Glynn v Boston Housing Authority (1967) 224 NE 2d 461 (Mass)

64 See generally; L.S. Tellier, 12 A.L.R. 2d 217 (1950)

65 Harris v Ellis Realty Inc (1966) 215 NE 2d 797

66 Hardin v Elvitsky (1965) 42 Cal. Rptr.748, 232 CA. 2d 357
Meiners v Mayer (1970) 119 Ill.App. 2d 94, 255 NE 2d 201
Saunders v Romanos (1969) 245 NE 2d 757 (Mass)
Geesing v Pendergrass (1966) 417 P. 2d 322 (Okla)

67 Tenant's Child:

Wheeler Terrace Inc. v Lynott (1967) 234 A 2d 311 (D.C.)
Nesmith v Starr (1967) 115 Ga. App 472, 155 SE 2d 24
Terry v Sweeney (1967) 420 SW 2d 368 (Mo)
Conroy v 10 Brewster Ave Corp. (1967) 97 NJ Super 75, 234 A 2d 415
Coleman v Steinberg (1969) 253 A 2d 167, 54 NJ 58
Taylor v Virginia Constr. Corp. (1968) 209 Va. 76, 161 SE 2d 732

Tenant's Grand-Parent:

Levine v Katz (1968) 132 U.S. App. D.C. 173, 407 F 2d 303

68 Richter v Koff man (1969) 223 So. 2d 876 (La)
Labreque v Holmes (1963) 159 Me 122
189 A 2d 380

Liability Of Lessor Of Neighbouring Premises

It has been seen that the tenant is unable to recover from his landlord for nuisances which exist on the premises demised to him.[1] Can he recover in respect of a nuisance existing on parts demised not to him but to other tenants? Under the law of nuisance, a lessor is liable for a nuisance on premises demised by him if he knew of it at the time of the demise,[2] if he has a duty to repair or if he has an express or implied right to enter and do repairs.[3] In such a situation the occupier of neighbouring premises may sue him if his own use and enjoyment of his property is affected.[4] Should it make any difference that the occupier of the neighbouring premises is also the defendant's tenant or that the two dwelling units concerned are both in the same house? It is submitted that this fact is irrelevant in the same way that it is irrelevant when considering the duties of a lessor as occupier of parts in his control towards his neighbours that these neighbours are also tenants.[5]

Applying these normal rules of nuisance, some interesting possibilities emerge. Taking a simple example, suppose that A rented a flat in a house owned by X and that B rented the flat above. Dampness in flat B spread down so as to interfere with A's enjoyment of his own flat. Direct application of the law of nuisance would permit A to recover from X if he

knew of the dampness at the time of the demise or if he ought to have known of it or if he had an express or implied right to enter and do repairs. Indeed, there seems no reason why, in appropriate circumstances, the tenant of flat A should not be able to sue X as landlord of flat B and then the tenant of flat B sue X as landlord of flat A. Suppose that vermin bred in both flats and that sometimes they travelled into the neighbouring flat. The tenant of flat A could bring an action against X in respect of those vermin which came from flat B into his flat. The tenant of flat B could bring a like action against X for vermin travelling in the opposite direction.

In the case of defects which exist in one flat but cause interference to another then the present argument may prove useful. The limitations imposed by the law of nuisance do, however, need to be noted; only the occupant tenant and not his family or guests can sue for this tort[6] and then there is doubt whether even he can recover for personal injuries.[7]

---

1 Supra 632, 647

2 Supra 632

3 Supra 647

4 eg Brew Bros v Snux (1970) 1 Q.B. 612

5 Supra 705

6 Malone v Laskey (1907) 2 KB 141
In Billings v Riden (1958) AC 240 at p. 254, 264, House of Lords expressly stated that on this point Malone v Laskey was still good authority. See further supra.

7 See Salmond, "Torts" (15th ed) at p.
Cunard v Antifyre (1933) 1 KB 551.

Part VI
The Remedies of the Slum Tenant

Tenant's Right to Damages

It has been seen in many parts of the discussion that the normal remedy of the common law for landlord's breach of an obligation to repair and maintain his property is an action for damages. This has been true of his obligation for furnished premises,[1] under section 6 of the Housing Act 1957[2] and for the covenant of quiet enjoyment.[3] It is proposed to draw together the previous references made as to this remedy and then to evaluate its utility to the slum-tenant seeking an improvement in his living condition.

The rule governing remoteness of damages in contract was stated by Alderson B. in Hadley v Baxendale.

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." 4

Applying this test to the case of a landlord who has broken his repairing obligation, what damages are likely to be recovered by the tenant?

The natural damage which flows from the breach

---

1 Supra 240
2 Supra 427
3 Supra 367
4 (1854) 8 Exch. 341, 354

is obviously the loss to the tenant of the use of a house which is properly repaired. If the obligation had been carried out by the landlord, the tenant would have had the enjoyment of a house in a repaired condition. The natural result of the landlord's breach is that the house is in a condition below that to which the tenant is entitled under the lease. Prima facie, the difference between these two states of repair is the cost of repair and this cost should find some reflection in the award of damages to the tenant.[5]

The foregoing argument gained some approval in the Court of Appeal decision in Hewitt v Rowlands[6] Horridge J. noted that the measure of damages in the case of a breach by a tenant of a repairing covenant was the damage to the reversion and that the cost of repairs is one factor to be taken into account in assessing this damage. He thought that on principle there was no reason why a similar rule should not apply to cases where the landlord was being sued. But he approached the subject with caution,

> "It may be that there may be cases in which the estimated cost of repairs could properly be looked at not as necessarily themselves being the damages but as enabling the tribunal to ascertain what damage the tenant has suffered. There may be other cases possibly where it would be almost useless to look at it."7

---

5 This is the view of the American law: cases collected, Annot. 28 ALR 1448, 1501, 28 ALR 2d, 446, 484
But see note, 102 Sol. J. 839 (1958)

6 (1924) 93 L.J.K.B. 729

7 Ibid 732

One of the factors to be taken into account in deciding how much importance to give to the cost of repairs is the length of the tenant's term,

> "there may be cases in which the cost of the repairs would not be applicable; the tenancy might have expired altogether, and, therefore, it would be ridiculous to give the tenant the whole money for putting the landlord's premises in repair."8

Apart from this decision, there is little guidance to be found on the damages recoverable by the tenant on the landlord's breach.[9] This lack of authority contrasts strikingly with what is available when one is dealing with the landlord's damages on breach by the tenant and is, no doubt, partly attributable to the fact that tenants tend not to litigate unless they have suffered physical harm, damage to their property or some other major loss. The more common and every-day burdens of living in substandard housing are borne without the exercise of legal rights, without redress.[10]

Under English law, the tenant can recover for physical injury or damage to property if such are the natural consequences of the landlord's breach. For

---

8 Ibid 731

9 See Note, 86 Sol. J. 365 (1942)
Note, 92 Sol. J. 598 (1948)

10 Cf. Note, 109 L.J. 634 (1959)
In Perera v Vandiyar (1953) 1 AER 1109 and Hart v Rogers (1916) 1 KB 646 sums were awarded for inconvenience but these were not the real damages sought by the tenant nor is it clear how much was awarded for what types of inconvenience.

example, the tenant in Summers v Salford Corp.[11] was awarded damages for injury suffered when a window crushed his hand and in Griffin v Pillet[12], the tenant recovered for injuries sustained by falling into a cellar as a result of the lessor's breach of his covenant to repair. Damages were awarded for harm caused to furniture in Hewitt v Rowlands[13] and Horrex v Pickwell.[14]

It is interesting to compare the American law on this point.[15] Many cases have held that the damages recoverable for breach of the lessor's agreement to repair are limited to the difference between the rental value of the premises as they are and what it would have been if they had been put and kept in repair. It has been held that damages for injury to the person or property of the tenant are too remote as not being contemplated by the parties at the time of the agreement.[16] Many jurisdictions, however, permit recovery on the basis that breach of the covenant also gives rise to an action in tort.[17]

---

11 (1943) A.C. 283

12 (1926) 1KB 17

13 (1924) 93 L.J. KB 729

14 (1958) C.L.Y. 1461
109 L.J. 634

15 See: 51C Corpus Juris Secundus "Landlord & Tenant" Sec. 373 (5) at p. 994
52 C.J.S. Sec 417 (4) at p.43
Cases collected; Annot, 78 ALR 2d 1238
Harkrider, 26 Mich. L.R. 383, p.392
Prosser, "Torts" (3rd Ed. 1964) Sec. 63 at p. 421

16 eg Cooper v Roose (1949) 151 Ohio St. 316
85 N.E. 2d 545
Cf. Brown v Toronto General Hospital (1893) 230 R. 599, 604 per Boyd C.

17 Supra 552

A novel attempt was made in John Waterer v Higgins[18] to recover for loss of the tenant's security under the Rent Acts when the landlord's breach caused her to move. In that case no damages were given under this head because the tenancy was created before the Rent Acts and hence it was not within the contemplation of the parties at the time the contract was made that the loss of this protection would be the result of the breach. However, many tenancies will have been entered into at a time when this protection must have been in the parties' contemplation and so damages should be recoverable for it if the landlord's breach causes its loss as when a closing order is made or the tenant can no longer be reasonably expected to stay on.

In some cases, the condition of the premises may become so bad that the tenant is forced to move out until they are repaired. Is he able to recover the cost of moving out, living elsewhere and thenmoving back in again? The case of Green v Eales,[19] decided in 1841, held that he was not able to do so. The lessee sought damages arising from the lessor's breach of an express covenant to repair. He had been forced to move to other premises, equip them for his trade and live there until the repairs were eventually carried out. The Court of Exchequer Chamber rejected his action

---

18 (1931) 47 T.L.R. 305

19 (1841) 2 Q.B. 225
114 E.R. 88

for the above expenses. Lord Denman C.J. delivering the judgement of the Court, said,

> "We are of opinion that the defendant was not bound to find the plaintiff another residence whilst the repairs went on, any more than he would have been bound to do so if the premises had been consumed by fire."20

This decision does not seem to have been overruled but it is submitted that it is no longer good law. Scrutton J. evidently did not think it binding in Hart v Rogers where he said,

> "As to the defendant's counter-claim, I should have given him, if he had moved after the first leakage, the cost of substituted lodgings until the premises were fit again."21

Comparison with Proudfoot v Hart[22] in which the landlord covenantee was awarded damages for the loss of rent from the house while the repairs were being carried out casts doubt on the authority of Green v Eales. What is good for the goose is good for the gander. Damages for the cost of living elsewhere have been recovered in at least three reported cases[23] on the

---

20 (1841) 2 QB 225, 238
114 ER 88, 93

21 (1916) 1 KB 646
Damages were actually recovered for substituted rooms when tenant did eventually leave.

22 (1890) 15 Q.B.D. 42.
76 Sol. J. 356 (1932)
See Note, 102 Sol. J. 839, 840 (1958)

23 Grosvenor Hotel Co. v Hamilton (1894) 2 Q.B. 836
Cruse v Mount (1933) 1 Ch 278
Perera v Vandiyar (1953) 1 AER 1109
cf. Cross v Piggott (1922) 32 Man. 362
69 D.L.R. 107
Where the tenant was not entitled to quit and so could not recover for the cost thereof.

breach of the implied warranty of quiet enjoyment and there seems no valid distiction between this covvenant and one requiring the landlord to do repairs.

At present, the tenant is unlikely to find much comfort in a right to seek damages. It involves him in initiating legal proceedings (unless he counterclaims in the landlord's action for rent) and hence the burden of activating the legal process is upon him. This may have a salutory effect in jolting the slum tenant from his inertia and apathy, the responsibility assumed in deciding to litigate may be self-strengthening and lead to positive attempts to better his slum environment. Unfortunately, the typical slum tenant is unlikely to have such reserves of initiative and self confidence. He is most unlikely to want to face judges and courts unless the likely benefit outweighs his fear and hostility. Even if legal aid is obtained, the damages would need to be sufficiently large before the time and expense of taking legal action would be justified. In addition, the sole litigant faces the fear of retaliation from his landlord. All these factors lead to the conclusion that it is only when substantial damages are recoverable that the tenant is likely to litigate.[24]

---

24 The remedy of an action for damages has been said to ignore "the high expense and relatively low payoffs for tenants who choose to litigate, the irritation and frustration of time consuming suits (and) the relative unavailability of legal services".

Lipsky and Neumann, 44 Tulane L.R. 36, 55 (1969)

In fact, damages awarded are often nominal. As has been observed,

> "The trouble about an action for damages in this type of case is, however, that the amount of damages claimable by the tenant on the basis laid down (in Hewitt v Rowlands) will often be purely nominal, and bear no relation to the cost of carrying out the repairs. For instance, a building may not look very pleasant if painting and repointing of the exterior wall is not carried out; but can it be said that yearly tenants of offices on the first floor have suffered from a considerable diminuation in the value of those premises to them as a result? The remedy is in fact inadequate in a great many cases."25

On a purely financial basis, the game may not be worth the candle.

Another defect of damages is the time involved. The tenant with a leaking roof requires immediate action but delay is inherent in the legal process. As Prof. Street has observed,

> "It would take him at least a month to obtain a legal aid certificate, and perhaps an average of another three months before the County Court could hear his claim."26

Dr. Valentine has made the same point in an amusing yet forceful way,

> "If the roof leaks and the lavatory is blocked -- the tenant can go to the County Court for redress. Particulars of Claim, Particulars of Defence, and possibly a Counterclaim that the tenant has thrown objects down the lavatory, Requests for Further and Better Particulars of the Particulars of Claim, a Surveyor's Report, an adjournment because the landlord is unwell, the

---

25 Sweetman, 19 Conv. 440, 443 (1955)

26 Street, "Justice In The Welfare State" (1968)

Long Vacation - none of these assist the damp and constipated tenant." 27

The most serious defect of damage as a remedy for breach of a duty to repair is that it does not go to the root of the problem. At most, the tenant will receive compensation for the landlord's breach. Damages will not in themselves get the roof or toilet repaired; the cause of complaint is not remedied.[28] All in all, one is forced to the conclusion that an action for damages is a hollow remedy for many tenants.[29]

---

27 D. G. Valentine, 37 Political Quarterly 300, 304 (1966)
Cf. Hamlar, 49 J. of Urban Law 201, 213 (1971
Comment, 1968 Washington U.L.Q. 461, 476

28 Lipsky and Neumann, 44 Tulane L.R. 35, 55 (1969)
Angevine and Taube, 52 Mass L.Q. 205, 212 (1967)

29 Cf. Comment, 1968 Washington U.L.Q. 461, 476

The Right To Vacate

There seems to be no authority that would entitle the tenant to terminate the lease and vacate the premises upon the landlord's breach of an obligation to repair in the absence of an express provision to this effect.[1] But, the point is really only of academic interest for most low-income tenants as they hold on weekly or monthly tenancies and may terminate simply by giving the statutory four weeks' notice under Section 16 of the Rent Act 1957.[2]

Assuming that the tenant can terminate the tenancy, the remedy is of little use to those with low-incomes. It could only be an effective remedy if there existed a plentiful supply of suitable alternative housing to which the tenant could move. Of course, this is not the state of the housing market and the tenant who decided to vacate may well end up on the list of the homeless.[3] Even if he is successful in finding new premises, he will often simply be exchanging one substandard housing unit for another. This remedy, like that of damages, also fails to deal with the basic problem: the substandard house is not repaired but remains on the market to inflict its ill effects on new tenants. As a remedy for the low-income tenant, the right to vacate is a non-starter.

Footnotes on next page

1 Adkin: "The Law Of Dilapidations" 6th Ed (W.A. West), 1963, p. 53.

Walton and Essayan; "A Handbook Of The Law Relating to Landlord And Tenant" (1961) p.168.

As regards a temporary vacation, the tenant may be able to recover its costs in an action for damages, supra.

Also, the landlord may deprive the tenant of the full use of the premises in order to carry out repairs;

Saner v Bitton (1878) 7 Ch.D 815

2 The Canadian legislation which amended the law relating to residential tenants generally permits the Court to terminate the tenancy on such terms as it thinks fit should a party breach his obligations;

S.B.C. 1970 c 18 section 49 (3) (a)

S.N.S. 1970 c 13 section 10 (6) (c)

R.S.O. 1970 c 236 section 96 (3) (a)

The Manitoba Statute states that a failure by a landlord or tenant to fulfil certain obligations including those of repair shall be sufficient reason for the non-offending party to terminate a tenancy agreement;

R.S.M. 1970 L.70 s 98 (3) added by

S.M. 1971 c 35s 10

cf Levi, Hablutzel, Rosenberg and White, "A Model Residential Landlord-Tenant Code" (1969) Sections 2 - 204, 2 - 205 criticized by Daniels, 59 Georgetown L.J. 909, 927-928 (1971.

3 Supra 348

Specific Performance - England

Until recently, it seems to have been the generally accepted view that specific performance was not available to enforce the landlord's covenant to repair. The decision in Jeune v Queens Cross Properties[1] discredits this view.

A leading text book states boldly that the remedy of specific performance is "inapplicable" to a breach of the covenant to repair and that "the Court of Chancery has consistently refused to grant this remedy in aid of a contract or promise to perform work or services."[2] Two writers of articles dealing with remedies for breach of the covenant to repair arrive at the same conclusion. One considers that "an action for specific performance would be the ideal remedy" but goes on to claim that "it is well settled law that no such action will lie".[3] The other writer goes so far as to say that "the rule seems too well established to admit of any possible challenge, short of legislation. And that would certainly be extremely difficult to frame adequately."[4]

The defendant company in Jeune v Queens Cross Properties Ltd. had covenanted to maintain, repair and

---

1 (1973) 3 AER 97

2 B.W. Adkin, "The Law of Dilapidations" 6th ed (1963) p. 104

3 A. E. Hughes, 65 L.Q.R. 26 (1901)

4 J. B. Sweetman, 19 Conv. 440, 443 (1955)

renew the structure of a building let to the plaintiffs. Owing to the defendant's breach of this covenant, the stone balcony of the building partially collapsed. The plaintiffs now brought an action claiming an order "that the Defendant Company do forthwith reinstate the said balcony in the form in which it existed prior to its partial collapse." Pennycuick V-C made an order in these terms. He first considered the common sense and justice of the claim. Viewed from this light, it seemed perfectly clear that this was the appropriate relief.[5] A mandatory order on the defendant to reinstate the balcony was a much more convenient order than an award of damages. There was "nothing burdensome or unfair in the order sought."[6]

The only problem for the learned judge to contend with was the view of some textbook writers that specific performance will never be ordered of repairing covenants in a lease. Against this view, he referred to the general law that in an appropriate case the Court will decree specific performance of an agreement to build providing certain conditions are satisfied.[7] The building work must be clearly defined by the contract; the plaintiff's interest must be substantial

---

5 (1973) 3 AER 97, 98

6 Ibid 99

7 Ibid. He quoted Snell's "Principles of Equity" 26th ed (1966) p. 647 in support. These conditions have their origin in Wolverhampton Corp v Emmens (1901) 1 QB 515 and Molyneux v Richard (1906) 1 Ch 34.

and of such a nature that an award of damages would be inadequate compensation and, finally, the defendant has to be in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass.[8] Pennycuick V-C found all these conditions to be satisfied in the case before him. He drew particular attention to the fact that the balcony was not included in any of the leases.[9]

The difficulty arose from a dictum by Lord Eldon L.C. in Hill v Barclay[10] decided in 1810. The tenant in that case had sought relief against forfeiture for failure to repair. Lord Eldon contrasted the remedies available to the landlord where the tenant had failed to pay rent. He could bring an ejectment for such non-payment and he could also compel the tenant to pay the rent. The second remedy was not available for breach of the covenant to repair,

> "He cannot have that specific relief with regard to repairs. He may bring an action for damages: but there is a wide distinction between damages and the actual expenditure upon repairs, specifically done. Even after damages recovered the landlord cannot compel the tenant to repair: but may bring another action. The tenant therefore, standing those actions, may keep the premises until the last year of the term; and from the reasoning of one of the cases (Hack v Leonard)11 the conclusion is,

---

8 See infra 754 for a discussion of these conditions

9 (1973) 3 AER 97, 99

10 (1810) 16 Ves Jun 402 33 E.R. 1037

11 (1724) 9 Mod Rep 90 88 E.R. 335

> that the most beneficial course for the landlord would be, that the tenant, refraining from doing the repairs until the last year of the term, should then be compelled to do them. The difficulty upon this doctrine of a Court of Equity is, that there is no mutuality in it. The tenant cannot be compelled to repair."12

Although Pennycruick V-C considered Hill v Barclay to be an authority for the principle that a landlord cannot obtain an order against his tenant for specific performance of a covenant to repair, he did not think it applied to a landlord's covenant to repair.[13] It is respectfully submitted that this is the correct interpretation. A case brought by a tenant seeking protection from the consequences of his own breach of covenant to repair can hardly be authority for the situation where the tenant seeks a remedy for his landlord's breach of covenant. Hill v Barclay is clearly distinguishable on these grounds.

Counsel in Jeune v Queens Cross Properties Ltd. had been unable to find other authority in point.[14] There are, however, references to the point in cases decided prior to Hill v Barclay.[15] In The City of London v Nash,[16] there was a covenant to "new build". Lord Hardwicke thought that specific performance of a covenant to build could be granted but not of a

---

12 (1810) 15 Ves Jun 402 33 E.R. 1037, 1038

13 (1973) 3 AER 97, 99-100

14 Ibid 100

15 See Note, 77 Sol. J. 775 (1933)

16 (1747) 3 Atk 512 33 E.R. 1095

covenant to repair.[17] In Lucas v Commerford,[18] Lord Thurlow disapproved of Lord Hardwicke's view as to covenants to build but gave further support to the view that covenants to repair could not be specifically enforced.[19] As this case involved a covenant to "rebuild" not repair, the reference to covenants to repair was again obiter.

Having thus considered the justice of the case, the general law and the decision in Hill v Barclay, Pennycruick V-C concluded his judgement in Jeune's case;

> "I cannot myself see any reason in principle why, in an appropriate case, an order should not be made against a landlord to do some specific work pursuant to his covenant to repair. Obviously, it is a jurisdiction which should be carefully exercised. But in a case such as the present where there has been a plain breach of a covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made."20

It is respectfully submitted that the decision in Jeune is to be welcomed. The reason advanced for the view that a covenant to repair could not be specifically enforced was that such a remedy would involve continual supervision by the Court.[21] As A.L. Smith

---

17 Ibid 515, 33 E.R. 1095, 1097

18 (1790) 1 Ves 235, 30 E.R. 318

19 Ibid 235, 30 E.R. 318, 319

20 (1973) 3 AER 97, 100

21 Sweetman, 19 Conv. 440, 443 (1955)

M.R. remarked in a case on the specific enforcement of a covenant to build, there is not much force in this objection.[22] Providing the work to be done is sufficiently defined, there should be no difficulty of enforcement. In many cases, specific performance will undoubtedly be a more adequate remedy than damages.

There is, however, an important reservation to be made in the welcome given to the decision. In Jeune, Pennycruick V-C referred to the three conditions that have to be satisfied before a covenant to build can be specifically enforced and he noted that all those conditions were satisfied by the facts before him.[23] One of those conditions was that "the defendent is in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass."[24] If this condition must always be satisfied before a covenant to repair can be specifically enforced, much of the impact of the decision is lost. Only if the defect happens to occur in a part of the premises not demised by the landlord will the tenant have the remedy. Thus parts shared in common such as stairs and hallways come within the remedy but not those let to particular tenants. This is a severe restriction.[25]

22 Wolverhampton Corp v Emmons (1901) 1 Q.B. 515.

23 (1973) 3 AER 97, 99

24 Ibid

25 See generally on distinction between parts in landlord's possession and parts demised to tenants; Supra 680

Specific Performance - Canada

The Canadian law was thought to follow the generally accepted view[1] that, under the common law, there could be no specific enforcement of a covenant to repair.[2] In fact, however, there is a dictum in the Ontario case of Johnstone v Givens[3] to the effect that a mandatory injunction might be available to ensure that the landlord carries out his covenant to supply heat though there seems to be no reported case in which the remedy was awarded. Statute law in Ontario now permits a judge to make such order to deal with the landlord's breach of covenant "as the judge considers appropriate".[4] This widely drawn provision would seem to give statutory authorisation for an order of specific performance. A Nova Scotia statute permits a magistrate in a similar situation to "require the landlord - to perform any act".[5] This would also appear to authorise an order of specific performance.

---

1 Supra 749

2 Williams, "Notes on the Canadian Law of Landlord And Tenant" (3rd ed 1957) p. 399.

3 (1941) O.R. 281
4 D.L.R. 634

4 R.S.O. 1970 c 236 s 96 (3) (c)

5 S.N.S. 1970 c 13 s 10 (6) (b)

Specific Performance - United States

There is a division of opinion in the American law on the question whether specific performance of a covenant by the landlord to repair is available.[1] The cases are inconclusive. An early New York decision recognised the remedy,

> "Where a case presented to the equitable consideration of this Court, showing that the tenant would be irreparably injured without a specific performance of the covenant to repair, and that the damages would not afford a sufficient compensation, such specific performance would be compelled.
>
> It is not, therefore, correct to say that the courts have not the power to decree it in cases of this nature, although this power, as far as I can ascertain, has rarely, if ever been exercised, principally because damages were considered to constitute an adequate redress and because the difficulty and inconvenience of carrying such a decree into execution would be practically very great."[2]

But later New York decisions have held the remedy not to be available.[3] Cases for Massachusetts[4] and Iowa[5] have permitted the tenant to maintain an action for specific performance if the repairs are extensive and costly. More recent approval was given to specific enforcement of the landlord's covenant by the District of Columbia's U.S. Court of Appeal in Javins v First National Realty Co.[6] where it was noted as one of the contractual remedies available to the wronged tenant.[7]

Footnotes on following page

1 American Law of Property (Casner ed. 1952)
s 3.79 p.352.

Fairville, 9 Iowa Law Bulletin 250, 265-266 (1924)

2 Walsh, "Commentories on the Law of Real Property"
(1947) s 162, p.219

2 Vallotan v Seignett (1855) 2 Abb. Pr. (N.Y.)121

3 Beck v Allison (1874) 56 N.Y. 366

followed in Galland v Shubert Theatrical Co.
(1924) 124 Misc 371, 208 NYS 144
reversed on other grounds, 220 App. Div. 704
221 NYS 437

4 Jones v Parker (1895) 163 Mass 564
40 N.E. 1044

5 Darnell v Day (1949) 240 Iowa 665
37 NW 2d 277

6 (1970) 428 F 2d 1071 cert. den. 400 U.S. 925
See Supra 141

7 Ibid 1082

Chapter 19

Breach of Landlord's Obligation To Repair: The Tenant's Right to Repair And Deduct Cost From Rent

In a recent Chancery Division case, Lee-Parker v Izzet[1], Goff J. recognised that, on breach of the landlord's covenant to repair, the tenant has the right to do the repairs himself and then recover the cost thereof by deducting it from future rents. This chapter discusses this case and its common law background, looks at relevant statutes in this and other countries and then attempts to evaluate the merits of the decision from the viewpoint of landlords and tenants. Particular attention is paid to the merits of the remedy with regard to the low-income tenant and those factors which may restrict the use of this remedy by such tenants.

The plaintiffs in Lee-Parker v Izzet claimed as mortgagees the enforcement of a registered charge on several properties in different parts of London. Goff J. ruled, on the particular facts, that the contracts made by the mortgagor with the various occupiers for the purchase of the properties were not enforceable against the mortgagees but the occupiers were held entitled to liens on the properties for deposit money and interest thereon. Two of the occupiers had a tenancy independently

---

1 (1971) 1 W.L.R. 1688

of any contract to purchase and they claimed a further lien for the cost of repairs carried out by them or alternatively for the value of any permanent improvement effected thereby. It was held that they were not entitled to a lien, whether based on the landlord and tenant relationship, as repairers, or based on the vendor and purchaser relationship.[2] But the learned judge made the following order in their favour.

> "In so far as the repairs carried out by the (tenants) are within the express or implied repairing covenants of the first defendant, as landlord, including those implied by section 32 (1) of the Housing Act 1961, they are entitled to deduct the proper cost from future payments of rent and to the extent of any such proper costs they will not be liable to be sued for such rent."

The limits of this right were carefully noted,

> "For the sake of avoiding misunderstanding, I must add that of course the -- right can only be exercised when and so far as the landlord is in breach and any necessary notice must have been given to him."[3]

Origins and Development of the Remedy

Although this important decision was at first instance only, it is submitted that it goes a long way to clear up dicta and doubts which surrounded the tenant's right to repair and deduct for centuries. Goff J. referred to this right as "an ancient common law right".[4] Authority regarding this right appears

---

2 (1971) Ibid, 1694-1695
3 Ibid at p. 1693
4 Ibid at p. 1693 See for ancient authority, Hughes, 17 L.Q.R. 26 (1901)

however, to be inconclusive, stretched in isolated cases along the path of the common law, and in conflict. Dicta and doubt stretch far back into legal history.

The earliest authority seems to be a case decided in 1388[5] but it is not clear just what was decided,

> "Debt upon a lease for a term of years. Pynch: The defendant (sic, should clearly be plaintiff) leased to us by the deed which is here the said lands, and by the same deed he granted us that we might repair the said lands at the time they were ruinous at the expense of the plaintiff, and (the defendant) says that they were ruinous, and shows how on that account he repaired the said lands and messuages out of the said moneys etc. Judgement if action. Markem: The deed does not show that he ought to repair the said messuages and land out of the said rent; by which judgement and we pray our debt. Delk: He has said that the messuage was ruinous and defective, and that he has expended the money in repairs, by which payment. Markem: He has expended in reparation only 20 shillings and we pray our debt for the remainder."

The next case[6], decided in 1522, reveals how established the principle under discussion appeared to be though the reference to it is obiter,

> "For if the lessor covenants to repair the house and does not do it the lessee can repair it and stop so much money in his hand in spite of his deed, and if he has any trees growing upon the place he can cut them down and repair; but here, seeing that he has not pleaded it, he has lost the advantage of it, and the plaintiff had judgement of recovery."

---

5 Year Book Trin 11 R.2; tit Bar 242

6 Year Book Trin T 12 H.VIII 1

There is a like dictum in a case reported in Brooke's Abridgement (1573)[7]. This was an action for debt and the defendant contended that he had spent the sum in making repairs at the landlord's request and claimed judgement. The Court held that the plea was bad for the tenant did not have to carry out this request and was, in any event, bound himself to repair. But Brudnel C.J. said, "if the lessor is bound to repair by a covenant, it is a good plea".

These cases in the Year Books were approved by a majority of the Court of Queen's Bench in the 1591 case of Taylor v Beal[8]. The report in Croke's Reports is quite short and the relevant passages can be quoted in full,

> "Debt for rent reserved upon a lease for years. The issue being joined if the rent were paid or not, the defendant gave in evidence for part of the rent, that the plaintiff by covenant was to repair the house and did not, and that thereupon he expended part of the rent in repairing the house. The question was, If the evidence will maintain the issue?
>
> Gawdy conceived it did, for the law giveth this liberty to the lessee to expend the rent in reparations, for he shall be otherwise at great mischief, for the house may fall upon his head before it be repaired and therefore the law alloweth him to repair it, and recoup the rent.
>
> Fenner. It is no evidence; for if the lessor will not repair it, he is to have his covenants against him.
>
> Clench seemed he might well expend the rent in reparations, but he ought to have pleaded it, and cannot give it in evidence upon the general issue --."

---

7 Brooke's Abridgement (1573) Debt 27

8 (1591) Cro Eliz 222, 78 ER 478
1 Leonard 237, 74 ER 216

The report in Leonard shows the decision to have been more clearly favourable to the tenant,

> "Upon evidence to a jury, it was holden by Gawdy and Clench Justices that, if a lease for years be made and the lessor covenants to repair during the term, if now the lessor will not do it the lessee may do it and pay himself by way of retainer of so much out of the rent."

Yet, as noted by Goff J. in Lee-Parker v Izzet[9], their holding must have been "dicta only" as the actual decision was a majority one against allowing the tenant in the case before the court to deduct the cost of repairs from the rent: Fenner J. so deciding on principle while Clench concurred on the basis of the pleadings.

The doubts expressed by Fenner J. in Taylor v Beal were repeated just over a century later by Holt Ch. J. in Clayton v Kinacton.[10] In this case concerning inheritance, counsel had argued by analogy, "Where the lessor covenants to repair the house demised, the lessee in default of the lessor may repair and, in debt for the rent, upon nil debt pleaded, he may give in evidence what he has expended in reperations". But, according to the reporter, Holt Ch.J. said he doubted if that was the law unless it were part of the covenant that the tenant should deduct the cost of necessary repairs.[11]

---

9 (1971) 1WLR 1688 at 1692
10 See also, Sweetman, 19 Conv.441 at 444 (1955) (1698) 1 Ld Raym 419, 91ER 1178
11 Ibid at 420, 91ER 1178 at 1178

The next relevant case appears to be Waters v Weigall decided by the Court of Exchequer - 1795.[12] The demised premises had been damaged by tempest and, to prevent further damage, the tenant had done the repairs. He was now sued for rent and filed a bill to retain the amount of the repairs out of the rent. Macdonald C.B. said,

> "If the landlord is bound in law or equity to repair in consequence of the accident that has happened, and you were right in expending this sum in repairs for him, it is money paid to his use, and may be set off against the demand for rent. If you fail in making out these points, your ground of relief is destroyed in equity, as well as at law." [13]

Although relied on by Goff J. in Lee-Parker v Izzet as support for the dicta in Taylor v Beal permitting the tenant to repair and deduct,[14] it is clear that this statement by Macdonald C.B. is also obiter. The decision was actually against intervention and the statement itself is qualified by the words, "if ... you were right in expending this sum in repairs for him". This view of the statement is confirmed if one looks at the subsequent proceedings in the Court of King's Bench in which the tenant's plea was rejected without argument on the ground that it did not set off any certain debt, but uncertain damages, which would have to be assessed by a jury.[15]

---

12 (1795) 2 Anstr. 575, 145 ER 971
13 Ibid at p. 576
14 (1971) 1 WLR 1688 at 1693
15 (1795) 6 Term Rep 488, 101 ER 663
Cf Sweetman op cit n 9 at p. 446

From 1795 until the decision in Lee-Parker v Izzet, there appears to have been no cases directly on the point. There is, however, a reference to the topic in a dictum by Lord Denman C.J. in Horridge v Wilson[16] where, in an action for rent, the tenant argued that the value of the rent should be reduced by the cost which he had expended towards the repair of a party wall. The Lord Chief Justice dealt very briefly with the point,

> "It is enough to say that, if he is entitled to the deduction at all, he cannot have the advantage of it on the present record." [17]

Turning now to the text-book writers and other commentators, perhaps it is not surprising that agreement is lacking. Lord Chief Baron Gilbert in his work, "On The Action of Debt" supported the tenant's right to repair and deduct[18] whereas Platt on "Leases" rejected this view.[19] One author, after a comprehensive review of the authorities, has argued that "there exists most substantial authority" showing the existence of this right[20] while another has said there is only a glimmer of hope for the tenant in the matter of self-help and "the glimmer is both small and faint".[21] Woodfall's

---

16 (1840) 11 Ad1 & E 645, 113 ER 559
9 LJ QB 72
17 Ibid at p. 655, 113 ER 559, 563
18 At p. 442 - 443 (1760)
19 Vol 2 at p. 215 (1847)
20 Hughes op cit n 4 at 27
21 Sweetman op cit n 9 at 445

"Landlord And Tenant" cites only Taylor v Beal but says the case "would still seem to be the law"[22] whilst Foa's "General Law of Landlord And Tenant" refers to the tenant's right to repair and deduct only in relation to distress and submits that the cost of such repairs is not equivalent to payment of rent so as to reduce the amount for which the landlord may distrain.[23] Some writers have also attempted to confine the tenant's right to cases of emergency only.[24] In the light of these differing views, reference to Commonwealth and American cases may prove useful.

Canadian Law

Dicta in comparatively recent Canadian cases support the decision in Lee-Parker v Izzet.[25] Though observing that there was "a singular dearth of English or Canadian authority on this head of law", Boyd C. declared in Brown v Toronto General Hospital, a decision of the Ontario Divisional Court,

> "In the case of slight repairs the tenant is justified after notice of want of repair, and a reasonable time elspses, to expend what is needed in making the repairs and charging it against his landlord or taking it out of the rent." [26]

---

22 27th Ecl (1968) Vol 1 p.665 para 1490
23 8th Ed (1957) p. 559
24 See Sweetman op cit n 9 at 447
Note 86 Sdl. J. 365 (1942)
25 See generally
E.K. Williams "Canadian Law Landlord And Tenant". 3rd ed (1956) p.210
26 (1893) 23 OR 599 at 607

In the case of Park v Hammond before the Ontario Court of Appeal, Roach J.A. said obiter,

> "In a lease there may be express covenants binding the owner to repair and failure by him to repair may give the tenant the right to do so and set off the cost thereof pro tanto against the rent."[27]

A recent Ontario law, discussed later,[28] has given statutory authorisation to this right.

American Law

The right of the American tenant to repair and deduct seems to be well-established. The Corpus Juris Secundum declares,[29]

> "Where the landlord has stipulated to keep the demised premises in repair and fails to do so according to the terms of the lease, the tenant may generally, after reasonable notice to the landlord, make the repairs himself, and recover the expenses thereof from the landlord[30] or deduct the amount from the rent."[31]

Two recent cases from New Jersey and New York illustrate this rule. In Marini v Ireland[32], the tenant had made fruitless complaints to her landlord about a leaking toilet. When nothing was done, she hired

---

27 (1948) 2 DLR 679 at 681
28 Infra 778
29 51 C Corpus Juris Secundum (1968) s 369 p.972
30 cf Infra 769
31 See also
49 American Jurisprudence 2 d (1970)s842 p.809
1 American Law of Property (Casner Ed) 1952 s 3.79 p.352
Faville, 9 Iowa Law Bulletin 250 at 263 (1924)
See eg
Myers v Burns (1866) 35 NY 269
Cases collected Annot. 28 ALR 1448 at 1465
" 116 ALR 1228 at 1234
" 28 ALR 2d 446 at 464
32 (1970) 56 NJ 130, 265 A 2d 526 Supra 160

a plumber to do the job and then deducted the cost of his services from her rent. In a subsequent action by the landlord for the withheld rent, the Supreme Court of New Jersey upheld the right of the tenant to repair and deduct,

> "If, therefore, a landlord fails to make repairs and replacements of vital facilities to maintain the premises in a livable condition for a period of time adequate to accomplish such repair and replacement, the tenant may cause the same to be done and deduct the cost thereof from future rents. The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make necessary replacement or repair. If the tenant is unable to give such notice after a reasonable attempt, he may nonetheless proceed to repair or replace." 33

In Jackson v Rivera, a judge of the New York Civil Court upheld a tenant's right to repair and deduct on substantially similar facts saying,

> "It is surely audacious for this landlord to refuse to discharge his legal duties with regard to a facility so essential to the habitability of an apartment and then complain that the tenant should not be allowed to make herself his creditor."34

In an extremely interesting decision, Goodall J. of the New York City Civil Court has extended the

---

33 (1970) 265 A 2 d 526 at 535.
This case is especially useful as it shows that the remedy of repair and deduct applies to the implied warranty of habitability as well as to express covenants; see generally Supra 159

34 (1971) 318 NYS 2 d 7 at 9 per Leonard H. Sandler J. of Susskind v 1136 Tenants Corporation.
(1964) 43 Misc. 2d 588
251 NYS 2d 321

right to repair and deduct to cover a situation where the landlord was under no contractual duty, express or implied, to do repairs but where he owed the tenant a duty in tort. The tenant in Garcia v Freeland Realty Inc[35] had two small children who were eating the plaster and paint flaking off the walls of the tenement apartment he rented. When complaints to the landlord had no effect, he purchased the materials to replaster and repaint the walls so as to save his children from the dangers of lead poisoning. The learned judge found him entitled to recover from his landlord for the cost thereof and for a reasonable sum to compensate him for his labour. The reasoning behind this decision is subtle. He first found that had the condition continued unchanged and had the children, as a result, suffered from lead poisoning then a tort action might well have been instituted by the tenant on behalf of his children and himself to recover in tort for breach of a statutory obligation imposed upon the lessor. By doing the work, the tenant had, therefore, "prevented the commission of an actionable tort that might have remitted from inaction". The final part of the argument proceeded,

> "If damage based upon the commission of a tort is an appropriate award; then in my view, it is proper and desirable to reimburse a plaintiff for the reasonable cost of preventing or averting the commission of a tort after a defendant has had a reasonable opportunity to act and failed to do so in circumstances calling for action on his part." 36

35 (1970) 314 NYS 2d 215
36 Ibid 222

Repair And Bring Or Defend Action

Though prior to Lee-Parker v Izzet good recent authority was lacking in support of the tenant's right to repair and then deduct the cost thereof from the rent, such authority existed to support his right to repair and then recover the cost of such repairs in an action against his landlord.[38] In Green v Eales,[39] the landlord had covenanted to keep in repair all the external parts of the demised premises. Owing to the action of a local authority, a party wall gave way rendering the house uninhabitable. The lessee immediately called upon the lessor to repair. Six weeks after the accident, the lessor refused to do this whereupon the tenant, whohad moved to other premises, pulled down and began to rebuild the wall. He now brought this action claiming damages in respect of the following costs: rebuilding the wall, the papering and painting involved in the repairs, replacing certain fixtures and architect's charges. In addition to these damages in respect of the demised premises, the tenant also claimed damages relating to the expense of moving to new premises. At the trial, the judge directed the jury that the plaintiff was entitled to recover for all his expenses if they

---

38 But see Hughes op cit n 4 at 26
39 (1841) 2 QB 225, 114 ER 88

were reasonably incurred and the jury found in his favour. When the case came before the judge of the Exchequer Chamber, the argument was chiefly concerned with matters not relevant here though it was said on the landlord's behalf,

> "Strictly (though this is not insisted upon) the tenant, in such a case as this, had no right to rebuild and charge his landlord with the expense." [40]

The decision of the Court was given by Lord Denman C.J. The claim for damages in respect of substitute premises was rejected but the learned Lord Chief Justice continued,

> "The other items consist of the actual cost of repairing or replacing the fixtures, of the surveyor's charge for superintendence and of two sums for injury to the plate glass and plastering occasioned by the sinking of the wall. All these, except the two last, are free from question: and as to the last two we think the plaintiff entitled ...." (emphasis added)[41]

A recent decision of the Court of Appeal also supports the tenant's right to repair and seek damages. In Granada Theatres Ltd. v Freehold Investments (Leytonstone) Ltd.[42], landlords had covenanted to keep the main structure and premises in good structural repair. The roof was out of repair and the tenants served a schedule of dilapidations. Long negotiations followed in which the

---

40 (1841) 2 QB 225 at 236, 114 ER 88 at 93

41 Ibid at 23i, 114 ER 88 at 93

42 (1959) Ch 592. (1959) 1 WLR 570

parties differed as to the cost of repairs needed. The landlords sent a team of men to the premises and they commenced repairs to the roof but were ordered off by the tenants who subsequently did the repairs themselves. In this action, the tenants claimed, inter alia, £961 on damages representing the cost of these repairs carried out by them. Vaisey J. Held that repairs to the roof were within the landlord's covenant and ordered an inquiry into what damages had been sustained by the tenants in executing the repairs.[43] The Court of Appeal, by a majority decision,[44] held that if the works proposed to be done by the landlord's workmen would have satisfied the requirements of the covenant then the tenants would be unable to recover in view of the fact that they themselves had prevented the landlords from fulfilling such covenant. However, it seems to have been accepted by the entire court that, had the landlords been in breach of covenant, then it was open to the tenant to do the repairs and recover the cost thereof from the landlord. Jenkins L.J. said in his judgement,

> "The covenant is clearly not specifically enforceable, but I aprehend that, in the event of the landlord failing to do the repairs in a reasonable time, the tenant can, at his option, do the requisite repairs himself and claim the proper cost of so doing as damages flowing from the breach."45

---

43 (1958) 1 WLR 845

44 Jenkins L.J. dissenting

45 (1959) Ch 592 at 608, (1959) 1 WLR 570 at 580

The other two judges declared their full agreement with this judgement subject to one point not here relevant.

Even before Lee-Parker v Izzet cleared up doubts as to the tenant's right to repair and deduct, it would seem therefore that the tenant could have withheld rent and then, when sued for nonpayment, have met the landlord's claim with a counter-claim in respect of the cost of repairs.[46]

Doctrinal Questions

Throughout this recital of cases it will have been observed that there has been no discussion of doctrinal questions, the law has proceeded more by blank assertion than logical analysis. But such questions raised by legal commentators deserve mention.

It has been argued that permitting the tenant to repair and deduct would be contrary to two well-established doctines of the common law. Both these objections would seem to be unfounded. The first objection is that the cost of repairs is not the true measure of damages sustained by the tenant on breach of the landlord's covenants[47] and hence

---

46 Sweetman op cit n 9 at 444
Woodfall op cit n 22 at p. 655 para 1490
Tarrabain v Ferring (1917) 35 DLR 632 at 639
aff'd (1918) 2 WWR 172

47 Hewitt v Rowlands (1924) 131 L.T. 757

permitting him to deduct such cost would be "neither logical nor practical."[48] It would give him the choice of bringing an action on the covenant and recovering a lesser sum or repairing and deducting the full cost of repairs.[49] This argument is superficially appealing but fades on closer examination. As has been observed, "the tenant does not, in such a case, receive the amount expended as damages or, indeed, at all; since the permanent benefit accrues to the landlord, while the tenant only benefits by having the premises in the condition in which the landlord has expressly covenanted they should be maintained.[50]

The second objection is based on the unjust[51] and anomalous[52] doctrine of independent covenants. The effect of this doctrine is that breach of his covenant to repair by the landlord does not permit the tenant to withhold rent, but only to bring an action on the covenant.[53] But this doctrine is

---

48 Sweetman op cit n 9 at 444

49 Note, 102 Sol. J. 839 at 840 (1958)

50 Hughes op cit n 4 at 27
of Fairville op cit n 31 at 263

51 Infra 873

52 Infra 860

53 Hart v Rogers (1916) 1 KB 646
Taylor v Webb (1936) 2 AER 763

Goff J. noted in Lee-Parker v Izzet
"The landlord can sue for rent although he has not repaired." (1971) 1 WLR 1688 at 1693.

irrelevant in the present context. The tenant is not breaching his covenant to pay rent, he is merely making payments to the landlord in kind by providing him with the benefit of repair rather than cash payment.[54] It is respectfully submitted that Goff J. was entirely correct in Lee-Parker v Izzet in distinguishing cases decided on the doctrine of independent covenants.

"Repair and Deduct" Statutes

Some American states have long hard laws which enable the tenant to repair and deduct upon the landlord's breach of a repair obligation.[55]

---

54 Under the common law, "rent" can include non-monetary payment,

See Barnes v Barratt (1970) 2 WLR 1085
Doe d. Edney v Benham (1845) 7 QB 976 (cleaning a church)
Pitcher v Torey (1692) 4 Mod R 71 (provision of chattels)
Otherwise under the Rent Acts,
Barnes v Barratt above.

55 See on these Statutes

1 American Law of Property p. 348 (Casner ed 1967)
Bartlett, 18 Stanford L.R. 1397 (1966)
Comment, 1 California L.R. 280 (1912)
51 C C.J.S. p.936
Fossum, 53 California L.R. 304, 312 (1965)
Fuerstein and Shestack,45 Ill.L.R. 205,207 (1950)
Gray, 6 Montana L.R. 44, 48 (1945)
Loeb, 21 Hastings L.J. 290 (1970)
Maher, 10 South Cardina L.R. 307, 310 ( )
McElhaney, 29 Maryland L.R. 193,205 (1969)
Parsell, 7 Cornell L.Q. 386,387 (1921)
2 Powell, "The Law of Real Property" s 233 (2) p. 315 (1967)

California's statute, first enacted in 1872, is typical of these laws,

> "If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent."[56]

Other states having similar provisions are Montana,[57] North Dakota,[58] Oklahoma[59] and South Dakota[60] though Montana is the only other State to restrict the tenant's expenditure to only one month's rent.

Unfortunately, it has been observed that "the value of these statutes to the tenant is usually more apparent than real".[61] Restrictive interpretation by the Courts has been partly to blame[62] but other factors such as retalitory actions by the landlord[63] and restrictions on the tenant's right to repair[64] and waiver by the use of standard form

---

56 Cal. Civil Code s 1942 as amended by California Statutes 1970 c 1280. See also ibid s 1941.
57 Mont. Revised Code Am ss 42-201,202 (1947)
58 N.D. Century Code ss 47-16-12; 47-16-13
59 Okla Stat. Am tit 41 ss 31, 32 (1954)
60 S.D. Code ss 38. 0409, 38.0410
61 Fesum op cit n 55 at 312
62 Bartlett op cit n 55 at 1399
Fuerstein and Shestock op cit n 55 at 207
Gray op cit n 55 at 49.
63 Infra 793
64 Infra 796

leases[65] are of more general interest and discussed later.

During the past few years, other States have passed repair and deduct statutes. New York has had legislation since the 1930s[66] which enables a tenant of substandard housing to withhold rent from the landlord and pay it into Court. The rent is held on deposit by the Court until repairs are done when the money is given to the landlord. One of the defects of this law was that the landlord had little reason to take prompt action as the money would go to him eventually, in the meantime the tenant suffered. An amendment in 1965 went some way to remedy this situation by incorporating repair and deduct into the law. If the landlord fails to correct "necessary" repairs, the tenant may arrange to do so and may apply to the Court to have the bills paid out of rent monies on deposit.[67] Michigan has also included the right to repair and deduct as part of its recent tenants' rights legislation.[68] The Model Residential Landlord-Tenant Code, prepared for the American Bar Foundation,

---

65 Infra 977

66 Laws of 1930 ch. 871. Now Real Actions And Proceedings Law s 755 Infra 897

67 N.Y. R.A.P.L.s 755 (3)

68 Mich. Comp. Law Am.s 125.534 (5) (Supp 1969)
See generally,
Neal, 15 Wayne L.R. 836 (1969)

places considerable reliance on this remedy.[69]

Repair and deduct has also found a place in the statute law of some Canadian Provinces as part of the recent tenants' rights laws which have changed the very nature of the landlord tenant relationship with regard to residential tenancies.[70] These laws had their origin in the recommendations of the Ontario Law Reform Commission, one of which recommendations was that,

---

69 Levi, Hablutzel, Rosenberg, White, "Model Residential Landlord and Tenant Code" (1969) s 2-206.

It has been suggested that the Pennsylvania Rent Withholding Law (Pa. Stat Am. tit. 35s 1700-1 Supp 1969) also authorises a tenant to obtain rent monies in escrow in order to do repair,

Clough, 73 Dickinson L.R. 583 at 601 (1969)

Early drafts of the District of Columbia Landlord-Tenant Regulations contained an express provision confirming the tenant's right to repair and deduct but it was deleted on the grounds that the common law adequately protected this right,

Daniels, 59 Geo. L.J. 901 at 938 - 939.

70 For the Ontario Act, see

D.H.L. Lamont, "The Landlord And Tenant Act Part IV"
Jowell, 48 Can B.R. 323 (1970)

The British Columbia Act is noted in,
J.T. English, 5 U of Brit. Colum. L.R. 321-331 (1970)

> "Alternatively to an action on the obligation, a breach of the landlords' covenant to repair should give rise to a right in the tenant to effect the repairs himself, at a reasonable price, and deduct the repair expenses from the next ensuing rental instalments." 71

This recommendation found its way onto the statute books in the guise of amendments to the Landlord And Tenant Acts of Ontario and British Columbia providing that the landlord's statutory obligation to repair,

> ".....may be enforced by summary application to a judge .... and the judge may,
>
> ...(b) authorise any repair that has been, or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or set-off."72

The Nova Scotia law,[73] which also provides for a statutory duty on the part of the landlord to repair, makes no express reference to the right of the tenant to enforce this duty by repair and deduct. It is provided, however, that a magistrate to whom a complaint is made concerning a violation of the law may, "require the payment of money by the landlord or the tenant."[74] Hence, the landlord may

---

71 Ontario Law Reform Commission,"Report On Landlord And Tenant Law Applicable To Residential Tenancies" (1968) at p.45

72 R.S.O. 1970 c 236 s 96 (3)
The British Columbia Act, R.S.B.C. 1970 c 18s 49 (3) is substantially the same.

73 S.N.S. 1970 c 13

74 Ibid s 10 (6) (a)

be required to pay the tenant the cost of repairs carried out by him if the magistrate so orders.

Nearer home, Ireland has a repair and deduct provision. Where a landlord of a tenement fails or neglects to execute repairs to such tenement which he is bound by covenant, agreement or otherwise by law to execute, and has been called upon by the tenant to carry out such repairs, the tenant may do the repairs at his own expense and set off the amount against the next gale, or gales, of rent as the circumstances may require.[75]

England does not have any statute authorising the residential tenant to repair and deduct.[76] It does, however, have statutes somewhat similar in that

---

75 Landlord And Tenant Act 1931 s61 cf Rent Restriction Act 1946s 48 where it is provided that, if owing to the default of the landlord, controlled premises are not in good and tenantable repair, the Court may order the landlord to pay to the tenant such sums as, in the opinion of the Court, will be required to put the premises in good and tenantable repair. See generally, Note 83 Ir. L.T. 47 (1949)

76 The Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1948 reg 13 provides,

> "If the landlord fails to execute repairs which are his liability within three months of receiving from the tenant a written request specifying the necessary repairs and calling on him to execute them, the tenant may execute such repairs and, except to the extent to which under the term of Part I hereof the tenant is liable to bear the cost, recover the reasonable cost from the landlord forthwith.

they permit local authorities to repair, recover the cost thereof from the tenant in instalments and then enable the tenant to deduct such cost from the rent.[77] For instance, section 291 (2) of the Public Health Act 1936 enables local authorities to declare any expenses recoverable by them under the section to be payable with interest by instalments and provides that any such instalment,

> "May be recovered from the owner or occupier for the time being of the premises in respect of which the expenses were incurred, and, if recovered from the occupier, may be deducted by him from the rent of the premises:
>
> Provided that an occupier shall not be required to pay at any one time any sum in excess of the amount which was due from him on account of rent at, or has become due from him on account of rent since, the date on which he received a demand from the local authority together with a notice requiring him not to pay rent to his landlord without deducting the sum so demanded."

---

77 As far back as 1472 there were statutes permitting tenants to deduct amounts spent on paving the ground in front of the property if the owners failed to do: 12 & 13 Edw. IV (Local Act for Gloucester). A local Act applying to Calais of 1548 provided that if lessees or occupiers paved, they should,

> "abate and retain in his or their own hands as much of the rent due to the lessors as they can duly prove to have expended on the same paving; and the lessor, for so much as the same doth amount unto, to have no action for re-entry for non-payment of the same, except it be otherwise agreed between them."
>
> 2 & 3 Edw.VI c 38

See generally, F. Clifford; "A History of Private Bill Legislation" (1887) Vol 2 pp 259-268

Section 10 (5) of the Housing Act 1957 has a like provision with respect to recovery of expenses incurred by the local authority in repairing unfit houses. Therefore, even in the absence of the landlord's breach of covenant,[78] the tenant may be able to employ a method of repair and deduct if he is able to convince the local authority to exercise their statutory power to repair the premises on the landlord's default and the authority then decides to recover its expenses by means of section 10 (5).

It may be of interest to note that English statutes also provide for deduction from rent in circumstances other than those concerned with disrepair.[79] Under the Rent Act 1968, a tenant who has paid more rent than was legally recoverable from him as a regulated[80] or controlled[81] tenant may, without prejudice to any other method of recovery, deduct the excess from any rent payable by him to the landlord. Rating law has also adopted the method

---

78 The right recognised in Lee-Parker v Izzet applies only if the landlord is in breach of his covenant, express or implied.

79 See generally, Note, 84 Sol. J. 143 (1940)

80 Section 33 (2)

81 Section 62 (2). Note that the enforcement section relating to Part VI premises (s 76) does not expressly provide for this method of recovery.

of deduction from rent to enable the rating authority, on the landlord's default, to require the tenant to pay to it the rates due but then permitting the tenant to deduct such amounts from the rent.[82] The law of distress provides a further example. The Law of Distress Amendment Act 1908 provides protection to under-tenants against the seizure of their goods as a distress for rent due in respect of the premises leased to their own landlord. Such tenants must serve the distrainor with a written declaration stating what rent is due from him and the times at which future rents will become payable and their amount. Section 1 (1) of the Act provides that the declaration should contain an undertaking to pay to the superior landlord any rent so due or to become due, till the distress is satisfied. Section 3 deals specifically with the consequences, enacting that any of these payments shall be deemed to be to the immediate tenant of the superior landlord and the sums payable shall be deemed to rent. Where the under-tenant has made such payments to the superior landlord, he may deduct the amount thereof from any rent due or which may become due from him. This right to deduct also applies when payments are made under a notice given under section 6 of the Act, which enables superior landlords to collect from sub-tenants without distraining.

---

82 See General Rates Act 1967 ss 55-66

Evaluation Of Repair And Deduct From Landlord's Viewpoint

It is not difficult to see why some landlords will regard the tenant's right to repair and deduct with hostility. They face the prospect of losing rent monies which are paid to building contractors or used by the tenant to pay his own labour and for raw materials. Apart from such general objections to any form of rent withholding, tenant repair and deduct carries with it special problems for the landlord. The tenant is unlikely to have the skill and knowledge to see that major repairs are properly carried out. The landlord might find himself faced with heavy repair bills in respect of work which might be both unessential and carried out at too high a cost. Moreover, the repairs might not be done in the manner in which he, the owner of the property, would wish them to be done.[83]

On the other hand, repair and deduct may deal more favourably with the landlord than other forms of rent withholding presently available to some tenants. Legislation such as the Rent Act provisions in England entitling the tenant to apply for a reduced rent in the event of disrepair,[84] or the provisions in some American States entitling the tenant to an abatement of rent[85] or depriving the

---

83 See Durnford 44 Can B.R. 477 506 (1966) Flitton, 48 Chi. Bar Record 14 at 24 (1967)

84 Infra 796

85 eg. Pa. Stat Ann. tit 35 s 1700-1 (Supp 1969) N.Y. Multiple Dwelling Law s 302a Infra 875

Landlord of it so long as the premises go unrepaired,[86] may be less advantageous to the landlord. With these other forms of rent - withholding the lessor may loose the rent, or a portion of it, forever. In the case of repair and deduct, the value of the rent is at least received by him though it may be in bricks and plaster rather than cash.

In some jurisdictions, limitations are placed on the tenant's right to repair and deduct in order to meet some of the landlord's objections. The Quebec Civil Code[87] and the Michigan Law[88] require the tenant to gain judicial authorisation before he can exercise this right. This limitation was also suggested by the Ontario Law Reform Commission in its Report[89] but is not imposed by the statutes which gives the court power to authorise any repair "that has been or is to be made".[90] The effect of

---

86 eg Man G.L. c111 s 127 FH
Maryland Laws 1968 ch 459
Infra 875

87 Art 1641 para 1.

88 Mich. Comp. Laws 12.534 (5)

89 Ontario Law Reform Com. op cit n 71 at 45.

90 R.S.O. 1970 c 236 s 96 (3) (b)
S.B.C. 1970 c 18 s 49 (3) (b) (emphasis added)
It should be noted, however, that whilst judicial authorisation does not appear to be a pre-requisite to tenant repair, such authorisation does seem essential under these statutes and under SNS 1970 c 13 s 10 (6) if the tenant is to deduct. It has been suggested by Jeffrey Jowell op cit n 79 at p. 330 that the tenant may only repair on his own initiative where the repairs are urgent and J.T. English op cit n 89 at p.331 has suggested that the British Colombia Act, "will be interpreted in such a manner that there will have to be a good cause shown by the tenant why he undertook to repair himself without first obtaining the permission of a judge, and a tenant who rushes off to have repaired something which the judge later considers ought not to have been repaired

(continued next page)

the limitation is to rob the remedy of one of its greatest benefits; the provision of a speedy solution readily available to the tenant.[91]

Another limitation imposed is that of a restriction on the cost of repairs which the tenant can do. California and Montana have long provided that the tenant's expenditure must not exceed more than the value of one month's rent.[92] This limitation increases what appears to be inherent in the use of this remedy by low-income tenants - its impotency in the face of large scale repairs.[93] An attempt to get around this limitation by California tenants who spent $378 on repairs and then sought to deduct it in four monthly instalments from the rent was unsuccessful in the Courts[94] and such a manoeuvre is now forbidden in effect by an amendment providing that the remedy shall only be avail-

---

90 (continued)
or which ought to have been repaired at a lower cost, may find himself out of pocket for that amount. Clearly, the safe course of action for the tenant will be to apply and have the Judge make the appropriate repair order."

91 Infra 788

92 Cal. Civil Code s 1942
Mont Rev. Code Ann. s 42 - 202 (1947)
A recently enacted Hawaiin statute is also similarly limited: Hawaii Rev. Stat. s 666-42 (1971)

93 Infra 791

94 Earle v Lachalli (1968) 13 Welfare Law Bulletin 17 Poverty Law Reporter para 2340.22

able to a tenant once in any twelve month period.[95]

Perhaps it may be fair to ask if any such limitations should really be imposed, the landlord who has disregarded a notice requiring him to repair really has little to complain about if his inactivity causes too extensive or too costly repairs to be done.

The common law right to repair and deduct as recognised by Goff J. - Lee-Parker v Izzet is also subject to certain limitations. The learned judge stipulated that the tenant could only repair and deduct "so far the repairs are within the express or implied covenants of the landlord" and that any necessary notice must have been given to him.[96]

---

95 Cal. Civil Code s 1942 as amended by Calif. Statutes 1970 c 1280.

Cf. Suggestion in Model Residential L-T Code op cit n69 that a limitation of $50 be imposed unless tenant submits "a written estimate by a qualified workman at least (four weeks) before having the work done ..." in which case this could be increased to one month's rent, s 26-206 (1).

Note that the Ontario statute enables the judge authorising any repairs carried out or to be carried out to,

"make such further or other order as the judge considers appropriate."

This provision seems wide enough for him to supervise work to be done and place limits on it.

96 (1971) 1 WLR 1688 at 1693

It is not possible to appreciate the limitation imposed by the first stipulation without an understanding of the whole law of the landlord's obligation for repairs and, in particular, his implied covenants in respect of furnished premises,[97] and under section 6 of the Housing Act 1957 and s 32 of the Housing Act 1961. From the account already given it has been seen that the rights of tenants have been very restrictively construed by the Courts[98] and that they are often very vague.[99]

There is also a great deal of uncertainty regarding the requirement of notice.[1] Does it include latent as well as patent defects ?[2] Must notice come directly from the tenant or can it come aliunde [3] Do defects in existence at the commencement of the term come within this requirement?[4] Lee-Parker v Izzet does not answer these questions, Goff J.

---

97 Supra 228

98 Supra 436

99 Supra 503

1 On the necessity for notice in American Law, see eg. Fussell v Pickrey (1972) 260 So 2d 826 (Misc)
Richards v Dodge (1963) 150 So 2d 477 (Fla)
Marini v Ireland (1970) 56 N.J.130 265A 2d 526 Supra
Fairville op cit n 31 at 264

2 Supra 406

3 Supra 410

4 Supra 411

merely says that the landlord must have been given any necessary notice. In this context, the requirement as to notice seems just; as a general rule, the landlord should be given the opportunity to make repairs before the tenant takes it into his hands to do so. But there may be emergency situations where prompt action is necessary and there is no time to give notice or where the landlord cannot be contacted. Will the law allow the tenant to go ahead without giving notice?

Evaluation of Repair And Deduct From The Tenant's Viewpoint

The advantages of repair and deduct to the tenant are in large measure a reflection of the inadequacies of other remedies available to him upon breach by the landlord of a covenant to repair. Unlike damages, it is a speedy remedy. Once the tenant has served notice on the landlord of the disrepair and allowed a reasonable time for him to honour his obligations, he can proceed immediately to get the repairs done. There is no need for lengthy proceedings in Court. The remedy is also one easily understood and initiated by the tenant involving no contact with the baffling and confusing net-work of courts or local authority departments. Above all, unlike damages, rescission or rent-abatement remedies, repair and deduct has the supreme advantage of attacking the roots of the problem by ensuring that repairs are actually carried out. The method of recovering the

tenant's costs by deduction is clearly the most efficient possible in that it avoids unnecessary administration and expense.

Although a great improvement on other remedies, repair and deduct is not an unmixed blessing. It is proposed to discuss some of the disadvantages of the approach.

The first point to note is that this method is inherently unjust to the tenant. For instance, suppose a tenant has tried for a period of six weeks to get his landlord to repair a broken door. The tenant decides to exercise his right to repair and deduct and so employs a contractor to do the job. The cost of the repairs is then deducted from future rents. At the end of this process, the landlord has received the full value of the rent (in kind rather than cash) and yet for six weeks the tenant has been deprived of the full enjoyment of the premises. The tenant could, of course, bring an action in damages in respect of this discomfort but the time and expense involved would be unlikely to be warranted by the amount recovered. One answer would be to allow the tenant to retain a sum of one or two weeks rent every time he rightfully used repair and deduct. This would, in effect, combine the compensating character of rent abatement with the practical results of repair and deduct.

A danger with repair and deduct is that the

landlord's obligations to repair may, to some extent, be shifted onto the tenant. Many American cases have held that a tenant who failed to repair is prevented from recovery in damages on the covenant for failure to mitigate his loss and from recovery in tort on the grounds of contributing negligence.[5] As one writer has observed, "He (the tenant) cannot stand by in such cases and permit damages to accrue which repairs easily made by him would have prevented."[6] In Brown v Trustees of Toronto General Hospital, Meredith J. seems to have decided[7] that the lessee's failure to repair constituted contributory negligence and so rejected his claim,

> "To make the steps safe was an easy and inexpensive matter, that which he might have done at the cost of the landlord: he chose to take the risk himself and to allow others to take it."

but in another Canadian case, Butliner v Betty,[8]

---

5 eg Clinger v Reahard (1947) 117 Ind App 172
70 NE 2d 436
Cases collected, Annot 28 ALR 1448 at 1470
supplemented 116 ALR 1228 at 1234
Annot 8 ALR 765 at 782
supplemented 163 ALR 300 at 338
" 78 ALR 2d 1238 at 1272

2 Richard Powell op cit n 55 at 307

6 Powell op cit n 55 at 307

7 (1893) 23 OR 599
But see United Cigars Stores Ltd. v Butter (1931) 2 DLR 144 where Riddell J.A. said that Brown does not "decide that it is the duty but only that it is the right of the tenant himself to repair."
But this was obiter as he also said it was unnecessary to express any opinion as to the law in such cases.

8 (1914) 26 WLR 705, 6 WWR 22

where by reason of structural defects in water closets the building had been declared a nuisance under the Public Health Act, it was held that whilst the tenant might make the repairs and charge them to his landlord, he was not bound to do so.

English authority seems restricted to the Court of Appeal decision in Porter v Jones [9] rejecting the imposition of a duty to repair on the tenant. The County Court judge had found against the tenant's claim for damages in respect of personal injuries resulting from breach of the lessor's agreement to repair on the grounds that she had failed in her duty to minimise the damage. She could have either refrained from using the defective part of the premises or could have done the repairs herself and claimed the cost from the landlord. The Court of Appeal upheld the tenant's appeal from this decision. The grounds for reversal were expressed by Lord Greene M.R.,

> "A suggestion was made that either she herself (or her daughter) ought to have taken a broomstick and climbed up a pair of steps and knocked the defective ceiling down and thereafter have used the kitchen; or alternatively, that she could have called in somebody to do the repairs. No doubt she might have done these things, but it is beside the point. The point is: Did she act unreasonably in doing what she did, namely, continuing to use the kitchen? In my opinion there is no evidence upon which unreasonable conduct can be imputed to her." 10

One restriction on effective use by low-income

---

9 (1942) 2 AER 570
10 Ibid at 571

tenants of the power to repair and deduct inheres in their very poverty, the tenant has no capital for the work. One commentator here even suggested that this fact contributes to the remedy being "undesirable".[11] It seems that this criticism goes too far, lack of capital acts as a restriction on effective implementation of the remedy but does not affect its intrinsic merits. Moreover, lack of capital will normally only act as a limitation where substantial works are involved. Many defects may be remedied by an expenditure no greater than a week's rent which the tenant can then retain. Some substantial repairs are only so because the defect has been allowed to grow worse; the tenant who is able to repair when a roof starts leaking may well prevent the collapse of the ceiling and so avoid the greater work. But, it must be admitted, some works will require substantial expenditure which the tenant simply cannot afford.[12]

This problem would not seem to be insurmountable. The Local Authority may well provide the solution by giving loans to the tenant to enable him to repair. Section 74 of the Housing Act 1969 already empowers a local authority to "advance money

---

11 Valentine 37 Political Quarterly 300, 305 n 17 (1966)

12 McElhaney, 29 Maryland L.R. 193 (1969) at p 206
Frankel, 37 Brooklyn L.R. 387 at 393 (1971)
cf Note, 86 SdL.J.365

to any person for the ... repair or improvement of any dwelling "though the section provides that the loan shall be secured by a mortgage of the borrower's interest in the dwelling. Private charitable bodies or community groups may be able to set up a fund to enable the repairs to be carried out on condition that the tenant pays the rents deducted back into the fund. Builders may even be willing to accept payment by instalments. Another possible solution involves no outside aid only a change of tactics, rather than repair and deduct the tenant should deduct and repair, ie. he withholds rent until he has kept back enough to do the repairs. There appears, however, to be no authority in favour of this approach and the withholding tenant may find it difficult to show an intention to do the repairs if the landlord brings an action in respect of non-payment before they are done.

Effective use of repair and deduct may be restricted by the fact that such use is likely to make the tenant "fall foul of his landlord"[13] who may attempt to retaliate by eviction or harassment.[14]

---

13 Valentime op cit n 110 at 305 n 17

14 This has deterred tenants from using the California type repair and deduct laws noted See Bartlett op cit n 55 at 1403.
A recent amendment to the California law (Calif. Statutes 1970 c 1280) provides protection against such retaliation.
See generally on retaliatory eviction and harassment infra 796

Perhaps the biggest problem with regard to the effective use by tenants of repair and deduct is the liklihood that many tenants will find that their right has been "waived" by the tenancy agreement. This has been found to be the case with respect to California type repair and deduct laws noted earlier, "in the rare cases where the slum tenant reads and understands his lease he will almost certainly discover that he has waived any protection he might have gained under these laws."[15] There would seem to be nothing to stop the English landlord expressly requiring the tenant to waive his rights to repair and deduct or, less obviously, demanding that rent be paid "without any deductions." In theory, of course, the tenant could safeguard his right by refusing to enter into a tenancy agreement containing such terms. In practice, he is unlikely to discover their importance until it is too late and, of course, he really has no such choice because the housing market is a seller's market[16] and the tenancy agreement often a mere contract of adhesion.[17]

---

15 Fossum op cit n 55 at 312
cf Bartlett op cit n 55 at 1399
Fuerstein and Shestack op cit n 55 at 220.
But see Buckner v Azulai (1967) 59 Cal Rptr 806
A recent California amendment is designed to remedy this defect, Calif. Statutes 1970 c 1280

16 Supra 190

17 See generally supra 190

Conclusion

There can be little doubt that Lee-Parker v Izzet is a case of the greatest importance. In terms of legal doctrine, it has cleared up an area of the common law confused by dicta and doubts. More importantly, it has confirmed the tenant's right to employ what is clearly a just remedy for a wrong done to him. No injustice is done to the landlord for he is only obliged to forego rents to remedy a situation which he himself has brought about and, moreover, the repairs carried out accrue ultimately to his benefit. If proof be needed of the justice of the rule then it is found in the many statutes passed to give the tenant just this right.

The greatest merit of the decision is that it enables the tenant, and those aiding him, to take direct action to improve his housing. No longer must he rely entirely on the good will of his landlord or the inadequate resources of local government, the solution to his problem is now in his own hands. Let us hope the will to use it can be found.[18]

---

18 In practice, few tenants appear to have carried out repairs which were not their responsibility. The Francis Committee investigating the Rent Acts in 1971 noted that only about 1½% of a sample of London tenants had undertaken such repairs in the two previous years. Of these half had received payment for some or all of the materials used from the landlord. Cmnd 4609 (1971) p.274

Repairs And The Rent Acts: England

Ever since 1915 when the first rent restriction legislation was passed, there has existed a very close connection between the condition of the premises and the amount of rent that can be recovered. The following account traces the development of that connection.

The Rent Acts 1915-1954

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 froze most rents at the figure prevailing on the 3rd August 1914.[1] Any increases above that figure was made irrecoverable. Section 1 (1) of the Act provided, however, that where the landlord had incurred expenditure on the improvement or structural alteration of a dwelling (not including expenditure on decoration or repairs) an increase of rent at a rate not exceeding 6% per annum on the amount so expended was not to be deemed to be an increase for the purposes of the Act. The 1915 Act was continued in force and amended by the Increase of Rent and Mortgage Interest (Restrictions) Act 1919. This allowed the landlord to increase the rent by 10% unless the sanitary authority certified that the house was not reasonably fit for human habitation or that it was not kept in a reasonable

---

1 Sections 1 (1), 2 (1)

state of repair.[2] To recover the 10% increase, the landlord had to inform the tenant of his right to apply to the sanitary authority for such a certificate.[3] The working of the above Acts and their consolidation was made the subject of an inquiry by a committee under the Chairmanship of the Marquis of Salisbury which reported in 1920.

The Salisbury Committee recommended that a rent increase be given to encourage landlords to make repairs.[4] But the Committee also recommended that the tenant should be able to get the increases suspended if these repairs were not done.[5] Section 2 of the Increase of Rent And Mortgage Interest (Restrictions) Act 1920 implemented the first recommendation by means of increases to the "standard rent". The "standard rent" was the rent at which the premises were let on 3rd August 1914, or where they were not let on that date, the rent at which they were last let before that date, or, if let only after that date, the rent at which they were then first let.[6] An increase of 6% of the cost

---

2 Section 2 (1)
3 Ibid
4 Cmnd. 658 para 6 (p.n. 1920 XVIII)
5 Ibid
6 s 12 (1)

was permitted if the landlord had spent money in the improvement or structural alteration of the premises before the Act came into operation whilst an 8% increase was permitted if such work was done after the Act.[7] In calculating what had been spent on alteration or improvement, the landlord was not to include any sum spent on decoration or repairs but the cost of additional or improved fixtures and fittings was permitted.[8] In addition to this increase for improvement or structural alterations, the landlord who was responsible for all the repairs could add to the standard rent a sum equal to 25% of the "net Rent".[9] The "net rent" meant the standard rent less the amount of any rates payable to the landlord.[10] If he was only responsible for part and not all the repairs, the landlord could add such lesser amount as might be agreed to by his tenant or, if agreement could not be reached, as determined by the County Court to be fair and reasonable.[11]

---

7 s 2 (1) (a) See also Rent and Mortgate Interest Restrictions (Amendment) Act 1933 s.7 (1) which amended this provision.

8 Ibid

9 s.2 (1) (d)

10 s.12 (1) (c)

11 s.2 (1) (d)

Section 2 of the 1920 Act also contained provisions enabling the tenant to challenge such increases. If the landlord sought to increase his tenant's rent on the ground that he had spent money on improvement or alterations and the tenant considered the expenditure to be wholly or partially unnecessary, he could apply to the County Court to have the increase suspended or reduced.[12] In the case of a repairs increase, either the tenant or the sanitary authority could apply to the County Court to suspend the 25% increase on the grounds that the premises were "not in all respects fit for human habitation or .... not in a reasonable state of repair."[13] If satisfied that the complaint was justified and that the condition of the house was not due to the tenant's neglect or breach of express agreement, the Court had to make an order to suspend the increase.[14] Furthermore, such an order suspended not only the 25% repairs increase but also the flat increase of 15% permitted by the Act.[15]

The Rent and Mortgage Interest Restrictions Act 1923 contained provisions to make it easier for the tenant to challenge the rent increases if the premises were not in the required state of repair.[16]

---

12 s 2 (1) (a). See Rent and Mortgage Interest Restrictions (Amendment) 1933 s.7 (2) which amended this provision.

13 s. 2 (2)

14 Ibid

15 Ibid

16 s 5 (1). See also Rent Restrictions (Notices of Increase) Act 1923 s.3 and the recommendation

(Footnote continued)

Instead of going to the County Court, the tenant could now obtain from the sanitary authority a certificate of disrepair stating that the house was not in a reasonable state of repair. A copy had to be served on the landlord. The tenant would then have a good defence to any action by the landlord seeking to recover payment of the increase unless the latter was able to prove that the premises were in good repair or that the tenant was responsible for their condition by reason of his neglect or breach of express agreement. Where the landlord executed the repairs which the certificate stated to be necessary to put the premises in a reasonable state of repair, he had a right to a report from the authority certifying that the work had been done.[17]

These provisions in the 1920 and 1923 Acts formed the basis of the law relating to rent control and repairs until the Repairs and Rent Act 1954.[18] Although the Constable Committee of 1924-5 thought the existing legislation gave sufficient powers to the tenant to get repairs done,[19] later reports showed the system to be working less well.[20] The

---

16(continued) of the Unslow Report of 1923 (Cmnd 1803 para 13, P.P. 1923 XII) that the certificate of disrepair procedure be retained.

17 s 18 (3)

18 Infra 801

19 Cmnd 2423 Para 66 (P.P. 1924-5 XV)

20 But cf note, 84 Sol. J. 143, 144 (1940): "Shilling certificates of this description have proved very effective weapons in some places."

Marley Committee reporting in 1931 revealed that tenants were not using their rights because of ignorance, fear and the inadequacy of local authority staff.[21] They were urged to use the disrepair procedure more frequently.[22] In 1945, the Ridley Committee stated, "The evidence submitted to us shows clearly that the issue of certificates and the consequent suspension of rent increases has not been resorted to on any extensive scale. Indeed, these were complaints that the provisions have been largely ineffective."[23] There was also "a considerable volume of evidence to the effect that the permitted increase has not in all cases been applied to the purpose for which it was designed, but has been regarded as an added increment to the landlord's income."[24]

The Housing Repairs And Rents Act 1954

The 1954 Act had its origins in a proposal made in 1951 by the Royal Institution of Chartered Surveyors.[25] The Institution was concerned at the cost to the Exchequer of replacing unfit houses which could have been repaired at less cost. Some increase in rent was necessary to remedy this situation. A percentage increase was rejected as it

---

21 Cmnd 3911 para 67 (P.P. 1931 XVII)
22 Ibid para 71
23 Cmnd 6621 para 86 (P.P. 1945 V)
24 Ibid para 79
25 "A Memorandum on Rent Restrictions and Repairs Problems" (1951)
See M.J. Barnett, "The Politics of legislation. The Rent Act 1957" (1969) pp 40-44.
J.B. Cullingworth, "Housing And Local Government" (1966) pp 38-39

would simply increase existing anomalies of rent control and would not be specifically related to repairs. The solution proposed was one which took advantage of the law of rating. Every house has a gross value for rating purposes[26] which is what the Inland Revenue Surveyor estimates as the market rent assuming the landlord to be responsible for the cost of repairs and the tenant for rates. Net (or rateable) value[27] is less than this. The difference represents the amount allowed to the landlord to cover repairs, insurance and other costs of maintenance. This difference is known as the statutory deduction. The R.I.C.S. proposal was that the statutory deduction should be used as a basis for fixing the necessary rent increases. Since the existing statutory deduction was based upon estimates made in 1934 and expenses had doubled by 1951, it was suggested that the repair increase be twice the statutory deduction.

The Government accepted these suggestions in its 1953 White Paper, "Houses: The Next Step."[28] As J. B. Cullingworth has pointed out, "The

---

26 See D. Widdicombe, D. Trustram Eves & A. Anderson; "Ryde On Rating: The Law And Practice" 12th ed (1969) pp. 378-380 and General Rate Act 1967s 19 (6).

27 Ibid, General Rate Act 1967 s 19 (3)

28 Cmnd 8996

political attraction of this Scheme was that it gave landlords an increase only for that part of their rent income which was needed for repairs and maintenance: it gave them no increases in their investment income."[29] The Government believed that these provisions would "work to the mutual benefit of landlord and tenant; they should enable millions of houses to be put and kept in good repair and thus help to preserve a national asset.[30]

The Housing Repairs and Rent Act 1954 received the Royal Assent on July 30, 1954 and came into force on August 30, 1954.[31] Its purpose was to implement the proposal for a rent increase based on twice the statutory deduction. But to qualify for such an increase, the landlord had to be able to show certain things. First, the premises had to be in good repair "having regard to their age, character and locality."[32] In the case of buildings divided into a number of units, the entrance, staircase, landings, etc. were also to be in good repair.[33]

---

29 Cullingworth op cit n 25 at p. 39

30 Op cit n 28

31 For commentary of the relevant provisions, see Ashley Bramall (1954) J. P.L.714
Note (1954) J.P.L. 670

32 S.S. 23 (1) (a) (1), 49 (1)

33 S 31 (2)

Any defect due to any act, neglect or default of the tenant or any person claiming under him was to be disregarded.[34] Second, the premises had to be reasonably suitable for occupation according to a number of specified details.[35] Third, the landlord had to be wholly responsible for the repairs either under the tenancy agreement or because the Act deemed him to be so responsible in the absence of liability on the tenant.[36] A landlord who was only liable for some of the repairs could claim only a proportional rent increase.[37] The Act gave no guidance as to the proportions to be assigned to various repairing liabilities. The final requirement was designed to ensure that the rent increase would, in fact, be spent on repairs; the landlord had to show some evidence of good faith by showing past repairs. He had to produce satisfactory evidence that work of repair had been done during a period of twelve out of the last fourteen months to the value of three times the statutory deduction.[38]

The amount of rent increase was twice the statutory deduction[39] subject to a limitation that

---

34 s 31 (1)
35 S 23 (1) (a) (ii)
36 ss 23 (1), 30 (1) (2)
37 s 23 (2)
38 s 23 (1) (b) Sched. 2
39 s 23 (2)

the rent could not exceed twice the gross value of the premises.[40] Payments for rates, furniture and services were to be excluded from the calculation whether or not the limit had been reached.[41] The statute contained a vague provision[42] dealing with internal decorative repair. Where neither landlord nor tenant was under an express liability to carry out such repair, the landlord could serve a notice excluding this element from consideration of whether the house was in good repair. Where this was done, the amount of the rent increase was reduced by one third. There was much doubt whether this reduction was to be made before or after applying the limit of twice the gross value.[43]

The Act gave the tenant the right to challenge the increase on the grounds that its requirements had not been satisfied. If he thought that the house was not in good repair or suitable for occupation, he could apply to the Local Authority for a certificate of disrepair.[44] This certificate prevented the landlord from recovering the increase. The procedure for setting aside the 40% increase under the Rent Act 1920 on the basis of disrepair was combined with that of the 1954 Act so that one

---

40 s 24

41 Ibid

42 s 30 (3)

43 See differing views taken by such eminent authorities as Ashley Bramall (1954) J.P.L. 714, 719 and R.E. Megarry (1954) J.P.L. 796

44 s 26

certificate relieved the tenant from both lots of increase.[45] The certificate could later be revoked by the Local Authority or annulled by the County Court[46]. It was pointed out[47] that annulment would present considerable practical difficulty as it would result in the tenant owing, in a lump sum, rent which he may have withheld over a considerable period. Moreover, the possibility of annulment was increased by the different tests of bad repair to be applied by the Court and the Local Authority under the Act.[48] If the tenant felt that the past repairs required before the increases were payable had not been carried out, he could apply to the County Court for a certificate which debarred the landlord from raising the rent.[49]

The 1954 Act seems to have failed in its aim of improving housing conditions. There is very little statistical information on its practical working[50] but such evidence as is available tends to that conclusion. In the first six months

---

45 s 27. The relevant provisions in 1920 and 1923 Acts were repealed: s 54 Sched. 5.

46 s 26 (3)

47 Bramall, (1954) J.P.L. 714, 720

48 Ibid. See s.31 (1)

49 s 23, Sched 2 para 4 (1)

50 Cullingworth op cit n 25 at p 42

following the Act, some 20,000 applications were made to local authorities for certificates of disrepair and 18,000 were granted. This was the peak period: less than half of these numbers were recorded in the following eighteen months.[51] As Cullingworth notes, in relation to the four million rent controlled houses which were thought to be essentially sound, these are extremely low figures.[52] They may mean that tenants were prepared to accept increases without protest or did not know how to appeal. But other evidence suggests that the low rate of appeal was more likely a reflection of the failure of the Act to make any real impact. According to Cullingworth's study of Lancaster, not a single landlord took advantage of the repairs increase.[53] "The Times" reported that, as far as could be ascertained, landlords in the North had not taken advantage of the Act.[54] A survey carried out by the National Federation of Property Owners said the great majority of landlords did not intend to claim the repairs increase.[55]

---

51 Ibid

52 Ibid

53 J. B. Cullingworth, "Housing In Transition" (1963) pp 50 - 51

54 Jan 17, 1955. See also article 7 Feb, 1956.

55 See Cullingworth op cit n 25 at p. 42

There were several reasons suggested for the failure of the 1954 Act. The repairs increase was criticised as being "just sufficient to irritate the tenants who were called upon to pay it but insufficient to enable landlords to meet the increasing cost of repairs and still show an economic return on their property."[56] The twice gross value limit was said to work unfairly against owners of houses with artificially low rateable values.[57] Some landlords did not have the necessary capital to pay for the initial repairs which were required before the increase was recoverable.[58] The procedure was said to be too involved[59] and the certificate of disrepair a discouragement.[60] The result of all these factors was that, "Rents did not rise. Repairs were not made."[61] Nye Bevan's description of the Act as "mouldy turnips"[62] had been proven true.

The Rent Act 1957

The 1954 Act had tried to encourage repairs by means of a rent increase tied down exclusively to repairs and it contained a relatively simple

---

56 S.W. Magnus, "The Rent Act 1968" p.8
57 Cullingworth op cit n 25 at p 42
58 Ibid
59 Ibid
60 Barnett op cit n 25 at p 44
61 Ibid
62 See Cullingworth op cit n 25 at p 42

procedure for tenants to resist the increases if the money was not spent on repairs. That Act had failed. In 1957, the Government changed its policy in the belief that rent control was itself to blame for the landlord's failure to repair.[63] The Rent Act of that year[64] went a long way to end that control. Houses with rateable values exceeding £40 in London and £30 elsewhere were decontrolled subject only to a stand-still period of fifteen months[65] though the Landlord and Tenant (Temporary Provisions) Act 1958 enabled a further breathing-space to be granted by the Court in cases of hardship. In addition to this "block decontrol", the Act provided for "creeping decontrol". The Rent Acts were not to protect tenants entering into tenancies coming into operation after the commencement of the Act whatever the rateable value.[66] Finally, the Minister could make an order to decontrol the remaining dwelling-houses by means of a statutory instrument.[67]

Most tenants still within the protection of rent control were required to pay higher rents based, inter alia, on the extent of the landlord's duty to repair. The "standard rent" of previous Acts[68]

---

63 M.J. Barnett; "The Politics of Legislation.The Rent Act 1957" (1969) p. 75, 77-78 Cf. infra 842

64 For a comprehensive account of this measure, see M.J. Barnett Ibid

65 s 11 (1). See now Rent Act 1968 Sch.2 para 1 (a)

66 s 11 (2). See now Rent Act 1968 Sch.2 para 1 (d)

67 s 11 (3)

68 Supra 797

was replaced by the "rent limit" of the 1957 Act. Broadly speaking, the new rent was to be the 1956 gross value of the dwelling multiplied by "the appropriate factor" together with the cost of rates and services.[69] The "appropriate factor" was dependent upon the allocation of the responsibility for repairs. If the landlord was responsible for all repairs, it was two.[70] If under the terms of the tenancy the tenant was responsible for all repairs, it was four-thirds[71] whilst if the tenant was responsible for some, but not all, repairs, the appropriate factor was to be such number less two but greater than four-thirds as might be agreed in writing between the landlord and the tenant or determined by the County Court.[72] The expression "repair" was not to include internal decorative repairs but, if the landlord was responsible or elected to be responsible for them, then he could recover an additional third of the gross value.[73]

---

69 s 1, See now Rent Act 1968 s 52.

70 Ibid

71 Sched. 1 para 1 (2). See now Rent Act 1968 Sched 9 para 1 (2).

72 Sched 1 para 1 (3). See now Rent Act 1968 Sched 9 para 1 (3).

73 Sched 1 para 2. See now Rent Act Sched 9 para 2.

The tenant who did not have to pay rent increases were those living in slum houses or houses needing repairs.[74] Dwellings within clearance areas or subject to a closing or demolition order were not included in the increase provisions. Nor were those dwellings where works of repair remained unexecuted despite a statutory order made under the Housing or Public Health Acts requiring the landlord to do such work.

The certificate of disrepair procedure employed since the 1919 Act[75] was made considerably more complex and dilatory. The first step was for the tenant to serve on the landlord a notice in the prescribed form (Form G) stating that the dwelling was indisrepair by reason of defects specified in the notice and that these defects ought reasonably to be remedied having due regard to the age, character and locality of the dwelling and requesting the landlord to remedy them.[76] Upon receiving Form G, the landlord could do the repairs, undertake to do them or such of them as the tenant might agree in writing to accept as sufficient,[77] or do none or only some of them. If the landlord gave an undertaking, it had to be in the prescribed form - Form H.[78]

---

74 s 2 (2) (c). See now Rent Act 1968 s 53 (3)

75 Supra 796

76 Sched 1 para 3. Form G and the following Forms mentioned below were prescribed by the Rent Restrictions Regulations 1957. See now Rent Act 1968. Sched 9 para 3.

77 Sched 1 para 4 (1). See now Rent Act 1968 Sched 9 para 4 (1).

78 Ibid

The consequences of breach of this undertaking are dealt with later.

If any of the defects specified in Form G remained unremedied on the expiration of six weeks from its service on the landlord and no Form H undertaking had been given, the following procedure was followed. The tenant could apply to the local authority on Form I for a certificate of disrepair.[79] A copy of Form G had to accompany the application.[80] If the local authority were satisfied that the Form G statements were correct, they were required to serve a Form J on the landlord.[81] This stated that the authority proposed to issue the certificate of disrepair and specified the defects to which it was to relate. After service upon him of Form J, the landlord had three weeks to give an undertaking on Form K to remedy these defects.[82] Service of a copy of Form K on the authority prevented the issue of the certificate.[83] There was a proviso which gave the authority discretion to refuse to accept the undertaking and power to proceed to issue the certificate if a previous certificate of disrepair

---

79 Ibid

80 Ibid

81 Sched 1 paras. 4 (2), 5. See now Rent Act 1968 Sched. 9 paras. 4 (3)(4), 5

82 Sched 1 para 5, See now Rent Act 1968 Sched 9 para. 5.

83 Ibid

had been issued against the landlord in respect of the dwelling or he had broken a previous undertaking or he had been in breach of certain Public Health and Housing Act Provisions.[84] If no undertaking had been given within three weeks from the service of Form J, the local authority were under a duty to issue a certificate of disrepair to the tenant on Form L.[85]

The following consequences followed from either the issue of a certificate of disrepair or a failure to remedy any defects to which an undertaking (whether to tenant under Form H or local authority under Form K) related within six months.[86] First, if the tenant applied for the certificate or accepted a Form H undertaking within six months of being served with a notice of rent increase, the notice was to have no effect.[87] Second, the "appropriate factor" would be four-thirds[88] so that the rent limit would be only one and one-third the gross value, plus rates and services. To enable this rent reduction to be back-dated, the tenant was permitted to deduct rent up to an aggregate amount

---

84 Ibid

85 Sched 1 para 4 (2). See now Rent Act 1968 Sched 9 para 4 (3) (4).

86 See Sched 1 para 8 (1). See now Rent Act 1968 Sched 9 para 8 (1).

87 Sched 1 para 7 (1). See now Rent Act 1968. Sched 9 para 7 (1).

88 Sched 1 para 7 (2). See now Rent Act 1968. Sched 9 para 7 (2).

equal to that which would have been irrecoverable if the certificate had been issued on the day of application or when a Form H undertaking was given.[89]

There were strict limitations on how much and how long these deductions could be. For any rental period, the tenant could only deduct rent not exceeding the amount made irrecoverable by the certificate or breach of the undertaking for the first rental period affected by the decrease in rent.[90] An example may be helpful. Thus, if the rent of a weekly tenant was reduced by the certificate of disrepair from 30s. to 21s., the tenant could make a further deduction of 9s. from his new rent of 21s. and may only 12s. per week. It is also important to note that this right of deduction existed only for rental periods beginning while the certificate of disrepair continued in force.[91] When the certificate was cancelled, no further deductions could be made. To take another example, suppose there was an eight week time lapse between applicationfor and issue of the certificate. The certificate reduced the rent by 9s. so that the tenant was permitted to deduct up £3.12s. Six weeks after the

---

89 Sched 1 paras 7 (4), 8 (1). See now Rent Act 1968 Sched 9 paras. 7 (4), 8 (1).

90 Sched 1 para 7 (4). See now Rent Act 1968. Sched 9 para 7 (4).

91 Ibid

certificate was issued, it was cancelled. By the date of cancellation, the tenant could have only deducted up to £2.14s. so that 18s. was still owed to him. That 18s. could not be deducted by him from future rents because the certificate would no longer be in force during future rental periods.

The certificate could be cancelled by either the Court or the local authority. The Court could do so if satisfied that any defect was one for which the tenant was responsible or that any defect specified in the certificate ought not to have been specified.[92] Where the Court cancelled a certificate as respects all the defects specified, it was to be deemed as never to have had effect.[93] Where a certificate was cancelled as respects some of the defects only, then it was to be deemed never to have had those defects specified therein.[94] After the issue of a certificate of disrepair, the landlord could apply to the local authority for its cancellation on the ground that the defects specified in the certificate had been remedied.[95] The authority was then under a duty to serve on

---

92 Sched 1 para 4 (4) (5). See now Rent Act 1968. Sched 9 para 4 (6) (7).

93 Sched 1 para 4 (6). See now Rent Act 1968. Sched 9 para 4 (8).

94 Ibid

95 Sched 1 para 6 (1). See now Rent Act 1968. Sched 9 para 6 (1).

the tenant a notice stating their proposal to cancel the certificate when an objection from the tenant was received by them within three weeks from the service of the notice on the ground that the defects or any of them had not been remedied.[96] If no objection was received or if the authority thought that it was not justified, they were under a duty to cancel the certificate as from the date of the application or such later date as appeared to them to be the date on which the defects were remedied.[97] Landlords and tenants could appeal to the Court against the refusal to cancel, or the cancellation of a certificate.[98]

Section 5 of the Act provided that the rent limit of a controlled house could be increased if an improvement had been completed after the commencement of the Act. The increase was payable after completion of the improvement and was at the rate of eight per cent per annum of the amount expended on the improvement by the landlord. The tenant could challenge the increase either on the ground that the improvement was unnecessary or that the amount spent was excessive. The first ground was not open to the tenant if he had consented to the improvement in the knowledge that

---

96 Ibid

97 Sched 1 para 6 (2). See now Rent Act 1968. Sched 9 para 6 (2).

98 Sched 1 para 6 (3) (4). See now Rent Act 1968 Sched 9 para 6 (3)(4).

it would lead to an increase in rent or where it was made with the aid of an improvement grant. The amount of any improvement grant used to make the improvement was to be deducted in calculating the cost of the improvement.

The great complexity of the disrepair procedure caused many difficulties in practice. Before the Act came into operation, the Housing Committee of the Association of Municipal Corporations concluded that the proposed procedure would not work.[99] The tenant, they thought, "would have little experience with the type of proceedings required". The delays provided were pointless. The available evidence amply supports these early fears.

The first step in the procedure, Form G, was a major stumbling block. The remaining steps and eventually rent reduction were dependent upon the tenant serving a notice in the prescribed form specifying the defects. Though there is evidence that in one city, Lancaster, about two-thirds of tenants obtained copies of Form G,[1] the majority of tenants failed to use the statutory form to request repairs. The Government Social Survey Report[2], which contained evidence on the working

---

99 The Municipal Journal Vol 64 pp 2019-20. quoted M.J. Barnett op cit n 25 at pp 139-140. See also J. S. Cullingworth, "Housing in Transition" (1963) p 53.

1 Cullingworth op cit n 99 at 54

2 P.G. Gray & R. Russell, "Rent Act 1957: Report Of Inquiry". Cmnd 1246. 1960.

of the procedure until 1960, shows that in Metropolitan London only 13% of tenants had used Form G whilst in the rest of England and Wales it was only 16%.[3] "Almost three quarters of those asking for repairs had not used Form G; mostly they had merely spoken to the landlord".[4] The study of Lancaster by J. B. Cullingworth shows the figure to be higher for that city; over a third of tenants requesting repairs had actually used Form G.[5] This higher percentage can probably be explained by the activities of a Rent Act Bureau set up in the City to give advice on the Act.[6] One reason given for failure to serve the statutory notice was that "many tenants felt that there was something unsavoury and precipitate in serving a formal notice, particularly when they were on good terms with their landlords."[7] No doubt ignorance of the law also played a part.

It is important to note that it was the tenant who had to specify the defects on the form.[8] Under the 1954 Act[9] and the 1923 Act,[10] the tenant merely

---

3 Ibid table 9 (a) p 29.

4 Ibid p 31

5 Cullingworth op cit n 99 at pp 98-99, 254-255.

6 Ibid 255

7 Ibid 100

8 Sched 1 para 3. See now Rent Act 1968. Sched 9 para 3.

9 s 26 supra 805

10 s 5 supra 799

had to apply to the local authority for a certificate and the local authority would specify what defects, if any, ought to be remedied. The 1957 Act shifted this task, previously done by trained public health officials, to the tenant. As might have been expected, the average tenant was unable to complete Form G without expert assistance which, of course, was rarely available.[11] Sometimes tenants would forget important defects or put down terms not within the statute. For example, Audry Harvey tells of one case where a lady put down items such as "rats in the scullery" but forgot altogether to say that the back of the house badly needed to be repointed as it let in rain. She had not asked for the front door and window frames to be repointed because she felt this would be asking for the moon.[12] In Lancaster, "the majority of forms merely listed the location of a defect without defining it - 'back door', 'front room window', 'roof'. Some did not even specify the location of a defect, contenting themselves with generalities such as 'windows', 'painting', 'floors'."[13] Cullingworth gives a good idea of the difficulty of the tenants in completing Form G by comparing one tenant's view of what

---

11 Cullingworth op cit n 99 at p 94.

12 Audry Harvey, "Tenants in Danger" (1964) p 77.

13 Cullingworth op cit n 99 at 95

repairs were necessary with the statutory disrepair notice served on the local authority on the same house.[14] The latter is much more detailed and gives a far better guide to the condition of the house.

Only a minority of landlords took advantage of the opportunities in the procedure to give undertakings to do repairs. The Social Survey shows that in Metropolitan London 80% of tenants with repairs outstanding did not receive an undertaking from the landlord whilst, in the rest of England and Wales, the figure was 70%.[15] Of course, this majority of landlords still gained the advantage of the delays built into the procedure to give them time to make such undertakings. One of the most significant statistics is that, of this 80% in London and 70% elsewhere, only 15% and 11% respectively of tenants had proceeded to obtain a certificate of disrepair.[16] The majority, 65% and 59% respectively, went no further in their use of the procedure than to serve Form G. When the landlord failed to do the requested repairs and then failed to give an undertaking, the tenants gave up and did not proceed to get the certificate of disrepair which alone entitled them to rent reduction. It

---

14 Ibid 95-97

15 op cit n 2 table 9 (c) p 30

16 Ibid, see also p 32

is suggested by the Social Survey that "The necessity of filling in Form I and sending it to the local authority may have been a stumbling block."[17] The need for a copy of Form G to accompany Form I may have added to the difficulty. Naturally, many tenants especially old ones or ones without clerical experience would have lost their copy of Form G in the six weeks that had to pass between the Form G and the Form I stages.[18]

Even when the tenant had followed the procedure to the stage of obtaining a certificate of disrepair or an undertaking which was not honoured within the stipulated period of six months, he did not always get the benefit of the rent reduction to which he was entitled. The Social Survey tells us that, "In as many as half the cases where the tenant said that the landlord's undertaking on Form H had not been honoured the rent had not been reduced."[19] The Report goes on to express surprise "to find no rent reduction in a fifth of the cases where a current certificate of disrepair was in force."[20]

Studies of the Rent Act 1957 show that it had only a limited success in ensuring more repairs. The Social Survey showed that all repairs requested

---

17 Ibid

18 Audrey Harvey op cit n 12 at p 78

19 op cit n 2 at p 32

20 Ibid

in Form G were only carried out in 61% of cases in Metropolitan London and 54% of cases elsewhere.[21] In 20% and 19% of cases respectively, some repairs were started but not completed.[22] Thus, in 19% of cases in London and 27% of cases in the rest of England and Wales, the statutory procedure failed to get the landlord to do anything at all whilst in another fifth of cases it was only partially successful. In some parts of the country, it was less successful than the national figures suggest. Cullingworth's study of Lancaster shows that only in 17% of cases were all repairs asked for on Form G completed, in another 19% of cases some repairs were started but not completed whilst no repairs were done in no less than 64% of cases where a Form G request was made.[23] Only 27% of the City's pre 1915 houses were repaired following increases in rent.[24] Though Lancaster is not typical of the country as a whole, it is pertinent to quote his conclusion that, "the evidence suggests that, so far as old privately rented houses in Lancaster are concerned, the Rent Act did not bring about a

---

21 op cit n 2 table 9 (b) p 30

22 Ibid

23 Cullingworth op cit n 99 at p 255

24 Ibid 98

significant improvement in condition."[25]

The complexity of the 1957 Act was no doubt one reason for its failure to bring about greater repairs. A Rowntree Study concluded that, in the country as a whole, "landlords and tenants paid scant attention to these complicated provisions."[26] Most rents were based upon the twice gross value rent limit regardless of the allocation of responsibility for repairs.[27] In some tenancies, it proved impossible to determine this allocation.[28] Audry Harvey who had much practical experience in the East End of the working of the repair machinery introduced by the 1957 Act described it as "immensely heavy and complex".[29]

The Rent Act 1965

The main purpose of the Rent Act 1965 was to restore protection from eviction[30] to tenants whose

---

25 Ibid 104

26 D.V. Dennison, C. Cockburn & T. Corbett, "Housing Since The Rent Act", Occasional Paper on Social Administration No 3, (1961) p 38.

27 Ibid table 15

28 Social Survey op cit n 2 at p 28
Cullingworth op cit n 99 at p 102-103.
For other evidence of the allocation of repair, See, Dennison, "Essays on Housing" Occasional Paper on Social Administration No 9 (1964) p 11-12.

29 Audry Harvey op cit n 12 at p 76.

30 The "standstill" provisions of the Landlord and Tenant (Temporary Provisions) Act 1958 had lapsed on 1st August 1960 and the decontrol provisions of the Rent Act 1957 became effective. The Protection From Eviction Act 1964 gave temporary protection against the worst effects of decontrol.

dwellings had been decontrolled by the 1957 Act.[31] It was also designed to ensure that the rents paid were fair to both parties. The method adopted to achieve this aim was a departure from previous Rent Acts: "fair rents" were to be determined by rent officers who would take all the circumstances other than personal circumstances into account.[32] In particular, regard was to be had to "the age, character and locality of the dwelling house and to its state of repair."[33] On the other hand, the following factors were to be disregarded by the rent officer; (a) any disrepair or other defect attributable to a failure by the tenant or any predecessor in title of his to comply with the terms of the tenancy, and (b) any improvement carried out, otherwise than in pursuance of the terms of the tenancy, by the tenant or any predecessor in title of his.[34] In registering a fair rent, the rent officer was authorised to take account of any variation in the amount paid by the tenant to the landlord for any works of maintenance or repair carried out by him.[35]

---

31 The 1965 Act applied to tenancies of a rateable value in Greater London of £400 and elsewhere in Great Britain £200: Section 1(1). See now Rent Act 1968 S 1.

32 Section 27 (1). See now Rent Act 1968 s 46.

33 Ibid

34 Ibid

35 Section 28 (3). See now Rent Act 1968 s 47 (4)

Once a fair rent had been registered, the amount so registered became the limit of rent that could be demanded from the tenant.[36] Normally, there could be no further application for reconsideration of this limit within three years of registration.[37] But if, since that date, there had been a change in the condition of the house including the making of any improvement then an application for a new fair rent could be entertained by the rent officer within the three year period.[38]

Where no rent had been registered, then, subject to certain adjustments, the rent limit was to be the rent payable under the previous regulated tenancy or that fixed by the tenancy agreement.[39] To this figure could be added or deducted "an appropriate" amount to take account of changes in the responsibility for repairs.[40] Any disputes as to the sum of the "appropriate amount" was to

---

36 Section 3 (1). See now Rent Act 1968 s 20 (1) (2).

37 Schedule 3 para. 3. See now Rent Act 1968 s 44 (3).

38 Ibid

39 Sections 3 (3), 5. See now Rent Act 1968 SS. 20 (3), 22 (1).

40 Section 4 (2). See now Rent Act 1968 s 21 (2). This only applies to the contractual rent limit. There is no similar provision for increasing the rent payable for any statutory period before registration.

(Compare the increases for services and the use of furniture for both contractual and statutory rent periods under s 4 (2) and s 6 (4) of the 1965 Act - see now Rent Act 1968 s 21 (2) and s 24 (1).)

be resolved by the County Court.[41] Furthermore, if improvements were carried out after the time as from which the rent for the previous tenancy was agreed or the tenancy terms agreed then the limit could be increased by 12½% per annum of the amount spent by the landlord.[42] In calculating this amount, improvement grants received by the landlord had to be deducted.[43] The tenant under a statutory tenancy was able to challenge the increase on the grounds that the improvement was unnecessary or unreasonably expensive unless a grant had been made under certain enactments or the tenant had consented in writing to the improvement and acknowledged that the rent could be increased as a result of it.[44]

There seems little published information on how the system of rent regulation affects the condition of premises.[45] The Francis Committee which

---

41 Section 4 (7). See now Rent Act 1968 s 21 (7).

42 Sections 4 (5) and 6 (6). See now Rent Act 1968 s.21 (5) and s.25 (1). This increase applies to both contractual and statutory rent periods.

43 Section 17 (2). See now Rent Act 1968 s 31.

44 Section 6 (7). See now Rent Act 1968 s 25 (3) (4).

45 My own attempts to research this relationship were frustrated by the failure of rent officers and rent assessment committees to state more specifically in their reports how the state of repair affected their determination of the fair rent. References tend to be too general or inextricably bound up with other factors.

investigated the working of rent regulation[46] had little to say on this topic. The requirement that the rent officer should have regard "to all the circumstances (other than personal circumstances) and in particular to the age, character and locality of the dwelling and to its state of repair" was said to be a normal part of valuation.[47] It did not appear to present any difficulty in practice.[48] The provision that the tenant's failure to repair and his improvements are to be disregarded was also considered as not likely to give rise to any difficulty of interpretation.[49]

The Committee considered a criticism that rent officers adhered too slavishly to the pattern of regulated rents in their own registers and did not give sufficient weight to the cost of maintenance.[50] The impression of the Committee was that, by and large, rent officers did take into account the landlord's contractual or statutory obligation in respect of repairs. In times of inflation, the rent officer should take account of the likely increase in the cost of maintenance, management and

---

46 "Report of the Committee On The Rent Act" (Chairman H.E. Francis), 1971, Cmnd 4609

47 Ibid 57

48 Ibid

49 Ibid

50 Ibid 85

and insurance over the three year period covered by the registration and then endeavour to find the fair average annual cost on this basis. Of course, in the case of badly maintained properties in respect of which there was reason to believe that the landlord would spend little if anything on repairs, it would be probable that the rent officer would estimate the cost of maintenance at a very modest figure and leave it to the landlord to apply for re-registration if in fact he improved the property during the three year period, either voluntarily or at the instigation of the local authority.[51]

The Francis Committee confirmed that there was a close relationship between applications for a rent level to be fixed and dissatisfaction with the state of repairs. This relationship seemed to have two contradictory aspects. It was found that "tenants very often apply to rent officers, not so much to get a reduction in rent, but to force the landlord to carry out necessary repairs for which, he is responsible."[52] A study of applications made by tenants to rent tribunals showed that furnished tenants often had similar intentions.[53]

---

51 Ibid

52 Ibid 68. See also p 264

53 Ibid 143. See the cases reported on pp. 480, 486, 490

On the other hand, some tenants decided not to apply for registration of a fair rent because they feared that they would then be less likely to get repairs done.[54]

The Rent Act 1968

The Rent Act 1968 consolidates the law relating to rent restriction in England and Wales by replacing and repealing the previous legislation.[55] Parts III and IV reproduce the provisions of the 1965 Act relating to regulated tenancies whilst Part V replaced the provisions of the 1957 Act with respect to Controlled tenancies. Schedule 9 substantially re-enacts Schedule 1 of the latter Act which dealt with the adjustment of rent in respect of repairs and abatement in the case of disrepair.

The Housing Act 1969

Part III of the Housing Act 1969 made important changes in the law of rent restriction and again emphasised the close relationship between the condition of the dwelling and the amount of rent recoverable. The effect of the Act was, in brief, to transform controlled tenancies into regulated tenancies if the local authority issued a qualifi-

---

54 Ibid 16

55 Specific references to relevant provisions of previous legislation still in force under the 1968 Act have been given in the footnotes.

cation certificate.[56] Before this certificate could be issued, the dwelling had to satisfy the following conditions, that is to say, that it was provided with all the standard amenities for the exclusive use of its occupants, that it was in good repair, having regard to its age, character, and locality disregarding internal decorative repair, and that it was in all other respects fit for human habitation.[57] These were the "qualifying conditions".[58]

Procedure under the Act was dependent on whether all the standard amenities were provided before the commencement of the Act or not. If such amenities were provided or in the course of being provided before that time, the following procedure was followed. The landlord's application for a qualification certificate was required to state the name of the tenant under the controlled tenancy and, before considering the application, the local authority sent a copy to the tenant.[59] The tenant was also informed that he could, within twenty-eight days, make representations to the authority that the dwelling did not satisfy the qualifying conditions.[60] Having considered any such representations, the authority was under a duty to issue the certificate

---

56 Section 43 (2). See generally; Ministry of Housing and Local Government Circular No 66/69

57 Section 43 (1)

58 Section 43 (5)

59 Section 44 (3) (4)

60 Section 45 (1)

if satisfied that the dwelling fulfilled the qualifying conditions.[61] If not so satisfied, notice of refusal of the application was to be sent to the applicant.[62] A written statement of reasons for the refusal was required to be given.[63] The tenant received a copy of the certificate or the notice of refusal.[64]

If the qualification certificate was issued, the landlord could apply to the rent officer for the registration of a fair rent under Part IV of the Rent Act 1968.[65] It should be noted, however, that Schedule 3 of the 1969 Act required that most rent increases be staggered over a four year period.[66] Moreover, where the qualification certificate was issued before certain specified dates in 1971 and 1972 (which varied with the value of the dwelling) the conversion from controlled to regulated tenancy was not to take effect until those dates.[67]

Provision was made for appeals by the applicant against refusal of a qualification certificate and by the tenant against its issue. Within twenty

---

61 Section 45 (2)

62 Ibid

63 Section 48

64 Section 45 (2)

65 Section 47 (1)

66 However, paragraph 3 of the Schedule provided that the minimum increase should not be less than 37½p.

67 Section 50

eight days of service upon him of a notice of refusal, the applicant could appeal to the County Court on the ground that the certificate ought to be issued.[68] On such appeal, the Court could confirm the refusal or order the local authority to issue the certificate.[69] On the other hand, the tenant also had a twenty-eight day period in which to appeal to the County Court against the issue of the certificate.[70] Such an appeal could be made on either of the following grounds: (a) that the certificate ought not to have been issued; or (b) that the certificate was invalid by reason of a failure to comply with the requirements of the Act or of some informality, defect or error.[71] In the latter case, the Court was to confirm the certificate unless satisfied that the interests of the tenant had been substantially prejudiced.[72]

The following procedure applied if, at the time the application for a qualification certificate was made, the dwelling lacked one or more of the standard amenities. Once again, the application had to state the tenant's name.[73] It also had to state what works were required for the qualifying conditions to be satisfied and be accompanied by plans

---

68 Section 49 (1)
69 Ibid
70 Section 49 (2)
71 Ibid
72 Ibid
73 Section 44 (3)

and specifications of those works.[74] A copy of this application was sent by the authority to the tenant.[75] If the authority thought that the dwelling would satisfy the qualifying conditions when the works specified in the application had been carried out, then it was to approve the application provisionally and issue to the applicant a certificate of provisional approval and send a copy to the tenant.[76] Armed with the certificate, the applicant could apply for a certificate of fair rent.[77] The certificate of fair rent specified the rent which would be a fair rent if the proposed works were carried out.[78] Upon production of this certificate and on being satisfied that the dwelling fulfilled the qualifying conditions, the local authority issued the qualification certificate and sent a copy to the tenant.[79]

The next step was for the applicant to go back to the rent officer who would register the rent in accordance with the certificate of fair rent unless the state of the dwelling failed to conform with what it could have expected to be in when the works specified in the application had been carried out.[80] In the latter case, the rent officer informed the

---

74 Ibid
75 Section 44 (4)
76 Section 46 (1)
77 Section 46 (2)
78 Schedule 2 Part I para 3
79 Section 46 (3)
80 Schedule 2 Part II paras 5-6

tenant of the application and invited representations.[81] If no representations were made, then, unless it appeared to the rent officer that the rent specified in the certificate of fair rent was higher than a fair rent, that rent was registered.[82] If representations were made or the rent officer thought the rent specified in the certificate of fair rent to be higher than a fair rent, he arranged a consultation with both landlord and tenant to consider what rent should be registered.[83] From the decision of the rent officer, an appeal could be made to a rent assessment committee.[84] The rent increase over the old controlled rent could normally only be recovered in stages.[85]

The Act made special provision for the situation where the landlord wished to carry out works to satisfy the qualifying conditions but could not until the tenant gave consent to such works. If consent was refused, the landlord could apply to the County Court for an order empowering him to enter and carry out the works providing a certificate of fair rent had been issued and the Court was not precluded from making the order by reason of the

---

81 Ibid para 7
82 Ibid para 8
83 Ibid paras 9 - 10
84 Ibid paras 11 - 14
85 Section 52, Schedule 3

tenant's low income.[86] To protect low income tenants from the increase in rent resulting from conversion to rent regulation, the Act precluded the Court from making the order if the tenant was entitled to rate relief.[87] In determining whether to make the order and, if so, what conditions to attach, the Court was to have regard to all the circumstances and, in particular, to any disadvantages to the tenant that might be expected to result from the works, the accommodation that might be available for him whilst the works were carried out, his means in relation to the increase of rent that would result and the stages inwhich that increase would become recoverable.[88] The order could be made subject to conditions as to the time at which the works were to be carried out and as to any provision to be made for the accommodation of the tenant and his household whilst they were carried out as the Court thought fit.[89]

The Francis Committee stated that it had received a considerable amount of evidence, not only from landlords,[90] but from local authorities, professional associations and others as to the

---

86 Section 54 (2) (3)

87 Section 55

88 Section 55 (5)

89 Section 54 (4)

90 In 1970, a landlord's group called the Fair Rent Association led a campaign against the Act based on the grounds that the cost of satisfying the qualifying conditions was too high. Daily Telegraph 26th Augst 1970.

complexity and inadequacy of Part III of the Housing Act 1969.[91] The Committee had seen tenement houses in Glasgow which illustrated the inadequacy of the Act. In many of the smaller houses, it seemed quite impracticable to instal bathrooms without depriving tenants of essential living accommodation.[92] Yet it was not possible to obtain a qualification certificate unless the bathroom was installed because it was a standard amenity needed to satisfy the qualifying conditions. The Committee considered the procedure laid down in the 1969 Act to be much too cumbrous.[93] Its conclusion was that controlled tenancies should be converted into regulated tenancies without pre-conditions as to repairs or fitness.[94]

The Housing Finance Act 1972

This Act gives effect to the proposals contained in the White Paper "Fair Deal For Housing".[95] It was passed on 27th July 1972 and came into force two weeks after.[96] As regards the relationship of rent to repairs, it makes the major change of automatically decontrolling all controlled tenancies on

---

91 "Report of the Committee on the Rent Act", (Chariman H.E. Francis) (1971) Cmnd 4609 p 96

92 Ibid

93 Ibid 97

94 Ibid 99

95 Cmnd 4728, 1971

96 Section 108 (5)

specified dates unless the premises have been formally classified as unfit. It also supersedes Part III of the Housing Act 1969 relating to decontrol upon the issue of qualification certificates and replaces the provisions of that Act with new provisions designed to simplify and expedite the qualification certificate procedure.

The main changes made in the qualification certificate procedure can be conveniently listed.[97]

1) Where a dwelling subject to a controlled tenancy does not have all the standard amenities, it will no longer be obligatory on the landlord to obtain a certificate of provisional approval before starting the necessary improvement works.[98] Even if the landlord makes no application to the local authority in connection with the qualification certificate procedure until after he has completed the necessary works, he will be eligible for a qualification certificate once the dwelling satisfies the qualifying conditions. The landlord will still be able to apply for a certificate of provisional approval to assure himself that the proposed works will be sufficient to bring the tenancy out of control.[99]

---

97 See Department of the Environment, Circular No 77/72, para 2.

98 Compare Housing Act 1969 Section 46.

99 Section 29 (3)

2) A certificate of fair rent will no longer be obligatory, but again the landlord may apply for one if he wishes to know beforehand the rent he can hope to recover upon decontrol.[1]

3) If the landlord seeks a County Court order empowering him to carry out the proposed works because the tenant is unwilling to consent to them, the County Court will no longer be able to take the tenant's means into account. Under the 1969 Act, the Court was to have particular regard to the tenant's means and was precluded from making the order if the tenant's income was within the limits for rate relief.[2] The 1972 Act states that "the Court shall not take into account the means or resources of the tenant".[3] The system of rent allowances established by Part II of the Act is intended to enable the tenant to pay the increased rent resulting from the improvement and decontrol.[4]

4) Under the 1969 Act, the tenant's right of appeal to the County Court against the issue of a

---

1 Section 30 (1)

2 Housing Act 1969 ss. 54,55

3 Section 33 (4)

4 Department of the Environment, Circular No. 77/72 para 2 (4)

qualification certificate lay only where the dwelling was (or was claimed to be) provided with all the standard amenities before the commencement of that Act.[5] Under the 1972 Act, there are no restrictions on the tenant's right of appeal.[6]

5) Instead of having a fair rent registered, landlords and tenants can agree rent increases between themselves providing they follow the procedure established in the Act which is designed to give certain information to the tenant and the local authority and to prevent excessive increases.[7]

6) The 1969 Act required that rent increases normally be phased over a four year period.[8] This is now shortened by the 1972 Act to a three year period.[9]

The following summarises the provisions of the 1972 Act relating to the qualification certificate procedure. Section 27 provides for a controlled tenancy to be converted to a regulated one when the local authority issue a qualification certificate certifying that the dwelling has all the standard amenities and is in good repair. Under section 28

---

5 Housing Act 1969 Section 49 (2)
6 Section 32 (2)
7 Section 44, See infra
8 Housing Act 1969 Section 52, Schedule 3.
9 Section 38, Schedule 6 para 2

the tenant is entitled to make representations to the authority that the dwelling does not satisfy the qualifying conditions unless the authority has already approved an application for a grant under the Housing Act 1969. Section 29 provides that, where the landlord applies for a qualification certificate before the dwelling satisfies the qualifying conditions, the local authority may issue a certificate of provisional approval of works proposed by the landlord. Section 30 permits the applicant for a qualification certificate to apply to the rent officer for a certificate of fair rent showing how much a fair rent would be if the works planned were carried out and Section 31 provides for the registration of a fair rent upon issue of the qualification certificate. Under s.32, the tenant can appeal within 28 days against the issue of a qualification certificate and the landlord has a similar appeal if it is not issued. If the tenant is unwilling to consent to improvement works required to satisfy the qualifying conditions, the County Court may under s. 33 make an order empowering the landlord to enter and do the works. In deciding whether to make the order, the Court must have regard to all the circumstances and, in particular, to any disadvantage to the tenant that might be expected to result from the works, the accommodation that might be available to him whilst the works are carried out and to the age and health of the tenant.

But it is specifically provided that the Court shall not take into account the means or resources of the tenant.

The qualification certificate procedure brings about immediate decontrol upon issue of the certificate but the landlord of controlled premises which do not satisfy the qualifying conditions need only wait for certain specified dates for the premises to be decontrolled unless they have been officially classified as unfit. The relevant provisions are found in Part IV of the 1972 Act.[10] Section 35 converts all remaining controlled tenancies into regulated tenancies by stages according to rateable value. The first stage of decontrol was to take place on 1st January 1973 and the last on 1st July 1975. Section 35 has effect subject to section 36 which excludes from general decontrol those dwellings in respect of which there had been served a notice under certain specified statutes declaring them to be unfit. If the notice later ceases to apply because the premises are rendered fit or the Secretary of State refuses to confirm the order or if it is quashed by the Court, then the premises are decontrolled as from that date.[11]

A landlord may apply to the rent officer at

---

10 See generally: Department of the Environment Circular No. 77/72 paras. 14 - 22.

11 Section 36 (2)

any time when there are three months or less to the day of decontrol.[12] When the rent is registered, the increase in rent from the controlled rent to the registered fair rent is phased generally over a two year period.[13] It is also possible for the landlord and tenant to agree upon a new rent without reference to the rent officer. In that case, Section 44 requires the agreement to be in a prescribed form giving the tenant certain information. It also requires the landlord to give a copy to the local authority which may then apply to the rent officer under Section 40 for him to fix a fair rent if the proposed rent is considered too high. Failure to comply with these provisions renders the increase in rent irrecoverable from the tenant.[14]

In favour of the 1972 Act it can be said that the low rents maintained by the system of rent control meant that landlords were not in a position to repair their premises even if they had a mind to do so.[15] This was the view of the Francis Committee

---

12 Section 40 (2)

13 Section 38, Schedule 6 para 2

14 Section 46

15 This is by no means a new criticism of the system of rent control. The problem goes back at least until the nineteen fifties: J. B. Cullingworth, "Housing In Transition"(1963) pp 42 - 50. One result was that the local authorities were finding it increasingly difficult to enforce the statutory obligations of owners either effectively or equitably; J.B. Cullingworth: "Housing And Local Government" (1966) p.33

which reported that "many small landlords are not in a financial position to spend a lot of money on repairs so long as they are in receipt of a controlled rent".[16] A survey carried out for the Committee on the attitude of landlords found that nearly all landlords (92% to 95%) of controlled tenancies found their rents inadequate to cover all necessary repairs.[17] This created indifference to the state of repairs and a determination to have nothing more to do with letting premises.[18]

Furnished Tenants

There has been no mention so far of the position of tenants of furnished premises under Part VI of the Rent Act 1968.[19] The reason is that the Act has no explicit requirement that the rent fixed by the rent tribunal must take account of the actual condition of the dwelling. Section 73 states that the tribunal shall consider the contract of tenancy and may then approve the rent fixed by the contract, reduce it to "such sum as they may, in all the circumstances, think reasonable" or dismiss the application. The duty of the tribunal is to determine what is the reasonable rent payable under the

---

16 "Report of the Committee on the Rent Act". (Chairman H.E. Francis) (1971) Cmnd 4609 p 99.

17 Ibid 335

18 Ibid 97

19 Which replaces the Furnished Houses (Rent Control) Act 1946.

contract, it is given no power to see whether the landlord has carried out his obligations under that contract. This has been described by Prof. Street as "absurd".[20] He suggests, instead, that "Tribunals should be empowered to reduce the rent when a landlord is not performing his obligations. A landlord would be able to have the rent revised on proof that the obligation was again being performed."[21]

Section 75 of the Act enables a new application to be made to the tribunal on the ground of change of circumstances. But Prof. Street observes that, "sometimes the landlord is found to be no longer properly carrying out his obligations to provide services or to maintain the premises, the tribunal cannot reduce the rent for that reason."[22]

In view of the evidence that applications are often made to rent tribunals more to get repairs done than to have the rent reduced,[23] it has been suggested that the tribunals should have some direct powers to ensure that premises are repaired. They could,for example, have the power to deduct

---

20 "Justice In The Welfare State", Hamlyn Lecture 1968, pp 46 - 47

21 Ibid

22 Ibid p. 50

23 See supra 828

so much from the rent until the repairs are done.[24] Though this would go some way to lessen the frustration of tenants unable to get repairs carried out, it seems unlikely that rent tribunals are the appropriate bodies. They have neither the staff nor the experience to supervise the landlord's activities. Tribunals seem to have no advantages over those already possessed by local authority departments which since the first rent act of 1915 have had powers to issue certification of disrepair with the effect of reducing the rent recoverable.

---

24 Burney, "Housing On Trial" (1967) p 14. Compare the suggestion made to amend the Victoria , Australia rent legislation in a similar fashion, Nedovic and Stewart; 7 M.U.L.R. 258, 277 - 278 (1969)

Rent Control in The United States

Introduction

Housing shortages created as a result of the two World Wars led to the enactment of rent control laws in many areas of the United States.[1] These emergency measures were gradually repealed until New York City became the only major metropolitan area still covered by rent control.[2] In very recent years, however,

---

1 The following articles deal with rent control imposed after the First World War:

Comment, 21 Colum. L.R. 802 (1921)
Dodd & Zeiss, 7 A.B.A. J.5 (1921)
Glassie, 7 Virginia L.R. 30 (1920)
Schaub, 1920 J. of Pol. Econ. 1.
Wickersham, 69 U. of P. L.R. 301 (1921)

On control imposed after the Second World War:

Borders, 9 Law & Contemporary Problems 107 (1942)
Comment, 50 Colum. L.R. 978 (1950)
" 36 Ill. L.R. 648 (1942)
" 14 U. of Chi L.R. 243 (1946)
Finkelstein, 22 St. John's L.R. 199 (1948)
Hansen, 10 U. of Pitts L.R. 583 (1949)
McCarthy, 25 Chicago Bar Record 263 (1943)
Schofield & User, 30 Chicago Bar Record 169 (1949)
Taylor, 11 Southern Calif. L.R. 444 (1938)
Watt & Fruchtman, 30 Chicago Bar Record 307 (1949)
Willis, 47 Colum. L.R. 1118 (1947)
" 16 Geo. Wash. L.R. 104 (1947)
" 6 Loyola L.R. 15 (1951)
" 20 Southern Calif. L.R. 16 (1948)
" 23 Temp. L.Q. 122 (1949)
" 98 U. of Pa. L.R. 654 (1950)
Winnet, 14 Pennsylvania Bar Ass'n Q. 71 (1942)

See generally on rent control: 51C C.J.S. s367 p. 935, 52 C.J.S. S 551 p.544.

2 Poverty Law Reporter para 2140.

Connecticut, Massachusetts and New Jersey have all passed enabling laws providing for its re-introduction. The relevance of such rent control for our purpose is that it can be used to decrease or increase rent depending upon the state of the premises and the services provided by the landlord. It is thus another remedy which can be used to improve the housing stock.

New York City[3]

Most buildings in the city constructed before 1947 are rent controlled.[4] According to the U.S. Census, there were 2,078,000 renter-occupied housing units in the city in 1960, of which 1,605,000 or 77% were under rent control.[5] These controls[6] are administered by the Rent and Rehbilitation Administration.

---

3 See generally, Comment, 3 Columbia J. of Law & Social Problems 30 (1967)
Nancy Leblanc, "Handbook of Landlord-Tenant Law" p. 37 - 38 (1969)
P. Wald, "Law And Poverty 1965" p.16.

4 In April 1969, the Administrative Code was amended to impose rent control on certain previously exempt buildings constructed after 1947 unless the owner was a "member in good standing" of a newly incorporated Real Estate Industry Stabilization Board and bound by its code.
N.Y. City Administrative Code Ch. 51 Title Y.
See generally, Comment, 36 Brooklyn L.R. 307 (1970)

5 M. Lipsky, "Protest in City Politics" p.146 (1969)

6 N.Y. City Administrative Code Ch. 51 Title Y.
City Rent Regulations.
Held Constitutional, Eisen v Eastman (1969) 421 F 2d 560

The Administration sets a maximum rent for each dwelling unit based upon the services and facilities provided by the landlord. If the tenant makes a complaint that these services and facilities are not being provided, the rent may be correspondingly reduced. The reduced rent remains the legally recoverable maximum until the landlord has restored the services and facilities and requests that he be permitted to increase the rent to the original level. Likewise, if the landlord provides additional services or facilities not included in the rent originally fixed then he may request an increase in the legally recoverable rent.

A study carried out during the Rent Strikes of the early sixties[7] gives some indication of how rent control may work in practise in the City. It was found that increases in rent in low-income neighbourhoods were most often granted with new leases or with installation of new equipment such as refrigerators and stoves. These were often granted regardless of the general condition of the buildings.[8] The Administration was prepared to grant reductions on application by individual tenants or groups of tenants. Investigations were also initiated by officials when bad housing conditionscame to the attention of the

---

7 Lipsky op cit n 5 at pp. 146-153

8 Ibid 146

Administration through newspaper reports, protest action, housing groups or other city agencies.[9] As a response to the rent strikes, very severe rent reductions of 50% or more throughout the building were sometimes made. In one month, 532 units had their rent reduced to $1 per month.[10] The author states that it is impossible to discover whether such severe reductions achieved the aim of greater compliance with housing standards but fragmentory evidence was discouraging. "Out of 19 rent strike buildings under rent control, substantial reductions were placed in 10. In all but one instance, those buildings with substantial rent reductions either continued to have high rates of violations, had been taken into receivership by the city or vacated, or had been subsumed by -- (a) rehabilitation project. In none of them had rents been restored on application of the private landlord, although in two cases restoration followed repairs made by the city in its receivership programme."[11]

Connecticut

A recent Connecticut statute[12] permits the creation of fair rent commissions. Any town, city

---

9 Ibid 148
10 Ibid 149
11 Ibid 153
12 Connecticut Laws of 1969, Public Act No. 274

or borough may create a fair rent commission to make studies and investigations, conduct hearings and receive complaints relating to rents of properties within its jurisdiction in order to control and eliminate excessive rents. In determining whether rents are excessive, the following factors are relevant: sanitary conditions, plumbing facilities, state of repairs and compliance with health and safety laws. The Commission may order rent reductions or the payment of rent into escrow if it finds repairs to be needed.

Massachusetts

The City Council of the City of Boston is authorised, if it finds that housing shortage creates an emergency situation, to adopt an ordinance providing for rent control.[13] Only structures having four or more dwelling units can be controlled. Rents should be frozen at their 1968 level unless higher amounts are necessary to remove hardship or correct inequities.

New Jersey

New Jersey has passed a statute[14] which imposes rent control only on substandard buildings. Only multiple dwellings are affected and these are defined as dwellings with three or more apartments or rented

---

13 Massachusetts Laws of 1969, House Bill No. 4209.

14 N.J. Stat. Ann. ss 2A = 42 - 74 to - 84 (Supp 1970)

to three or more tenants or family units. Whenever a municipality finds that the health and safety of its residents are impaired or threatened by the existence of substandard multiple dwellings, it may appoint a public officer to be responsible for rent control. His job is to decide which buildings are "substandard" and order their repair within a reasonable time. There is no criteria specified in the Act to help decide what buildings can be considered "substandard" other than that there must be some housing code violations. If repairs are not carried out, the officer may impose rent control to reduce rents. But even after the reduction is imposed, sufficient income must be produced to provide the owner with a net operating income of not less than 20% of gross income in a dwelling with less than five units and 15% in buildings of five or more units. When the public officer finds that the building is no longer substandard, the rent control is lifted.

This New Jersey statute is a most interesting attempt to combine rent control with partial rent abatement. The restriction to substandard buildings emphasises its purpose as a technique to ensure conditions are improved rather than merely fixing a fair rent for the dwelling.[15] Doubts have been expressed as to the consitutionality of the law in view of the

---

15 cf infra 875

failure to clarify the meaning of "substandard".[16] The relatively high return that must be provided to the landlord means that reductions will rarely be very large.[17] Some landlords may consider a guaranteed minimum of 15% or 20% of the gross income a sufficient return on the investment and feel under no great pressure to remedy conditions.[18]

---

16 Gibbons, "Legal Representation Of The Poor" p. 307 (1966)

17 Daniels, 59 Georgetown L.J. 909, 924 n (1971)

18 Gibbons op cit n 15 at p. 308

Common Law Rent - Withholding: The Doctrine of Independent Covenants

The English Law

The tenant might think that once the landlord has broken his obligation to maintain the property then the tenant's obligation to pay rent comes to an end. In legal terminology, he might think that the covenant to do repairs and the covenant to pay rent are mutually dependent.[1] Such a view would be wrong for these covenants are independent of each other and the breach of one does not entitle the other to be broken. Thus, if the landlord covenants to repair and the tenant covenants to pay rent, the failure of the landlord to repair is not a defence should the tenant subsequently breach his covenant to pay rent. The tenant is instead required to maintain an independent action to recover damages for the landlord's breach.

The doctrine of independent covenants[2] is illustrated by the long-standing[3] attitude of the common law towards the effect of the tenant's breach of covenant on the landlord's liability for breach of the covenant of quiet enjoyment. In Hays v. Bickerstaffe,[4] the landlord had covenanted that the tenant "paying the rent and performing the covenants on his part to be performed" shall quietly enjoy. The tenant now brought action based upon the landlord entry onto the premises. In his defence, it was pleaded by the

---

1. Infra 871 for position in contract, and infra 864 for some landlord-tenant law examples.
2. See generally, Woodfall "Law of Landlord and Tenant" Vol. 1, s.1113, p. 466, 27th ed. (1968).
3. Allen v. Babbington (1666) 1 Sid. 279, 82 E.R. 1105.
4. (1675) 2 Mod. 37, 86 E.R. 926.

landlord that the tenant had wrongfully cut down wood which was contrary to his covenant and then and not before had he entered, "and so by the plaintiff's not performing his covenant, the defendant's covenant ceases to oblige him". The tenant entered a demurrer to this plea. Judgement was given for the tenant; the covenant of quiet enjoyment was not conditional upon the tenant fulfilling his own covenants. The leading case on the point is Dawson v. Dyer[5] in which the Court of Exchequer decided that even a tenant in arrears of rent could sue on the covenant of quiet enjoyment.

Turning to the condition of the premises themselves, the doctrine of independent covenants was said to apply rigidly to the situation where premises had been destroyed by natural causes. This was stated to be so by Chief Baron Macdonald in Hare v. Groves,

> "I take the distinction to be this: where, upon a covenant by one party, the law raises another mutual and correlative covenant, the one becoming impossible, the other also is gone. But where the covenants both arise out of the express agreement of the parties, and are not described as dependent the one upon the other, although the performance of the one becomes impossible, yet the force of the other remains. And this has been repeatedly decided in cases resembling the present."[6]

---

5. (1833) 5 B. & Ad. 586, 110 E.R. 906 followed in Edge v. Boileau (1885) 16 Q.B.D. 117.

6. (1796) 3 Anst. 687, 696, 145 E.R. 1007, 1011. The following cases were cited in support: Dyer 33a; Paradine v. Jane (1647) Aleyn 26, 82 E.R. 897; Monk v. Cooper (1727) 2 Ld. Raym 1477, 92 E.R. 460; Belfour v. Weston (1786) 1 T.R. 310, 99 E.R. 1112; Pindar v. Ainsley (1767) reported in (1786) 1 T.R. 310, 312, 99 E.R. 1112, 1113; Doe v. Sandham (1787) 1 T.R. 705, 99 E.R.1332. See supra 105 for a discussion of these and similar cases. It is difficult to see how they or Hare v. Groves itself are really examples of the independence of covenants doctrine. With the exception of Monk v. Cooper and Belfour v. Weston in which there were covenants to rebuild by the landlord, there was no breach of covenant by the landlord as the court held there was no implied covenant that the premises would continue fit for their purpose.

Hence the tenant's liability for rent continued despite the destruction of the house.

In 1844 the Court of Common Pleas extended the doctrine to covenants to repair and pay rent in Surplice v. Farnsworth.[7] The defendant tenant had leased a malthouse from the plaintiff. The roof was badly damaged by a storm and, upon the lessor's failure to repair it, the tenant vacated the premises and tendered the keys to the plaintiff who refused to accept them. The landlord now brought this action for rent unpaid from the date of the tenant's abandonment to the expiration of the lease. The tenant defended on the grounds that the landlord had breached an implied duty to repair. The court assumed that such a duty to repair did exist but then went on to find that a breach of this duty was no defence to the action for rent. Coltman J. aptly summed up the effect of this decision,

> "I am not prepared to give my assent to the proposition that, if the landlord is bound to repair the premises, the tenant is at liberty to leave them on the landlord's failure to repair them. The tenant's proper remedy is by an action on the contract and not by throwing up possession of the premises."[8]

Surplice v. Farnsworth was applied in Hart v. Rogers[9] where Scrutton J. thought that the doctrine was "clearer if the breach only affects the premises for part of the remainder of the demise".[10] In that case, the landlord's breach was a failure to keep parts under his control in proper repair in violation of his common law duty to do so.

---

7. (1844) 13 L.J.C.P. 215.
8. Ibid 216.
9. [1916] 1 K.B. 646.
10. Ibid

The next case to apply the doctrine,[11] Taylor v. Webb,[12] concerned the converse situation. Here, the tenant was suing for breach of the covenant to repair and the landlord's defence was that he had not fulfilled his part of the agreement by paying all the rent. This defence was rejected by Du Parcq J.,

> "I hold that these covenants are independent covenants and that the tenant who has not paid the whole of the rent is yet entitled to claim damages and that the non-payment of rent does not absolve the landlord from his duty to do the repairs."[13]

The landlord was successful on another point in his appeal to the Court of Appeal and that court found it unnecessary to express an opinion on whether the landlord's covenant to repair was conditional upon performance of the tenant's covenant to pay the rent.[14]

Camden Nominees v. Forcey[15] reveals very clearly the relevance of the doctrine of independent covenants to common law rent-withholding. Flats were let upon tenancy agreements in a standard form containing (a) an obligation on the tenant to pay his rent, usually by monthly instalments in advance, and other usual obligations, and (b) certain obligations on the landlord, including that of lighting the staircase and landings and keeping them properly cleaned and swept, and of maintaining constant hot water

---

11. A note in 84 Sol. J. 143 (1940) suggests that Cruse v. Mount [1933] Ch. 278 was a case of rent-withholding but this would not seem to be so.

12. [1936] 2 A.E.R. 763. Noted 181 L.T. 314 (1936); 3 Solicitor 164 (1936), 80 Sol. J. 259 (1936).

13. Ibid . Reliance was placed upon Dawson v. Dyer and Edge v. Boileau supra n 5

14. [1937] 2 K.B. 283

15. [1940] 1 Ch. 352. Noted, 84 Sol. J. 143 (1940).

and central heating. In the autumn of 1939, certain of the tenants complained that their landlords were not satisfactorily carrying out their obligations under the tenancy agreement. They, therefore, formed a tenants' association and the defendant, as chairman, wrote to the landlords threatening to give instructions to withhold rent if their grievances were not satisfied.[16] The landlords brought an action for the tort of inducement of breach of contract. It was necessary for the court to decide whether the defendant's threat was lawful or not. Her counsel argued for mutuality of covenants, "If A breaks one of the terms of his contract with B, he cannot complain if B subsequently breaks one of the terms of his contract with A."[17] Counsel for the landlord contended that the covenants were independent, "the fact that the landlord has broken his covenant does not justify the tenants in breaking their covenant to pay rent."[18] Simonds J. gave judgement for the landlord,

> "It is clear, nor has the contrary been suggested by her counsel,[19] that it is no answer to a claim for rent for the tenant to say that the landlord has not performed his obligation to clean the staircase or furnish hot water. (The def.) was, therefore, in her letter taking up a position which in law was not tenable."[20]

---

16. The facts are taken from the judgement of Simonds J. ibid 355.
17. Ibid 353.
18. See [1940] 2 A.E.R. 1, 3.
19. This would not seem to have been so.
20. [1940] 1 Ch. 352, 356. He later quoted from the judgement of Buckley L.J. in the case of Smithies v. N.A.O.P. [1909] 1 K.B. 310, 337 to the effect that where there are two independent contracts, the breach of one by one party does not entitle a breach of the other by the other party. Ibid 364.

The proper remedy for the tenants was to seek damages or specific performance.[21]

In summary, there are thus three High Court decisions and one decision of the Court of Common Pleas holding that the covenant to repair is not dependent upon the covenant to pay rent.[22]

The Canadian Law

The Canadian common law has followed a parallel path. Twelve years after Suplice v. Farnsworth was decided, it was followed by the Queens Bench Division of Upper Canada in Wilkes v. Steele.[23] This was a case of the lease of a mill in which the landlord sued on the covenant for rent and the tenant pleaded his breach of covenant to repair in defence. The defence was emphatically rejected,

> "If a failure on the plaintiff's part to comply with anything he covenanted to do would be a good defence against an action of covenant for the rent, which is what the defendant assumes, then there could be no such thing as independent covenants in a lease, and the landlord would lose his whole rent for some trifling default on his part. The parties might come into those terms if they pleased, but it is not shown that they did, and it certainly is not the law that when the landlord does not keep every covenant in his lease, he cannot recover his rent."[24]

---

21. There is much doubt whether the remedy of specific performance would, in fact, be available. Supra 749

22. A county court decision, Stevenson (Westminster) Ltd. v. Mock [1954] J.P.L. 275, held that a tenant was not entitled to withhold a part of her rent to compensate herself for loss of part ~~of her rent to compensate herself for loss of part~~ of the premises caused when the local authority declared basement rooms to be unfit for habitation and made a closing order.

23. (1856) 14 U.C.R. (K.B.) 570.

24. Ibid.

Many other Canadian courts came to a like decision.[25] For instance, almost a hundred years after Wilkes, the Supreme Court of Newfoundland decided Steers Ltd. v. Dokin.[26] This was another action for rent in which the tenant pleaded breach of a covenant to repair, this time one implied by statute. This plea was dealt with as a preliminary point,

> "Before dealing with the facts I feel I should consider a point of law raised on the face of the pleadings. By para. 6 of her defence the defendant states that she is willing to pay the defendant such amount as may be due for rent if and when the plaintiff effects repairs to the premises and makes them habitable. This defence involves a mistaken view of the legal position. A tenant cannot withhold rent that is due on the ground that the landlord owes something for repairs or set off the one claim against the other."[27]

Certain Canadian provinces have now passed legislation to extend the contract doctrine of dependency of covenants to leases. In 1968, the Ontario Law Reform Commission recommended that "covenants be treated as dependent in the case of the tenant's obligation to pay rent where the landlord has broken his obligation

---

25. e.g. Cross v. Piggott [1922] 32 Man. 362, 69 D.L.R. 107. (Breach of covenants to repair roof and provide heat "The principle deducible from the authorities appears to be that after the tenant has gone into possession his obligation to pay rent does not depend upon the performance by the lessor of any collateral obligations assumed by him.")
Johnson v. Givens [1941] O.R. 281, 4 D.L.R. 634. (Breach of covenant to provide heat, "The term and the obligation to pay rent continue notwithstanding the landlord's breach of covenant.")
Cases collected: Williams, "Notes on the Canadian Law of Landlord and Tenant" (3rd ed. 1957) p. 400.

26. [1950] 24 M.P.R. 239, 1 D.L.R. 58.

27. Ibid 240.

such as covenants to heat, for quiet enjoyment or to repair."[28] This recommendation was implemented in a 1970 amendment to the Ontario Landlord and Tenant Act,

> "....the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements."[29]

British Columbia[30] and Manitoba[31] have enacted similar provisions.

Although the intention of the Ontario Law Commission was to "eliminate the anomaly of a tenant having to pay rent and perform his other obligations under a lease even though the landlord has broken such covenants as to repair, provide heat and give quiet enjoyment", these provisions may not achieve this aim. First, do the obligations as to fitness and repair implied by the recent amendments[32] constitute a "covenant" within these provisions? If such obligations are covenants, are they "material"?[33] Finally, assuming that the landlord is in breach of a material covenant and these provisions entitle the tenant to withhold rent so that no action lies for arrears of rent, can the landlord seek possession

---

28. Ontario Law Commission, "Interim Report on the Law Relating to Residential Tenancies" (1968) p. 56-58.
29. R.S.O. 1970 c.236, s.89. On the contract doctrine of dependency infra §71
30. S.B.C. 1970 c.18, s.42.
31. R.S.M. 1970 cL 70, s.91.
32. Supra §20
33. Jowell, 48 Can. B.R. 323, 331.

upon expiration of the appropriate notice to quit?[34] Does the prohibition on retaliatory eviction[35] protect the tenant; would the notice be served "because of the tenant's attempt to secure or enforce his legal rights?"

The American Law: The Majority View

In America, the weight of authority also holds that the covenants to repair and to pay rent are independent.[36] McCullough v. Cox[37] was an early case from New York in which it was held that covenants by the landlord to fit up premises as "a genteel grocery store" and to instal water in a house let with the store were not conditions precedent to the tenant's covenant to pay rent. Stewart v. Childs[38] was a leading case in New Jersey.[39] The tenant had covenanted to pay rent and the landlord to keep a basement waterproof. Breach of the latter covenant did not excuse breach of the former. A more recent example is provided by the decision of the United States District Court for California in

---

34. e.g. under R.S.O. 1970 c.236, ss.98-106.

35. Infra

36. Cases collected Annot; 28 A.L.R. 1448, 1453, 28 A.L.R. 2d. 446, 456. 52 C.J.S. s.487 p.420. Comment, 8 Minn. L.R. 68 (1923). Faville, 9 Iowa Law Bulletin 250 (1924). Restatement, "Contracts" s.290 (1932). Tiffany, "Landlord and Tenant" s.51 p. 1237 (1910). 6 Williston, "Contracts" s.890 (3rd. ed. 1962).

37. (1849) 6 Barbour (N.Y.) 386. cf. Hill v. Bishop (1841) 2 Ala. 320. Leavitt v. Fletcher (1865) 10 Allen (Mass) 119. Obermyer v. Nichols (1813) 6 Binn. 159, 6 Am. Dec. 439.

38. (1914) 86 N.J.L. 648, 92 Atl. 392.

39. Followed until 1969 (see e.g. Peters v. Kelly (1967) 98 N.J. Super 441, 237 A. 2d. 635) but overruled by N.J. Supreme Court in Reste Realty v. Cooper (1969) 251 A. 2d. 268 infra 865

Hutcherson v. Lehtin,[40]

> "It has been held in California that the landlord's covenant to repair and the tenant's covenant to pay rent are independent of each other and, unless the landlord's covenant is expressly or impliedly made a condition precedent to payment of rent, a breach of the covenant to repair does not justify the tenant's refusal to pay rent."[41]

Thus, it was held in that case that such a defence was irrelevant to an action brought for possession under an unlawful detainer statute.[42]

The constitutionality of such unlawful detainer statutes reflecting the independency of covenant doctrine was considered by the United States Supreme Court in Lindsey v. Normet.[43] The material facts were stipulated. Appellants were the month to month tenants of appellee and paid $100 a month for the use of a single family residence in Portland, Oregon. On November 10, 1969, the City Bureau of Buildings declared the dwelling unfit for habitation due to rusted gutters, broken windows, broken plaster, missing rear steps and improper sanitation. Appellants requested appellee to make certain repairs which, with one minor exception, appellee refused to do. They then refused to pay the December rent until the requested improvements had been made. In reply,

---

40. (1970) 313 F. Supp. 1324. Other recent cases include Thompson v. Harris (1969) 9 Ariz. Appl. 341, 452 P. 2d. 122; Pavkind v. Jones (1969) 439 S.W. 2d. 470 (Tex.)

41. Ibid 1328.

42. cf. Brownlee v. Sussman (1970) 238 So. 2d. 317 (Fla.).

43. (1972) 92 S.Ct. 862.

the appellee's attorney wrote a letter threatening to "get a Court Order out on this matter" unless the rent was immediately paid. Before the statutory eviction procedures were begun in the Oregon courts, the tenants sought a declaratory judgement that such procedure under the Oregon Forcible Entry and Wrongful Detainer Statute was unconstitutional. One line of attack was that the Statute limited the triable issues in an action to the tenant's default and precluded consideration of defences based on the landlord's breach of duty to maintain the premises. This limitation and exclusion of a defence based upon dependency of covenants was said to be invalid as in violation of the Due Process Clause of the Fourteenth Amendment.

The majority of the Supreme Court upheld the Oregon statute. Mr. Justice White delivered the opinion of the court,

> "Underlying appellants' claim is the assumption that they are denied due process of law unless Oregon recognises the failure of the landlord to maintain the premises as an operative defence to the possessory F.E.D. action and as an adequate excuse for nonpayment of rent. The constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertaking of the tenant and those of the landlord as independent rather than dependent covenants."[44]

The court also drew attention to the fact that "the tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action".

---

44. Ibid 871.

Mr. Justice Douglais vigorously dissented. Precluding affirmative defences reflected "the ancient notion that a lease is a conveyance". Contractual analysis led to the conclusion that the covenants were dependent and this was the view taken by Oregon State courts. The question for the Supreme Court was not whether as a matter of constitutional law a lease is required to be interpreted as an ordinary contract "but whether once Oregon has gone this far as a matter of state law, the requirements of due process permit a restriction of contract-type defenses in an F.E.D. action".

> "Normally a state may bifurcate trials, deciding, say, the right to possession in one suit and the right to damages in another ... But where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere may allow him to litigate the basic question in the case."[45]

The Minority View

A minority of cases has rejected the general rule and found the covenants of repair and to pay rent to be mutually dependent.[46] The case of Barnes v. Strohecker[47] decided by the Supreme Court of

---

45. Ibid.

46. Bennett, 16 Texas L.R. 47, 69 (1937). Comment, 36 Harv. L.R. 624, 625 (1922). Comment, 8 Minn. L.R. 68 (1923). Faville, 9 Iowa Law Bulletin 250, 251 (1924). Plevan, 50 Boston U.L.R. 24, 28 (1970). Ropacz, 4 De Paul L.R. 173, 178 (1954). Schier, "Protecting the Indigent Tenant" in "The Law Of The Poor" (1966) p. 356.(Ten Broek ed.)

47. (1855) 17 Ga. 340, reconsidered (1856) 21 Ga. 430.

Georgia in 1855 provides a clear example,

> "It has been urged before us that these covenants were, ... independent of each other. We cannot conceive how such an agreement can be regarded in this light. The effect of such a contract is that the tenant agrees to rent the premises for one year from a given day and to pay a specified sum, if the landlord will put certain repairs upon them by the commencement of the term or within a reasonable period thereafter. The landlord undertakes to do this, and the contract is made. Can these covenants, ex vi termini, and in the very nature of things, be ought else but dependent?"[48]

The Supreme Court of Arkansas came to the same decision in Berman v. Shelby[49] and the Texas Court of Civil Appeals in Ingram v. Fred[50] a few years later. A New Jersey Court added to the group of minority cases with Higgins v. Whiting[51] in which the agreement by the landlord to heat the premises and the tenant's agreement to pay rent were declared to be mutually dependent.[52]

In the last few years, the doctrine of independent covenants has been expressly abandoned by some of the courts implying a warranty of habitability in residential leases.[53] In Reste Realty

---

48. Ibid 344.

49. (1910) 93 Ark. 472, 125 S.W. 124. See also Tedstrom v. Puddlephatt (1911) 99 Ark. 193, 137 S.W. 816. Ashmore v. Hays (1923) 252 S.W. 11. Noted Comment, 8 Minn. L.R. 68 (1923).

50. (1919) 210 S.W. 298 and see infra 872
cf. Gilbert v. Young (1924) 266 S.W. 1113.

51. (1926) 102 N.J.L. 279, 131 A. 879. See also Stewart v. Childs (1926) 102 N.J.L. 279 supra 861 Reste Realty Corp. v. Cooper (1969) 251 A. 2d. 268.

52. The following cases illustrate the dependency of covenants approach as applied to other lease covenants. Medico-Dental Bldg. Co. v. Horton (1942) 21 Cal. 2d. 411, 132 P. 2d. 457; University Club of Chicago v. Deakin (1914) 265 Ill. 257, 106 N.E. 790; Stifter v. Hartman (1923) 225 Mich. 101, 195 N.W. 673; Hiart Investment Co. v. Buehler (1929) 225 Mo. App. 151, 16 S.W. 2d. 219. It has been observed that most of these cases concern commercial leases though there would seem to be no reason not to extend them to residential leases. Plevan, 50 Boston U.L.R. 24, 28 (1970).

53. Supra 136

Corp. v. Cooper,[54] the New Jersey Supreme Court considered two earlier cases[55] which differed as to whether the doctrine applied. The decision finding the covenants to be dependent was espoused as "propounding the sounder doctrine". The leading case of Marini v. Ireland[56] reiterated this earlier holding,

> "The concept of mutually dependent promises was not originally applied to the ascertainment of whether covenants in leases were dependent or independent. However, presently we recognise that covenants are dependent or independent according to the intention of the parties and the good sense of the case."[57]

The court went on to say, however, that the tenant was not relieved from the payment of rent so long as the landlord fails to repair.[58] Likewise, in Javins[59] the United States Court of Appeals for the District of Columbia Circuit expressly applied the dependency of covenant concept but then went on to say that some portion of the rent might still be owed. On a purely analytical level, these two decisions seem to contradict themselves. To say that the duty or obligation to pay rent is dependent on the landlord's duty to repair and then to allow him to recover rent whilst he is in

---

54. (1969) 251 A. 2d. 268
Supra 138

55. Stewart v. Childs (1914) 86 N.J.L. 648 - independent covenants discussed supra 861 Higgins v. Whiting (1926) 102 N.J.L. 279 - dependent covenants discussed supra 865

56. (1970) 265 A. 2d. 526, 56 N.J. 130, supra 160

57. Ibid 534. See also Academy Spires Inc. v. Jones (1970) 261 A.2d. 413, 108 N.J. Super 395 in which it was said that Reste had "destroyed the doctrine of independent covenants", and Sprock v. James (1971) 278 A. 2d. 421, 115 N.J. Super 111 in which it was decided that even prior to Marini equitable defences should have been available to tenants in summary dispossess actions.

58. But see Academy Spires v. Brown (1970) 268 A. 2d. 556, supra 161 allowing rent withholding.

59. (1970) 428 F. 2d. 1071, 1082, supra 141

breach of that duty seems quite inconsistent.[60] As a practical matter, however, it might be said that the theory of partial abatement of rent is to be preferred to complete abatement.[61]

Michigan has modified the doctrine of independent covenants by judicial construction of a recent statute. A 1968 Act permitted the tenant to assert the defence of failure of a condition precedent to payment of rent.[62] The draftsman of this provision pointed out, "The tenant need only persuade the court that the failure of the landlord to repair, if that is the case, is a substantial breach of contract, giving rise to a failure of a constructive condition precedent to the duty to pay rent."[63] The Court of Appeals of Michigan was so persuaded in Rome v. Walker[64] and reversed a Circuit Court decision applying the independence of covenants theory. Regard was had to the Legislative's indication that the statute be "liberally construed" in reaching the conclusion that "these statutorily required covenants are mutual with, rather than independent of, the covenant to pay rent".[65]

---

60. King, 32 Ohio State L.J. 207, 215 (1971). cf. Martin, 39 U. of Cinn. L.R. 600, 608 n.51 (1970).
61. Infra §77
62. Mich. Comp. Laws s.600, 5646 (1968).
63. Schier, 2 Prospectus 227, 237 (1968).
64. (1972) 38 Mich. App. 458, 196 N.W. 2d. 850.
65. 196 N.W. 2d. 850, 852.

The Model Residential Landlord - Tenant Code suggests a more direct modification of the doctrine rather on the lines of the Canadian provisions.[66] Section 2-102(2) provides that, "Material promises, agreements, covenants or undertakings of any kind to be performed by either party to a rental agreement shall be interpreted as mutual and dependent conditions to the performance of material promises, agreements, covenants and undertakings by the other party". The Uniform Landlord and Tenant Relationship Act contains a similar provision.[67]

Procedural Rules designed to prevent circuity of litigation may also operate so as to make covenants dependent. For example, the rules of the District of Columbia Superior Court state that,

> "in actions in this branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or set-off as a counterclaim for money judgement based on the payment of rent or an expenditure claimed as credits against rent or for equitable relief related to the premises."[68]

Rationale of Independent Covenants Doctrine

The reason for the independence of covenants theory is to be found in the concept of a lease as a conveyance of an estate in land.[69] Professor Schoshinski points out that,

---

66. Supra 860
67. Section 1.304 (1972).
68. D.C. Super. Ct. (Civ.) Landlord-Tenant Rule 5(b). Daniels, 59 Geo. L.J. 909, 922 n.89 (1971).
69. Supra 168

> "The tenant became the owner of an estate for a limited period of time. Rent was not consideration for the sale of the estate; it was a tenement itself, something which issued from the reality and which the tenant gave to the landlord. Any covenants in the lease were independent of the basic tenurial relationship and independent of each other."[70]

This type of analysis in terms of conveyance rather than contract is illustrated by the decision of the North Carolina Supreme Court in Walters v. Snow.[71] The tenant had covenanted to pay rent and the landlord to repair. In the latter's action for rent, the tenant pleaded breach of the repair covenant. Finding for the landlord, the court explained the decision thus,

> "The plaintiff has substantially performed that which he contracted to perform - put the defendant Snow into possession of the house and lot; and the lessee has gotten substantially that which he contracted for; and any special injury he may have sustained by the non-performance of the plaintiff of the covenant to repair may be compensated to him in damages, and he cannot, in a suit to recover the rent, plead the covenant as a condition precedent."[72]

Here we see the court stressing the central element of the tenancy; the conveyance of an estate. Other provisions such as the covenant to repair are regarded as tangential and breaches are remedied by damages alone.

Another point that must be remembered is that the doctrine that a lease is a conveyance and the corresponding rule of independent

---

70. Schoshinski, 54 Geo. L.J. 519, 534-535. See also, Faville, 9 Iowa Law Bulletin 250, 253 (1924); Lesar, 35 N.Y.U. L.R. 1279, 1281 (1960); Moran, 19 De Paul L.R. 752, 758 (1970); Quinn and Phillips, 38 Fordham L.R. 225, 233 (1969).

71. (1849) 32 N.C. 216.

72. Ibid.

covenants were established before the development of the concept of dependency of covenants in the law of contract.[73] By 1500 the lease had acquired its essential character as a conveyance.[74] Yet, at that time, it would not have mattered whether it had been viewed as a contract or conveyance because the doctrine of independent covenants applied also to contracts.[75] Nichols v. Raynbred provides an illustration,

> "Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 shillings: adjudged for the plaintiff in both counts, that the plaintiff need not aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will both be nuda pacta."[76]

Another case that might be mentioned is Ware v. Chappel[77] which shows the same reasoning applied to a contract under seal. Ware had by deed covenanted with Chappel that he would provide five hundred soldiers and bring them to a certain port, and Chappel had covenanted to provide shipping and victual for them. Ware sued Chappel for not fulfilling his part of the bargain and the latter pleaded that Ware had not raised the soldiers at that time.

---

73. 6 Williston, "Contracts" s.890 (3rd ed. 1968). Lesar, 35 N.Y.U.L.R. 1279, 1281 (1960).

74. Supra 170

75. See Holdsworth, "History of English Law" Vol. 8 pp. 72-75. Also, 3 Corbin, "Contracts" s.656 at 616 (1951); Faville, 9 Iowa Law Bulletin 250, 252 (1924); Walsh, 40 Connecticut B.J. 539, 555. 6 Williston, "Contracts" s.816 (3rd ed. 1968).

76. (1615) Hobart 88, 80 E.R. 238.

77. (1649) Style 186, 82 E.R. 633

Rolle C.J. held that this plea was no answer to the action, because "they are distinct and mutual covenants, and there may be several actions brought for them".

It was not until the eighteenth century that the modern doctrine of dependency of covenants in contract law was established. One of the earliest restatements of the law[78] was that given by Lord Mansfield giving judgement in Kingston v. Preston[79] decided in 1773,

> "In delivering the judgment of the court, Lord Manfield expressed himself to the following effect: -- There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act. -- His Lordship then proceeded to say, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and, that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance."[80]

---

78. The doctrine of independent covenants was disapproved in Thomas v. Cadwalloder (1744) 5 Willes 496, 125 E.R. 1286

79. Reported in Jones v. Barkly (1781) 2 Doug. 684, 68-91, 99 E.R. 434, 437-438.

80. Ibid 690-691. See also Boone v. Eyre (1777) 1 H.Bl. 273 n. 126 E.R. 160; Campbell v. Jones (1796) 6 T.R. 570, 101 E.R. 708; Ellen v. Topp (1851) 6 Exch. 424.

It has been said that the modern history of the law of contract begins with the adoption by the courts of this changed attitude.[81] But the attitude of most courts towards leases did not change and the doctrine of independent covenants remains as a relic of legal history to this day.

As we have seen,[82] a minority of courts regard covenants as dependent - this is a reflection of the view that leases should be treated just like a contract.[83] The point was made with some vigour by the Texas Court of Civil Appeals in Ingram v. Fred,[84]

> "But if there be any principle of public policy prevailing in England which would exempt a lease contract from the operation of the general rule of mutuality of covenants applicable to the construction of other contracts, the same does not obtain in this state. On the contrary, such an exception in favour of a landlord and against the tenant, which, so far as we can perceive, is purely arbitrary and without any reasonable or equitable basis, is incompatible with the spirit and genius of our institutions and should not be allowed."[85]

More recent cases have applied similar reasoning. In Javins, the United States Court of Appeals for the District of Columbia Circuit stated,

> "In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition."[86]

---

81. Holdsworth op. cit. n.7 at 75.

82. Supra 864

83. See generally supra 175

84. (1919) 210 S.W. 298.

85. Ibid 300.

86. (1970) 428 F. 2d. 1071, 1082. See Zenor, 56 Cornell L.R. 489, 499 (1971).

The doctrine of dependency of covenants is thus another sign of the modern tendency to analysis tenancy agreements according to the principles of contract rather than real property law.[87]

Evaluation of Dependency of Covenants Theory

Although the tit for tat nature of the dependency of covenants theory satisfies a basic sense of justice,[88] there are serious drawbacks to this type of rent-withholding. The most serious from the tenant's viewpoint is precisely that it does operate on a tit for tat basis. If the landlord's right to rent is dependent on the tenant's right to repairs then the tenant's right to repairs is also dependent on the landlord's right to rent.[89] This means, in practice, that if the tenant falls into arrears with his rent he will be unable to enforce any of the landlord's obligations to repair. Justice may demand such a conclusion but it is no way to get repairs carried out. The other major drawback is that whilst the doctrine of mutual dependency provides a good defence to an action for possession based on non-payment of rent, "the landlord is free to seek eviction at the termination of the lease or on any other legal

---

87. See generally supra 179

88. It has been said that "the prospect of a tenant's being forced to continue paying rent under pain of summary eviction when heat is not supplied seems preposterous to one who expects basic fairness from the law".
Quinn and Phillips, 38 Fordham L.R. 225, 233 (1969).

89. At present, the independence of covenants doctrine prevents this result; Taylor v. Webb [1936] 2 A.E.R. 763 supra 856
cf. Annot, 28 A.L.R. 1448, 1463.

ground".[90] These difficulties[91] lead one to the conclusion that rent withholding is better legalised by proper statutory provisions than by modifications of the common law.

---

90. Javins v. First National Realty Corp. (1970) 428 F. 2d.1071, 1083, n.64. In England, tenants protected by the Rent Act 1968 may not be so easily removed but many tenants are not "protected tenants" - see generally infra 1036

91. See also infra 878 for other difficulties applying to such defensive forms of rent-withholding. It is also possible that the courts might construe the tenant's continued presence on the premises as a waiver of the landlord's breach Walsh, 40 Conn. B.J. 539, 556 (1966). cf. supra 155

American Rent-Withholding Laws

Introduction

In recent years, American Legislatures have turned increasingly to rent-withholding as a remedy for the tenant whose landlord fails to repair. In its widest sense, this remedy covers all those techniques that deprive the landlord of rental income. But to understand and evaluate the many statutes employing this remedy, it is useful to make some distinctions in types.[1] The most drastic type is rent abatement which means that the landlord is never entitled to the rent and the longer he delays, the more he loses.[2] Rent withholding[3] and rent escrow[4] are not so harsh; the money is denied the landlord until repairs are carried out though some may also be spent on repairs meanwhile. Rent escrow differs from rent withholding in its narrow sense in that escrow means

---

1 McElhoney, 29 Maryland L.R. 193, 202-203 (1969)
See also, Comment, 55 Minn. L.R. 82, 100 (1970)

2 See New York Multiple Dwelling Law s 302a infra.
Pennsylvania Stat. Ann. tit 35 s 1700 - 1 infra.
Statutes requiring Certificate of Code compliance - infra.

3 Massachusetts Gen. Law. c 239 s 8A. infra.
New York Real Property Actions and Proceedings Law s 755 infra.

4 Massachusetts Gen. Law c 111 s 127 infra.
New York Real Property Actions and Proceedings Law s 755 infra
" " " " " " " Article 7A "
Pennsylvania Stat Ann tit. 35 s 1700 - 1 infra
Rhode Island Gen. Laws Ann. s 45 - 24. 2 - 11 infra.

the rent is paid to some third party whereas withholding means the tenant keeps it in his possession. Within these basic types, there are further distinctions to be made. For instance, in rent escrow the rents may be paid either to the Court[5] or to some other third-party such as the code enforcement agency[6] or a receiver.[7] Statutes rarely employ just one technique and these basic types are found in various combinations. Before rent is abated it may need to be deposited in escrow.[8] Rent withbolding may be followed by escrow.[9] A further distinction is between tenant-initiated types[10] and defensive types.[11] The former permit the tenant to go to Court whilst the

---

5 Massachusetts Gen. Law c 111 s 127 infra.
New York Real Property Actions and Proceedings Law 755 infra.

6 Rhode Island Gen. Laws Ann. s45 - 24. 2 - 11 infra

7 Massachusetts Gen. Laws c 111 s 127 infra.
New York Real Property Actions and Proceedings Law Article 7A infra.

8 Pennsylvania Stat. Ann. tit. 35 s 1700- 1 infra.

9 Massachusetts Gen. Law c 239 s 8A infra.
New York Trsl Property Actions and Proceedings Law s 755 infra

10 Massachusetts Gen. Law c 111 s 127 infra.
New York Real Property Actions and Proceedings Law Article 7A infra.
Rhode Island Gen. Laws Ann. s45 - 24. 2 - 11 infra.

11 Code compliance statutes infra.
Massachusetts Gen. Law c 239 s 8A infra.
New York Multiple Dwelling Law s 302 a infra.
New York Real Property Actions And Proceedings Law s 755 infra
Pennsylvania Stat. Ann. tit 35s 1700-1 infra

latter may only be used after the landlord starts a possession action.

Some general comments can be made about each type. Rent abatement can be viewed as punitive and intended to satisfy a desire for revenge and a sense of justice: if the landlord does not repair, why should the tenant pay rent?[12] Furthermore, the drastic nature of the technique threatening permanent loss of rent should be a heavy incentive to the landlord to repair.[13] But it has been observed, "the only problem with abatement statutes is that while they compensate the tenant for his discomfort they do not help him get the house repaired and both society and the tenant loose in the long run."[14] Crucial rent revenues needed for the purpose of making repairs are denied to the landlord and this increases the likelihood that repairs may never be made;[15] the landlord simply does not have the necessary funds. Rent escrow schemes may sometimes avoid this result by permitting the landlord to recover money for repairs[16] or handing the accumulating rent to a receiver to do them.[17] The disadvantage of this

---

12 Comment, 55 Minn. L.R. 82, 100 (1970)

13 Ibid
Hales & Livingston, 23 U. Florida L.R. 79, 95 (1970)

14 Comment, 55 Minn. L.R. 82, 100 (1970)

15 Daniels, 59 Georgetown L.J. 909, 927 (1971)

16 Massachusetts Gen. Law c 111 s 127 infra
New York Real Property Actions and Proceedings Law s 755 infra
But see Pennsylvania Stat. Ann. tit 35 s 1700-1 infra.

17 Massachusetts Gen. Law c 111 s 127 infra
New York Real Property Actions and Proceedings Law Article 7A infra.

technique is that if all remaining rents are eventually returned to the landlord, there may be little incentive for him to do the work promptly.[18] Rent withholding suffers from the same disadvantage. Also, there is a danger that some tenants would be tempted to spend the withheld rent on other things thus limiting the money available for repairs.[19] On the other hand, this technique is procedurally less complicated as it avoids the need to pay over rent to some third person. The tenant may also be able to use the rent to do repairs.[20]

A comparison of defensive and tenant-initiated techniques also reveals advantages and disadvantages in each type. Failing to pay rent and then defending the landlord's action is a technique that places the burden of commencing legal action on the other side. This is much less complicated than most forms of tenant-initiated techniques which require tenants to be able to set in motion the legal machinery- something of which most will have no experience.[21] On the other hand, the big disadvantage of defensive techniques is that the tenant is under attack and may lose his home if he is unable to justify his decision not to pay rent.[22] Tenant-initiated techniques enable him to

---

18 Daniels, 59 Georgetown L.J.909, 927 (1971)

19 McElhoney, 29 Maryland L.R. 193, 204 (1969)

20 eg New York Real Property Actions and Proceedings Law s 755 infra

21 cf Daniels, 59 Georgetown L.J. 909, 926 (1971) McElhoney, 29 Maryland L.R. 193, 203 (1969)

22 Ibid. See also Dooley & Goldberg, 7 Harvard J. on Legislation 357, 376 (1970).

find out before if non-payment to the landlord is justified. There are other disadvantages linked to the status of the tenant as defendant in a possession action.[23] Landlords, although technically required to attempt personal service, may rely on posting notice of the action thus cutting down the time in which a defence may be prepared and a reply entered. Also, tenants may face the problem of "sewer service" in which process servers swear to service but have, in fact, thrown the notice away. The first thing the tenant knows of the action is the baliff's notice to leave as judgement has been given in default.

Some statutes require proof that the code enforcement agency has found a code violation before rent may be denied to the landlord.[24] This requirement takes away one of the chief advantages of the remedy - that of avoiding dependence upon administrative agencies.[25] In its place are substituted all the problems connected with housing code administration:[26] shortage of staff, delay, confusion of agencies and complex procedures.[27] A study of a New York statute

---

23 Nancy Leblanc, "Landlord - Tenant Problems" p.53.

24 Massachusetts Gen. Law c 111 s 127 infra, ibid c 239 s 8A infra.
New York Multiple Dwelling Law s 302 a infra.
Pennsylvania Stat. Ann. tit 35 s 1700 - 1 infra.
Rhode Island Gen. Laws Ann. s 45 - 24. 2 - 11 infra.

25 Flitton, 48 Chi. Bar Record 14, 19 (1967)

26 Supra 100 for a discussion of the problems of code enforcement

27 Daniels, 59 Georgetown L.J.909, 926 (1971)
Flitton, 48 Chi. Bar Record 14, 20 (1967)
Greiner, 12 Villanova L.R. 631, 640 (1967)
McElhoney, 29 Maryland L.R. 193, 205 (1969)

which had such a requirement at the time[28] illustrates these difficulties.[29] In many cases landlords were given judgement because inspectors had not yet reported violations, or the data processing machinery had not yet produced a recording of the violation. "Merely obtaining copies of the relevant records through a simple subpoena process proved, at times, a difficult obstacle. Rent strike lawyers balked at personally paying the small fees when they felt tenants should bear that responsibility. This resulted in needless and irritating adjournments or loss of cases."[30]

Agency determination that a violation exists does, however, possess the advantage for the tenant that he knows the state of the premises is sufficient to justify rent denial. A problem with many statutes is the vague fashion in which the conditions justifying the remedy is described.[31] For example, the following standards are used: violations which "may endanger or materially impair the health or well-being of any tenant"[32] or a condition which "is, or is likely to become dangerous to life, health or safety".[33]

---

28 New York Real Property Actions and Proceedings Law s 755 infra

29 Lipsky, "Protest in City Politics" p. 144 (1970)

30 Ibid

31 Flitton, 48 Chi. Bar. Record 14, 21-23 (1967)

32 Massachusetts Gen. Laws c 111 s 127 infra

33 New York Real Property Actions and Proceedings Law s 755 infra

Such vagueness may be necessary if the remedy is not to be excluded by too rigid a definition, but it does place both landlord and tenant in a difficult position. Until the matter is litigated, it will be impossible to be certain whether the remedy may be employed.

An important point in evaluating any tenant remedy is to examine how available it is to the average tenant.[34] Statutes which require organisation of a number of tenants or complex procedures to be followed will have limited value. After an examination of a number of rent denial statutes, one commentator concluded, "Unfortunately, all of these remedies are quite complicated, require initiation by well-counselled tenants, and often become a trap for the unwary. Moreover, they have seldom been availed of by low-income residents absent time consuming efforts by organisers attempting to unify and to infuse militancy into the life style of the urban poor."[35]

Once again, the New York statute[36] provides an example. "Tenant problems in utilizing this judicial remedy represent almost a paradigm of the problems of the poor in the administration of justice. Problems

---

34 See generally, Daniels, 59 Georgetown L.J.909, 925-926 (1971)
Fankel, 37 Brooklyn L.R. 387, 393 (1971)

35 Garrity, 46 J. of Urban Law 695, 707 (1969)

36 Supra n 28

of proof and procedure had to be analyzed and solved. To make the remedy available to large numbers, systemotization was required, and non-professionals had to be assigned to tasks of mobilizing evidence, rounding up tenants, and serving as links in the chain from tenant, to rent strike organizer, to rent strike lawyer. The availability of lawyers became the crucial element in the story of rent strikes in Court. -- A heavy caseload, comprised of defendants unfamiliar with attorneys and courtroom procedures, had to be distributed among volunteer lawyers who offered their services for one day or one morning a week. The efforts of these volunteers had to be coordinated so that tenants were assured of representation in court. More than likely, lawyers would be unfamiliar with the details of tenants' problems represented in the caseload for the day."[37] The Courts were sometimes far from the tenants' homes, they had difficulty in getting time off from work or leaving children at home.[38] All these difficulties of tenant access to the remedy limits its effectiveness. On the other hand, some procedural safeguards are required to prevent tenant misuse of what could be a source of serious financial loss to the landlord. The problem is to strike a balance.

---

37 M. Lipsky op cit n 29 at pp. 143-144.

38 Ibid

The statutes normally contain express provisions to prevent tenant abuse. The landlord does not suffer loss of rent if he is able to show that the conditions complained of were caused by the tenant or someone for whom the tenant is responsible.[39] If the tenant has prevented the landlord from doing repairs, the same result may follow.[40] A couple of statutes render the tenant who brings an action in bad faith liable to a penalty in costs.[41] In the case of defensive types of rent denial, the tenant who is found to have raised the defence wrongly suffers eviction.

Certificate of Code Compliance

The oldest form of statutory rent-abatement would seem to be that permitted by certain states as a result of failure by the landlord to comply with statutes requiring him to have a certificate of code compliance.[42] The first such statute was apparently passed by New York in 1901[43] followed by Connecticut in 1905,[44] Indiana in 1913,[45] Michigan in 1917[46] and Iowa in

---

39 Mass Gen Laws Ann. ch 239 s 8A (1)(c) infra.
New York Multiple Dwelling Law s 302- a infra.
New York Real Property Actions and Proceedings Law Article 7A infra.
cf. Pennsylvania Stat. Ann. at 35 s 1700 - 1 infra.

40 New York Multiple Dwelling Law s 302 - a infra.
New York Real Property Actions and Proceedings Law Article 7A infra.

41 New York Multiple Dwelling Law s 302 a.
Maryland Ch. 459 (1968) Maryland Laws 832.

42 See Vogt, 35 Mich. L.R. 1183 (1937)

43 N.Y. Laws (1901) s 123.

44 Conn. Pub. Acts (1905) c 178 ss 26, 27
See Marks, 12 Conn. B.J. 9 (1938) for a critical appraisal.

45 Ind. Acts (1913) s95 p.377

46 Mich. Acts of 1917 No. 167

1924.[47] It was a provision of Lawrence Veiler: Model Housing Law of 1914.[48] This type of enactment is still to be found on the statute book.[49] For example, the Zoning Regulations of the District of Columbia state that "no person shall use any structure, land, or part thereof for any purpose other than a one-family dwelling until a Certificate of Occupancy has been issued to such person."[50] The Zoning Act provides that " it shall be unlawful to use any building, structure or land until such certificate be first obtained."[51] The District of Columbia Building Code contains the following requirement,

> "No person shall use any building, land or premises, or part thereof, for any purpose, except as hereafter exempted, until the Director of the Department of Licenses and Inspections, upon written application, shall have issued a certificate of occupancy to such person for such use, provided the use complies with the requirements of the Zoning Regulations, this Code, the related Mechanical and Electrical Codes, and the Housing Regulations."52

---

47 Iowa Code (1924) s 6432

48 Veiller, "Model Housing Law" s 142 p.226 (1916) See supra 94

49 eg. New York Multiple Dwelling Law ss 301, 302. For a recent case, see Washington Square Professional Building Inc. v Edene Leader (1971) 326 N.Y.S. 2d 716 holding that statute did not apply to reduction of existing residential space.

50 Section 8104.1.

51 D.C. Code s 5 - 422 (1967)

52 Ibid s 1 - 228.

See Golf Inc. v District of Columbia (1933) 62 App D.C. 309, 67 F2d 575

Jones v District of Columbia (1963) 116U.S. App D.C. 301, 323 F 2d 306

Some of the statutes expressly forbade the recovery of rent if the premises were occupied without the certificate.[53] Such a statute was applied by the Connecticut Court in Second National Bank of New Haven v Loftus[54] to bar the landlord's action for arrears. But other statutes which did not expressly preclude recovery were held not to have that effect.[55] Arguments based on the illegality of the landlord's action in letting premises in violation of the law were rejected.[56] Moreover, even those statutes precluding recovery from the tenant have been held not to permit him to recover back rent already paid.[57] This restrictive attitude found further expression in a Michigan decision that, although the landlord could not recover rent, he was not prevented from recovering possession from a tenant who had refused to pay.[58]

---

53 Annot, 144 ALR 259 (1943)

54 (1936) 121 Conn. 454
185 A 423
Noted, Vogt, 35 Mich L.R. 1183 (1937)
See also Burlington Apartments v Man (1942)
7 NW 2d 26 (Iowa)
Comment, 28 Iowa L.R. 693 (1943)

55 eg Euclid Holding Co v Schulte (1934) 153 Mis.832
276 NYS 533

56 Supra

57 Wokal v Sequin (1938) 167 Misc. 463
4 NYS 2d 86

58 Borsky v Litwin (1939) 289 Mich 672
287 NW 339
But see the following holding that action for possession based on nonpayment of rent are barred.
941 Park Ave Corp v Fried (1933) 148 Misc 137
265 NYS 239
Silamar v Bien (1937) 165 Misc 239
2 NYS 2d 512

Maryland

The State of Maryland has enacted a rent escrow statute.[59] In any action to recover rent, levy distress or recover possession for non-payment of rent, the tenant may assert as a defence that there exists on the premises certain conditions. These conditions must constitute or be likely to constitute "a fire hazard or a serious threat to the life, health or safety of the occupants thereof, including but not limited to, a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities or an infestation of rodents."[60] Before the tenant can assert this defence, he must pay into court the amount of rent found by the court to be due and unpaid to be held by the court pending its order.[61]

The landlord can defeat the defence by establishing that the conditions in the premises as alleged in the defence do not exist or have been remedied or that they were caused by the tenant or his family and guests.[62] The tenant's unreasonable refusal to allow the landlord to enter the premises for the purpose of correcting the defects is also an answer to his defence.[63] Furthermore, to be liable, it must be shown that prior to the commencement of the landlord's action, he or his agent was notified in writing by certified mail

---

59 Ch. 459 (1968) Maryland Laws 832

60 Ibid sub-section (a)

61 Ibid sub-section (b)

62 Ibid sub-section (c)

63 Ibid

of the state of the dwelling either by the tenant or an appropriate State or municipal agency.[64]

The Court considering the defence "shall pass such order as the justice of the case shall require, including any one or more of the following:

1) An order of set-off to the tenant as determined by the Court in such amount as may be equitable to represent the existence of any condition (within the statute) which is found by the Court to exist.

2) Terminate the lease or order surrender of the premises to the landlord.

3) Refer any matter before the Court to the proper State or municipal agency for investigation and report. When such a continuance is granted, the tenant shall deposit with the Court any rents which will become due during the period of continuance, to be held by the Court pending its further order or in its discretion the Court may use such funds to pay a mortgage on the property in order to stay a foreclosure."[65]

It has been argued that "pass such order as the justice of the case shall require" is authority for a judicial order that the landlord make repairs or that an administrator be appointed to have them carried out in default.[66]

There is provision to prevent tenant abuse of the rent escrow procedure,

> "If it shall appear that the tenant has raised a defence under this section in bad faith, or has caused the violation or has unreasonably refused entry to the landlord or his agent for the purpose of correcting the condition giving rise to the violation, the Court in its discretion, may impose upon the tenant the reasonable costs of the landlord, including repairs where the Court finds the tenant has

---

64 Ibid sub-section (b)
65 Ibid sub-section (d)
66 McElhaney, 29 Maryland L.R. 193,212-213 (1969)

caused the violation."[67]

On the other hand, any provision in a lease or tenancy agreement purporting to waive any of the tenant's rights under the statute is deemed against public policy and shall be void.[68]

Although this Maryland Act has been described as providing "a start toward giving tenants an economic weapon to force landlords to repair",[69] it has not escaped criticism. The conditions justifying rent withholding are not comprehensively defined and so the tenant must guess at his peril whether he can employ the defence.[70] If he does decide to use it, he must give notice in writing to the landlord of the state of the dwelling. It has been said that "it is unfair to require poor tenants, perhaps illiterate and unlikely to be familiar with the post office except on a most elementary level, to send formal written notification to landlords about defects in order to raise the defence."[71] The alternative is to complain to the housing authorities but this then makes rent withholding subject to all the delays and inadequacies of housing code enforcement.[72]

---

67 Ch 459 (1968) Maryland Laws 832 sub-section (e)
68 Ibid sub-section (f)
69 McElhaney, 29 Maryland L.R. 193, 213 (1969)
70 Ibid 209, cf. Supra 347
71 Ibid
72 Supra 100

The provision requiring the tenant who raises the defence in bad faith to pay the landlord's reasonable costs has been attacked as one-sided.[73] There is no similar provision for the landlord who brings an action in bad faith.

Massachusetts

Massachusetts has enacted comprehensive rent-withholding and escrow laws[74] including a tenant initiated remedy, a defensive remedy, rent escrow, receivership and restraining orders.

The tenant initiated remedy commences when he files a petition.[75] The petition must contain certain allegations. First, it must state that the premises have been inspected by the local board of health or "other appropriate housing agency". Second, it must allege that such inspection showed the premises to be in violation of the State sanitary code. The next allegation is that such violation "may endanger or materially impair the health or well-being of any tenant" in the building. "Finally, it must state that the condition was not substantially caused by the tenant or any other person acting under his control." The Court notifies the landlord of the petition and he can then file an answer. If the judge finds the

---

73 McElhoney op cit n 69 p. 210-211.

74 See generally Angevine and Taube, 52 Mass. L.Q. 205 (1967)

75 It should be noted that a local board of health or the Boston Housing Inspection Division may also petition the Court: G.L. c111 s 127 B.C. (Supp 1969)

tenant's allegations to be true, he may order rent due or to become due to be paid to the Clerk of the Court.[76] The Clerk may pay all or any of the money to the landlord so that he can remedy the violations.[77] When the violations are corrected, the rent is returned to the landlord.[78] This form of rent withholding by payment into Court is the only remedy available in the District Court. When rent is paid into the Superior Court, a wider range of remedies is available. The Superior Court judge may also issue restraining orders, order all tenants to vacate the premises or appoint a receiver.[79]

The powers and duties of a receiver are determined by the Superior Court judge.[80] They may include the power to evict a tenant for non-payment of rent. The Court is also to determine what rents and profits the receiver must collect for the purpose of removing the violations on the dwelling. Although no provision is made for the qualification or compensation of the receiver, the law does say that an individual, partnership or corporation may act in that capacity.[81] The receiver may petition the Court in order to apply to the State Department of Public Health for financial

---

76 G.L. c 111 s 127 F.
77 Ibid
78 Ibid s 127 H.
79 Ibid s 127 I.
80 Ibid
81 Ibid

assistance to supplement rents if these are not sufficient to correct the violations. Any unused part of this money must be returned and that spent on the property will be a debt with interest owed by the landlord to the State and constitutes a lien.[82]

The law also "arms the tenant with a defensive weapon - a shield to accompany his sword."[83] This is achieved by an amendment to the Summary Process Law.[84] The tenant has a complete defence when a tenancy has been terminated by notice to quit for non-payment of rent if he has withheld rent because of a condition in the premises which violates the State or local standards of fitness for human habitation and endangers or materially impairs the health or safety of persons occupying those premises. To be successful the tenant must prove that, before withholding rent, he gave notice to the person collecting rent of his intention to do so; that the health authority had found a violation endangering or materially impairing the health or safety of occupants and that such violations were not caused by himself or anyone under his control. The Courtmay order the tenant to pay all or part of the rent into Court. The landlord is entitled to the withheld rent as soon as he has remedied the violation. It has been suggested that one result of this is that

---

82 Ibid s 127 J.

83 Angevine & Taube, 52 Mass. L.Q. 205, 228 (1967)

84 G.L. c 239 s 8A

he can delay action until the tenant is forced to vacate, whereupon, the tenant would be liable to hand over withheld rent.[85]

The Model Residential Landlord-Tenant Code[86]

Section 2 - 207 of the Model Code proposes a rent abatement remedy if the landlord fails to provide certain facilities. Where the landlord fails to provide hot water, the tenant may either terminate the rental agreement or, upon notice to the landlord, keep one-fourth of the rent accrued during any period when hot water is not supplied. The landlord may avoid this liability by showing of impossibility of performance. If the landlord fails to supply water or heat, the tenant may terminate the lease or, upon notice to the landlord, procure adequate substitute housing for so long as heat or water is not supplied. During this time, rent is completely abated and the landlord becomes liable for any additional expense incurred by the tenant up to one half of the amount of abated rent. This additional expense shall not be chargeable to the landlord if he is able to show impossibility of performance.

It will be seen that the proposed rent abatement remedy is very limited in its application; only failure

---

85 Angevine & Taube, 52 Mass. L.Q. 205, 230 (1967)

86 Levi, Hablutzel, Rosenberg and White, "Model Residential Landlord - Tenant Code" (1969)

to supply water, hot water or heating or within its scope. The tenant whose roof falls down cannot refuse to pay rent under this Model Code provision. Also, the remedy of abatement seems to apply to failure to supply water or heating only if the tenant is able to find temporary alternative accommodation. Since one major problem with low-income tenants is that they are simply unable to find anywhere else to live,[87] this requirement drastically restricts the utility of the remedy. Even if the tenant should find alternative housing, the additional expenses he incurs may not be covered by one half of the abated rent which is all he is entitled to claim. All in all, the Model Code is quite inadequate.[88]

New York Rent Abatement Law

Since 1965, the New York Multiple Dwelling Law[89] has contained a provision that permits a complete abatement of rent when certain conditions exist. In order for this provision to be relied upon, the housing code enforcement agency must have certified that there are violations of the code and, further, that these violations are classified as "rent impairing". Notice is given to the last registered owner of the violations. At this stage, the tenant must continue to pay rent to

---

87 Supra 348

88 cf Daniels, 59 Geo. L.J. 909, 928-929 (1971)

89 Section 302a

the landlord but, after six months from the date the owner was notified, the violations have still not been corrected then he may stop paying rent. The tenant should save the rent because the section requires him to deposit it with the Court if the landlord seeks possession for non-payment. At the possession hearing, the tenant must prove the existence of rent impairing violations.[90] If he can do this, the landlord has only two means of recovering the money. He must show either that the tenant or his family caused the violation or that the tenant refused to let him into the apartment to fix the violation. Unless the landlord is able to prove at least one of these things, the tenant is entitled to an order returning to him the money on deposit in the Court. In addition, no more rent is payable until the "rent impairing" violations are corrected. As a protection to landlords, the law provides that an action brought by a tenant in bad faith enables the Court to assess the reasonable costs of the owner, not exceeding $100 against the tenant.

The requirement that tenants deposit rent money in Court before reliance can be placed on the law has been declared unconstitutional in a lower New York Court decision. In Amanuensis v Brown,[91] Judge Leonard H. Sandler of the Civil Court of the City of New York

---

90 It is essential for the tenant to produce proof that the violations are "rent-impairing": Washington Square Professional Building Inc. v Leader (1971) 326 NYS 2d 716

91 (1971) 318 NYS 2d 7

held the requirement to be wholly arbitrary and unreasonable and a violation of procedural due process. Three factors combined to make this so. First, the tenant was required to deposit the very amount claimed by the landlord without any provision for a hearing to insure that the demand was accurate. Thus, if a landlord should demand several times the amount actually due, the tenant's inability to deposit an exaggerated amount could preclude him from presenting an otherwise conclusive defence. Second, no time limit was fixed for the landlord to commence proceedings subject to the defence. A landlord could choose to wait many months, or indeed years, putting the tenant under the burden of setting aside monthly reserves of money so that he might raise the defence when and if the proceedings were commenced. "Surely this indefinite deprivation of the use of money, without any kind of hearing, cannot be reconciled with procedural due process."[92] Finally, the issue presented by the statute made the requirement of deposit peculiarly unreasonable. "For surely in most cases,as in this one, the official records of the appropriate agency will establish, at least presumptively, the validity or invalidity of the defence."[93] He concluded that, at the very least, a tenant should be permitted to present an official record establishing the violation

---

92 Ibid 21.

93 Ibid.

and its duration, in lieu of depositing the money.

This provision has been subject to severe criticism by advocates of tenants' rights. The view has been expressed that what is really startling is that we have reached such a point in the radical inequality between landlord and tenant that it presents itself as remedial legislation.[94] "Observe that we are talking about a gross abuse of service by the landlord which constitutes a serious violation of the housing or health code. The tenant must suffer this violation for a full six months before the law accords him the abatement remedy. He is held to the full rent during that period. In addition the landlord can defeat (the law) by singling out the critical violation, repairing it, and leaving everything else in the same condition. If the tenant loses in his action, he loses not only the case but also can be order to pay $100 in Court costs plus the rent! This results notwithstanding the fact that the apartment is definitely substandard and the landlord is in default on many points."[95] The long delay of six months before rent is abated has also been criticised because it may result in the further decay of the premises and the increase of risk and inconvenience to the tenant. In support of the law, it has been observed that it is quite revolutionary

---

94 Quinn & Phillips, 38 Fordham L.R. 225, 247 (1969)

95 Ibid

when contrasted with the remedies offered both at common law and under prior legislation.[96]

New York Rent Escrow Statute

The classic example of a pure rent escrow statute is provided by section 755 of the New York Real Property Actions And Proceeding Law. This provides tenants with a defence to the landlord's possession action if they prove the existence of certain sub-standard conditions and pay their rent into Court where it is retained until the landlord corrects the conditions. The law was first enacted in 1930[97] as part of a legislative response to tenant demands stemming from depression hardships.[98] In the late 1950s and early 1960s the provision seems to have been little used.[99] It was only during the New York rent strike of 1964 that this section "long-ignored and largely uninterpreted"[1] began to be used by tenant lawyers.[2] Recent years have also seen substantial changes in the law. The original law was criticised for three main limitations;[3] It was confined to New

---

96 Kurtz & Forgang, 17 Syracuse L.R. 490, 499-501 (1966)

97 L 1930 c 871

98 M. Lipsky, "Protest in City Politics" p.137 (1970)

99 Ibid

1 Carlton, Landfield & Loken, 78 Harv. L.R. 801 , 845 (1964)

2 Infra 966

3 Nancy Leblanc, "Landlord-Tenant Problems" p.12 (1966)

York City, a housing code violation had to be filed by the administrative agency before it became operative and the violation had to be "such as to constructively evict the tenant from a portion of the premises occupied by him." Amendments in 1969[4] extended it throughout the State, removed the requirement of intervention by an administrative body and extended it to a condition which "is, or is likely to become dangerous to life, health or safety."

The relevant part of the section is in the following form,

"1. (a) Upon proper proof that a notice or order to remove or cease a nuisance or a violation or to make necessary and proper repairs had been made by the municipal department charged with the enforcement of the multiple dwelling law, the multiple residence law, or any other applicable local housing code, or officer or officers thereof, charged with the supervision of such matters, if the condition against which such notice or order is directed is,in the opinion of the Court, such as to constructively evict the tenant from a portion of the premises occupied by him, or is, or is likely to become, dangerous to life, health, or safety, the Court before which the case is pending may stay proceedings to dispossess the tenant for non-payment of rent or any action for rent or rental value. In any such proceedings, on the question of fact, as to the condition of the dwelling the landlord or petitioner shall have the burden of disproving the condition of the dwelling as such condition is described in the notice or order.

(b) Upon proper proof of the existence of a condition that is in the opinion of the Court, such as to constructively evict the tenant from a portion of the premises occupied by him, or is, or is likely to become, dangerous to life, health or safety, the Court before which the case is pending may stay proceedings to dispossess the tenant for non-payment of rent, or any action for rent or rental value."

---

4 L. 1969 c 820

The constitutional validity of section 755 has been upheld by the New York Supreme Court in Emroy Realty Corp. v Stefano.[5] "That the placing of violations and the correction of dangerous or unsanitary conditions thereby is a proper exercise of police power seems hardly arguable. And a measure not unreasonably severe to induce compliance seems unobjectionable."[6] The Section does not, however, apply to commercial premises.[7]

Judicial construction has been mainly directed to the problem of determining the degree of unfitness needed to justify the defence. In Malek v Perdina,[8] the New York City Civil Court held that housing code violations consisting of accumulations of refuse and rubbish in the courts and yards of a tenement building and dusty and dirty public hallways and stairs constituted a constructive eviction for the purpose of the section. Such conditions made the premises uninhabitable in accordance with civilised standardsof decency. Another decision of the same Court, Jackson v Rivera[9] also found conditions existed to justify an order under section 755 permitting the tenant to deposit the rent in Court until such time as they were remedied.

---

5 (1957) 160 NYS 2d 433, 5 Misc 2d 352.

6 Ibid 435

7 The City of New York v Deland (1970) 311 NYS 2d 675

8 (1969) 297 N.Y.S. 2d 14
58 Misc. 2d 960.

9 (1971) 318 N.Y.S. 2d 7

These conditions consisted of rat holes in the bedroom and bathroom, and falling plaster, extensive and dangerous in character, in the bathroom. But a third decision of the Court, Gregory Towersv Koch,[10] went the other way. A few minor defects were held to be the minimum and not to justify the application of section 755. In Buddwest & Saxony Properties Inc. v Layton,[11] the City Court of Yongers held that although a record of code violation was no longer necessary, the naked testimony of a health inspector that a ceiling was "potentially dangerous" was not sufficient. He should have shown some specifics upon which he based his conclusion, for example that the ceiling wall had sagged or the composition of the material which made up the wall had changed.

The differing attitudes of the judges on the question of the standard required has been noted. "It varies considerably from judge to judge as to what constitutes a sufficient number of violations or a sufficiently serious violation. For some judges, any violation is sufficient to obtain a 755 Order. With other judges, the building must be nearly falling down before they will grant the tenant a s 755 Order. Certain types of violations are more meaningful to the Courts than others. Such violations include no heat, rat

---

10 (1972) 328 NYS 2d 736

11 (1970) 308 NYS 2d 208
62 Misc 2d 171

infestation, no water, no hot water, or fire department violations. Violations regarding failure to repair usually must be quite numerous before they constitute a good basis for a 755 Order."[12]

The Civil Court of the City of New York was faced in 176 East 123rd Street Corp v Flores[13] with the problem of what to do with rent deposited pursuant to a section 755 Order when the landlord had failed to correct the violations and tenants had been forced to abandon a rotting East Harlem tenement. The Court saw three choices: to release the fund to the landlord, restore it to the tenant or maintain on deposit with the Clerk of the Court. The first choice was rejected. "To deliver the deposited rents to the landlord now would encourage other landlords in similar position to do nothing to eliminate hazards to life and health. The Court would be reduced to the role of rent collector and when, as here, the conditions of life became intolerable and tenants could do nothing but leave, the landlord at his leisure would pick up his accrued, collected rents. Neither the Court nor the statute was created for that purpose."[14] On the other hand, nothing in the Section permitted tenants

---

12 Nancy Leblanc op cit n 3 at p. 12.
See also; Comment, 40 St. John's L.R. 253,258 (1966)
Kurtz & Forgang, 17 Syracuse L.R. 490, 496 (1966)
Quinn & Phillips, 38 Fordham L.R. 225, 245 (1969)
It should be noted that, as from 1969, the standard involved has been amended, supra p898 This may have led to a change in the judicial attitude.

13 (1970) 317 N.Y.S. 2d 150

14 Ibid 153

to occupy premises paying no rent or less than the sum to which they had agreed. It did not give tenants any new substantive rights but was designed to force landlords to comply with applicable housing laws. Accordingly, so long as there was any likelihood that repairs would be made, the purpose of the statute would be best served by retaining the fund on deposit. "Should it be factually demonstrated at a later date that the retention of the fund will no longer serve the purpose of the statute, the Court will reconsider the disposition of the fund."[15]

Some idea of how s 755 works in practice is revealed by a study of the 1963-1964 Rent Strikes in New York City.[16] "Not only the effectiveness of rent strikes, but the potential of the rent strike remedy itself was called into question by the sudden usage of the obscure law. Although definitive evidence on rate of successful Section 755 proceedings is not available, fragmentary evidence suggests that in the majority of cases, tenants were unsuccessful. Examination of cards on which lawyers assisting the Community Council on Housing jotted notations in Court indicates that on seven non-consecutive days from March 3 to March 17, C.C.H. tenants obtained only three favourable rulings under Section 755 proceedings, landlords obtained

---

15 Ibid 155.
In some cases decided during the Rent Strike of 1963-64, rent monies were returned to tenants: Lipsky op cit n 98 at p. 140.

16 Lipsky op cit n 98 at pp 137-145.

final orders of eviction in 31 cases, 20 cases were adjourned, and four cases were dismissed. --- It is understood that for the period ending May 1, 1964, three Section 755 orders were obtained for every 14 final orders of eviction in over 100 cases which were handled by the Mobilization for Youth legal staff and volunteers during this time."[17] But even when the Court supported a rent strike by making a Section 755 order, such strikes appear to have had mixed success in forcing landlords to repair buildings in order to obtain rents. Housing code violations continued despite the order permitting tenants to pay rent into Court.[18]

Section 755 has come in for a good deal of criticism. Two writers go so far as to say it is "simply shocking in its callous disregard for basic justice" and "preposterous".[19] The cause of such vehement objection is the continued liability of the tenant for rent even though it is paid not to the landlord but into Court.[20] All the time the Section 755 order is in effect, the premises are seriously substandard but this is not reflected in any reduced

---

17 Ibid 142 - 143.

18 Ibid 139.

19 Quinn & Phillips, 38 Fordham L.R. 225, 246 (1969)

20 See also; Comment, 1968 Washington U.L.Q. 461, 480

liability for rent. Once the repairs are made, the landlord collects the money from the Clerk of the Court suffering no real hardship. The tenant's losses in the interim period are not compensated for at all.

New York : Article 7A

A third New York statute provides the basis for collective rent escrow action.[21] One third or more of the tenants occupying a multiple dwelling in New York City may bring an action against their landlord if there exists in the premises,

> " a lack of heat, or of running water, or of electricity or of adequate sewage disposal facilities, or any other conditions dangerous to life, health or safety, which has existed for five days, or an infestation of rodents or any combination of such conditions." 22

There is no need to show a violation of a housing code or any other code if the above is satisfied. The tenants must specify the nature of the defects, the estimated cost of removing them, and the rent due from each of them. In answer to the action, the landlord may claim that the defects are not within the provision, that they are due to the actions of the tenants or that he was refused entry to repair the premises. If judgement is given for the tenants, the owner or any other person having an interest in the property is given the

---

21 Article 7A of the Real Property Actions and Proceedings Law.

22 Ibid s 770

opportunity to undertake to do the required works himself providing he can show that he will do the work promptly and is able to provide security for his promise. If such an undertaking is not taken from the owner, all the tenants in the building are ordered to pay rents then due and all future rents into Court. It is to be noted that all tenants are ordered to pay rent into Court and not only those who brought the action. The Court appoints either a certified accountant, an attorney or a real estate broker to act as administrator of the building and to supervise the required works. These works are paid for out of the rents deposited in Court and any surplus is paid to the owner less a "reasonable amount" to be paid to the administrator for his service. Protection is given to tenants by a provision that prohibits eviction on the grounds of non-payment of rent. Eviction based on termination of the tenancy would fall foul of rent control regulations.

This law, Article 7A of the New York Real Property Actions and Proceedings Law, was first enacted in 1965.[23] Although obviously intended mainly to remedy dangerous and unhealthy conditions existing in slum dwellings,[24] the first test of the new law in Himmel

---

23 L. 1965 ch 909.

24 Welfare Law Bulletin No. 2 (Feb. 1966) p. 6. But in Himmel, the Court said, "Evidently the Solons intended - to paraphrase the French satirist - that the law in its majestic equality should protect the opulent, as well asthe indigent, tenant from the indifferent attitude of an unfriendly landlord." (1965) 262 NYS 2d 515, 521.

v Chase Manhatten Bank[25] involved a luxury apartment house on New York's fashionable East Side. The tenants came to a settlement with the landlord in that case and the first order made by a Court under the new law was obtained by the Legal Services Unit of Mobilization for Youth in the New York Civil Court in Liquet v Achva Realty Corp.[26] But Himmel did uphold the constitutionality of Article 7 A as a valid exercise of the police power. It was pointed out that the provision "merely and more definitely facilitates the enforcement of pre-existing rights - it creates no new rights."[27]

Himmel also gave some guidance on the type of conditions necessary to bring the law into play.

> " Some question may be raised as to what are conditions dangerous to life, health or safety. Each case will depend on its own facts -- There was some testimony by a tenant having a form of respiratory ailment and to whom air conditioning was a health factor. Again, the constant breakdown of elevators in high-rise multiple-story multiple dwellings can obviously become a health andsafety factor. Inadequate heat, hot or cold water are health factors." 28

In another case involving a luxury apartment block, Dekoven v 780 West End Realty Co.[29], the Court found that absence of a doorman was not a "condition dangerous to life, health or safety" within the provision. But a skylight in such a defective condition as to

---

25 (1965) 262 N.Y.S. 2d 515
47 Misc 2d 93

26 New York Law Journal Sept. 24, 1965, p.5.
Welfare Law Bulletin No. 2 (Feb 1966), p.6.

27 (1965) 262 N.Y.S. 2d 515, 519.
See also Dekoven v 780 West End Realty Co., infra, (1965) 266 N.Y.S. 2d 463, 467.

28 (1965) 262 N.Y.S. 2d 515, 520-521

29 (1965) 266 N.Y.S. 2d 463, 48 Misc 2d 951

permit rain to leak into the living room of an apartment was held to be a nuisance and a danger to the health of the tenants occupying those premises. Rent due from this tenant was ordered to be paid to the Clerk of the Court.

In Kahn v Riverside Syndicate Inc.,[30] the Supreme Court, Appellate Division, reversed the decision of the Civil Court of the City of New York on this point. The following conditions were considered by the lower Court to come within the law; "passenger elevator not in proper working order; general lack of adequate heat and hot water caused by defective boiler and radiators; roof leaks permitting water to flow into building causing severe damage; exposed electrical wiring et al."[31] The Supreme Court did not consider that these facts sustained the existence of the emergency situation which the Legislature envisaged when Article 7A was enacted. "The proof adduced was clearly insufficient to support the appointment of an administrator."[32] The legislative intent looked to relief in cases of unusual circumstances and neglect by a landlord. It was significant that the tenants were

---

30 (1970) 308 N.Y.S. 2d 65
34 A.D. 2d 515
reversing (1969) 298 N.Y.S. 2d 853
59 Misc 2d 238
The Court of Appeals of New York dismissed a motion for leave to appeal upon the ground that the order sought to be appealed from was not appealable by permission of the Court of Appeals: (1970) 27 NY 2d 724
314 NYS 2d 531

31 (1969) 298 NYS 2d 853

32 (1970) 308 NYS 2d 65, 66

unable to establish any violation of record against the property and their petition for a rent reduction based upon the same complaints had been denied by the Rent Control Commission. The Court concluded, "At best the conditions complained of were transitory and sporadic. This record presents a factual situation unfortunately commonplace in many apartment houses in the City of New York and remediable well within the prior existing statutory scheme through numerous specialised housing and other municipal administrative agencies."[33]

A later decision of the Civil Court of the City of New York shows a more liberal approach. The sole issue presented in Tynan v Willowdale Commercial Corp.[34] was whether, as the tenants contended, a bell and buzzer system installated at the entrance to a multiple dwelling which was non-functional because of disrepair constituted a condition dangerous to the life, health and safety of the tenants. The purpose of Article 7A was to provide additional enforcement powers which were found to be necessary to compel the correction in multiple dwellings of conditions dangerous to life, health and safety. Such a broad statement of purpose left to judicial interpretation the task of delineating those conditions. Turning to the facts of

---

33 Ibid

34 (1972) 329 NYS 2d 695
69 Misc 2d 221

the particular case, the bell and buzzer system had gone unrepaired for some twenty years. This fact made manifest the inadequacy of the penalty sanction in the Multiple Dwelling Law to compel the repair. "It was just because of such statutory inadequacy and the failure of the administrative apparatus established for that purpose to cope with the ills besetting housing that Article 7A was conceived. Accordingly, this Court finds that Article 7A is a proper vehicle for compelling the repair of a defective bell and buzzer system."[35] Daily acts of crime and violence and the deterrent value of such a system rendered its defective condition one "dangerous to life, health or safety." It is interesting to note the differing views taken in Kahn and this case as to the relationship of Article 7A to the Housing Code. Kahn suggests that only in emergency situations where the Code and the administrative agencies are unable to offer a remedy will Article 7A be available. Tynan takes a more pessimistic view of traditional remedies and uses Article 7A to supplement them when they are available but not adequate.

The organization of one third of the tenants occupying a multiple dwelling must precede successful utilization of Article 7A proceedings. Normally tenants living in deteriorating or substandard housing will not be aware of their legal rights and lack

---

35 Ibid 697

organising experience.[36] These drawbacks may be overcome by housing improvement groups but there will still be impediments to successful collective action by fear of landlord retaliation or suspicion of the judicial process. This first step of organization terminates when a petition is filed in Court alleging the existence of the dangerous conditions. The petition must also specify the work required to remedy the conditions and the estimated cost of such work. This means that a building contractor or other qualified person will be needed.[37] If an administrator is appointed, he is not permitted to make any repairs not specified in the petition except emergency repairs.[38] To argue their case before the Courts, the assistence of an attorney is also necessary.[39] A survey of 49 cases filed in the New York City Civil Court within the first eighteen months of the Statute becoming effective showed that in all but five of these cases, the length of time between filing and final disposition ranged from four to eighteen weeks with two thirds of the cases requiring less than ten weeks.[40]

---

36 See generally, Comment, 3 Columbia J. of Law & Social Problems 1, 7 - 9 (1967)
Stang, 2 Harv. Civil Rts - Civil Lib. L.R.201, 203 (1967)

37 Nancy Leblanc, "Handbook of Landlord-Tenant Law" p.23 (1966)
Stang, 2 Harv. Civil Rts. - Civil Lib. L.R. 201, 203 - 204 (1967)

38 Stang suggests that it might be wiser to permit the administrator to perform necessary repairs whether or not they are listed in the petition - subject to the approval of the Court. Ibid 204.

39 Comment, 3 Columbia J. of Law and Social Problems 1, 9 (1967)

40 Stang, 2 Harv. Civil Rts - Civil Lib. L.R. 201, 205 (1967)

If the Court finds that the relevant conditions exist, the landlord is given an opportunity to do the repairs before an administrator is appointed to do them. In the survey already mentioned, it was found that administrators were appointed, by consent or otherwise, in only one third of the cases reaching some final disposition or in 42% of those "won" by the tenants (considering cases settled as cases "won").[41] The remaining cases - more than half - were won by the tenants without bringing into play all of the machinery provided by the law. Even where the parties had not settled before trial, the statistics indicated that most landlords requested to be allowed to perform the necessary repairs themselves rather than permit an administrator to take over their building.[42]

If the landlord will not make the necessary repairs himself, an administrator is appointed. The administrator must be either a certified accountant, an attorney or a real estate broker and it may not always be possible to find such a person willing to take on the task. "The difficulties in finding a willing and able person to act as administrator are commensurate with the frustration and thanklessness of the administrator's job. Adequate supervision of the repair process may require ten to twelve hours per week, and the

---

41 Ibid 205

42 Ibid

administrator's compensation usually will not exceed 10% of the cost of repairs. -- In some cases the tenants attorney was compelled to assume the responsibility himself."[43]

The task of the administrator is to administer the necessary works out of the rents paid to him by the tenants. There is some doubt as to the exact extent of his powers. It is not clear whether he can seek possession from tenants who do not pay their rents, whether he can lease vacant units and whether he can pay normal running costs out of the rents.[44] His duties are also to some extent vague. In particular, must he pay taxes and mortgage payments out of the deposited rent? If so, there might be little left to devote to repair.[45] The New York City Civil Court decided in Kahn v Riverside Syndicate Inc.[46] that such payments need not be made. The provision expressly stated that the collected rents should be used to "remedy the condition -- alleged in the petition"[47] filed by the tenants. Since the tenants had not complained of failures to pay such debts, the rent could not be used to satisfy them. This reasoning is con-

---

43 Comment, 3 Columbia J. of Law and Social Problems 1, 12 (1967)

44 Ibid 13 - 14.

45 Nancy Leblanc op cit n 37 at p. 24.

46 (1969) 298 NYS 2d 853
59 Misc 2d 238

47 Real Property Actions and Proceedings Law ss 770, 776.

vincing but, as has been seen,[48] this lower Court decision was reversed on appeal on another point.

Financial difficulties present serious problems to the administrator. Sometimes the rents are so low and the cost of repairs so high that the repairs can only be made over a long period unless a loan can be arranged.[49] Accumulating sufficient funds for the more expensive repair work to be done means that the funds remain idle or are spent on less important repairs while the major work is postponed.[50] Contractors are unwilling to do the work and then receive monthly payments as rents become due because they have their own expenses to consider.[51] Loans are difficult to arrange. "The primary objection is that the rent rolls furnish inadequate security. The administrator will not ordinarily wish to become the tenants' security, and since the mortgage and title remain unaffected by the Article 7A proceeding, the only security available is the amounts deposited at monthly intervals into the Court."[52] These financial difficulties have been so serious in several cases that the administrator has been forced to return the building to the landlord's control with the understanding that he would complete

---

48 Supra 907

49 Nancy Leblanc op cit n 37 at p. 23

50 Stang, 2 Harv. Civil Rts - Civil Lib. L.R. 201, 206 (1967)

51 3 Columbia J. of Law and Social Problems 1, 14 (1967)

52 Ibid 15.

the outstanding works.[53]

Tenant initiated receiverships in New York and Massachusetts[54] provide some interesting comparisons.[55] New York requires that one third of the tenants petition for receivership.[56] In Massachusetts it is possible for only one tenant to do so.[57] The receiver in New York must only do the work specified in the petition,[58] Massachusetts permits him to correct any code violations.[59] There is no specific power in New York enabling the receiver to evict tenants who fail to pay rent, Massachusetts gives such a power.[60] The New York law has no provision to help the receiver obtain loans from the State, Massachusetts does.[61] The receiver in New York must be a certified public accountant, an attorney or a real estate broker,[62] Massachusetts imposes no such restriction on qualification. The above comparisons suggest that the Massachusetts law is more flexible and gives the receiver greater powers. On the other hand, New York law has the very

---

53 Ibid

54 Supra 890

55 Dooley & Goldberg, 7 Harv, J. Legislation 357 (1970)

56 R.P.A. & P. Law ss 770, 776 (b), 778 (Supp 1969)

57 G.L. Ann. Ch 111 s 127 H (d) (Supp 1969)

58 R.P.A. & P. Law s 778 (1)

59 G.L. Ann. Ch 111 s 127 J.

60 Ibid s 127 I.

61 Ibid s 127 J.

62 R.P.A. & P. Law s 778 (1)

important advantage that, if an order is made, all the tenants in the building must deposit their money with the receiver. In Massachusetts, only the petitioning tenant is affected.[63]

Article 7A has been favourably compared with other rent withholding and receivership laws.[64] Unlike simple rent withholding, it does not rely on coercing the landlord into action but provides for such repairs to be carried out in his default if necessary. Since it produces one hundred per cent rent withholding even though only one third of the tenants may be plaintiffs in the action, it is preferable to those statutes that are effective only in proportion to the number of tenants who actively seek their protection. Unlike other types of receivership, it is self financing and imposes no financial burden on the City. Finally, there is no requirement that code violations have been recorded as, for example, under the New York abatement law.[65] On the other hand, the absence of a cause of action for the individual tenant has been described as unfortunate because often a condition exists which does not affect sufficient tenants.[66] It has also been

---

63 Angevine & Taube, 52 Mass. L.Q. 205, 220 (1967) suggest that the statute be amended to subject rent payments of all tenants to an order to pay into Court so that greater financial pressure could be brought to bear on the landlord.

64 Stang, 2 Harv. Civil Rts - Civil Lib. L.R. 201, 202 (1967).
See Supra 877 for a consideration of the merits of differing rent withholding statutes.

65 Supra 893

66 Kurtz & Forgang, 17 Syracuse L.R. 490, 505 (1966)

observed that Article 7A is not truly a tenants' remedy in one sense because it requires the expertise of organisers, attorneys and administrators.[67]

Two studies which have examined Article 7A in some depth conclude by giving it qualified praise. "Article 7A proceedings can be efficicacious in providing needed relief for tenement dwellers "but too much should not be expected of the remedy - it is no panacea for the slums.[68] "It is not a complete answer to slum housing problems -- butArticle 7A is a giant step in the right direction."[69] It has also been assessed in a less optimistic manner, attention has been drawn to "the awesome complexity involved in organising the tenants, presenting the case, and adminstering the buildings."[70] These writers continue, "The process discourages all but the hardiest ghetto lawyer, and more often than not, even he will refuse to go the 7A route."[71]

---

67 3 Columbia J. of Law & Social Problems 1, 16 (1967)

68 Ibid

69 Stang, 2 Harv. Civil Rts - Civil Lib. L.R. 201, 210 (1967)

70 Quinn & Phillips, 38 Fordham L.R. 225, 249 (1969)

71 Ibid

Pennsylvania

The Pennsylvania Rent Withholding Act[72] combines a rent escrow scheme with rent abatement. According to its terms, if a city certifies a dwelling as "unfit for human habitation", the duty of the tenant to pay, and the right of the landlord to collect rent is suspended without affecting any other terms or conditions of the landlord-tenant relationship. Rent remains suspended until the dwelling is certified as fit for human habitation or until the tenancy is terminated for any reason other than non payment of rent. During the period of suspension, rents due are to be deposited in an escrow account in a bank or trust company approved by the city. If the dwelling is re-certified as fit within six months after the original certification of unfitness, all funds in the escrow account are payable to the landlord. If, however, the dwelling remains unfit at the expiration of the six month period, all escrow funds are returnable to the tenant, except that such funds may be used to effect repairs needed to render the dwelling fit or to pay for utility services for which the landlord is obligated but unwilling or unable to pay. The Act concludes by stating that no

---

72 Pa. Stat. Ann tit. 35 s 1700 - 1 (Supp 1969)
See Clough, 73 Dickinson L.R. 583 (1968)
Intrieri & Pasquerelli, 5 Duquesne U.L.R. 413 (1967)
Ominsky & Lamar, 43 Penn. B.A.Q.109 (1971)
Senick, 30 U. of Pittsburgh L.R. 148 (1968)
Toole, 32 U. Pitts L.R. 626 (1971)
Walker, 7 Duquesne L.R. 476 (1969)

tenant shall be evicted for any reason whatsoever while rent is deposited in escrow.

Judicial construction has done much to clarify the meaning of this provision. The first question dealt with was whether the Act permitted the tenant to continue to pay rent into the escrow account beyond the six month period specified. The Superior Court of Pennsylvania applied the rule of strict construction in United American Mechanics v Roberson[73] and held that there was nothing in the Act which provided for a continuation of the privilege to pay rent into the escrow account beyond the six months and that the tenant could be lawfully evicted thereafter. In a later case, Klein v Allegheny County Health Department,[74] the same Court said that any other interpretation would be unreasonable to say the least. "Such an interpretation would permit a tenant to assume possession of another's property without limitation of time so long as he paid his rent into the escrow account, with the expectation of having it returned to him of the owner were unwilling or unable to make the required repairs. We do not think that the legislature intended that result and therefore affirm our conclusion that this is a temporary measure to compel an owner to make his

---

73 (1969) 214 Pa. Super 9
248 A 2d 861
See also related hearing, (1969) 216 Pa Super 37
261 A 2d 616

74 (1969) 216 Pa Super 50
261 A 2d 619

property fit."[75] This decision was reversed on appeal by the Supreme Court which held that the Act authorised successive six month periods of rent withholding should the dwelling be re-certified as "unfit" after the first escrow period has elapsed.[76]

Another decision of the Supreme Court of Pennsylvania, De Paul v Kauffman,[77] dealt with several other points. The appellants were landlords of an apartment building which had been certified as unfit for human habitation. Pursuant to the Act, rents were withheld and paid to appellee as escrow agent. The appellants brought this action seeking a declaration that the Rent Withholding Act was unconstitutional and an injunction restraining appellee from returning any of the escrow funds to the depositing tenants. The Supreme Court was unpersuaded by the constitutional arguments and held the Act to be a valid exercise of the police power. In particular, the Court considered it not unreasonable that landlords should be expected to repair. They possessed either the skills needed to make property repairs or, at least, the knowledge

---

75 Ibid 620 - 621.
Cercone J. in a separate concurring opinion said that if the landlord had not taken steps to improve the premises by the end of the first six month period "then condemnation, and not continued occupation by the tenant rent free, should be ordered by the Health Authorities." He also suggested that if the premises are permitted to remain habited beyond the six month period, the landlord could very well argue that if they can continue to remain so inhabited, they could not be unfit for habitation and therefore he should be permitted to collect rent for the tenant's occupancy. Ibid 625

76 (1970) 441 Pa 1. 269 A 2d 647

77 (1971) 441 Pa. 386. 272 A 2d 500

of whom to hire to make such repairs. Tenants, as a class, were unlikely to possess these skills and this knowledge to the same degree.[78]

Besides the constitutional validity of the Act, DePaul v Kauffman cleared up some other problems. First, the tenant was only protected by the Act if he paid his rent into the escrow account. "A tenant may in no event remain in possession without paying the required rent to the escrowee."[79] Second, the Act did not require the renewal of a lease which was set to expire during the six month period of rent suspension. The wording that the duty to pay and the right to receive rent shall be suspended "without affecting any other terms or conditions of the landlord-tenant relationship," suggested that there was no requirement of an involuntary lease renewal. On the other hand, the Act also stated, "No tenant shall be evicted for any reason whatsoever while rent is deposited in escrow." To give meaning to both of these portions of the Act, the Court concluded that "the Act does not require the renewal of an existing lease but only an extension of the original lease so long as rent is in escrow."[80] Finally, although the Act insulated the tenant from eviction during the rent withholding period, the land-

---

78 Ibid 505 - 506

79 Ibid 505

80 Ibid

lord was fully protected in the case of tenant abuse of the property. He could sue the tenant for damages for any destruction or, if monetary damages were inadequate, he could seek an injunction against the misuse of his property.[81]

The Act provides that "any funds deposited in escrow may be used for the purpose of making such dwelling fit for human habitation and for the payment of utility services for which the landlord is obligated but which he refuses or is unable to pay." Does this entitle the landlord to recover rent sufficient to pay for repairs to the premises though the repairs do not lead to the premises being re-certified as fit? The Pennsylvania Superior Court thought not in United American Mechanics v Roberson.[82] "We find no provision in the Act to entitle an owner to recover rentals paid into escrow either by making partial repairs or by making repairs only to the limit of the rentals, or to any extent less than is necessary to restore the leased premises to the reasonable standard of fitness established by the Department, regardless of the amount of the expenditure."[83]

Despite these decisions, many important questions

---

81 Ibid 506

82 (1969) 216 Pa. Super 37
261 A 2d 616

83 Ibid 618
See also Klein v Alleghany County Health Dept.
Supra§13

remain unanswered.[84] Can the tenant who paid part of his rent into the escrow account and later left the premises receive his money back after the six month period? Can the landlord re-let the premises in such a case or does the certificate of unfitness prevent this? Must the exact amount of rent be paid exactly on time or will substantial compliance suffice? On retaliatory eviction, can the landlord get revenge on a tenant by evicting him as soon as the premises have been re-certified as fit? Would public policy prevent such subsequent retaliation?[85]

The procedure of the Act has the advantage of being fairly straight forward. The following account shows its practical operation in one county in 1969.[86] If an inspector from the Bureau of Building Inspections determines from his inspection that the property should be eligible for rent withholding, he certifies it as unfit and the landlord and tenant are notified of the certification and the basis for it. If a person is aggrieved by this decision, appeal is made to the Court of Common Pleas. The Bureau of Building Inspection holds no hearings in the matter and appeals are heard directly by the Court. Upon certification, the tenant is directed to the County Health Department to receive his escrow account number. All matters

---

84 See generally, Toole, 32 U. of Pitts L.R. 626, 632 (1971)

85 Clough, 73 Dickinson L.R. 583, 595-596 (1969)

86 Clough, 73 Dickinson L.R. 583, 596 (1969)
See also Intrieri & Pasquarelli, 5 Duquesne U.L.R. 413, 417 (1967)
Senick, 30 U. of Pitts L.R. 148, 149 (1968)

concerning the processing of the account and the disposition of the funds are handled by this Department. The dwelling is inspected again at the end of the six month period and re-certified as either fit or unfit. If the former, the rent money is handed back to the landlord. If the latter, the tenant is able to keep it and also continue to pay rent into escrow.

The Act has received moderate but generally favourable support from commentators. One has said that it is "no paragon of legislation, however, it can work effectively. In spite of the faults that can be found in the Act, it is achieving a great deal of social good in obtaining the upgrading of many slum properties in areas where the Act is in operation."[87] Its greatest value is seen as its use as a bargaining tool.[88] Further, it presents an opportunity for the slum tenant to take positive action himself in co-operation with the local agencies to upgrade the community.[89] Another commentator has seen this relationship of tenant and administrative agency as basically sound.[90] The tenant can take his own action and not rely solely upon housing code enforcement. On the other hand, the need for agency inspection and certification serves as a check on the tenant and

---

88 Ibid 604

89 Ibid

90 Senick, 30 U. of Pitts L.R. 148, 150 (1968)

and protects the landlord from unwarranted complaints thus striking an effective balance between the needs of the two parties involved. Two writers have questioned the justice of the Act in those cases where full rent is paid to the landlord after re-certification of the premises as fit.[91] It is pointed out that the tenant has lived in an unfit dwelling without any compensation under the Act. The refusal to allow landlords access to escrow funds so as to make repairs if these repairs do not result in a certificate of fitness[92] has also been criticised. "It is surely not the purpose of the Act to frustrate the landlord's efforts to repair his unfit building. And, if the landlord's efforts to repair are substantial and made in good faith, there seems to be no reason to penalize him by reason of non-reimbursement."[93]

Rhode Island

The Rhode Island rent-escrow statute[94] differs from those of the other American States[95] in that there is no court action necessary. Where the Code enforcement agency has ordered repairs, the obligation to pay rent to the landlord is suspended and the rent shall be paid into an escrow account established by the agency. Rent money may be given to the landlord to make repairs and, when all necessary repairs are completed, the balance is returned to him.

---

91 Intrieri & Pasquarelli, 5 Duquesne U.L.R. 413, 424-425 (1967)

92 Supra §21

93 Toole, 32 U. of Pitts L.R. 626, 635 (1971)
See also Senick, 30 U. of Pitts L.R. 148,156 (1968)

94 R.I. General Laws Ann s 45 - 24, 2 - 11 (1971)

95 But see Nova Scotia Statute infra §25

Nova Scotia

A recent amendment to the Landlord-Tenant Act of Nova Scotia provides the basis for a form of rent-escrow in that Province. Having imposed certain conditions on the landlord as to the condition of the premises,[1] the Act goes on to provide,

> "A tenant may apply to (a residential tenancy board) to receive and hold in trust rent payable to the landlord pending performance by the landlord of any act the landlord is required by law to perform and no action shall be brought or taken by the landlord against the tenant in respect of the rent while the rent is held in trust."2

---

1 S.N.S. 1970 c 13 s 6 (1)

2 Ibid s 11 (6) cf s 11 (3)

The Rent Strike

a) The Merits of the Rent Strike

American experience so far does not encourage widespread use of the rent-strike.[1] Lipsky writes of the Harlem rent strikes of 1963 and 1964.

> "The rent strikes did not succeed in obtaining fundamental goals. Most buildings in which tenants struck remained in disrepair, or deteriorated even further. City housing officials became more responsive to housing problems, but general programs to repair slum housing remained as remote as ever. Perhaps most significant, the rent strike movement, after a hectic initial winter, quickly petered out when cold weather again swept the Harlem streets." [2]

And the Chicago strikes were thus summed up by Davis and Schwartz,

> "With the possible exception of Old Town Gardens, no landlord was included by rent-withholding to make substantial repairs or agree to bargain. In the Chicago experience landlords finally gave in because of adverse publicity and political pressure, not because of reduction in incoming revenues." [3]

Such pressure and publicity may well have been mobilized by less onerous tactics such as picketing and protest marches. Naturally one cannot generalise overmuch from specific examples especially as they come from another country but they do emphasise

---

1 But See comment, 55 Min. L.R. 82, 110

2 M. Lipsky, "Protest in City Politics" p. 11, See also pp. 154-157. He does, however, consider that the rent strike movement was successful in dramatising the housing problem which led to changes in housing code enforcement: pp 85-86, 116-117.

3 Davis and Schwartz, "Housing For The Poor: Rights And Remedies" p. 133

the need for caution before exercising this particular remedy for substandard housing; the possible cost to the tenants is great in terms of evictions whilst the chances of success do not seem very high. The experience of the English rent-strike movement has been one of mixed success and failure.[4]

The weakness in rent-withholding as a remedy for substandard housing can be briefly summarised. The first is organisational, it is extremely difficult to get a sufficiently large number of tenants to strike so as to bring effective pressure to bear on the landlord.[5] Moreover, the problems of organising slum tenants may mean that the weapon is discredited by its inconsistent application. It has been observed, "it may be invoked sporadically with some owners being subjected to what is admittedly a heavy sanction while others get by with an occasional fine or perhaps no penalty at all".[6] Second, except where statute protects the strikers,[7] those who engage in this tactic are open to sweeping legal action in the way of evictions or breech of contract actions. Torts such as inducement of breach of contract and conspiracy which have long dominated the legal framework of trade disputes

---

4 Infra 937

5 Infra 935

6 Fossum, 1966 Calif. L.R. 304, 334

7 Supra 875

will also be at the landlord's disposal.[8] Tenants who take the law into their own hands in this way will not be too kindly treated by the Courts.[9] Such actions may well be taken by some landlords to crush any existing strike and to discourage any future activity of this sort. A third weakness of the rent strike may lie in its precarious political character.[10] Militancy is essential at certain stages of the strike and is indeed inherent in the tactic itself but too much militancy will frustrate the objectives of the strikers by alienating those from whom help is sought. A fourth weakness has been suggested in that rent-strikes are self-defeating by depriving the landlord of money which would ordinarily be used for repairs.[11] This is not a point peculiar to rent-strikes but covers most tenant actions which relieve the landlord of money or which could be said to discourage investment in slum housing.[12]

---

8 Infra 950

9 Infra 950

10 Infra 931

11 Fossum, 1966 Calif. L.R. 304, 334
Friedman, "Government And Slum Housing" pp 63-64
Levi, 1966 Colum. L.R. 278, 285
Sax and Hiestand, 65 Mich. L.R. 869, 915 - 916

12 See generally Supra 30-31

In favour of rent-strikes it can be argued that the above difficulties are not insurmountable and so there is no good reason to deny the tenant this direct method of enforcing his complaint. A rent-strike, although dependent to a large extent on outside help,[13] is also a self-help remedy by tenants. Once the tenant has consulted a lawyer on an action for damages or injunction, the burden of decision-making is taken from him and he is led along in a paternalistic fashion by the legal system. The rent-strike demands more active participation by the tenant.[14] He must be prepared to face the consequences of his decision to participate and there is at least the possibility that each tenant will be involved in the major decision-making processes. These positive aspects of rent-strike organisation deserve special note. It may be that although rent-withholding will do little to improve the physical conditions of substandard housing, it will play a valuable role in improving other attributes of slum-living. Marshall Clinnard has emphasised,

> "Although the slum is generally characterised by inadequate housing, deficient facilities, overcrowding and cogestion, it involves much more than these elements. Sociologically,

---

13 Infra 935-937

14 On the requirement for maximum participation for the strike to be effective, see; Friedman op cit n 11 pp 59-60.
Gold, 11 William and Mary L.R. 740 - 748
Moskovitz and Hanigsberg, 58 Geo. L.J. 1013, 1047

> it is a way of life, a subculture with a set of norms and values, which is reflected in poor sanitation and health practices, deviant behaviour and characteristic attributes of apathy and social isolation. People who live in slum areas are isolated from the general power structures and are regarded as inferior and slum-dwellers, in turn, harbour suspicion of the outside world."15

It may be that by encouraging slum dwellers to shake off their apathy and participate in collective action, by encouraging them to call in outside aid, the rent-strike can break through this subculture and tenants be brought into the power structures in the wider society.[16]

But there is equally a danger if the strikes prove too ineffective in their immediate aim,

> "If the poor and politically weak protest to acquire influence that will help change their lives and conditions, only to find that little comes from all that risk and trouble, then apathy or hostility towards conventional political methods may result."17

This factor and the weakness of rent-strikes lead to the conclusion that the weapon should not be lightly used.[18] Where tenants are highly organised and

---

15 Clinnard; "Slums And Community Development" (1966) p 3
cf. Coates and Siburn, "Poverty: The Forgotten Englishmen" (1970) pp. 111-116
Shelter Report, "Reprieve" (1972) p 7

16 cf Comment, 55 Minn. L.R. 82, 110
Froelke, 3 Akron L.R. 69, 74
P. Wald, "Law And Poverty 1965" (1965) pp 2 - 3

17 Lipsky op cit n 2 p. 15

18 cf Davis and Schwartz op cit n 3 p 134 pointing out that less onerous tactics such as picketing may be just as successful. See also Hales and Livingston, 23 U. of Florida L.R. 79, 96

able to suffer set-backs without giving up, the strike may well be an effective weapon but otherwise it may lead only to great unhappiness resulting from eviction and other types of legal action and to despair resulting from failure. A premium is thus placed on tenant organisations.

b) The Politics of the Rent Strike

The Rent Strike presents an interesting political phenomenan. On the one hand, a writer by no means unsympathetic to tenants' aims has strongly attacked it as taking the conflict between landlord and tenant into the streets and provoking violence.[19] Whilst another has argued,

> "Perhaps the strongest argument for legalising rent withholding is that where used it may divert a potentially explosive situation into manageable channels. -- By providing the tenants with an orderly, yet effective, and directly accessible means of attempting to improve their living conditions, the city and state may be able to avert more militant expressions of protest."[20]

---

19 Levi, 66 Colum. L.R. 275, 285

20 Fossum, 1966 Calif. L.R. 304, 327
cf Angevine and Taube, 52 Mass. L.Q. 205, 237. Michael Davitt writing of the unusual absence of agrarian crime despite evictions during the Irish land crisis of the 1880s explains that, "The succor given to the evicted by the (Irish Land League - infra937) explains this unusual freedom of the work of numerous evictions from retaliatory bloodshed. Had there been no combination behind the tenants to give advocacy to their cause and to defend them in the Courts, there would have been another story to tell." "The Fall of Feudalism" (1904) pp. 262-263

The explanation for these differing views on the nature of a rent strike seems to lie in its political character as a precarious balance between militancy and working within the existing legal framework.[21] Militancy is expressed in the direct attack on property rights; rights which are very well protected by the landlord's common law power to evict if rent-withholding takes place. The tenant rejects sole reliance on the goodwill of the local government officials charged with enforcing housing laws and regulations. He rejects the orderly but slow method of voicing his grievances in an action for damages or an injunction. Instead he takes the law into his own hand and seeks to compel the landlord to react by direct action, a method which seems both easy and obvious yet calculated to have maximum effect.

But rent-strikers do not totally abandon the existing legal system even where statute does not expressly protect them. Rent-strikes are invariably brought face to face with the existing legal order in eviction proceedings and here they find the need for expert legal assistance in providing defences and seeking compromises. More fundamentally also

---

21 See generally; M. Lipsky, "Rent Strikes: Poor Man's Weapon", Transaction Feb. 1969 pp. 10-15 upon which the following account is based and Fossum, 1966 Calif. L.R. 304, 334

the rent-strike is part of the politics of protest. The poor with lack of power as well as money can only hope to achieve some bargaining strength by enlarging their conflict with the landlord and so bring outside pressures to bear on him. Unless the tenants are prepared to take the literally revolutionary step of taking over control of the running of the building,[22] they must enlist the hope of local government officials who can bring legal pressures to bear on the landlord. The aid of such officials will be lost if the strikers seem too militant, "too unreasonable". Moreover, the aid of local officials may itself be largely dependent on the ability of the strikers to attract public sympathy. Militant action may bring much publicity and news coverage but often at the sacrifice of such sympathy.

The organisers of a rent-strike are thus in a difficult position. If they are to attract followers and dramatise their plight to the public, they must be militant to gain publicity. Lipsky has pertinently emphasised that "protest, politically speaking, does not exist unless it is projected and preceived".[23] Stirring advocacy and action is needed to shake slum

---

22 This has happened in some cases: Moskovitz and Honigsberg, 58 Georgetown L.J. 1013, 1016 cf Davis and Schwartz, "Tenant Unions: An Experiment in Private Law Making" in "Housing For The Poor: Rights and Remedies" (ed. Dorsen and Zimmerman) p. 119. A tenant take-over may occur legally if they are appointed receivers by the Court; Krol, 53 Chi-Bar Rec. 367, 371.

23 Lipsky op cit n 21 p. 12

tenants out of their apathy[24] and to maintain their support. But the leader who becomes too militant faces disaster. Adverse publicity will alienate the wider public and local government bodies whilst some of the tenants are likely to have second thoughts as the consequences of their actions become greater. Lawyers involved in the strike may also be faced with an acute dilemma, how far can the militancy of a rent strike be reconciled with their professional status within the establishment? Once the strike is over, successfully or otherwise, the lawyer must represent other clients. How far can he go along with the militancy of the rent-strikers without appearing"irresponsible", without harming not only his own future interests but those of future clients?[25] Of course where the rent-strike operates in a legal framework these conflicts are not so great but they are inherent in the very nature of a situation in which large groups of poor people spurn the traditional legal methods of grievance settlement and take their fate at least partly into their own hands. But no doubt such factors were present in the early days of trade unionism and yet today most people are

---

24 As to which see supra 929

25 See generally on this conflict; Glotta, 26 The Nat. Law Guild Prac. 132

willing to accept "the right to strike". Whether tenants will ever be in a like position is a question for the future but the initial difficulties of rent-striking should not be ignored.

c) The Administration of A Rent Strike

The apparent ease and directness of a rent-strike is deceptive. It looks easy, all the tenants have to do is stop paying rent thus bringing pressure to bear upon the landlord. Unlike an action for damages or an injunction which requires a tenant to take the initiative in the strange world of courts and lawyers, the rent-strike involves no direct legal action of that sort. But this simplicity is illusory, the rent-strike requires a good deal of organisation and the role of the lawyer may well be crucial. To achieve real pressure on a landlord and to provide protection from retaliation, it is necessary for the tenants to act collectively. To get large numbers of poor tenants to act together will involve considerable organisation. [26] Slum tenants with their traditional apathy are unlikely to be

---

26 See generally on the problem of organisation; M. Lipsky, "Rent Strikes: Poor Man's Weapon" Transaction Feb. 1969 pp 10 - 15
Davis and Schwartz, "Tenant Unions: An Experiment in Private Law-Making" in Housing For The Poor: Rights And Remedies" (ed Dorsen and Zimmerman) pp 133-134

stirred into action unless there is a determined recruitment drive. Where legal protection exists to protect striking tenants, they will need expert legal advice to ensure that this protection is properly utilised and that nobody strays outside of it. Where the protection does not exist, a lawyer will be needed to delay eviction proceedings, work out compromises and generally lessen the effects of the illegality of the strike.[27]

Because the rent strike is primarily a weapon of protest, it will be necessary to plan actions to attract maximum publicity and public support.[28] Experience of New York rent strike legislation suggests that such organisation is beyond the ability of the poor tenants[29]. They are usually ignorant of their legal rights, have little organisational experience and often fatalistic. To be successful, non-tenants need to give assistance and remedy the

---

27 On the role of lawyers, see M. Lipsky, "Protest in City Politics" (1969) pp. 167-168 Glotta, 26 Nat. Law Guild Prac. 132. In Dorfman v Boozer (1969) 414 F. 2d 1168, the landlord sought to enjoin the attorney for the Tenants Council from giving advice to continue with a rent strike. She filed a motion to dismiss, arguing that the complaint sought to interfere with her, and her clients' right to a lawyer-client relationship. The motion was granted without opinion: (1969) Poverty Law Reporter para 9950.

28 Supra 933

29 Comment, 3 Columbia Journal of Law and Social Problems pp. 7 - 8.

tenants' lack of experience and initiative. The likely success of a rent strike may well depend on the extent to which this is done. But notwithstanding the importance of non-tenants, it remains true that, in the final analysis, it is the collective strength of the tenants themselves which is of most importance. To gain, extend and preserve the unity, an organisation isneeded. It is to such organisations that the discussion now turns.

Tenant Organisations

a) Tenant Organisations - The United Kingdom

The origins of tenant's associations can be found far back in English history. In 1549, risings began in Somerset against the enclosure by feudal lords of common land.[1] But the earliest tenant organisation which is relevant to our purposes was the Irish Land League founded in 1879[2] which was

---

1 W.H.R. Curtler, "The Enclosure And Redistribution Of Our Land" (1920) pp 94-96. See also ibid pp. 131-132 for anti-enclosure movements led by the Diggers in 1607.

2 There was a Tenant Right League formed in 1850 to secure for tenants the three F's ie a fair rent, fixity of tenure and a free sale of his interest. It failed because of a lack of leaders and a failure to arouse national response; See generally;

M. Davitt, "The Fall of Feudalism in Ireland" (1904) pp. 66-72
E. Norman, "A History of Modern Ireland" (1971) pp 141-151
O'Hegarty, "A History of Ireland Under The Union" (1952) pp. 405-410

"aimed at nothing less than the total abolition of the landlord system".[3] The tactics employed by the League included rent strikes[4] and the notorius weapon of "Boycotting".[5] These activities led to charges of conspiracy being brought against the organisers but the case of R v Parnell[6] ended with an acquital because the jury could not agree on their verdict.[7] The activities of the Land League also led to the Land Act of 1881[8] which set up a

---

3 N.D. Palmer, "The Irish Land League Crisis" (1940) p. 111. The best account of the movement is that given by M. Davitt op cit n 2, a leader of it. O'Hegarty op cit n 2 also describes the League at pp 481 - 513. See also J. O'Connor, "History of Ireland 1798-1924" (1925) pp.44 - 98.

4 As to which, see especially M. Davitt op cit n 2 pp. 156, 301-312; N.D. Palmer op cit n 3 pp. 176-180

5 As to which, see especially M. Davitt op cit n 2 pp. 274 - 285; N.D. Palmer op cit n 3 pp. 195 - 217.

6 (1881) 14 Cox C.C. 508, See infra.

7 See generally for this prosecution, M. Davitt op cit n 2 pp. 272 - 295

8 Gladstone himself admitted that the Act was due to the Land League; N.D. Palmer op cit n 3 p. 254

Land Commission to arbitrate between landlord and tenant and fix "fair rents".[9] The League came to an end soon after when it was proclaimed an illegal organisation and its leaders arrested.[10] Some ninety years later, rent strikes have made a new appearance in Ireland as part of civil disobedience campaigns by both Civil Rights[11] and Protestant[12] movements.[13]

---

9 Land Law (Ireland) Act 1881 (44 & 45 Vict. ch 49) See generally on Act; O'Connor op cit n 3 pp. 94-95, Palmer op cit n 3 pp. 247-264.

10 In October 1881, Charles Parnell issued an unsuccessful Manifesto for a generaal rent strike which led to the League's being proclaimed as an unlawful organisation. In 1886, "The Plan Of Campaign" was launched with the object of compelling a reduction of rent by the refusal to pay any rent at all. Though it had some success, it was not of the same importance as the Land League. See generally, M. Davitt op cit n 2 pp. 514-520. O'Connor op cit n 3 pp. 122-128.

11 See David Bell, "Warfare Welfare", "New Society". 16th Dec. 1971.

12 "Times" 1st April 1972.

13 Under the Payments For Debts (Emergency Provisions) Act 1971, the Government can reduce supplementary benefits and other Social Security payments to pay withheld rents where tenants refuse to do so. For criticism of this statute, see Tom Hadden and Peter Townsend, "Society At Work", "New Society" 18th and 25th Nov. 1971 and letters to "New Society" by W. K. Fitzsimmons on 9th Dec. 1971 and by Peter Townsend on 16th Dec. 1971

Rent strikes are said to have led to another enactment giving extensive protection to tenants - the Rent Act of 1915.[14] The focal point of these strikes was Glasgow. War-time workers on the Clyde objected to paying increased rents to their landlords and engaged in rent strikes in protest.[15] Attempts at eviction were foiled by an army of angry housewives,[16] and when the landlords sought a judicial order to attach earnings, there were mass strikes and demonstrations which, it is said, caused the sheriff to telephone the Minister of Munitions for help.[17] The Ministerial response was to introduce the first Rent Restriction Act.[18]

During the Spring and Summer of 1939 a successful rent strike took place in the East End of London.[19]

---

14 T. Bell, "John Maclean" (1944) Chap 8 pp.50-55.
W. Gallacher, "Revolt On The Clyde" (1940) Chap 4
T. Wooley, "Housing, Rents And The Tenants Struggle In Scotland" (1971) (Solidarity (Clydeside) Pamphlet No 4) pp. 12 - 13.

15 Ibid. See also the Constable Committee Report on the Rent Act, Cmnd 2423, P.P. 1924-5 XV.

16 W. Gallacher op cit n 14 p. 53.

17 Ibid 54 - 58

18 Supra 796

19 "Times" June 28th 1939, p.16, June 30th, 1939, p.16. For other examples of tenant association activities between the two World Wars, see T. Wooley op cit n 14 p.13, George Woodcock, "Homes or Hovels: The Housing Problem And Its Solution" (The Freedom Press, 1944) pp. 27 - 28. See also Camden Nominees Ltd. v Forcer (1940) 4 AER 1, Supra856

After forty eight hours of negotiations between landlords and the leaders of a twenty-one week long rent strike, an agreement was reached whereby the landlords granted 320 families rent reductions amounting to £1,000 per year and further agreed to spend £2,500 on repairs in the first year and £1,500 every year thereafter.

More recently, tenants have been organised to oppose legislation considered to be against their interests. The Rent Act of 1957 led to many meetings in protest but, "the petitions, protests and lobbies of the tenants' associations all failed to achieve any political impact - on Parliament or the executive".[20] A similar conclusion must be recorded of tenant activity against the Housing Finance Act of 1972.[21] Though there were protest demonstrations and isolated rent strikes,[22] they failed to influence the nature

---

20 M. Barret, "The Politics of Legislation" (1969) pp. 123-126.

21 In 1960, tenants in St. Pancras, London refused to pay Local Authority rent increases but failed to reverse its policy and were ultimately defeated; See D. Burns, "Rent Strike, St. Pancras 1960" (1972) published by Architectural Radical Student Educators. Another rent strike by G.L.C. tenants against rent increases took place in 1968 but was also unsuccessful especially after a Court of Appeal decision against the tenants in Greater London Council v Connolly (1970) 2 Q.B. 100.

22 eg. "Evening Standard" 2nd Dec. 1971; 8th May, 1972; 5th July, 1972; 5th Oct. 1972. "Community Action" March-April 1973, p.3. "Times" 10th, 26th April 1972. Association of London Housing Estates "News-Sheet" from January 1972 to December 1972 especially July 1972 which expressed disappointment that only 1,000 tenants turned up

(continued on next page)

of the legislation or its implementation.[23]

The present situation with regard to tenant associations is difficult to describe.[24] There are many associations which function primarily as social clubs organising sports, dances and outings. These are often found on local authority housing estates. In London, the Association of London Housing Estates acts as a co-ordinating body. Formed in 1958, the Association has about 140 affiliated local associations. Though social activities

---

22 continued from previous page
...to a protest rally held at Trafalgar Square on 9th July 1972. Various Tenant Association news-letters and leaflets.

23 As the August 1972 Newsletter of the Association of London Housing Estates put it; "Her Majesty the Queen has now given her Assent to the Housing Finance Bill presented by Parliament, and it has now become an Act irrespective of what the tenants think."

24 The best sources of information are Tenant Association newsletters and newspapers and community and local newspapers. I would like to record my thanks to the Association of London Housing Estates for allowing me to look at their collection of Tenant Association news-letters and to various tenant associations which sent me news-letters and leaflets describing their activities. Thanks are also due to Agit-Prop which allowed me access to its large collection of community newspapers.

are very important, the Association also takes up repair and other complaints on behalf of tenants and seeks a solution with the Housing Department of the relevant local authority.[25] In addition to this type of association, there are others which are more militant in character.[26] It is difficult to gauge the strength of such bodies. Some seem well-established with their own newspapers[27] but others appear to suffer from a high mortality rate and fluctuate in strength.[28] Political differences may prevent joint action though there are regional bodies and, at a national level, there is the National Association of Tenants and Residents.[29] Though not strictly

---

25 Interview with officials of the Association 20th April 1972.

26 The magazine "Community Action" is a very good source of information on these organisations.

27 eg. The West End Tenants Association, Newcastle publishes a monthly Bulletin and Edinburgh Tenant Associations seem well organised - see T. Wooley op cit n 14 p. 15.

28 eg. The Moseley Tenants Association; see Ray Fox in "West Midlands Grassroots" No 1 (Dec 1971). T. Wooley has written of Glasgow's Tenants Associations; "In Glasgow the tenants associations are ineffective organisations that appear to make little impact. They get little support from the mass of tenants and as a result have little influence on the housing authorities in the city." Zeroxed paper; "What's Wrong with Glasgow's Tenants' Associations?" (not dated).

29 Founded in 1948. Though its constitution requires it to be "non-Party", it seems true to say that N.A.T.R. is on the left of the political spectrum. See also M. Barret op cit n 20 p.124.

speaking a part of the tenant population, student unions have perhaps shown the most militance in recent years by the use of rent strikes against universities as a protest against rents which they allege to be too high.[30]

Examples of rent strikes designed to secure the repair or improvement of substandard dwellings occur quite frequently.[31] Tenants living in a six-storey block in London's East End recently staged a rent strike against their landlords, the Greater London Council, to force them to remedy dampness leading to fungi spreading through the block.[32] In another case reported by the press, the tenants' rent strike in protest over living conditions led to harrassment by a private landlord in retaliation.[33] Sometimes the strike is staged by individual tenants. A Shelter report gives the case of a family which had lived in an unfurnished flat for twelve years.[34] In the last three years there were three different landlords who all refused to repair. "Using their

---

30 eg "Times" 25th April 1972, 26th April 1972, 8th August 1972, 27 Nov. 1972, 22nd Jan. 1973, 6th April 1973, 17th April 1973.
"Evening Standard" 7th August 1972. Another militant protest group in the housing field deserves a mention, the squatters. A comprehensive account is given by Ron Bailey, "The Squatters" (1973) (Penguin Books); See also Dr. John Pollard, "Squat" (pamphlet 1972).

31 For a Canadian case-study of such a rent strike see Jowell, 48 Can. Bar. Rev. 323

32 "Evening Standard" 31st Jan. 1973

33 "Evening Standard" 25th Sept. 1973

34 Shelter, "Notice To Quit" (1968) p. 18-19.
Local newspaper often report such strikes eg Hackney Gazette 13 Oct. 1972

own sense of justice, the family stopped paying the rent and then called on the Council for help. It ordered the landlord to carry out repairs but only a beginning was made. So the family stopped paying rent again. The result was eviction on twenty eight days' notice and the family is now in welfare accommodation."[35] Tenants living in blocks of flats have frequently organised against what they consider excessive service charges and this has attracted much publicity.[36]

b) Tenant Organisations - United States

As was the case in England.[37] rent strike movements in the United States during World War I and the immediate post-war period, and again during the depression, played a crucial role in the establishment of rent control legislation.[38] A New York

---

35 Ibid

36 "Times" 8th April 1972, Ibid 10-12th April, Ibid 20th April 1972. Ibid 1st May 1972. Before leaving this topic, it might be noted that tenant rent strikes are not always for good objects. In Smethwick, the Council in 1961 successfully defied a rent strike against the rehousing of a Pakistani whose house had been demolished by Slum clearance: Paul Foot,"Immigration And Race Relations in British Politics" (1965) p.38. See also "Times" 5th April, 1973, tenant association applying pressure for gypsy caravans to be moved on.

37 Supra 940

38 M. Lipsky, "Protest in City Politics" (1969) p.34, 53-55. See also Fossum, 53 Cal. L.R. 304, 322. As far back as the 1890's, there were rent strike movements in America; Comment, 77 Yale L.J. 1368, 1370

rent strike in 1920 led, for example, to laws against exorbitant rent increases and evictions.[39] The hardships of the depression saw a further increase in tenant union activities.[40] The most famous post-war rent strike movement was that led by a militant housing reformer Jessie Gray in New York from the summer of 1963 to the winter of 1964.[41] Apart from a relatively well supported rent strike, the tenants dramatised their plight by such acts as bringing dead rats into the Court that dealt with the non-payment of rent actions brought against them.[42] In Court, tenants secured the protection of the New York rent escrow law[43] and, until the decision was subsequently reversed, the benefit of the doctrine of partial constructive eviction.[44] Though individual tenants were often unsuccessful in their primary aim of having their premises rendered suitable for occupation,[45] the strike did lead to changes in

---

39 Ibid 53-54. See generally on rent control laws. Supra.

40 Ibid 54.

41 M. Lipsky op. cit n 38 gives a comprehensive account of this movement.

42 Ibid 63

43 Ibid 63-64. The law (section 755 of the Real Property Actions And Proceedings Law) is discussed supra897

44 Gembo v Martise (1946) 246 NYS 2d 750
41 Misc. 2d 475 Supra354

45 M. Lipsky, op.cit. n 38, p.154. See also Supra926

housing code enforcement and, in particular, to an emergency repair and rat extermination program.[46]

These early rent strike movements were relatively short term in their aims concentrating on immediate issues.[47] The concept of a tenant union as a permanent organisation negotiating collective agreements with the landlord and regulating the entire relationship only really took shape in 1966.[48] It was in that year that large scale tenant unionization took place in Chicago as a result of the work of such diverse bodies as the Southern Christian Leadership Conference, the Industrial Union Department of the AFL - CIO and Students For a Democratic Society.[49] Sophisticated collective bargaining agreements were signed after pressure from unions in the shape of rent strikes, picketing and a publicity campaign.[50] Reinforced by the Civil Rights Movement and the War

---

46 Ibid 186

47 Davis and Schwartz, "Housing For the Poor: Rights And Remedies", p. 102. F.P. Grad, "Legal Remedies For Housing Code Violations" p. 139.

48 Ibid

49 The story of the most important Chicago tenant unions is told by Davis and Schwartz op cit n 47 pp 104-115.
See also "Newsweek" Sept. 19th 1966, p. 33.

50 Ibid 109-110.

On Poverty,[51] the rent strike and tenant union activities spread across the United States.[52] According to an article in a Chicago newspaper,[53] the Urban Research Corporation had listed 89 cases of tenants' rights activity reported in newspapers and journals in the first eight months of 1969. 56% of such activity took place among people living in low income private housing; 26% among people living in middle and upper income group;[54] and the remaining 18% among people living in public housing.[55] The grievances listed were: poor maintenance in 64% of the cases: rent in 34%; lack of tenant control in

---

51 For the influence of these movements on the rent strike and tenant union movements, see
Comment, 77 Yale L.J. 1368, 1373
Fossum, 1966 Calif. L.R. 304, 322.
L.M. Friedman, "Government And Slum Housing" (1967) p. 60
M. Lipsky, op cit n 38, pp. 46, 55.
For an example of the civil rights movement in the housing field, see Barker and Levine, 20 Syracuse L.R.21.

52 Hales and Livingston, 23 U. of Florida L.R. 79, 99 - 111.

53 "Chicago Tribune" Nov. 2nd 1969, p.1, quoted by Moran, 19 De Paul L.R. 752.

54 See further Hales and Livingston, 23 U. of Florida L.R. 79, 101. Over 1,200 University of Michigan Students took part in a rent strike in 1969; P. Zwerdling, "New Republic", May 31st 1969.

55 On rent strike and tenant union activity in public housing, see;
Coron and Fisham, 28 Legal Aid Briefcase 111.
Friedman op cit n51 p. 132.
Hales and Livingston, 23 U. of Florida L.R. 79, 101-102
Poverty Law Reporter paras 10, 402; 10, 547; 10, 605
Earl v San Francisco Housing Authority (1967) 10 Welfare Law Bulletin 11.

18% and inadequate security in 11%. A national convention in October 1969 led to the formation of the National Tenants Organisation to represent tenants on a nation-wide basis.[56]

---

56 Hales and Livingston, 23 U. of Florida L.R. 79, 105-106
Moskovitz and Honigsberg, 58 Georgetown L.J. 1013, 1016

The formation of a National Tenants' Association and a proposed constitution were discussed by Simon, 47 Texas L.R. 1160.

Tenant Organisations And The Law

Tenant union activity can be divided into two main stages involving different legal considerations: (a) organising the tenants into a tenant union or rent strike movement, (b) negotiating with the landlord for a collective agreement to regulate the relationship in the future. Within each main stage there may be a number of steps to be taken as is shown by this example based on the experience of a Chicago tenant union:[1]

1) Formation of a nuclear group - This can come from among the tenants, a neighbourhood community organisation or other group.

2) Door to door handbilling and canvassing - Organisers in the nuclear group pass out handbills outside the premises and try to contact each tenant individually in his dwelling.

3) Picketing - Organise picket lines involving as many tenants as possible at strategic points near the premises.

4) Organisation of union - Election of officers and provisions for a meeting place and the holding of meetings.

5) Demand to negotiate - Union organisers begin persuasive efforts to negotiate a contract with landlord.

6) Final contract or agreement - Formality of executing contract.

---

1 Davis and Schwartz, "Housing For The Poor": Rights And Remedies" (1967)

a) Organising Tenants

One of the most important tactics at the disposal of tenant groups is to picket the landlord's premises, office or even his home to protest at his conduct.[2] The legal questions raised by picketing are too wide to be dealt with comprehensively in this thesis, raising as they do issue of constitutional law and civil rights.[3] American Courts have made many distinctions depending upon how and where the picketing was conducted and the cases go both ways.[4] In People v Koperzak,[5] tenants had paraded

---

2 Davis and Schwartz, op cit n 1 p.133-134
Hales and Livingston, 23 U. of Florida, L.R. 79, 96-97
M. Lipsky, "Protest And City Politics" (1969) p.169
Picketing has been used extensively by housing groups in the U.K. For example, in 1966 demonstrators picketed the home of a Medical Officer of Health alleged to be responsible for evictions at a hostel for the homeless in Kent: "King Hill News" No 1 p.2. Later, they picketed the home of the Minister of Health: "King Hill News" No. 2 p. 7 (Feb. 1966). Ibid No. 3 p. 2 (July 1966) and the Council Chamber Ibid.
In 1970, the Housing Department, Manchester, was picketed by membets of the Carter Street Housing Union to protest at the Council's slum clearance policy: "Moss Side Peoples Paper", Nov. 1970, pp 4, 8.

3 See generally, H. Street, "Freedom, The Individual And The Law" (1971) pp.

4 99 A.L.R. 533, 535
93 A.L.R. 2d 1284, 1294
Davis and Schwartz op cit n 1 pp 123 - 132
Ellis, 1971 Urban Law Annual 223

5 (1934) 153 Misc. 187, 274 NYS 629
aff'd 266 NY565, 195, NE 202
See also Birnbaum v Margosia (1933) N.Y.L.J. March 6th p. 1323, 1537
Fulton Ave Corp v Fox (1933) N.Y.L.J. April 24th, p. 2445
Weinberg v Barsky (1932) reported,

continued on nextpage

with signs reading "Rent Strike Against Fire Trap Condition". Their conviction for disorderly conduct was upheld by the New York Court of Special Sessions on the basis that the lawful thing for the tenants to have done would have been to complain to the relevant municipal department. On the other hand, the Supreme Court of Pennsylvania has recently held in Hibbs v Neighbourhood Organisation[6] that picketing in a peaceful manner is constitutionally protected free speech. In this case, the tenants had peacefully picketed the landlord's own home. There seem to be no reported English cases on tenant picketing but the general law is that picketing is lawful unless it constitutes a trespass or obstruction of the highway.[7]

Unless protected by statute, the rent strike is a breach of contract because the tenant has no right to withhold rent even if the landlord is in breach of his obligations.[8] Therefore, anybody who induces another to go on rent strike is himself liable for the tort of inducement of breach of contract. There

---

5 ..continued
33 Colum L.R. 1267, 1268.
Opinion of the Corporation Counsel, N.Y. City, Police Dept. Circular No. 17, March 21, 1933 - reported 33 Colmn. L.R. 1267
Springfield v Hochman (1964) 44 Misc. 2d 882
255 NYS 2d 140

6 (1969) 433 Pa 578
252 A 2d 622 Noted Ellis, 1971 Urban Law Annual 223.
See also Barnes - Arno Bldg. Corp v Hoffman (1933) N.Y.L.J. March 6th, p. 1324
Dicta Realty Associates v Shaw (1966) 50 Misc. 2d 267
270 NYS 2d 342

7 H. Street op cit n 3

8 For the doctrine of independent covenants, see Supra

is clear English authority to this effect in the case of Camden Nominees v Forcer[9] already considered. That case decided that "inequality in wealth or position" was not sufficient justification to constitute a valid defence.[10]

Rent Strike organisers may find themselves facing the tort, or even criminal charge, of conspiracy.[11] In R v Parnell[12] the defendents were leaders of the Irish Land League.[13] There were nineteen counts in the information against them and these included the charge that "the traversers, intending -- to impoverish and injure owners of farms in Ireland let to tenants in consideration of the payment of rent, did conspire, combine and confederate, to solicit large numbers of tenants in breach of their contracts of tenancy to refuse to pay, and not to pay, to the owners of farms the rents which they the said tenants were and might become lawfully bound to pay, -- to the great damage of the said owners, and to the evil example of others in the like case offending." Directing the jury, Fitzgerald J. defined

---

9 (1940) Ch. 352 Noted, Comment, 40 Colum L.R. 1094 (1940). See Supra 856 . For American law, see 52 A C.J.S. S830 p. 382; for Canadian law, Jowell, 48 Can. B.R. 323, 332.

10 See Brimelow v Casson (1924) 1 Ch. 302 for defence of justification to this tort.

11 Jowell, 48 Can. B.R. 323, 332-333.

12 (1881) 14 Cox C.C. 508

13 See Supra 937

conspiracy[14] as "the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."[15] He explained that "unlawful" did not necessarily mean criminal in itself if done by only one person; any wrongful act would do. The following example was given,

> "If, for instance, a tenant withholds his rent, that is a violation of the right of his landlord to receive it, but it would not be a criminal act in the tenant, though it would be the violation of a right; but if two or more incite him to do that act their agreement so to incite him is by the law of the land an offence."[16]

In this particular case, the jury was unable to agree and so the defendants were acquitted but the possi-

---

14 He was described by Michael Davitt as "a tenant-right patriot and member of Parliament in the fifties" : "The Fall of Feudalism" (1904) p.289 but only a month before the trial he had strongly denounced agrarian disorder as had his fellow judge Mr. Justice Barry : N.D. Plamer, "The Irish Land League Crisis" (1940) p. 169. See Davitt pp. 263 - 264 for general hostility by Chief Justice May; a speech delivered by him on a preliminary application by the defendants had caused such a public protest on account of its alleged prejudice against them that he decided not to take any further part in the proceedings: Ibid 288-289.

15 cf. Kenny-Turner, "Outlines of Criminal Law" (19th ed 1966) pp 426-432 for modern law.

16 (1881) 14 Cox C.C. 508, 513

bility of a conviction remains if this case is followed.[17]

The generally unfavourable attitude of the Common Law towards tenant organisations and rent strike movements has led to proposals for statutory protection for such activities similar to that prevailing in the labour relations field.[18] A model Tenant Union-Landlord Relations Act would give tenants the right to organise in the same way that workers are free to organise. Furthermore, a tenant organisation with the support of a majority of tenants in an area would be able to claim recognition in collective bargaining. Other commentators have expressed the view that such an Act would be premature as extensive experimentation with tenant unions is still necessary.[19]

b) The Collective Agreement

The primary aim of a tenant union is to negotiate

---

17 It is possible that it goes too far. As Prof. Grunfeld has observed, "A civil breach of contract can seldom be an unlawful act for the purpose of the crime of conspiracy. From Vertue v Lord Clive (1779) 4 Burr 2472 one may conclude that the breach of contract would have to involve some great danger to the nation": "Modern Trade Union Law" (1966) p. 407. In Vertue v Lord Clive, British Officers had agreed to terminate their commission contracts without giving proper notice at a time when there was an imminent danger of an attack. Held to be a criminal conspiracy.

18 Comment, 77 Yale L.J. 1368, 1400
Froelke, 3 Akron L.R. 69
Moskovitz and Honigsberg, 58 Georgetown L.J.1013

19 Davis and Schwartz op cit n 1 pp. 121-122

an agreement with the landlord which gives the tenant certain rights to fair treatment and a procedure which can be used to enforce these rights.[20] The contents of such agreements will vary from situation to situation and will reflect the balance of bargaining power. The following example does not seek to be exhaustive of all the points that could be dealt with but it does appear to cover the most important topics. It is based largely on an agreement reached between a Chicago Union, the Old Town Gardens' Tenants' Action Council, and the landlords, the Community Renewal Foundation.[21]

There should be clauses to strengthen the union's position. It should be agreed that the land - lord recognise the Union as sole collective bargaining agent of the tenants and that the terms of the agreement should be incorporated in every tenancy agreement. If the union is strong enough, the agreement should require every tenant to join the union and to pay union subscription which could be automatically deducted from the rent.

Along with provisions as to security of tenure and rent rises, there should be incorporated clauses

---

20 Supra 947

21 Reproduced, Davis and Schwartz, "Housing For The Poor : Rights And Remedies" pp. 141-152. See also Indritz, 1 New Mexico L.R. 132 - 138.

to ensure that the premises are kept in a good condition. Existing defects could be listed and a promise given by the landlord that they be remedied within a fixed period. A comprehensive undertaking to keep the premises in good repair should be given and the standard of repair and the parts concerned should be well detailed to avoid technical arguments over "structural" or "main" repairs.

It is essential that there be an adequate procedure to enforce these undertakings. This could be done by requiring the tenant who has a complaint to take it up with the landlord in the first instance. If this fails to achieve success, it could be discussed by landlord and union representatives. Failure to reach agreement could lead to an appeal to an independent body composed of 1 or 2 members chosen by each of the disputing parties and an independent chairman. Should this not produce agreement, the union should be entitled to withhold rent. Emergency conditions could be dealt with by omitting the landlord-tenant stage and the appeal procedure.

To provide a just agreement, the union should also give certain undertakings so as to improve the conditions in the buildings. It should agree to do everything in its power to enable the landlord to discharge his obligations by punishing tenants who obstruct him or do deliberate damage. Arrangements could also be made regarding the cleaning of common

parts which are the responsibility of no individual tenant but which may be more easily seen to by the tenants than by the landlord providing they are suitably organised.[22]

The legal problems concerned with the validity of such collective agreements correspond to those of collective agreements in the labour relations field.[23] Does it bind all the tenants or only those immediately concerned? Can the landlord plead duress? If the tenants agree only to pay their rents in return for the landlord's promises, are they giving the landlord any fresh consideration to support the collective agreement?

Though most landlords view tenant unions with suspicion and hostility,[24] it has been argued that they are, in fact, of benefit to landlords as well as tenants.[25] For the landlord there is the economic benefit that comes from having a stable tenant population with an interest in improving the condition of

---

22 Supra 680

23 For English law, see R. W. Rideout, "Principles Of Labour Law" (1972) pp. 70 - 80.
Davis and Schwartz op cit n 21 have considered the following questions and suggested answers under the American law pp. 134 - 140. See also Bazarko , 18 Clev. - Mar. L.R. 358.

24 Gold, 11 William and Mary L.R. 740
Strauss, "Tenant Unions : Special Privilege Outside The Law" 32 J. Property Management 129 (1967)

25 Hales and Livingston, 23 U. of Florida L.R. 79, 88 - 89
Froelke, 3 Akron L.R. 69, 73-75

their dwellings. In particular, tenant unions can be an effective restraint on vandalism and can exert moral pressure on their members and other tenants to live up to their tenancy obligations.[26] More generally, they can act as representatives of the tenants in arbitration proceedings designed to provide an orderly method of dispute resolution.[27] These

---

26 Coulson, 14 Prac. Law 24 - 27; Comment, 1970 Wisconsin L.R. 607, 613 n 26: "Impressive examples may be found of the responsible and even business-like attitude of tenants." One such example is given of New York tenants whose rents were reduced to $1 dollar per week under the rent control law. They continued to set aside their old rents and used it to pay for the services of a janitor. When they found the existing janitor to be inefficient they dismissed him and appointed a tenant in his place. They also reluctantly agreed to evict some of their number for failure to pay rent.
A review of English Tenant Association newssheets provides many examples of advice to tenants to stamp out vandalism, eg "Argus" (Argyle Estate Tenants' Assoc. Wimbledon) July 1967; "Insight" (Thamesmead Community Assoc. London) June 1970; "The Grape Vine" (Rye Hill Park Tenants' Assoc. London) Oct. 1971; Arndale Newsletter Dec. 1971.

27 Jackson and Taylor, 27 Legal Aid Briefcase 130. Sembower, 24 The Arbitration J. 35.
Canadian Statutes have specifically provided for mediation in the landlord-tenant relationship;

R.S.A. 1970 c 200 s 22 (2)
S.B.C. 1970 c 18 s 66 (2) (3)
R.S.M. 1970 L.70 s 85, 119 (2), 120
S.N.S. 1970 c 13 s 11 as am. by S.N.S. 1970-71 c 74
R.S.O. 1970 c 236 s 110 (2) (3)

cf. the limited power of English Rent Officers to conciliate - The Francis Report Cmnd 4609 (1971) pp. 37-38 and recommendation for Tenancy Relation Officers with such power - Ibid p.111.

advantages have led to recognition by certain public landlords of tenant unions as bodies that should be consulted prior to important decisions.[28]

Whether the union will achieve its aim of recognition as bargaining agent for the tenants will depend on several factors.[29] The strength of the union is obviously important, like a trade union it gains its strength from its ability to organise collectively. The more tenants it organises, the greater its bargaining power. The type of landlord involved is also important. A small landlord owning only one or two houses may easily be brought to the negotiating table whilst a large property company may resist strongly. If there is a rapid change-over in tenant population, organisation will be difficult and racial differences may hinder collective action. The attitude of the news media may also be decisive in bringing pressure to bear on the landlord.

---

28 Poverty Law Reporter para 2500 describing various U.S. schemes.
In England, several local authorities have experimented with schemes to give tenants some participation in the management of council estates;
Association of London Housing Estates, Southwark Group "Tenant Participation In Management Schemes" (pamphlet 1972)

29 See generally : comment, 77 Yale L.J. 1384 - 1387

Welfare Rent Withholding : The United States

There are many Federal and State programmes designed to ensure that groups such as the blind, the disabled and the aged are able to afford decent housing.[1] Normally, money is paid directly to the recipient who then arranges his own housing. The importance of such programmes should not be underestimated. "Though less directly than public housing, to be sure, public assistance is the largest national programme concerned with the housing needs of the poor."[2] Many studies have shown that the type of housing actually secured by welfare recipients falls far short of the standard intended.[3] The result is that public money is being used to subsidise substandard housing. Realisation of this fact has led to welfare bodies playing a more direct role. Sometimes this means only that advice is given to tenants about where to find decent housing.[4] It may mean that arrangements are made for the recipients to enter public housing.[5] A third response is to withhold rent allowances and so bring pressure to bear on the landlord to correct the conditions. The following

---

1 Alvin L. Schorr, "Slums And Social Insecurity"(1964) p. 93 - 105.

2 Ibid 94

3 Ibid 94-95

4 Ibid 98

5 Ibid 100

pages consider how this third response had been employed in the States of New York, Illinois and Michigan.

New York

Welfare rent-withholding is authorised in New York by a section of the Social Welfare[6] Law known as the Spiegal Act. This section authorises welfare officials to withhold rent payments of welfare clients who live in buildings which contain "any violation of law -- which is dangerous, hazardous or detrimental to life or health". The tenant is protected from eviction by the provision that, "Itshall be a valid defence in any action or summary proceeding against a welfare recipient for non-payment of rent to show existing violations in the building as the basis for non-payment." This defence does not become operable until the violations are reported by the appropriate agency to the welfare department. Thus, where rent accrued before the alleged violation was reported to the welfare department, the landlord was entitled to a judgement.[7] Nor does the defence apply if the tenant has caused the violations.[8]

An important 1965 amendment[9] provided not only for rent-withholding but also for the further remedy

---

6 New York Social Welfare Law s 143 - 6.
See generally; Simmons, 15 Buffalo L.R.572 (1966)
Fossum, 53 Calif. L.R. 304,327-331 (1965)

7 Mid Island Collision Inc v Fiore (1968) 290 NYS 2d 857

8 Caravetto v Springfield (1967) 283 NYS 2d 298
See also, Simmons, 15 Buffalo L.R. 572, 591 (1966)

9 N.Y. Laws 1965 Ch 700

of rent abatement. The statute, as originally enacted, suffered from one major flaw. Providing the landlord had actually remedied the violation at the time when he brought his action for non-payment, he was entitled to all withheld rent including that for the period when the violation existed. The existence of the violation merely superceded his right to rent, it did not abate it and therefore public money was still being used to subsidise substandard housing.[10] This defect in the law was remedied by the 1965 amendment which provided that the landlord,

> "shall not be entitled to an order or judgement awarding him possession of the premium or providing for removal of the tenant, or to a money judgment against the tenant, on the basis of non-payment of rent for any period during which there was outstanding any violation of law."11

But some discretion is still left to the welfare agency by sub-section 6 which provides,

> "Nothing in this section shall prevent the public welfare department from making provision for payment of the rent which was withheld pursuant to this section upon proof satisfactory to it that the condition constituting a violation was actually corrected."

The exact scope of this discretion was the subject of an action in Williams v Kurtis[12] before the New York

---

10 See Lawrence M. Friedman, "Government And Slum Housing" (1968) p. 64 n 117.

11 s 143 - b (5) (b)

12 (1969) 162 N.Y. L.J. No. 124 p.18
Poverty Law Reporter para 10, 783

For a criticism of this restriction in the Law; Simmons, 15 Buffalo L.R. 572, 585 (1966)

Supreme Court. Whilst violations were still uncorrected, the Department of Social Services had paid rent to the landlord as a result of his plea that he needed the money to be able to correct the violation. The Court held that it had no authority to do so except upon proof that the violation had been actually corrected and therefore enjoined the Department from making payments until a certificate of correction of violations was received.

If the Spiegal Act has been involved, the Welfare Department writes to inform the tenant to stop rent payments. Upon receipt of the landlord's claim for possession, the tenant should take it to the welfare investigator who then lets the Clark of The Court know that the defence will be entered to the landlord's action. The mechanics of this form of rent withholding are thus quite straight-forward.[13]

The Act was the subject of empirical research during the first two years of its adoption.[14] The results were encouraging. "-- Reports have been in unanimous agreement that the Spiegal Law has been assisting welfare departments obtain improved housing conditions for their clients. Several agencies have reported that some new difficulty has been encountered in securing housing for welfare clients because landlords are reluctant to rent to families under the pro-

---

13 See Nancy LeBlanc, "A Handbook of Landlord-Tenant Procedures and Law" (1969) p.10.

14 Simmons, 15 Buffalo L.R. 572 (1966)

tection of this law,[15] but all report that the existence of the law has made it easier to persuade landlords to make needed repairs. The suggestion that rent will be withheld has served as a successful "discourager of hesitancy" and provided the welfare workers with additional leverage for their day-to-day negotiations with the landlords"[16] It was found that the Spiegal Law was used with caution, being only invoked if the Department felt that there was a substantial likelihood that a landlord would actually be induced to make repairs. If it was thought unlikely that the landlord would respond favourably either because of financial inability or recalcitrance, the usual practice was to move the welfare client and so avoid a prolonged controversy.[17]

Illinois

A programme somewhat similar in effect to the Spiegal Law has been utilised in Illinois since 1961. Although originally unauthorised by law,[18] this practice now operates within a statutory framework.[19]

---

15 See infra

16 Simmons, 15 Buffalo L.R. 572, 592-593 (1966)

17 Ibid

18 Fossum, 53 Calif. L.R. 304, 333-334 (1965)
Friedman, op cit n 10 at 62

During the depression in 1931-33, the Chicago Relief Agencies adopted a "rent moratorium" to enable aid to stretch further. This caused much hardship to both landlords and tenants. Families were constantly evicted or forced out by harrassment. Welfare clients found it difficult to get

18 and 19 continued on next page

County and local public aid departments are authorised to suspend rent payments of recipients of public aid who live in buildings containing violations which are "dangerous, hazardous or detrimental to life or health." There may be partial payments to the landlord for partial repairs. The existence of such violations is a defence to an eviction action for non-payment of rent. The landlord is deprived of the right to employ the distress remedy in these circumstances against welfare tenants. The Act also imposes penalties on landlords who discontinue utility services to buildings where rents have been withheld and empowers the State Department of Public Aid to pay for these services in such buildings and deduct the cost from the withheld rent. A 1969 amendment[20] contains provisions for partial or complete abatement in some circumstances. The landlord is given 90 days to correct the violations. Thereafter the welfare agency may deduct 20% of rent payments withheld if the violations have not been corrected. For each 30 day period thereafter for which violations remain uncorrected, an additional

---

18 continued
...housing and had to conceal the fact that they were on welfare. Landlords were sometimes forced to go on relief themselves and suffered mortgage foreclosure. No repairs were carried out and conditions became insanitary and often degrading to the extent that some families would hang their food on strings as the least expensive way to protect it from the rats.
See generally, Edith Abbott, "The Tenements of Chicago 1908-1935" (1936) pp.441-475.

19 Ill.Rev. Stat ch 23 s 11 -23 (1969.
See generally, Comment, 37 U. of Chi. L.R.798 (1970).

20 Illinois Laws of 1969, H.B. 2916

penalty of 20% will be deducted.

Although the Illinois statute is similar to the Spiegal Law, there are some important differences.[21] The Spiegal Law does not specifically require the Department to give notice to the landlord of the intention to withhold rent. The Illinois Statute does have such a requirement. Under the New York law, there is no provision for the Department to intervene in actions for possession resulting from welfare rent withholding. The Illinois Statute gives the Department the right of intervention. The graduated system of rent abatement appears only in the Illinois law.

Empirical study of the Illinois Statute shows that it has had only limited success.[22] The Welfare Department withheld rent in only 21% of the cases originally brought to its attention.[23] Compliance with housing laws was achieved in 36% of the withholding buildings as opposed to 22% of the nonwithholding buildings.[24] Thus, the technique was only used on a limited scale but was "an effective tool for inducing compliance"[25] when it was used. It was found that "administrative problems were the predominent cause of the limited nature of the enforcement scheme."[26]

---

21 For a comparison, see Flitton, 48 Chi. Bar Record 14, 16 - 17 (1967)

22 Comment, 37 U. of Chi. L.R. 798 (1970)

23 Ibid 840

24 Ibid

25 Ibid

26 Ibid

These problems were the cause of long delays; the medium time required for a case to move from initiation to rent withholding being 156 days.[27]

Michigan

Legislation in Michigan authorises the State department of Social Welfare to establish minimum housing standards for the preservation of health and prohibits the use of general relief to pay rent for any dwelling that does not meet those standards.[28]

Evaluation of Welfare Rent Withholding

A number of draw-backs to welfare rent-withholding have been suggested. The first relates to the nature of the agency involved. It is said that welfare departments are plagued by the "debilitating influences" of bureaucracy, inertia and shortage of staff.[29] The administrative problems emphasised by the study of the Illinois Statute would seem to provide some evidence for these criticisms.[30] The wide discretion placed in the lands of welfare officials lacking expert knowledge of housing has also been criticised.[31]

---

27 Ibid 844.

28 Mich. Comp. Laws Ann s 400:14C (1967)

29 Simmons, 15 Buffalo L.R. 572, 592 (1966)

30 Supra

31 Fossum, 53 Calif. L.R. 304, 330 (1965)
Simmons, 15 Buffalo L.R. 572, 589 (1966)
On the vagueness of the standard of fitness required, Kurtz & Forgang, 17 Syracuse L.R.490,502 (1966)

This technique has also been said to run the danger of being used by some welfare departments to reduce the department's budget even though it means that families must remain in unsafe housing meanwhile.[32] Other adverse effects on tenants have been pointed out. Some social workers have claimed that welfare rent withholding degrades welfare tenants and introduces a sense of inferiority by singling them out for special treatment.[33] In reply it has been said this consideration must be balanced against the advantages conferred upon such tenants by use of the technique.[34] There is also a risk that the withholding of rent will strain relations between landlord and tenant even though the decision is taken by the Department not the tenant.[35] A related danger is that landlords will guard against the possibility of losing future rents by not letting their premises to welfare recipients.[36] There is some evidence to suggest this has happened[37] though it is argued that welfare officials are capable of judging when the use of the

---

32 Simmons, 15 Buffalo L.R. 572, 586 (1966)

33 Fossum, 53 Calif. L.R. 304, 330 (1965)

34 Ibid

35 Flitton, 48 Chi Bar Record 14, 18 (1967)

36 Comment, 37 U. of Chi L.R. 798, 847 (1970)
Flitton, 48 Chi. Bar Record 14, 18 (1967)
Fossum, 53 Calif. L.R. 304, 334 n (1965)
Simmons, 15 Buffalo L.R. 572, 587 (1966)

37 Friedman op cit n 10 at 63
Simmons, 15 Buffalo L.R. 572, 593 (1966)
During the "rent Moratorium" of the Depression (Supra n 18), welfare clients found it difficult to get housing as landlords feared non-payment; Edith Abbott, "The Tenements of Chicago 1908-1935" pp 450 - 453 (1936)

technique would be counter-productive.[38]

In favour of rent withholding by welfare departments, it can be said that it has been successful in getting repairs done when it has been used.[39] It has also been suggested that regular checks by departments to see whether the law should be invoked leads to more effective discovery of housing code violations than by the hap-hazard inspections of a municipal code enforcement agency or individual complaints by tenants.[40] Certainly, it provides an extra watch-dog. Looked at from the viewpoint of the public generally who provide the payments, this technique serves the important purpose of ensuring that these payments are not used to subsidise the activities of a landlord who lets premises in violation of relevant housing laws.

---

38 Simmons, 15 Buffalo L.R. 572, 588 (1966)

39 Supra 966, 967

40 Comment, 5 Duquesne U.L.R. 413, 419 (1967)

Welfare Rent Withholding : England

Persons receiving supplementary benefit are entitled to an amount to cover the cost of renting accommodation if they are tenants.[1] The whole rent may not be paid for several reasons.[2] Adjustment may be made to take account of rent rebates or allowances, payments already made in respect of heating, lighting, etc. and contributions which should be made by other persons staying with the claimant. Most importantly for our purposes, the Ministry of Social Security Act 1966 provides that the Supplementary Benefits Commission need only pay the weekly net rent or "such part of that amount as is reasonable in the circumstances."[3] Thus, if rent is considered to be unreasonably high, the Commission will not grant a full allowance to the tenant-claimant. In practice, 99% of claimants had their rent met in full in 1971 so relatively few tenants are affected by this restriction.[4] But it is of interest to examine the meaning of this provision as a form as welfare rent-withholding and to see its

---

1 Ministry of Social Security Act 1966. Schedule 2 para 13.

2 See generally, Tony Lynes, "The Penguin Guide To Supplementary Benefits" (1972) pp 37-48.

3 Schedule 2 para 13.

4 Report of the Committee on the Rent Acts (1971) Cmnd 4609 (The Francis Report) p.78.

effect on the tenants involved.

The Supplementary Benefits Handbook which gives "the broad lines along which the Commission exercises its discretionary powers in day to day administration" explains that,

> "in deciding whether the rent is reasonable or not local officers ask them selves:
> (1) whether the rent is reasonable for the accommodation provided;
> (2) whether the accommodation is reasonable for the claimant."[5]

There is no indication that the state of the premises is a specific factor to be taken into account but, in practice local officers of the Commission inspect registers of rents fixed by rent officers, rent tribunals and rent assessment committees.[6] If a rent has been fixed, this will be accepted as reasonable for the accommodation (though not necessarily that the accommodation is reasonable for the claimant). If no rent has been fixed, officers may consult the register to get an idea of what is considered reasonable in the area.[7] Thus by basing reasonable rents on registered rents either directly or indirectly, the Commission takes account of the state of the premises which is an element in deciding the registered rent.[8] The relationship

---

5 Lynes op cit n 2 p.43

6 Francis Report op cit n 4 at p. 79
Lynes op cit n 2 at p. 44-45

7 Ibid. The Francis Committee recommended that the Commission should have the power to apply to the Rent Officer for a fair rent to be registered op cit n 4 at p.100.

8 See generally Supra §23

between repairs and reasonable rent is only one of the factors that must be taken into account by the officer deciding whether to withhold the rent allowance but it would seem that the Act permits the withholding of rent if the conditions are sufficiently bad so as to render the amount of rent unreasonable.

In the absence of specific protection for the tenant, the consequences of withholding rent will often be too severe on the claimant to be recommended as a normal technique to ensure that repairs are done.[9] Audrey Harvey has described the tenant's dilema: "A tenant whose rent is considered unreasonable -- is caught between cruel pincers. If he is to pay his rent he has somehow got to find the difference between what the landlord charges and what the Board allows. And how is he to do that except by taking it out of his allowances for bare necessities?"[10] One of the worst aspects of the problem was that tenants did not usually understand what had happened. All they knew was that they were unable to make ends meet. Landlords were seldom told the real reason for rent arrears and nor were the Courts." The result is that perfectly honest tenants can find themselves accused of feckless-ness or - worse than that - find themselves evicted simply because the State has let them down; or, to put

---

9 Cf the position under in Illinois before withholding was specifically authorised and the tenant protected, Supra¶65

10 Audrey Harvey, "Tenants in Danger" (1964) p.114.

it another way, because the State has not felt it proper that public funds should go into the pockets of profiteering private landlords."[11] In the case of protected tenants, the power of the County Court judge to refuse possession if to give possession would be unreasonable[12] may come to the tenant's aid but the furnished tenant has no such protection though, no doubt, the rent tribunal will take the tenant's plight into account in deciding whether or not to extend the notice to quit in relevant cases.[13]

There is also the question whether the Commission would be willing to intervene in landlord-tenant affairs by withholding rent to get the landlord to repair. At present, the supplementary benefit payments are nearly always made to the tenant who then arranges housing for himself. Although there is power to pay rent directly to the landlord,[14] this is only done occasionally. One survey found that local social security officers were reluctant to consider doing so and others appeared to be unaware thatsuch an arrangement could be made.[15] The following case was reported by the Coventry Information Centre.[16] The Centre

---

11 Ibid

12 Rent Act 1968 s 10.

13 Ibid sections 77-78.

14 Ministry of Social Security Act 1966 s 17 (3) See Lynes op cit n 2 at p. 55-56.

15 John Greve, "Homelessness in London" (1971) p.188.

16 See "Community Action" July-August 1972 pp.5-6.

had discovered that a landlord had been demanding £4.50p. per week rent when the rent had been fixed by a Rent Tribunal at £3.50p. "When we informed Social Security of the fact that the landlord was, in effect, receiving money from the Social Security, via the tenant, in a fraudulent way, they stated that they would not or could not do anything about this, but if we were successful in reclaiming the money that had been paid over and above the fixed rent (approximately £50) they would want it returned."[17] On the other hand, many Rent Officers told the Francis Committee investigating the Rent Acts that poorer tenants often applied to them to fix the rent after being requested or advised to do so by local officers of the Commission.[18]

---

17 Ibid

18 op cit n 4 at p. 79

Part VII

Safeguarding the Tenant's Rights and Remedies

Exclusion Clauses - The American Law

Most American Courts which have been called upon to determine the question have upheld the validity of exclusion clauses appearing within residential leases.[2] They have done upon the broad grounds of freedom of contract; if the parties to the lease see fit to contract that the lessor shall not be liable for damages resulting from his negligence, the law must permit them to do so and give effect to their wishes.[3] This view was vigorously expressed by the New York Court of Appeals in Kirshenbaum v General Outdoor Advertising Co,

> "Stipulations between a landlord and tenant, determining which shall bear a loss arising from nonrepair or misrepair of the tenement, and which shall be immune, are not matters of public concern. Moreover, the two stand upon equal terms; neither the one nor the other is under any form of compulsion to make the stipulations; either may equally well accept or refuse entry into the relationship of landlord and tenant." 4

Some recent cases have continued to hold these clauses to be valid either on the grounds of freedom of contract[5] or because of the weight of the case law on the matter,[6] but the tendency is to hold them to be invalid.

During the past few decades, the whole concept of freedom of contract has been subjected to severe criticism and this general development in the law of contract has had its effect on the validity of exclusion clauses. With the increasing standardization of contracts in the present century, doubts have been

expressed as to the fundamental concept of a contract as a voluntary agreement made by equal parties.[7] Where the contractual terms are drafted by the party with superior bargaining power and then offered to the other party on "a take it or leave it" basis, it cannot be said that the resulting contract is a truly voluntary agreement. The capacity of the weaker party is so grossly unequal that he has not really been permitted to bargain at all. Academic doubts were given judicial expression by Frank J. in Siegelman v Cunard White Star,

> "The ticket is what has been called a 'contract of adhesion' or a 'take it or leave it' contract. In such a standardization or mass production agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract', cannot be applied rationally. Such a contract is 'sold not bought'. The one party dictates the provisions; the other has no more choice in fixing those terms he has about the weather." 8

In the leading case of Henningsen v Bloomfield Motors[9] the Supreme Court of New Jersey applied this reasoning to invalidate a motor manufacturer's attempted disclaimer of an implied warranty of merchantability.

A similar disparity in bargaining power between landlord and tenant and the absence of true freedom of contract has been recognised by many writers and Courts. Schashinski notes that,

> "All the elements of adhesion contracts and characteristic circumstances surrounding their execution exist in the case of a lease by an indigent tenant. Most landlords use a standardised form of lease or at least stand-

> ardised language. The landlord is the draftsman and the terms strongly favour him. The tenant has no choice but to adhere by signing the lease or to reject the entire transaction and remain homeless." 10

The Supreme Court of Pennsylvania has recognised the true relation of the parties and the artificialty of the common law in the face of a housing shortage,

> "No longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord to be and tenant to be negotiate a lease on an 'arm's length'basis. Premises which, under normal circumstances, would be completely unattractive for rental are now, by necessity, at a premium." 11

It has been further observed by the United States Court of Appeals for the District of Columbia Circuit that racial and class discrimination may also weaken the tenant's bargaining position.[12] The result of all three factors is that the landlord is not only able to rent substandard property but he can also oblige the would be tenant to exempt him from the legal consequences of the unfitness of these premises. It is fruitless for the tenant to seek a lease having no exclusion clauses,

> "these clauses were included in all form leases used by practically all landlords in urban areas -- This meant that even if a prospective tenant were to 'take his business elsewhere, he would still be confronted by the same exculpatory clause in a form lease offered by another landlord." 13

Those Courts which have recognised these simple social realities and have not been blinded by myopic views of freedom of contract have granted relief to the tenant either by strict construction of the offending

clauses or by the more radical move of declaring them to be void as contrary to public policy.

The severity of some clauses has been mitigated by very narrow construction of their scope.[14] Some recent decisions of the Supreme Court of Pennsylvania provide examples of this approach.[15] The tenant in Galligan v Arovitch[16] brought an action for damages when she tripped on the lawn which was retained in the defendant's control. The lower Court rejected her claim because of the inclusion in the lease of a clause which relieved the landlord of liability generally for injuries occurring on the premises. The Supreme Court reversed this decision on the grounds that the clause had no application to this particular accident. In addition to the general immunity of the landlord, the clause had named seven specific areas over which he assumed no responsibility for injuries. The lawn was not one of the areas mentioned and the Court therefore held that the clause was not effective to relieve landlord of liability for injuries occurring thereon. In two later cases the Court held that a lease provision purporting to release owner from liability "for any errors of omission or commission" did not cover past negligent conduct.[17] The rules of construction applied in these cases were stringent ones,

> "(1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favourites of the law; --

(2) Such contracts must spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation; --

(3) Such contracts must be construed with every intendment against the party who seeks the immunity for liability; --

(4) The burden to establish immunity from liability is upon the party who asserts such immunity." 18

Whilst this approach may succeed in rendering ineffective the offending clause, the danger is that it will bring the law into disrepute by engaging in little better than a fiction by ignoring the clear words of a contract yet claiming to construe them.[19] As one writer has observed,

> "The process of emasculating the exemption clauses by the expedient of strict construction is apparently little influenced by the language of the clause." 20

An increasing number of Courts have taken a much more radical approach to these clauses by declaring them to be void as against public policy.[21] An early case on these lines was Excellent Holding Corp. v Richman[22] before the New York Court of Appeals where it was held that the lessor could not contract out of his statutory duty to repair. In holding the clause to be against public policy, the Court said that the statutory duty to repair is paramount and the lease must be subject to the statute. Parties cannot privately contract to release one party from an obligation required by law. The conflict between this

case and Kirshenbaum v General Outdoor Advertising Co [23] was resolved by statute.[24] The Supreme Court of New Hampshire was also an early adherent of this approach. In Papakalos v Shoka the Court held that, "One may not by contract relieve himself from the consequences of the future non-performance of his common law duty to exercise ordinary care."[25] New Jersey adopted a similar position in Kurzmiak v Brookchester[26] and Michigan in Feldman v Stein Building & Lumber Co.[27] In Tenants Council v Defranceaux[28] before the United States District Court for the District of Columbia, a corporation of tenants sought to restrain their landlords from requiring agreement to an exclusion clause as a condition of using swimming pools on the housing estate. The Court found for the tenants and quoted with approval this dictum of a previous District of Columbia Court,

> "it is doubtful whether a clause which did undertake to exempt a landlord from responsibility for such negligence would now be valid. The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy."

The Court of Appeals for the District decided in the later case of Javins v First National Realty Corp[30] that a clause attempting to exclude liability for breach of the implied warranty of habitability would also be invalid. The Supreme Court of Pennsylvania has noted in recent cases[31] that, apart from the doctrine of strict construction, an exclusion clause might be struck out as contrary to public policy as

lacking true agreement.

The Supreme Court of Illinois was of a contrary opinion in O'Callaghen v Waller & Beckworth Realty Corp.[32] The plaintiff tenant had contended that due to the shortage of housing there was a disparity of bargaining power between lessors of residential property and their lessees which gave the landlord an unconscionable advantage over the tenants, Upon this ground she maintained that exculpatory clauses in residential leases must be held to be contrary to public policy. The Court was quite unimpressed by this argument,

> "The relationship of landlord and tenant does not have the monopolistic characteristics that have characterised some other relations with respect to which exculpatory clauses have been held invalid.33 There are literally thousands of landlords who are in competition with one another. The rental market affords a variety of competing types of housing accommodation from simple farm houses to luxurious apartments. The use of a form contract does not of itself establish disparity of bargaining power. That there is a shortage of housing at one particular time or place does not indicate that such shortages have always and everywhere existed, or that there will be shortages in the future. Judicial determinations of public policy cannot readily take account of sporadic and transitory circumstances." 34

The glaring fallacies and shortcomings inherent in this argument were clearly revealed and denunced by the dissenting opinion[35] and by legal commentators.[36] The theoretical competition between landlords and the resulting freedom of contract bestowed upon the tenant simply does not exist in a situation where the same terms are found in nearly all leases.[37] In a more

recent case before the Washington Court of Appeal,[38] the Court expressed "distinct concern" over the tenant's lack of bargaining power but felt unable to discern any public policy which was violated by the exclusion clause in the lease before it.

In some States the judicial upholding of exclusion clauses or the uncertainty of the case law has led to legislative reform.[39] Such are the States of California,[40] District of Columbia,[41] New York,[42] Massachusetts,[43] Illinois[44] and Maryland.[45] For example, the decision of the Court of Appeal of Maryland in Eastern Avenue Corp v Hughes[46] upholding the validity of such a clause was reversed by the following law,

> "Any provision in a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to -- preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage, or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways, or other appurtenancies used in connection therewith and not within the exclusive control of the lessee or tenant, shall be deemed to be against public policy and void." 47

Even if the exclusion clause is valid as against the tenant, it may be held to have no effect on a plaintiff who is not a party to the lease.[48] There

is a division of opinion on whether third parties such as the tenant's family[49] and guests[50] are bound by such clauses.

Exclusion Clauses: English Law

No doubt due to the relative immunity of English landlords from liability at common law, exclusion clauses have not appeared in the English law. In the case of statutory modifications to that immunity, Parliament has ensured that there is to be no "contracting out". [51]

1 For treatment of this topic in standard works, see

84 ALR 654
175 ALR8, 83
12 ALR 3d 958
1 Ann. Law of Property s 3.78 p.346
49 Am. Jur. 2d ss. 869-872 pp. 837-842
6 A Corbin. "Contracts" s 1472 p.600
52 C.J.S. s 417 (18) p.97, s 418 (7) p.131, s 419, p.141, s 423 (2) p.162
2 Powell s 234 (2)
Restatement of Contract ss 574 - 575
6 Williston "Contracts" s 1751 C.

The following are the more important articles;

Alexander, 21 U. Miami L.R. 676
Arbitter, 111 U. Pa. L.R. 1197
Arensberg, 51 Dickinson L.R. 36
Becker, 40 Temp. L.Q. 195
Byrum, 50 Chi.-Bar Rec 95
Comment, 15 Temp. U.L.Q. 427
" 44 Wash. L.R. 498
Croake, 1972 Wis. L.R. 520
Fisch, 28 U. Pitts L.R. 85
Georgalas, 15 U. of Pitts L.R. 493
Lyle, 17 Wash & Lee L.R. 89
Schoshinski, 54 Geo. L.J. 519, 557

2 Alexander, 21 U. Miami L.R. 676, 677
A.B.A., 5 Real Prop, Probate & Trust J.532,563
84 ALR 654
175 ALR 8.83
26 ALR 2d 1044, 1054
49 Ann. Jur. 2d s 869 p. 837
Comment, 37 Colum L.R. 248, 263
" 5 Howard L.J. 251
" 22 Maryland L.R. 256
" 15 Temple U. LQ. 427, 430
6 A Corbin s 1472 p. 600
Dehner, 23 Tenn. L.R. 219, 226
Firsch, 28 U. Pitts L.R. 85
Fuerstein and Shestack, 45 Ill. L.R. 205, 221
Grimes, 2 Val. U.L.R. 189, 223
Lyle, 17 Wash & Lee L.R. 89, 90
McCoy, 16 Ala. L.R. 189, 190
McHugh, 47 Ill. B.J. 790
Noel, 30 Tenn. L.R. 368, 389
2 Powell s 234 (4) p. 368
Schlegel, 19 Chi-Kent L.R. 317, 334

3 175 A.L.R. 8, 86
49 Ann. Jur 2d s 870 p. 839
Comment, 15 Temple U.L.Q. 427, 431
Croake, 1972 Wis. L.R. 520, 522-524
Fuerstein and Shestack, 45 Ill. L.R. 205, 221
Key, 15 Alabama L.R. 266, 268
2 Powell s 234 (4) p. 368
Schlegel, 19 Chi-Kent L.R. 317, 335

4 (1932) 180 N.E. 245, 247
Noted; 2 Brooklyn L.R. 118, 10 NYULQR 89,
7 St. John's L.R. 73, 42 Yale L.J. 139
See also, Wierwick v Hamm Realty Co (1929)
179 Minn 25, 30
228 N.W. 175, 177
Queens Ins Co v Kaiser (1965)
27 Wis 2d 571
135 N W 2d 247

This last case suggested that the consideration for the clause will be a lower rent and so there is a genuine bargain. See also Lerner v Heicklen (1926) 89 Pa Super 234
175 A.L.R. 8.88
49 Ann. Jur. 2d s 870, p.840
Comment, 15 Temple U.L.Q. 427,430
Fuerstein and Shestock, 45 Ill.L.R. 205, 222

5 O'Callaghan v Waller & Beckworth Realty Co. (1959) 155 NE 2d 545, 546-547 Infra 983

6 Eastern Avenue Corp v Hughes (1962)
180 A 2d 486 (Md) Infra
Talley & Skelly Oil Co. (1967) 199 Kan 767, 433 P 2d 425
McCutcheon v United Homes Corp. (1970) 469 P 2d 997 (Wash) infra

7 Llewellyn, "What Price Contract?"
40 Yale L.J. 704, 736 (1931)
Llewellyn, Book Review
52 Harv. L.R. 700 (1939)
Kessler, "Contracts of Adhesion - Some Thoughts About Freedom Of Contract"
43 Colum. L.R. 629 (1943)
Friedman, "Changing Functions of Contract in the Common Law"
9 U. of Toronto L.J. 15, 23 (1951)
Ehrervzweig, "Adhesion Contracts in the Conflict of Laws"
53 Colum. L.R. 1072 (1953)
Lenholf, "Contracts of Adhesion and the Freedom of Contract": A Comparative Study in Light of American and

Foreign Law."
36 Jul. L.R. 481 (1961)

Shawson, "Standard Form Contracts and the Democratic Control Of Lawmaking Power".
84 Harv. L.R. 529 (1971)

8 (1955) 221 F. 2d 187, 204.
Cf Campbell Soup & Wentz (1948) 172 F 2d80

9 (1960) 32 N.J. 358, 161 A 2d 69

10 Schoshinski, 54 Geo. L.J. 519, 555
Cf. Arbitter, 111 U. Pa. L.R. 1197
Bell, 1966 Wisc. L.R. 583
Comment, 15 Temple U.L.Q. 427, 433
" , 44 Wash. L.R. 498

11 Reitmeyer v Sprecher (1968) 431 Pa 284, 243 A 2d 395, 398
cf. Galligan v Arovitch (1966) 421 Pa 301, 219 A 2d 463, 465

12 Javins v First National Realty Corp. (1970) 428 F. 2d 1071, 1079
cf Edwards v Habib (1968) 397 F. 2d 687,701

13 O'Callaghan v Waller & Beckwith Realty Corp. (1959) 155 NE 2d 545, 548 per Bristow J and Daily C.J. dissenting.
For a survey which supports this statement, see Mueller, 69 Mich L.R. 247 Supra n2

14 Alexander, 21 U. Miami, L.R. 676, 678
A.B.A. 5 Real Property, Probate & Trust J. 532, 563
84 ALR 654
175 ALR 8, 89
26 ALR 2d 1044, 1055
49 Am. Jur. 2d s 869 p.838
1 Am. Law of Property s 3.78 p.346
Comment, 2 Brooklyn L.R. 118, 119
" 54 N.W.U.L.R. 61, 69
" 15 Temple L.Q. 427, 431
" 16 U. Chicago L.R. 243, 249
" 44 Wash. L.R. 498, 499
52 C.J.S. s 417 (18) p. 100. s 423 (2) p.163
Croake, 1972 Wis L.R. 520, 525
Fisch, 28 U. Pitts L.R. 85, 89
Geogolas, 15 U. Pitts L.R. 493, 501

Grimes, 2 Val. U.L.R. 189, 224
Noel, 30 Tenn. L.R. 368, 389
2 Powell s 234 (4) p. 369

15 See also cases collected; 175 A.L.R. 8,89
And for general background to Pennsylvania decisions;
Becker, 40 Temple L.Q. 195
Georgalas, 15 U. Pitts L.R. 493

16 (1966) 421 Pa. 301, 219 A 2d 463

17 Employers' Liability Co v Greenville Men's Assn. (1966) 224 A 2d 620
Sophia Kotwasinski v Raser (1969) 258 A 2d 865
See for other examples of strict construction;
Parkhill Trust Fund Inc. v Carroll (1967) 115 G. App. 108 153 S.E. 2d 615
Estate of Corbin v McKey & Poague Inc. (1969) 105 Ill. App. 2d 120,245 NE 2d 117
Home Indemnity Co. v Basilko (1967) 245 Md.412 226 A 2d 258
Emery Bird Thayer Dry Goods Co v J.C. Nichols Co (1968) 427 SW 2d 492 (Mo)
Stromberg's v Victor Gruen (1967) 384 F 2d 163 (N.M.)

18 Employers' Liability Co. v Greenville Men's Assn (1966) 224 A 2d 620, 623 per James J. (citations omitted)

19 "A Court can 'construe' language into patently not meaning what the language is patently trying to do."

Llewellyn, 52 Harv. L.R. 700, 702
One other consequence is that the draftsman and judge may engage in a battle of wits - the judge rejects a broad exclusion clause only to be met with one using more specific wording designed to elude the earlier objection. For this tendency, see;

Alexander, 21 U. Miami L.R. 676
174 A.L.R. 8,84 - 86
Comment, 15 Temple U.L.Q. 427, 429
Fuerstein and Shestack, 45 Ill.L.R. 205,222
2 Powell s 234 (4) p. 367

20 175 A.L.R. 8, 90
Cf. Fisch, 28 U. Pitts L.R. 85, 94

21 Comment, 54 N.W.U.L.R. 61, 75
" 15 Temple U.L.Q. 427, 433
" 44 Wash. L.R. 498, 500
" 42 Yale L.J. 139, 141
Croake, 1972 Wis. L.R. 520, 526
Fisch, 28 U. Pitts L.R. 85, 95
Fuerstein and Shestack, 45 Ill.L.R. 205,223
Lyle, 17 Wash & Lee L.R. 89, 93
Sax and Hiestand, 65 Mich. L.R. 869, 914

22 (1935) 155 Misc. 257, 279 NYS 587
See also 3175 Housing Corp v Schmidt (1934)
150 Misc. 853 270 NYS 663

23 (1932) 258 N.Y. 489, 180 NE 245, Supra 977

24 Infra 984

25 (1941) 91 N.H. 265, 18 A 2d 377

26 (1955) 111 A 2d 425

27 (1967) 6 Mich. App. 180, 148 N.W. 2d 544

28 (1969) 305 F. Supp. 560. cf. more hesitant view taken in Diamond Housing Corp. v Robinson (1969) 257 A 2d 492.

29 Kay v Cain (1946) 154 F 2d 30 , 306

30 (1970) 428 F 2d 1071, 1081-1082

31 Galligan v Arovitch (1966) 219 A 2d 463, 465
Kotwasinski v Rasner (1969) 258 A 2d 865
See also Weaver v American Oil Co. (1970)
261 NE 2d 99 in which the Appellate Court of Indiana held an exculpatory clause to be invalid where there was a "patent disparity of bargaining positions" and nothing to indicate that the tenant was aware of the clause or of its implications."

32 (1959) 155 N E 2d 545
See generally; Alexander, 21 Miami L.R. 676,677
Comment, 54 N.W.U.L.R. 61,68
52 C.J.S. s 417 (18) p. 98
Fisch, 28 U. Pitts L.R. 85,86
Georgalas, 15 U. Pitts L.R. 493
500
And for Illinois law, Byram 50 Chi-Bar Rec.95

33 Innkeeper - Guest; Employers - Employees; Common Carriers - Customer; Bailor-Bailee - see Restatement "Contracts" s 575.
For the view that the landlord-tenant relationship is similar to these other relationship, see Simmons v Columbus Venetian Stevens Buildings (1959) 20 Ill App. 2d 1, 155 N E 2d 372, 380 - 386 per Bryant J.

See also; Arensberg, 51 Dickinson L.R.36
Comment, 44 Wash.L.R. 498, 501
Schoshinski, 54 Geo. L.J. 519,555

34 (1959) 155 NE 2d 545, 547

35 Ibid 547 per Bristow J. and Daily C.J.
See also Simmons v Columbus Venetian Stevens Buildings (1959) 20 Ill. App. 2dl, 155 NE 2d 372.

36 Comment, 54 N.W.U.L.R. 61
Lyle, 17 Wash & Lee L.R. 89
Mazza, 8 Clev - Mar. L.R. 538
McHugh, 47 Ill B.J. 790
Decision now reversed by statute; infra 984

37 (1959) 155 NE 2d 545, 548 per Bristow J. and Daily C.J.

38 McCutcheon v United Homes Corp. (1970) 469 p 2d 997.
Cf. Thomas v Housing Authority (1967) 71 Wa. 2d 69, 426, P 2d 836. Noted, Comment, 44 Wash. L.R. 498.

39 Alexander, 21 U. Miami L.R. 676, 684
A.B.A., 5 Real Property, Probate & Trust J. 532, 563
Arensberg, 51 Dickinson L.R. 36, 42
Bois, 25 Boston U.L.R. 374
Comment, 71 Colum L.R. 275, 289
" 5 Howard L.J. 251, 252
52 C.J.S. s 417 (18) p. 97, s 423 (2) p. 163
Croake, 1972 Wis. L.R. 520, 527
Firsch, 28 U. Pitt L.R. 85, 86
Fuerstein and Shestock, 45 Ill. L.R. 205, 225
Georgalas, 15 U. Pitts L.R. 493, 503
McHugh, 47 Ill. B.J. 790, 794
Moran, 19 DePaul L.R. 752, 776

40 Cal. Civil Code s 1668
Applied, Halliday v Greene (1966) 53 Cal.Rptr.267
Bucker v Azulai (1967) 59 Cal.Rptr.806

41 Section 2906 of the Landlord-Tenant Regulations
Daniels, 59 Geo L.J. 909, 948

42 N.Y. Gen. Obligations Law s 5 - 321 (1964)
adopted 1937.
For background, see Comment, 7 Fordham L.R.126
Constitutionality upheld, Billie Knitwear v New York Life Ins. Co. (1940) 174 Misc. 978, 22 NYS 2d 324.
aff'd (1941) 262 App. Div. 714, 27 NYS 2d 328.

43 Mass. Gen. Laws Ann Ch 186 s 15 adopted 1945
Noted, Bois, 25 Boston U.L.R. 374
Constitutionality upheld, Manaster v Gapin
(1953) 330 Mass 569
116 NE 2d 134

44 Ill. Rev. Stat. Ch 80 s 91 (1971) replacing Ill. Stat. Ch 80 s 15 a (1966) adopted 1959 and declared unconstitutional in Sweeney Gasoline and Oil Co v Toledo,
Peoria & Western Railroad Co. (1969) 42 Ill. 2d 265, 247 NE 2d 603.

45 Md. Ann. Code art. 53 s 40 (1972)
Recently applied; McCoy v Coral Hill Associates (1970) 264 A 2d 896.

46 (1962) 180 A 2d 486 Supra 977

47 Md. Ann. Code art. 53 s.40 (1972)

48 Alexander, 21 U. Miami L.R. 676, 681-684
12 A.L.R. 3d 958
49 Am. Jur. 2d s 871 - 872 pp. 840-842
Arbitter, 111 U. Pa. L.R. 1197, 1200 - 1201
Bois, 25 Boston U.L.R. 374
Comment, 54 N.W.U. L.R. 61, 70- 74
52 C.J.S. s 418 (7) p.131, s 419 p.141
McCoy, 16 Ala. L.R. 189, 191
McHugh, 47 Ill. B.J. 790, 793
Noel, 30 Tenn. L.R. 368, 391
Schlegel, 19 Chi-Kent L.R. 317, 335

49 Tenant's family not bound by exclusion clause;

Valentin v D.G. Swanson & Co, (1960) 25 Ill. App 2d 285 167 NE 2d 14
Taylor v Virginia Construction Corp (1968) 209 Va. 76 161 S.E. 2d 732
Alexander, 21 U. Miami L.R. 676, 683
12 A.L.R. 3 d 958, 962
49 Am. Jur 2d s 872 p.841
Comment, 54 N.W.U. L.R. 61, 72
52 C.J.S. s419 p.141

Tenant's family bound;

Deen v Holderfield (1963) 275 Ala. 360, 155 So. 2d 314
Alexander, 21 U. Miami L.R. 676, 683
12 A.L.R. 3d 958, 961
49 Am. Jur. 2d s. 872, p.841
52 C.J.S. s 419 p.141
McCoy, 16 Ala. L.R. 189, 191

50 Tenant's guest not bound by exclusion clause:

Larson v Santa Clara Valley Water Conservation Dist. (1963) 218 Cal. App. 2d 515, 32 Cal. Rptr. 875
Alexander, 21 U. Miami L.R. 676, 682
12 A.L.R. 3d 958, 965
49 Am. Jur. 2d s 872 p. 841
Comment, 54 N.W.U.L.R. 61, 71
52 C.J.S. s 418 (7) p.131

Tenant's guest bound;

Levins v Theopold (1950) 326 Mass 511, 95 NE 2d 554
Alexander, 21 U. Miami L.R. 676, 682
12 A.L.R. 3d 958, 964
49 Am Jur 2d s 872 p. 841
Bois, 25 Boston U.L.R. 374
Comment, 54 N.W.U.L.R. 61, 71
52 C.J.S. s 418 (7) p.131

51 Supra 383, 500, 695

Chapter 26

Retaliatory Action By The Landlord: The American Law

This thesis has noted many legal theories intended to aid the tenant of sub-standard housing but these theories count for little if the landlord is able to rid himself of his troublesome tenant by the simple formality of a notice to quit or some other retaliatory act such as an exorbitant rent rise.[1]

The following account of the fate of a Washington tenant who dared to complain to the housing authority of his landlord's lack of maintenance illustrates the nature of the problem.

> "The name of Mr. Smith, who draw up the petition, appeared first among the signatures. Shortly after the petition was sent to the bureau, he received an eviction notice from the landlord. His rent was paid up, there had been no complaints against him by the landlord, there was obviously no other reason for his eviction, but his audacity in complaining. -- At this point the Director and the representative of the Association got in touch with the landlord to discuss the matter with him. During the interview the landlord made it very clear that he would evict whomever he pleased and that he would not deal with any "outside trouble makers" or associations but only with individual tenants.-- Help was sought from the Legal Aid Society, which only confirmed that there was no legal remedy against retaliatory eviction, that the 30 day eviction was legal and that the only thing Mr. Smith could do was to vacate the premises. Although the Director used every resource and every connection at her disposal, she was unable to find suitable housing for the evicted family."[2]

This example shows two situations in which retaliatory action may occur: the reporting of housing violations and membership of a tenant organisation. Other circum-

stances include rent withholding and the use of novel actions by tenants, in the latter case the landlord may evict in order to render the action moot by the time it reaches the Court.[3]

The tenant may try non-legal tactics in some situations such as complaining anonymously or using the name of a tenant organisation[4] but the only real defence lies in being able to show that retaliatory action is illegal. Until recent years, it was not possible to do that.

Although Forcible Entry and Detainer Statutes[5] have long regulated the manner of eviction, the traditional approach of American Courts has been that a landlord is entitled to evict ~~his~~ arbitrarily for any reason or no reason at all.[6] There were only a few exceptions to this general rule: where a governmental body was the landlord,[7] when rent control legislation was in force,[8] if the eviction was to punish the tenant for the exercise of his civil rights[9] and where it was on account of his race.[10] Retaliatory eviction is a very recent addition to this list.

The Doctrine In The Courts

As was the case with other recent innovations in landlord-tenant law, the leading case on retaliatory eviction was decided by the United States Court of Appeals, District of Columbia Circuit. The appellant in Edwards v Habib[11] had rented premises from the

appellee on a month to month basis. Shortly thereafter she complained to the Department of Licenses and Inspections of Sanitary Code violations which her landlord had failed to remedy. More than forty violations were discovered and the Department ordered the landlord to rectify them. He then gave his tenant a 30 day statutory notice to quit and obtained a default judgement for possession of the premises. She moved to reopen this judgement alleging that the notice to quit was given in retaliation for her complaints to the Department. The present appeal was brought against the holding of the District of Columbia Court of Appeals that this was not a valid defence. In reversing this holding, the United States Court of Appeals decided that "proof of a retaliatory motive does constitute a defence to an action of eviction."[12]

The Court first considered the appellant's constitutional challenge to the judicial enforcement of a retaliatory eviction but it was not necessary to decide this point in order to give judgement. Instead, reliance was placed upon the intention of Congress in passing the legislation under which the landlord sought possession and upon reasons of public policy. The housing and sanitary codes indicated "a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live."[13] Effective implementation and enforcement of the codes obviously depended in part on

private initiative in the reporting of violations. The Court reasoned, therefore, that, "To permit retaliatory evictions -- would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington."[14] It had a responsibility to consider the social context in which its decisions would operate. "In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated."[15]

Building upon an acknowledgement of the necessity of continuing reporting by tenants of housing violations and an awareness of the social problem concerned, the Court constructed the ratio of its decision,

> "The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself." 16

Thus, although the summary proceeding provisions did not expressly recognise the defence of retaliatory eviction, such recognition was to be implied.

The position of a tenant who had successfully raised the defence was clarified,

> "This is not, of course, to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity. If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury." 17

In short, successful use of the doctrine did not make Mrs. Edwards a tenant for life.[18] The judgement does not, however, make clear how the landlord is to show that he no longer has an improper motive for bringing the action.[19] It has been suggested that it may be unfair to place a burden of showing a bona fide reason for a later eviction because normally, a landlord can evict without giving a reason.[20] In reply, it can be said that a landlord who has once abused his power of eviction in order to retaliate ought no longer to be given such wide powers of eviction.[21]

Later cases in the District have tended to restrict the scope of the doctrine of retaliatory eviction. In Wheeler Terrace v Sylvester,[22] the District of Columbia Court of General Sessions held the doctrine would not protect tenants when the landlord's dominent intention was to safeguard his ownership rights against a tenant council which had the aim of taking over the building by the use of rent strikes. It was considered that he had "a right to protect himself against the economic pressures employed against him by the one means available to him - the eviction of the parties

responsible."[23] The landlord in Wilson v John R. Pinkett Inc.[24] had served a statutory notice to quit upon tenants who had refused to enter into a lease agreement waiving their right to such a notice. The tenants' argument that this was in breach of the doctrine established in Edwards v Habib was rejected by the District of Columbia Court of Appeals,

> "We think that the tenants' reliance upon Edwards v Habib for the proposition that the notices to quit in the case at bar are invalid because of the motive behind them, is erroneous. Edwards dealt with "improper" motives, specifically, retaliation for Mrs. Edwards' reporting of housing code violations to the authorities. -- We are not convinced that the motive of the landlord here, to lease his premises to persons who agree to a statutorily authorised waiver of notice to quit and to evict those tenants who refuse to agree to such a lease is an illegal reason." 25

These cases show that it will take a number of decisions to determine just what constitutes an "improper" motive for the purposes of the doctrine.

The Supreme Court of Wisconsin has held in Dickhut v Norton[26] that the legislative public policy of the State permits the defence of retaliatory eviction to be raised when landlords seek to evict tenants for reporting housing violations. The Court quoted the legislation policy statement accompanying the Urban Renewal Act which emphasised the need to remove slums and continued,

> "It is our opinion that public policy as espoused in (the Urban Renewal Act) clearly indicates that the legislature intended that housing code violations should be reported. If a landlord could terminate a tenancy solely because his tenant had reported a violation the intention of the legislature would be frustrated." 27

To be successful in his defence, however, the tenant must prove by evidence that is clear and convincing that a condition existed which in fact did violate the housing code,[28] that the landlord knew the tenant reported the condition to the enforcement authorities, and that the landlord for the sole purpose of retaliation, sought to terminate the tenancy.[29] The Dickhut decision thus imposes a very heavy burden on the tenant.[30] It is so severe that it threatens to rob the doctrine of much of its utility.[31]

The Superior Court of New Jersey added the doctrine of retaliatory eviction to its landlord-tenant law with its decision in Engler v Capital Management Corp.[32] The landlord had acknowledged that notices to quit had been served upon the plaintiffs because of their membership of a tenants' association. The Court noted that activity in such an association was one of the ways in which a tenant could seek to improve his housing conditions and that one of its essential purposes would be to report and, if necessary, press complaints.[33] Such a purpose and the initiative to carry it out would be in furtherance of the legislative objectives of health codes, building codes and related

legislation hence legislative policy provided the foundation for the retaliatory eviction doctrine.[34]

The Supreme Court of California joined the number of Courts recognising the doctrine with its holding in Schweiger v Superior Court of Alameda County[35]. The tenant had written to his landlord requesting that he repair two longstanding dilapidations - two broken windows and a broken back door. This was the first step in the statutory procedure which would entitle the tenant to do the repairs himself and deduct their cost from the rent.[36] The landlords responded with a letter telling his tenant that the rent would be increased from $75 to $125 per month. At that time, the average monthly rent for an apartment in the building was between $70 and $75. The tenant refused to pay the increase on the grounds that it was an unlawful retaliation against him for asserting his statutory rights. This refusal led to the landlord bringing an unlawful detainer action seeking possession.

The California Court found some guidance in Edwards v Habib. The Edwards Court had been faced with the problem of reconciling the apparently unlimited power of landlords to evict with the fundamental public policy underlying the housing and sanitation codes. The Schweiger Court was confronted with an identical problem and reached a like conclusion,

> "If we fail to recognise a reasonable limitation on the punitive powers of land-

> lords to increase rents and evict tenants, the salutory purposes sought to be achieved by the Legislature in enacting (the repair and deduct provision) will be frustrated. If we deny tenants a defence against retaliatory eviction in unlawful detainer actions, we lend the exercise of the judicial process to aid landlords in punishing those tenants with the audacity to exercise their statutory rights. Thus sound statutory construction here, as Edwards held in comparable circumstances, requires that we reconcile (the repair and deduct provision and the unlawful detainer provision) by recognising existence of a defence in unlawful detainer actions when the landlord's is retaliation for the exercise of statutory rights under (the repair and deduct provision). Adoption of the alternative course would suggest a devious legislative intent to render (that provision) ineffective as a protective measure. 37

Further support was found in related areas of State law. In the past, California Courts had not hesitated to prohibit retaliatory exercises of broad private power when they interfered with public policy.[38] For example, the employer's right to dismiss employees had been curtailed.[39] The growing body of legislative action against retaliatory eviction and critical legal commentary provided yet more support for the Court's decision.[40]

The Schweiger Court noted, as had the Edwards Court, that its decision did not imply that a tenant who could prove retaliatory eviction was entitled to remain in possession in perpetuity. Quoting Edwards, it stated that the landlord could evict or raise the rent of his tenant for any economic or other legitimate reason or even for no reason at all once the illegal retaliatory purpose had been dissipated.[41]

The Schweiger decision is especially interesting because its facts concerned not a straight-forward action for possession but an action based upon the tenant's refusal to pay an increased rent.[42] Many commentators had expressed concern that Edwards v Habib could be circumvented by the use of exorbitant rent rises or other retaliatory action, such as a decrease in services, short of actual eviction.[43] Schweiger shows that the Court's protection cannot be so easily evaded. But the decision is not without problems. It will be difficult to show that a rent rise is retaliatory as there are so many proper grounds such as increased costs and taxes which the landlord can use to justify an increase.[44] Also, Courts may not be the best bodies to decide whether a particular rent increase is reasonable or whether it is merely retaliatory; they are ill-equipped in terms of time, expertise and fact gathering capacity.[45]

The Schweiger decision extended the Edwards defence to substantially different facts, it was further extended by the California Court of Appeals in Aweeka v Bonds to give the tenant a course of action. The facts were similar to those in Schweiger; the tenants had requested the landlord to repairand had been punished by an immediate increase in rent to a figure which the Court found "unfair, unreasonable and uneconomical in view of the condition of the premises."[47]

After denial of a preliminary injunction to prevent the landlord from enforcing the rent increase or instituting an action in unlawful detainer, the appellants vacated the premises. They now sought general and punitive damages for the eviction and for the intentional infliction of emotional distress.[48] Viewing the Schweiger decision as controlling, the Court stated its view that it could,

> "discern no rational basis for allowing such a substantive defence while denying an affirmative course of action. It would be unfair and unreasonable to require a tenant, subject to a retaliatory rent increase by the landlord, to wait and raise the matter as a defence only, after he is confronted with an unlawful detainer action and a possible lien on his personal property. Accordingly, we conclude on the authority of Schweiger that the complaint stated a course of action for retaliatory eviction." 49

The appellants were held entitled to seek consequential as well as punitive damages though the actual damages need not be more than nominal.[50] Additional to the remedy in damages was the remedy of injunctive relief. The trial Court had erred in denying this to the tenants. It was observed that, "In the current reconceptualization of the landlord-tenant relationship, the availability of injunctive relief is particularly significant for the tenant."[51]

Federal Courts in New York, California and Massachusetts have held that the United States Constitution may provide protection to the tenant faced with retaliatory eviction.[52] The tenant in Hosey v Club

Van Cortlandt[53] sought an injunction in the United States District Court for New York to restrain his landlord from instituting a summary proceeding to evict him for organising other tenants to complain to the housing authorities about the condition of their apartments. His contention proceeded thus: (a) his organisational activities wereprotected by the First Amendment (b) any State action penalizing him for the exercise of these rights would be a violation of the Fourteenth Amendment. The crucial connection was that an order of the State Court evicting him, and an enforcement thereof, would be "state action". Hence, the Federal Court should enjoin this threatened violation of the Fourteenth Amendment. This argument was accepted by the Court,

> "A retaliatory eviction would be judicial enforcement of private discrimination, it would require the application of a rule of law that would penalize a person for the exercise of constitutional rights. We accordingly hold that the Fourteenth Amendment prohibits a State Court from evicting a tenant when the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for the exercise of his constitutional rights." 54

However, the Court refused the injunction sought by the tenant on the grounds that the law was unsettled in New York whether retaliatory eviction would be a defence.[55] Since this question had not been settled, the Court considered that "the threat of a constitutional violation is not sufficiently strong to require us to interfere with the orderly progress of the case through

the State Courts."[56]

Hosey v Club Van Cortlandt was followed by the United States District Court for California in the 1970 case of Hutcherson v Lehtin.[57] At that time, it was unclear whether State law precluded the defence of retaliatory eviction.[58] The Federal Court, therefore, refrained from exercising its jurisdiction to declare the unlawful detainer action brought by the landlord to be an unconstitutional restriction of the tenant's First and Fourteenth Amendment rights.[59]

The Massachusetts case of McQueen v Druker[60] concerned rather different facts. The landlord had developed his land with the aid of Federal and State funds and had agreed to adhere to many restrictions required by the city redevelopment authority as to the management of his property. He now served notice to quit on his tenants who had taken part in tenant union activities. The tenants' application for injunction and declaratory judgement was granted by the United States Court of Appeals, First Circuit. The activities of the tenants were protected by the First Amendment and the landlord's relationship with the State was such that his actions took on colour of State law and made applicable the due process clause of the Fourteenth Amendment.

The retaliatory eviction doctrine has not been recognised by all the Courts that have considered it.

In a curt rejection, the Court of Appeals of North Carolina declared in Evans v Rose[61] that the defence of retaliatory eviction was "irrelevant to the landlords' right to recover possession of their property." Two lower Maryland Courts in Weinberg v Scheper[62] and Milton Sommers v Goode[63] have taken the view that recognition of the defence must come from the Legislature. In Kiyo Motoda v Marie Moreau Donohoe,[64] the Washington Court of Appeals decided that impropriety in the motives of the landlord in evicting the tenant did not constitute an equitable defence. The unlawful detainer statute imposed oo restriction on the landlord concerning his motives. It merely required that he give the appropriate twenty days' notice to quit. Accordingly, the judgement of the trial Court awarding possession to him was affirmed.

Inconclusive decisions have been rendered by Courts in Connecticut and Florida. The trial Court in Lachance v Hoyt[65] had rejected the defence on the grounds that it saw no evidence that the Connecticut legislature intended that such a defence could be raised, it viewed the defence as one that would create chaos in landlord-tenant relationships. On appeal, the Appellate Division of the Circuit Court of Connecticut held that the want of finding or basis for finding of an impermissible motive on the part of the landlord precluded the Court from considering the theory of retaliatory eviction.[66] In Wilkins v

Tebbetts,[67] the Florida District Court of Appeal decided that the record was not sufficient for it to determine whether Edwards v Habib was applicable. The tenant had failed to place the relevant housing and sanitary codes before the Court.

Retaliatory Action Legislation

Legislation in a number of States provides protection from retaliatory eviction. The extent of this protection varies considerably.[68] The following account gives the text of the relevant statutes and offers some commentary on them.

California

> * (a) If the lessor has as his dominant purpose retaliation against the lessee because of the exercise by the lessee of his rights under this chapter (which imposes maintenance of fitness duties on landlords and gives the tenant repair and deduct rights) or because of his complaint to an appropriate governmental agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services, within 60 days:
>
> (1) After the date upon which the lessee, in good faith, has given notice pursuant to (the repair and deduct provision); or
>
> (2) After the date upon which the lessee, in good faith, has filed a written complaint, with an appropriate governmental agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

(3) After the date of an inspection or issuance of a citation, resulting from a written complaint described in paragraph (2) of which the lessor did not have notice; or

(4) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tentability is determined adversely to the lessor.

In each instance, the 60-day period shall run from the latest applicable date referred to in paragraphs (1) to (4), inclusive.

(b) A lessee may not invoke the provisions of this section more than once in any 12-month period.

(c) Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his rights under any lease or agreement or any law pertaining to the hiring of property or his right to do any of the acts described in subdivision (a) for any lawful cause. Any waiver by a lessee of his rights under this section shall be void as contrary to public policy.

(d) Notwithstanding the provisions of subdivisions (a) - (c), inclusive, a lessor may recover possession of a dwelling and do any other of the acts described in subdivision (a) within the period or periods prescribed therein if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a). If such statement be controverted, the lessor shall establish its truth at the trial or other hearing." 69

This provision which dates from 1970 has both strong and weak points from the tenant's viewpoint. It covers retaliation both for exercise of the statuory right to repair and deduct[70] and for complaints to a governmental agency. The provision prohibiting waiver by the tenant of his rights provides protection against the type of landlord who would make waiver a condition

of granting the tenancy.[71] On the other hand, the tenant has the burden of showing that the landlord's dominant purpose is one of retaliation. The restrictions on protection are also quite severe: it extends only for a sixty day period, only once in a year and only if the tenant's rent is paid up.

Connecticut

> "In any action for summary process under chapter 922 of the general statutes it shall be an affirmative defense that the plaintiff brought such action solely because the defendant attempted to remedy, by lawful means, including contacting officials of the state or of any town,city, borough or public agency any condition constituting violation of any of the provisions of chapter 352 of the general statutes or of the housing or health ordinances of the municipality wherein the premises which are the subject of the complaint lie. The obligation on the part of the defendant to pay rent or the reasonable value of the use and occupancy of the premises which are the subject of any such action shall not be abrogated or diminished by any provision of this act."72

This statute provides limited protection. It applies only to summary eviction proceedings, there is no restriction on retaliatory rent rises. The tenant must show that the action against him is being brought "solely" for retaliatory purposes and, furthermore, that the condition of the premises, is actually in violation of the housing and health ordinances. If the tenant complains of a defect which turns out not to constitute a violation then he may be subject to a

retaliatory eviction despite the good faith of his complaint.[73] On the other hand, there is no time restriction on the protection afforded as is the case in California though, the longer the interval between the tenant's actions and the landlord's retaliation, the more difficult it would be to prove the landlord's motive was solely retaliatory.

District of Columbia

> "No action or proceeding to recover possession of a dwelling unit may be brought against a tenant, nor shall an owner otherwise cause a tenant to quit a dwelling unit involuntarily, nor demand an increase in rent from the tenant, nor decrease the services to which the tenant has been entitled, nor increase the obligations of a tenant in retaliation against a tenant's:
>
> (a) good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization;
>
> (b) good faith organization of a membership in a tenant organization;
>
> (c) good faith assertion of rights under these Regulations, including rights under Sections 2901 or 2902." 74

These Regulations considerably expand the extent of protection against retaliation that Edwards v Habib[75] recognised. Not only is the tenant protected in reporting violations to housing officials, but also in making complaints to the landlord or organization of a tenant union and, especially important, in asserting rights under the other provisions of the Regulations.

The protection also extends beyond mere eviction to other forms of retaliation. The scope of protection is thus adequate. Difficulties are likely to arise, however, in making use of this provision. There is no presumption of retaliation so that the tenant may have a hard task in proving an improper motive especially where there may be more than one motive.

Illinois

> "It is declared to be against the public policy of the State for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any governmental authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation. Any provision in any lease, or any agreement or understanding, purporting to permit the landlord to terminate or refuse to renew a lease or tenancy for such reasons is void." 76

This Illinois statute was the first to be enacted and dates back to 1963. It is extremely vague; merely declaring that certain retaliatory action is against public policy. No specific consequences are to follow from such action. Only termination or refusal to renew a tenancy are covered so that the landlord can still retaliate in other ways such as rent rises or a decrease in services. Again, only complaints to a governmental authority are covered and not tenant union activity or the exercise of other tenant rights such as litigation in the Courts. Although commendable as

a pioneer statute, it is too limited in its protection.

Massachusetts

> "S.2A. It shall be a defense to an action for summary process that such action was in reprisal for the act of the tenant for reporting a violation or suspected violation of law as provided in section 18 of chapter 186. The commencement of such action against a tenant within six months after the making of such report by said tenant shall create rebuttable presumption that such action is a reprisal against the tenant for making such report"--- 77
>
> "S.18. Any person or agent thereof who threatens or takes reprisals against a tenant of residential premises for reporting to the board of health, or, in the city of Boston, to the commissioner of housing inspection or to any other board having as its objective the regulation of residential premises a violation or a suspected violation of any health or building code or of any other municipal by-law or ordinance, or state law or regulation which has as its objective the regulation of residential premises shall be liable for damages which shall not be less than one month's rent or more than three month's rent, or the actual damages sustained by the tenant whichever is greater, and the costs of the suit, including a reasonable attorney's fee.
>
> The receipt of any notice of termination of tenancy except for nonpayment of rent or of increase in rent or of any substantial alteration in the terms of tenancy within six months after making a report or complaint of violations or suspected violations of any health or building code, municipal by-law or ordinance, or state law or regulation which has as its objective the regulation of residential premises shall create a rebuttable presumption that such notice is a reprisal against the tenant for making such report or complaint." 78

The Massachusetts provisions are significant for two reasons. First, there is a presumption of retaliation if the landlord's action takes place within six

months of the tenant's complaint. Secondly, there is a remedy of damages as well as a defence to an action for summary process. It should be noted that the presumption is rebuttable. This is illustrated by the case of Applestein v Quinn[79] which dealt with an appeal against judgement for the landlord in a summary process action. Affirming the judgement, the Supreme Judicial Court held that the presumption had been rebutted. Although the action was commenced within six months after the making of a complaint to the housing authority, there was evidence that it was brought not in retaliation but because the tenant had refused to agree to an increase in rent to cover increased taxes and operating costs.[80] Though recognising the reality of the evidentary problem that the presumption is intended to solve, one writer has observed that "the fact that a time period is attached to the presumption may have the undesired effect of precluding a tenant from showing a retaliatory eviction after the expiration of the time period."[81]
A drawback of the Massachusetts provisions is that they only cover complaints to governmental agencies and not other actions such as tenant union activities and litigation also designed to improve housing conditions.

Michigan

"(4) When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges in a responsive pleading and if it appears by a preponderance of the evidence that any of the following situations exist, judgment shall be entered for the defendant:

(a) That the alleged termination was intended as a penalty for the defendant's attempt to secure or enforce rights under a lease or contract, or under the laws of the state or its governmental subdivisions, or of the United States.

(b) That the alleged termination was intended as a penalty for the defendant's complaint to a governmental authority with a report of plaintiff's violation of any health or safety code or ordinance.

(c) That the alleged termination was intended as retribution for any other lawful act arising out of the tenancy.

(d) That the alleged termination was of a tenancy in housing operated by a city, village, township or other unit of local government and was terminated without cause.

(5) When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges and it appears by a preponderance of the evidence that the plaintiff attempted to increase the defendant's obligations under the lease or contract as a penalty for such lawful acts as are described in subsection (4), and that the defendant's failure to perform such additional obligations was a material reason for the alleged termination, judgment shall be entered for the defendant on the claim of possession, and all such additional obligations shall be void." 82

The above provision is note-worthy in that it attempts to reduce the standard of proof required of the tenant. He need only show "by a preponderance of the evidence" that the landlord's action for possession

is being brought in retaliation. The provision is also a good attempt to enumerate protected tenant activities and seems comprehensive in its coverage. Tenant union activity, for example, would seem to be protected by sub-section 4 (c) as being "any other lawful act arising out of the tenancy". The provision is also comprehensive in the types of retaliatory actions it strikes at. Generally, it seems the most satisfactory of all the statutes.

Model Residential Landlord-Tenant Code, Hawaii

> "(1) Notwithstanding that the tenant has no written rental agreement or that it has expired, so long as the tenant continues to tender the usual rent to the landlord or proceeds to tender receipts for rent lawfully withheld under part 2 of this Article, no (A) action or proceeding to recover possession of the dwelling unit may be maintained against the tenant, nor shall the landlord (B) otherwise cause the tenant to quit the dwelling unit involuntarily, nor (C) demand an increase in rent from the tenant, nor (D) decrease the services to which the tenant has been entitled, within six months after:
>
> (a) The tenant has complained in good faith of conditions in or affecting his dwelling unit which constitute a violation of a building, housing, sanitary, or other code or ordinance, to a body charged with the enforcement of such code or ordinance; or
>
> (b) Such a body has filed a notice or complaint of such a violation; or
>
> (c) The tenant has in good faith requested repairs under sections 2-205, 2-206 or 2-207.
>
> (2) Notwithstanding subsection (1), the landlord may recover possession of the dwelling unit if:

(a) The tenant is committing waste, or a nuisance, or is using the dwelling unit for an illegal purpose or for other than living or dwelling purposes in violation of his rental agreement; or

(b) The landlord seeks in good faith to recover possession of the dwelling unit for immediate use as his own abode; or

(c) The landlord seeks in good faith to recover possession of the dwelling unit for the purpose of substantially altering, remodeling, or demolishing the premises; or

(d) The landlord seeks in good faith to recover possession of the dwelling unit for the purpose of immediately terminating for at least six months use of the dwelling unit as a dwelling unit; or

(e) The complaint or request of subsection (1) relates only to a condition or conditions caused by the lack of ordinary care by the tenant or another person in his household or on the premises with his consent; or

(f) The dwelling unit and other property and facilities used by or affecting the use and enjoyment of the tenant were on the date of filing of such complaint or request in full compliance with all codes, statutes, and ordinances; or

(g) The landlord has in good faith contracted to sell the property, and the contract of sale contains a representation by the purchaser corresponding to (b), (c), or (d) above; or

(h) The landlord is seeking to recover possession on the basis of a notice to terminate a periodic tenancy, which notice was given to the tenant previous to the complaint or request of subsection (1).

(3) Any tenant from whom possession has been recovered or who has been otherwise involuntarily dispossessed, in violation of this section, shall be entitled to recover three month's rent or threefold the damages sustained by him, whichever is greater, and the cost of suit, including a reasonable attorney's fee.

(4) Notwithstanding subsection (1), the landlord may increasethe rent if:

(a) The dwelling unit and other property and facilities used by and affecting the use and enjoyment of the tenant were on the date of filing such complaint or request of subsection (1) in full compliance with all codes, statutes, and ordinances; or

(b) The landlord has become liable for a substantial increase in property taxes, or a substantial increase in other maintenance or operating costs not associated with his complying with the complaint or request, not less than four months prior to the demand for an increase in rent; and the increase in rent does not exceed the prorated portion of the net increase in taxes or costs; or

(c) The landlord has completed a substantial capital improvement of the dwelling unit or the property of which it is a part not less than four months prior to the demand for increased rent, and the increase in rent does not exceed the amount which may be daimed for Federal Income Tax purposes as a straight-line depreciation of the improvement, prorated among the dwelling units benefited by the improvement; or

(d) The complaint or request of subsection (1) relates only to a condition or conditions caused by the want or due care by the tenant or another person of his household or on the premises with his consent; or

(e) The landlord can establish, by competent evidence, that the rent now demanded of the tenant does not exceed the rent charged other tenants of similar dwelling units in his building or, in the case of a single family residence or where there is no similar dwelling unit in the building does not exceed the market value of the dwelling unit." 83

This provision in the Model Code has been enacted with minor changes in Hawaii.[84] The draftsmen regard it as an attempt to serve public policy by aiding the

enforcement of building codes and other laws governing the construction, maintenance and use of residential dwellings.[85] Generally speaking it would seem a poor attempt though it possesses some good points. In its favour is the fact that no specific retaliatory motive need be proven by the tenant. Subject to many exceptions, the tenant is made immune from eviction, rent increases and decrease in services for six months after complaint or a good faith request for repairs. The section is comprehensive in the type of retaliatory acts it covers though not in the range of tenant activity it protects. Complaints to governmental agencies and good faith requests for repairs are covered but not tenant union activities nor the bringing of novel forms of action by tenants. Another good point is the remedy in damages provided in subsection (3).[86]

But, taken as a whole, the section is inadequate. First, it will be observed that most of it is concerned with exceptions to the general immunity conferred on tenants. Indeed, they are so numerous that they may well swallow up the general rule. They certainly give the landlord every opportunity to find an escape from liability,in some cases quite unjustifiably. Why, for example, should a landlord who is prepared to make immediate use of the dwelling for his own abode be permitted to retaliate with a possession action?[87] Or the landlord who wishes to sell to a future owner-occupier?[88] Or one who can afford not to let the

dwelling for six months?[89]

In practice, the most serious gap in protection is likely to be that the tenant is not covered if he makes complaints to the housing authority but no violations are discovered.[90] The draftsmen admit that the relevant clauses were included with "mixed emotions and regard for the conflicting policies involved".[91] They justify their choice on three grounds;

> "First, we suspect that, where the property is in compliance with all relevant codes, the landlord is less likely to be angered by a tenant's complaint, and thus less likely to be evicting or attempting to raise the rent for the forbidden reason.
>
> Secondly, this is an additional impetus to the landlord to bring his building into compliance with codes. We must hesitate before striking any provision that tends to have this effect.
>
> Thirdly, as a matter of policy, we hesitate to recommend a restriction of a property's owner's right to selection of his tenants or determination of the rents they are to pay without some affirmative showing of dereliction on the landlord's part." 92

There is merit in the second and third considerations, but the first seems based on suspect psychology. One would have thought that the average landlord is more likely to be angered by a complaint that turns out to be unjustified than one which is correct. Against the requirement of an actual violation can be placed the argument that it will discourage tenants from reporting the condition of the dwelling to the relevant authorities. Should their complaint turn out not to involve a violation then

they have no defence to retaliation. As recognised by the draftsmen, "this requirement results in requiring the tenant to be the insurer of his complaint."[93] In a great many cases, even an experienced lawyer would be in some doubt whether a particular defect constitutes a violation, to ask the tenant to decide prior to making his complaint is asking too much. Taking into account that improvement of dwellings is the primary objective, it would seem that the requirement is counter productive.

New Jersey

> "Any person, firm or corporation or any agent, officer or employee thereof who threatens to or takes reprisals against any tenant for reporting or complaining of the existence or belief of the existence of any health or building code violation, or a violation of any other municipal ordinance or state law or regulation which has as its objective the regulation of rental premises, to a public agency, is a disorderly person and shall be punished by a fine of not more than $250.00, or by imprisonment for not more than 6 months or both.
>
> In any action brought under this section the receipt of a notice to quit therented premises or any substantial alteration of the terms of tenancy without cause within 90 days after making a report or complaint or within 90 days after any proceedings resulting from such report or complaint shall create a rebuttable presumption that such notice or alteration is a reprisal against the tenant for making such report or complaint." 94

This was the first statute passed in New Jersey on the subject of retaliatory eviction. It is unusual because it relied solely upon criminal sanctions and gave no

express protection to tenants. The question soon arose whether such protection was implied. In Alexander Hamilton Assoc. v Joseph Whaley,[95] the New Jersey District Court held that the statute prevented a landlord's action for possession where the grounds for the action were that the tenant had petitioned housing officials to inspect the premises and was a leader of a group of tenants. A subsequent case, Kernodle v Antonette Apartments Corp,[96] held that the tenant had the right to a full jury trial on the issue of retaliation but did not allow him to make use of the rebuttable presumption of the criminal statute; the burden of proof to show improper motive remained on the tenant. A third case, E. & E. Newman Inc. v Hallock,[97] involved an apparently retaliatory rent rise made because the tenant had complained to the board of health and had been active in organising a tenant's meeting. The Superior Court, Appellate Division reversed a judgement for possession and remanded the case for a determination as to whether a reprisal had occurred. Though these cases had found an implied defence to an action for possession, it was quite unsatisfactory that there was no express defence. Moreover, the reliance on the Criminal Sanction may not have been a sufficient deterrent.[98]

The following statute was enacted to meet the above criticism of the earlier statute;

"No landlord of premises or units to which this Act is applicable shall serve a notice to quit upon any tenant or institute any action against a tenant to recover possession of premises, whether by summary dispossess proceedings, civil action for the possession of land, or otherwise:

(a) As a reprisal for the tenant's efforts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey or its governmental subdivisions, or of the United States; or

(b) As a reprisal for the tenant's good faith complaint to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code or ordinance, or state law or regulation which has as its objective the regulation of premises used for dwelling purposes; or

(c) As a reprisal for the tenant's being an organiser of, a member of, or involved in any activities of any lawful organization."[99]

The Statute goes on to state that the receipt of an eviction notice after the tenant has engaged in any of these actions creates a rebuttable presumption that such notice is retaliatory.

This statute is similar to the Michigan Statute[100] in that it protects a wide range of tenant activities and to the Massachusetts[1] statute in that it contains a rebuttable presumption of retaliation. It differs from these statutes because it only applies to recovery of possession not to other forms of reprisal. Also, there is no time limit for the existence of the rebuttable presumption as is the case in Massachusetts. This leaves considerable discretion to the Courts.

Silberg v Lipscomb[2] provides an example of how this discretion has been exercised in practice. The tenants of a number of adjoining multi-family houses had formed a tenants union. They communicated with the landlord making numerous complaints of the condition of the premises. Receiving no satisfaction, they requested that an administrator be appointed to carry out repairs as provided by a rent withholding statute. The Court found in their favour. Within a few days of the trial, the landlord had served notices to quit on all his tenants and when they failed to move, he brought the present summary dispossess proceedings. He testified that it was his plan to subdivide the property and sell the houses and that vacant possessionwas required for this purpose. The tenants were unable to establish any actual malice or hostility on his part. The District Court of New Jersey found,

> "No proof that he was so angered or annoyed by the actions of the tenantsas to lead the Court to find that he formed the specific intent of ridding himself of them for this reason. In fact, the Court is satisfied from the evidence that the dominent reason giving rise to the present proceedings was the economic factors to which the landlord referred."3

This holding did not, however, dispose of the issue before the Court because of the presumption in the statute,

> "(It) creates a presumption that, under the circumstances here present, a reprisal against the tenants is intended. The landlord can overcome such presumption only upon a showing, to the satisfaction of the Court, that the decision to evict was reached inde-

pendent of any consideration of the activities of the tenants protected by the statute. This the landlord has failed to do. The present complaint will therefore be dismissed." 4

The Court did point out that there was a limit to the presumption,

"The Landlord is not barred from instituting future proceedings wherein he can satisfy the Court as to their proper basis, as indicated above. The application of the statute in question cannot be construed to give a tenant a lease for life; the landlord still has the right to terminate a tenancy as otherwise provided by law, so long as he is able to sustain the burden of proving the lack of any intent of reprisal at the time the notice is served." 5

Rhode Island

"When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges in his answer and if it appears by a preponderance of the evidence that any of the following situations exist, judgment shall be entered for the defendant:

(A) That the alleged termination was intended as a penalty for the defendant's justified attempt to secure or enforce rights under a lease or contract, or under the laws of the state or its governmental subdivisions, or of the United States.

(B) That the alleged termination was intended as a penalty for the defendant's justified complaint to a governmental authority with a report of plaintiff's violation of any health or safety code or ordinance.

(C) That the alleged termination was intended as a penalty for any other justified lawful act of the defendant.

(D) That the alleged termination was a tenancy in housing operated by a city, town, municipal housing authority, or other unit of a local government, and was terminated without cause." 6

This statute is very similar to the Michigan statute already noted and like comments apply.[7] It differs, however, in significant ways. Most importantly, the Michigan statute goes further by adding a sub-section which prohibits increases in the tenant's obligations which are intended as reprisals. The Rhode Island Statute is restricted to actions for possession. Also, it refers to the tenant's "justified attempt to secure rights under a lease", "justified complaint to a governmental authority" and any other "justified lawful act" of his. Just what is meant by "justified" is not clear. Does it merely mean made in good faith or does it refer to action upheld by a Court of law? If the latter, then it has the disadvantage of the Connecticut statute[8] and the Model Code[9] which require actual violations of the health or housing codes before the defence of retaliatory eviction is available. In a similar way, the Rhode Island tenant has to be sure that an actual violation exists before he complains to the governmental authority. Indeed, the Rhode Island statute goes further if this interpretation of "justified" is correct. Before enforcing any rights under the lease or under the laws of the state, etc, he must be sure that his action will be upheld by the Courts. If he gambles wrongly in the forensic lottery then his action is likely to be considered "unjustified" and so outside the protection of the statute.

Other States

The above statutes deal generally with retaliatory eviction. Maryland,[10] Missouri[11] and Pennsylvania[12] laws provide a limited protection against retaliatory eviction in connection with rent withholding laws. The Maryland statute,[13] for example, prohibits generally the bringing an action against a tenant to recover possession, or for distress for rent for a period of six months from the date on which a Court authorised a tenant to withhold rent because of housing code violations. Rent rises are also prohibited for this period. There is a rebuttable presumption that any such action is a reprisal against the tenant but this is not to prevent the landlord from recovering possession where the tenant caused the violations, where the landlord seeks in good faith to recover possession for his own use or where he has contracted to sell the property.

1 Comment, 18 Catholic L.R.80, 94 (1968)

2 P. Wald, "Law And Poverty 1965" pp 45-46. The problem is by no means a new one. Jacob Riis quotes a New York Health Department Report of 1869; "The complaint was universal among the tenants that they were entirely uncared for, and that the only answer to their request to have the place put in order by repairs and necessary improvements was that they must pay their rent or leave." (Riis, "How The Other Half Lives (1891) pp. 4, 276).

3 Schapiro, 20 Buffalo L.R. 317, 318 n7 (1971)

4 Pletkin, 39 U. of Cincinnati L.R. 712, 714 (1970)

5 See eg Michigan Comp. Laws Ann. s 600, 5601 (1968)
Rhode Island Gen. Laws Ann. s 34-18-17 (Supp. 1971)

6 Avis and Cooper, 71 West Virginia L.R. 425, 426 (1969)
Martin, 13 St. Louis U.L.J. 323, 324, (1968)
Titus, 11 William and Mary L.R. 537, 538 (1969)
See eg De Wolfe v McAllister (1918) 229 Mass 410 118 NE 885
Wormwood v Alton Bay Comp Meeting Assn. (1934) 87 N.H. 136 175 A 233

7 Rudder v United States (1955) 226 F 2d 51
But see United States v Blumenthal (1963) 315 F 2d 351

8 Block v Hirsch (1921) 256 U.S. 135

9 United States v Bruce (1965) 353 F. 2d 474

10 Abstract Investment Co. v Hutchinson (1962) 204 Cal. App 2d 242 22 Cal. Rptr. 309

11 (1968) 397 F 2d 687
Cert denied (1969) 393 U.S. 1016.

Noted;
Avis and Cooper, 71 West Virginia L.R. 425 (1969)
Comment, 82 Harvard L.R. 932 (1969)
" 26 Maryland L.R. 200 (1966)
" 44 N.Y. U.L.R. 410 (1969)
" 1969 U. Toledo L.R. 269
" 13 Welfare Law Bulletin 15 (1968)
Crearley, 23 Arkansas L.R. 122 (1969)
Danberg, 48 Nebraska L.R. 1101 (1969)
Martin, 13 St. Louis U.L.J. 323 (1969)
Potvin, 44 Notre Dame Lawyer 286 (1968)
Titus, 11 William and Mary L.R. 537 (1969)

12 Ibid 690

13 Ibid 700

14 Ibid 700-701

15 Ibid 701

16 Ibid 701-702

17 Ibid 702

18 cf Schweiger v Superior Court of Alameda County (1970) 90 Cal. Rptr. 729, infra.

19 Comment, 82 Harv. L.R. 932, 935 (1969)
Potvin, 44 Notre Dame Lawyer 286, 292 - 293 (1968)

20 Comment, 44 N.Y. U.L.R. 410, 414 (1969)

21 cf Abernathy, 54 Marquette L.R. 239, 243 (1971)

22 (1969) Poverty Law Reporter para 10, 371

23 Ibid

24 (1970) 265 A 2d 778

25 Ibid 779

26 (1969) 173 N.W. 2d 297
Noted; Abernathy, 54 Marquette L.R. 239 (1971)
Comment, 1971 Wisconsin L.R. 939
Johnstone, 39 U. of Cincinnati L.R.610 (1970)
Kris, 12 William and Mary L.R. 444 (1970)

27 Ibid 301

28 cf. requirement of actual violation in the Connecticut retaliatory eviction statute, the Model Code provision and possibly the Rhode Island statute infra.

29 (1969) 173 N.W. 2d 297, 301

30 See; comment, 1971 Wisconsin L.R. 939, 946-950

31 On the evidentary problem, see

Clough, 73 Dickinson L.R. 583, 596 (1969)
Comment, 56 Geo. L.R. 920, 935 (1968)
" 13 Welfare Law Bulletin 15 (1968)
Danberg, 48 Nebraska L.R. 1101, 1125 (1969)
Goodman, 3 Harv. Civil Rts - Civil Lib. L.R. 193, 205 (1968)
Martin, 13 St. Louis U.L.J. 323, 328 (1968)

For statuory attempts in Massachusetts and New Jersey to solve this problem by the use of a rebuttable presumption of retaliation in certain circumstances, see infra.

32 (1970) 112 N.J. Super 445
271 A 2d 615

33 Ibid 617

34 Ibid

35 (1970) 90 Cal. Rptr. 729
476 P 2d 97

Noted; Comment, 46 Notre Dame Lawyer 457 (1970)
See also earlier decision of the California Municipal Court;
Johnson v Cotton (1968) Poverty Law Reporter para 2210. 85 in which the Court reportedly withheld an order for possession on the basis of the retaliatory eviction defence.

36 California Civil Code ss 1941, 1942, Supra 523

37 (1970) 90 Cal. Rptr. 729, 732
476 P 2d 97, 100

38 Ibid 734, 476 P. 2d 97, 102

39 Ibid

40 Ibid

41 Ibid 735, 476 P. 2d 97, 103

42 In a previous decision of the California Superior Court involving this type of situation, the Court granted a preliminary injunction to restrain the landlord from increasing the rent or instituting a possession action for non-payment of the increase: Murray v Tinkler (1967) Poverty Law Reporter para 2210. 58.

43 Abernathy, 54 Marquette L.R. 239, 243 (1971)
Avis and Cooper, 71 West Virginia L.R. 425, 429 (1969)
Comment, 44 N.Y. U.L.R. 410, 414 n. 39 (1969)

44 Martin, 13 St. Louis U.L.J. 323, 328-329 (1968)

45 Comment, 82 Harv. L.R. 932, 935-936 (1969)

46 (1971) 97 Cal. Rptr. 650

47 Ibid 651

48 As noted by the Court in Aweeka, Ibid 652; the authorities indicate that the landlord-tenant relationship is one where liability for intentional infliction of emotional distress ought to be imposed. Restatement of Torts 2d S46 Comment (e).As early as 1913, the Washington Supreme Court found liability where a landlord unlawfully forced his way into the tenant's house and made a general nuisance of himself:

Nordgren v Lawrence (1913) 74 Wash 305
133 P. 436

And in Dunster v Donnell (1928) 12 S.W. 2d 811, the Texas Court allowed recovery against a landlord who used violent language toward the plaintiff's husband in her presence and nailed up doors and windows in the house.
See Hill, 41 U. of Colorado L.R. 541, 562 (1969)
Schoshinski, 54 Geo. L.J. 519, 548-551

49 (1971) 97 Cal. Rptr. 650, 652

50 Ibid

51 Ibid

52 This account does not discuss the constitutional issues raised by retaliatory eviction. There are many articles dealing with the subject; See, in particular,

Comment, 82 Harv. L.R. 932, 936-938 (1969)
" 44 N.Y.U. L.R. 410, 413-414 (1969)
" 15 Welfare Law Bulletin 17 (1968)
Crearley, 23 Arkansas L.R. 122 (1969)
Danberg, 48 Nebraska L.R. 1101,11141118 (1969)
Goodman, 3 Harv. Civil Rts - Civil Lib. L.R. 193, 195-201 (1968)
Martin, 13 St. Louis U.L.J. 323, 325-327 (1968)
McElhaney, 29 Maryland L.R. 193, 223-224 (1969)
Plotkin, 39 U. of Cinn L.R. 712 (19700
Potvin, 44 Notre Dame Lawyer 286, 286-289 (1970)
Rosenthan and Secreat, 36 Geo Wash. L.R. 190, 193-196 (1967)

53 (1969) 299 F. Supp 501

54 Ibid 506

55 There were conflicting lower Court decisions, N.Y. City Housing Authority v Gantt, (1967) 292 NYS 2d 759, had held that the landlord's motive was irrelevant. In Lincoln Square Apartments v Davis (1968) 295 NYS 2d 358, the N.Y. Civil Court had specifically rejected the defence. But it had been allowed in the following cases: Portnay v Hill (1968), 294 NYS 2d 278, Speziale v Laranzano (1969) Poverty Law Reporter para 10.095 and 703 Realty Corp v Greenbaum (1969) Poverty Law Reporter para 10.854.

56 (1969) 299 F. Supp 501, 506. In Church v Allen Meadows Apartment (1972) 69 Misc 2d 254, 329 NYS 2d 148, the Supreme Court of Onordago County, New York refused a preliminary injunction on the same grounds. It was pointed out that of the cases against the defence (see last note), New York City Housing Authority v Gantt did not involve a defence of retaliatory eviction and that the Lincoln Square Apartments case had been limited in Club Van Cortlandt to its own facts "with such succint finalty as to make it practically an orphan and deprive it of hope for posterity."

57 (1970) 313 F. Supp. 1324

58 See now Schweiger v Superior Court of Alameda County supra 1001

59 (1970) 313 F. Supp 1324, 1328

60 (1970) 317 F. Supp 1122, affirmed (1971) 438 F 2d 781

61 (1971) 12 N.C. App 165
182 S.E. 2d 591

62 Peoples Court, Baltimore, Maryland, Nov. 30,1968 Reported by McElhaney, 29 Maryland L.R. 193, 218 (1969)

63 Civil Court, Baltimore, Maryland, Feb. 4 1969 Reported by McElhaney op cit n 62 and (1969) Poverty Law Reporter para 9405.

64 (1969) 459 P 2d 654

65 Connecticut Circuit Court (1968) 14 Welfare Law Bulletin 11. Poverty Law Reporter para 9092.

66 (1969) 6 Conn. Cir. 207
269 A 2d 303

67 (1968) 216 So. 2d 477

68 Titus, 11 William And Mary L.R. 537, 542 (1969)

69 Cal. Civ. Code s 1942.5 (West Supp. 1972)

70 Supra 774

71 cf Supra 977

72 Conn. Stat. Rev. s 52-540 a (Supp. 1969)

73 See further infra 1020

74 District of Columbia Housing Regulations s. 2910
See, Daniels, 59 Geo. L.J. 909, 944-946 (1971)

75 (1968) 397 F. 2d 687 Supra 995

76 Ill. Rev. Stat. Ch 80 s 71 (1963)
See, Senick, 30 U. of Pittsburgh L.R. 148,154 (1968)
Schapiro, 20 Buffalo L.R. 317, 322 (1970)

77 Mass. Gen. Laws Ann. ch 239 s 2A (Supp 1970)

78 Mass. Gen. Laws Ann. ch 186 s 18 (Supp 1970)

79 (1972) 281 NE 2d 228

80 Ibid 229

81 Daniels, 59 Geo L.J. 909, 947 (1971)

82 Mich. Comp. Laws Ann. s 600.5646 (4)
See, Glotta, 2 Prospectus 247, 252-253 (1968)
Schier, 2 Prospectus 227, 237 (1968)

83 Section 2 - 407
See; Daniels, 59 Geo. L.J. 909, 946-947 (1971)
Titus, 11 William And Mary L.R. 537 (1969)

84 Hawaii Rev. Stat. s 666 - 43 (Supp 1971)

85 Levi, Hablutzel, Rosenberg and White;
"Model Residential Landlord-Tenant Code" s.
2 - 407 Comment p. 71.

86 Cf Massachusetts statute Supra 1013

87 s 2 - 407 (2) (b)

88 s 2 - 407 (2) (g)

89 s 2 - 407 (2) (d)

90 s 2 - 407 (2) (f) and (4) (a)

91 op cit n 85 p. 71

92 Ibid

93 Ibid

94 N.J. Rev. Stat. s 2A: 170 - 92.1 (Supp 1970)
Held to be constitutional in State v Field (1969)
107 N.J. Super 107, 257 A 2d 127, case noted,
Schapiro 20 Buffalo L.R. 317 (1970)

95 (1969) 107 N.J. Super 89
257 A. 2d 7

96 Superior Court, New Jersey, March 25, 1970;
affirmed App. Div. June 8, 1970 - reported
Schapiro, 20 Buffalo L.R. 317, 324 - 325 (1970)

97 (1971) 116 N.J. Super 220
281 A 2d 544

98 Schapiro, 20 Buffalo L.R. 317, 325-326 (1970)

99 N.J. Stat. Ann. 2A - 42 - 10.10 (Supp 1972)
See McCarthy, 1970/1971 Annual Survey of
American Law 365, 376-377.

100 Supra 1015

1 Supra 1013

2 (1971) 117 N.J. Super 491
285 A 2d 86

3 (1971) 285 A 2d 86, 87

4 Ibid 88

5 Ibid

6 R.I. Gen Laws Ann. s 34 - 20 - 10 (1970)

7 Supra 1015

8 Supra 1010

9 Supra 1016

10 Ch. 233, Laws of Maryland 1969, Supra 886

11 Pub. Act No. 315 s 13, 1969, Supra

12 Pa. Stat. Ann. tit 35 s 1700-01 (Supp 1969) Supra 917

13 The legislative history of this statute and the
manner in which its application was restricted
during the legislative process to cover only
lawful rent-withholding is discussed in McElhaney,
29 Maryland L.R. 193 (1969)

Retaliatory Action By The Landlord: The United Kingdom

Eviction or the threat of eviction has long been the response of a certain type of landlord to his tenant's requests for repairs. Octavia Hill, the Victorian housing reformer, gives the following account of some houses which she subsequently took over to manage,

> "One large but dirty water-butt received the water laid on for the houses; it leaked, and for such as did not fill their jugs when the water came in, or who had no jugs to fill, there was no water. The former landlord's reply to one of the tenants who asked him to have an iron hoop put round the butt to prevent leakage, was that, "if he didn't like it, he might leave." 1

Of course, this took place before the Rent Acts conferred security of tenure on tenants coming within the Acts.[2] But these Acts have never applied to all tenants not even to all those tenants with low incomes. The Milner-Holland Committee which investigated London's housing problem[3] in 1965 was concerned about the effects of rent decontrol resulting from the Rent Act 1957.[4] One of these effects was that tenants could no longer freely exercise their rights relating to repairs,

> "We were told in a number of cases notice to quit was given merely as a reprisal against the tenant for having exercised his rights, such as asking for repairs to be done which are the landlord's responsibility or reporting insanitary conditions to the Local Authority. Such conduct, of course, stultifies the intentions of the legislature in putting obligations of repair upon owners (for example, section 32 of the Housing Act 1961) and in regulating overcrowding and low standards of conditions and can only be effectively prevented by conferring greater security of tenure on tenants." 5

The Rent Act 1965 restored security to the unfurnished tenant[6] but did little to aid the furnished tenant.[7]

The tenant of furnished tenant remains in a precarious position as regards his security of tenure.[8] Once his landlord has served the statutory four weeks' notice to quit[9] (if one is necessary in his case[10]), his only method of preventing the landlord obtaining a possession order from the County Court is to apply to the Rent Tribunal for an extension of the notice to quit.[11] The Tribunal cannot grant more than six months extension on this first application but, with some important exceptions, the tenant can re-apply for further extensions.[12] It should be noted that even this minimal form of security is unavailable to tenants with fixed term tenancies. Such tenancies expire by effluxion of time without the necessity of a notice to quit so that the Tribunal is unable to defer the landlord's right to obtain a possession order.[13]

There is disturbing evidence that the furnished tenant's lack of security restricts the exercise of his right to improved housing conditions. Mr. Rowley, Housing Manager of the London Borough of Camden, suggests that in view of the absence of any real security of tenure, "the tenants of furnished accommodation may be extremely reluctant --- to make complaints about insanitary conditions to the local authority, or to exercise their other rights."[14] Prof. Greve's study of the plight of the homeless family in London noted that,

> "The furnished sector --- also contains some of the worst living conditions in London, where lack of security is all too often exa-

> cerbated by poor facilities, lack of privacy, overcrowding, exorbitant rents and poor physical condition. Insecurity of tenure also perpetuates such conditions in that complaints invite reprisal in the form of eviction or harassment or both." 15

So long as landlords are able to silence tenants with the service of a notice to quit, it is pointless to talk of the rights of tenants. A right that cannot be exercised is of no value. So long as the furnished tenant has no permanent security of tenure, he is in no position to make use of the many legal doctrines designed to improve housing conditions which have been discussed in this thesis.

Furnished tenants face the threat of lawful retaliation in the form of a notice to quit but all tenants, furnished and unfurnished, may find themselves subject to other types of retaliation. This may be a straight-forward eviction with or without violence. The tenant may be physically ejected from his home or he may return to the house to find the lock on his door changed and his possessions in the hallway or even on the pavement.[16] Reprisals may stop short of actual unlawful eviction and consist of various acts of harassment.[17] These may be a physical attack, a threatened attack, verbal abuse, the cutting off of gas and electricity supply or a multitude of petty actions (such as the making of noise late at night or the destruction of letters) which can make life quite unbearable.[18] The tenant affected by such unlawful

eviction or harassment may have civil remedies. He can also complain to the local authority which has power to prosecute if certain conditions are satisfied. We shall consider the latter course of action first.

The Rent Act 1965, Section 30

The landlord who harasses his tenant or evicts without due process of law commits a criminal offence under section 30 of the Rent Act 1965 as amended;

> " (1) If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof or attempts to do so he shall be guilty of an offence unless he proves that he believed, and had reasonable cause to believe, that the residential occupier had ceased to reside in the premises.
>
> (2) If any person with intent to cause the residential occupier of any premises -
>
> (a) to give up the occupation of the premises or any part thereof; or
>
> (b) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof;
>
> does acts calculated to interfere with the peace of comfort of the residential occupier or member of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence.
>
> (3) A person guilty of an offence under this section shall be liable;
>
> (a) on summary conviction, to a fine not exceeding £400 or to imprisonment for a term not exceeding six months or to both;
>
> (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or both.
>
> (4) Nothing in this section shall be taken to prejudice any liability or remedy to which a

person guilty of an offence thereunder may be subject to civil proceedings.

(5) In this section "residential Occupier" in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises."

Local authorities are empowered to prosecutre for this offence.[19]

The procedure used to enforce the law relating to unlawful eviction and harassment varies from one authority to another but the following account gives a general idea.[19a] The local authority officer will consider the complaint and decide its gravity. If it appears to involve an unlawful eviction or a real threat that one will take place, he contacts the landlord in order to warn him of the consequences of his action. He may caution him and take a statement with a view to prosecution. Sometimes a mere warning and intimation that the local authority is aware of the position is enough to allow the tenant to move back or be free of further threats. If the complaints seem less serious, then the officer will try to conciliate the parties, make them see each other's viewpoints and generally produce a solution that does not require the use of the criminal law.

Often the tenant will complain not to the local authority but to the police who are frequently called

to the scene of the dispute, sometimes late at night. In such a case, the police make such investigations as are possible on the spot. If it appears that there may have been a breach of the law relating to harassment and unlawful eviction, the police officer warns the landlord of his liability to prosecution. Whether or not such a warning is given, a full report of the incident is sent to the local authority and, in appropriate cases, the complainant is told that this report has been made.[20]

The attitude of the police has been criticised as "wholly negative".[21] They will only act to prevent a breach of the peace. Furthermore, certain forces appear to take the view that the remove a tenant's furniture out on the street is not conduct likely to cause a breach of the peace and they do not intervene in those circumstances.[22] It has been suggested that, as the police are often the only body available at nights and at weekends when most evictions take place, they should take a more positive approach at the time to help the tenant.[23] But, in justification of the practice of the police, the Under-Secretary of State for the Environment (Mr. Paul Channon) has pointed out,

> "The problem is quite simply that a constable who attends such a situation often has no way of knowing the rights and wrongs of the situation. It is not clear to him, and cannot be clear, who is in the right in a situation in which an alleged landlord and alleged

> tenant are making allegations against each other. The constable cannot know at the time whether there is anything in the suggestions that the offence of harassment has been committed. We are here in a situation where complex issues relating to landlord-tenant law are involved. The facts of the situation are often contested and it would be quite wrong for a constable to appear to take sides when there has been no opportunity for proper investigation of the allegations made."24

He also observed that there is a statutory procedure whereby members of the public may lodge a complaint against a police officer if they are aggrieved.[25]

Enforcement of the law relating to harassment and unlawful eviction is hindered by the difficulty in showing sufficient evidence that the alleged acts took place and that the relevant intent was present. Many alleged acts of harassment and unlawful eviction take place in the premises when only the landlord and tenant are present. The absence of independent witnesses makes it difficult to secure a conviction. This is especially the case when the alleged acts consist of assault, banging or verbal abuse. Even if there are witnesses present, they will often be other tenants of the landlord who will not want to antagonise him by giving evidence against him. The high rate of mobility of certain tenants may mean that crucial witnesses have moved elsewhere. Indeed, having made the complaint, the tenant himself may fail to turn up to the trial[26] either because he has moved elsewhere and wants to put the unpleasant experience behind him or

perhaps because he has come to some kind of arrangement with the landlord. If he does turn up, he may do the prosecution harm by losing his temper with the landlord or by concentrating on relatively minor matters such as alleged abuse and ignoring the more important points such as the cutting off of services.

Assuming that the alleged cuts can be proven, the prosecution must still show that they were carried out with the intent "to cause the residential occupier ---- (a) to give up the occupation of the premises or any part thereof; or (b) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof."[27] The Association of Municipal Corporations in their Memorandum of Evidence to the Francis Committee referred to the difficulty in proving this intent[28] whilst the Works Committee of the London Boroughs Association stated that magistrates "are reluctant to infer out of the landlord's acts as intent to cause the tenant to give up possession or to refrain from exercising his rights to pursue a remedy."[29] It was often necessary to prove such an intent strictly eg by establishing a previous Notice to Quit or a demand for possession from the landlord.[30] One example of a situation where it is difficult to prove intent is where the landlord fails to pay gas or electricity bills and the supply is cut off by the Gas or Electricity Board.[31] He can argue that he never intended the Board to take the action it did, that it was their decision. Another example might be

the following type of case where the tenant complained that her landlord would cook Jewish food late at night in order to force her to leave. His reply to the complaint was that he had no such intent; he merely intended to eat!

Even if a prosecution proves successful, this may not greatly aid the tenant. If he has been unlawfully evicted, a conviction does not get him back into the house. Only expensive County Court proceedings can do that.[32] A conviction may not even deter the landlord from subsequent acts of harassment. Fines are usually well below the legal maximum. From 1966 to 1968, the average fine for harassment and unlawful eviction was about £22; in 1969 and early 1970, it had dropped to just over £16.[33] When it is considered how much a possession order would cost in legal fees alone, it is no wonder that many landlords continue to defy the law.[34] Also, in the particular situation we are concerned with, the landlord will save the cost of repairs which may be many times the size of the fine imposed. Imprisonment is largely an empty threat being only very rarely imposed.[35]

Various suggestions have been made with the aim of making enforcement of the law more effective. One proposal has been that Magistrates' Courts should be empowered to grant ex-parte injunctions to prevent evictions and restrain harassment.[36] Magistrates' Courts enjoy benefits not shared by County Courts. They

sit on Saturdays, the procedure is quicker and the order of the Court could be served by a police officer and not the Court bailiff.[37] The Government spokesman promised to have the matter studied but he thought that such an injunction would be totally unprecedented and that there would be considerable legal difficulties in having such a procedure.[38] Another solution to the problem was suggested by the Francis Committee,

> "One possibility that has occurred to us is that the local authority acting by (say) the harassment officer should be entitled to serve a statutory notice requiring the landlord forthwith to restore the dwelling to the claimant and to desist from evicting him or interfering with his occupation for a limited period (say 72 hours). This interval should be enough to enable the claimant to obtain legal advice, and, if thought fit, apply to the County Court judge for an injunction. Contravention of the notice would have to be made an offence."39

No action has been taken to implement this suggestion.

As a result of the recommendation of the Francis Committee,[40] the maximum penalties were increased by the Criminal Justice Act 1972 from the original figure of £100 on a first conviction to £400.[41] The former Director of Administrative And Legal Services for the London Borough of Islington has suggested that discretion be given to the Courts to relate fines "to the financial benefit flowing from the criminal act".[42] This would seem to be an excellent reform though, if it is to be successful, Courts must take a more realistic approach to the size of penalties. A further suggestion was made by Mr. Douglas-Mann M.P. that there

be a minimum fine of £200 in the absence of "special circumstances".[43] The Government spokesman thought that such a minimum penalty would be wholly contrary to the well-established principle in the administration of criminal justice that it was for the Court to decide the penalty having regard to all the circumstances and the offender.[44] "Any attempt to administer justice in a vacuum by requiring the imposition of a standard minimum penalty without regard to the circumstances could not fail to cause injustice and hardship."[45]

Another proposal was rejected by the Francis Committee. It had been said that the requirements as to the necessary intent should be repealed. The Committee was quite set against this view,

> "It seems to us that such an amendment is quite out of the question. It must be remembered that the "acts" later referred to in Section 30 (2) of the 1965 Act may be quite lawful in themselves. It is only the intent which can possibly justify making the acts criminal." 46

Whilst agreeing with the Committee that some element of intent must be retained, it is still possible to make enforcement more effective by making it easier to prove intent. One solution would be to follow the Massachusetts[47] and New Jersey[48] retaliatory eviction statutes and declare that retaliatory action taken within (say) a six month period of the tenant making a complaint, would raise a rebuttable presumption that the landlord had the relevant intent. Again, the

criminal burden of proof might be replaced by the civil law's burden of showing intent on the balance of probabilities.

The Civil Law

The civil law relating to unlawful eviction and harassment has been touched upon already in our treatment of constructive eviction[49] and breach of the covenant of quiet enjoyment.[50] It is, however, convenient at this point to summarise that law. There is an implied covenant of quiet enjoyment in every lease.[51] If the landlord evicts the tenant unlawfully or harasses him, then he is in breach of that implied covenant and liable in damages for the consequences.[52] However, for breach of the covenant only nominal and not exemplary damages are recoverable.[53] But if the landlord commits acts of trespass in the course of eviction or harassment, such as removing doors and windows, he becomes liable to pay exemplary damages for his tortious conduct.[54] Furthermore, as we saw earlier, eviction suspends the duty to pay rent.[55] Injunctions may be issued to restrain breach of the covenant of quiet enjoyment or tortious conduct.[56]

The difficulty with taking civil action is that its cost may be prohibitive unless legal aid can be obtained. Also, such actions will normally be subject to all the delays of the County Court procedure. However, the additional remedies of damages and injunction are normally worth considering in addition to action under the Rent Act 1965 Section 30.[57]

1 Octavia Hill, "Homes Of The London Poor" (1883) p. 26.
See also Albert Fried and Richard Elman; "Charles Booth's London" (1968) p. 336 quoting a similar experience at about the turn of the century.

2 The first Rent Act was in 1915, supra796

3 Report ofthe Committee on Housing in Greater London (1965) Cmnd. 2605.

4 Supra 808

5 Op cit n 3 pp. 170-171, see also pp. 115, 183-184 and cases No. 10, 39 and 69 reported on pp. 277 - 278.
Audrey Harvey notes that no one could safely advise tenants to make use of their powers to get repairs done unless they were ready to take the risk of losing their homes: Audrey Harvey, "Tenants In Danger" (1964) pp. 72, 75.

6 Supra 823

7 Section 39 of the 1965 Act did, however, extend the temporary security offered by Rent Tribunals from the three month period under Section 5 of the Furnished Houses (Rent Control) Act 1946 and Section 11 of the Landlord and Tenant (Rent Control) Act 1949 to a six month period.

8 For a fuller account of the law relating to the security of furnished tenants, see;
Alexander Irvine, "A Cruel Choice For Tenants" "New Statesman" 5th March 1971.
"Report Of The Committee on the Rent Acts" (The Francis Report), 1971, Cmnd 4609.
Society of Labour Lawyers, "Memorandum of Evidence To The Francis Committee" (1970)

9 Section 16 of the Rent Act 1957

10 Infra 1036

11 Under section 78 of the Rent Act 1968

12 Ibid. In practice, "it is unusual for more than two extensions to be granted. The general approach of Rent Tribunals on questions of security is that, prima facie, the landlord of a periodic furnished letting is entitled to terminate it by notice to quit, and that the security provisions of the Act is to enable Rent Tribunals to ensure that the tenant is given adequate time to find other accommodation" : Francis Report op cit n 8 p.151.

13 The recommendation of the Francis Committee was that this loop-hole should be closed by a requirement that a furnished tenancy should only terminate by a month's notice in writing op cit n 8 p. 161.

14 L. Rowley: "Housing In Camden" Volume I (1969) p.13.

15 John Greve et al; "Homelessness In London" (1971) p. 63. See also pp. 110, 136, 217.

16 This is what happened in a well-publicised case in 1970 involving an elderly landlady from Penge, Mrs. Elsie Raum.
See eg Daily Telegraph 21stAugust 1970 to 3rd September 1970.

17 For a case in which the landlady smashed windows, tipped ink and disinfectant over clothes, bedding and cupboards, threw toys through windows and smeared lard on the stairs; see Parliamentary Debates, House of Commons, Vol 807 col. 1632 (3rd Dece. 1970, Mr. Douglas-Mann).

18 For a full account of the various types of harassment which may occur, see the Milner-Holland Report op cit n 3 pp.

19 Rent Act 1968 s 108.

19a Much of the following account is based upon the impressions I gained whilst being employed as Investigating Officer concerned with Tenancy Protection by the London Borough of Islington from June to September 1970. In view of this, it has not always been possible to give specific references for the points made.

20 For this procedure, see Francis Report op cit n 8 p.105-106.

21 Mr. Bruce Douglais-Mann; Parliamentary Debates, House Of Commons, Vol. 807 col. 1633 (3rd December 1970).

22 Ibid

23 Ibid

24 Parliamentary Debates, House of Commons, Vol. 807 col. 1640.

25 Ibid col. 1641

26 The Francis Committee advances the tenant's refusal to give evidence as one reason why the local authority may decide not to prosecute; op cit n 8 p.110.

27 Rent Act 1965 s.30 (2).

28 Francis Report op cit n 8, p.107

29 Ibid 108.

30 Ibid

31 In Westminster City Council v Peart (1968) 19 P. & C.R. 736 the Divisional Court left this point open.

32 Infra

33 Francis Report op cit n 8 p.104.

34 Ibid 108 (Works Committee of the London Boroughs Association).

35 From the coming into force of the legislation until March 1970, there were only 5 sentences of imprisonment in England and Wales; Francis Report op cit n 8 p. 104. Also, until the Criminal Justice Act 1972 repealed the provision, the Criminal Justice Act 1967 required the Court to suspend any sentence of imprisonment on a person who had not previously served such a sentence. In a case heard by a jury at the Crown Court, Middlesex Guildhall on 15th September 1972, Judge T.K. Edie criticised the requirement of suspension in a case involving forcible entry onto the premises by the landlord; "Hornsey Journal," 22nd September 1972 p.1.

36 Mr. Bruce Douglas-Mann; Parliamentary Debates, House of Commons, Vol. 807 col. 1633-1634 (3rd December 1970).

37 Ibid

38 Mr. Paul Charman, Under-Secretary of State for the Environment, Ibid col. 1635 - 1636.

39 Op cit n 8 p.111.

40 Ibid 110.

41 Criminal Justice Act 1972 Section 30.

42 Mr. Michael Casey, "Observer" 22nd November 1970

43 Op cit n 36 col. 1634

44 Ibid col 1639

45 Ibid col 1639 - 1640

46 Op cit n 8 p.110

47 Supra 1013

48 Supra 1021

49 Supra 371

50 Supra 359

51 Supra 371

52 Kenny v Preen (1963) 1 Q.B. 499

53 Ibid, Perera v Vandijar (1953) 1 W.L.R. 672

54 Lavender v Betts (1942) 2 AER 72

55 Morrison v Chadwick (1849) 7 C.B. 266, Supra 371

56 Supra 367

57 The London Borough of Camden has said it will help tenants to bring civil actions relating to harassment and unlawful eviction; "The Times" 13th July 1972.

Expenses and other losses following death. Many of the provisions for expenses already mentioned above apply also to the situation where a person is killed in an accident. Thus, "actual and reasonable expenses . . . necessarily resulting from the . . . death" may be paid by the commission [96]; funeral expenses, to the extent that the amount is "reasonable by New Zealand standards," are specifically included in recoverable expenses.[97] If a dependant of a person killed in an accident "suffers any loss of support by reason of the termination or reduction," upon the death, of any superannuation, pension or annuity, the commission, in the light of other compensation payable and all the relevant circumstances, may pay compensation to the dependant for a period limited by reference to various criteria (*e.g.* not exceeding the expectation of life of a normal person of the same age and sex as the deceased person).[98]

Future Developments

The New Zealand system of comprehensive insurance for accidents will be a pioneering experiment for the rest of the common law world, which should follow its development with close interest. The success of the new system will depend largely on the decisions and practice of the new commission, especially on the principles evolved to guide the exercise of its many discretionary powers, on the details of the new structure of differential levies, and on the commission's ability to build up a working relationship with the private insurance companies. With Australia likely to follow the New Zealand example, and with important changes in road accident compensation recently coming into effect in the United States and Canada, there will soon be a wealth of comparative material available for the study of the actual working of different methods of compensating accident victims. The Royal Commission now sitting in the United Kingdom will not lack overseas experiments of direct relevance to its inquiries.

D. R. Harris.*

[96] s. 121 (1). There are a number of exceptions: see above under "Expenses," pp. 373–374.
[97] s. 122.
[98] s. 121 (4).
* B.A., LL.M.(N.Z.), B.C.L., M.A.(Oxon.), Fellow and Tutor, Balliol College, Oxford, and Associate Director, Centre for Socio Legal Studies.

STATUTORY COVENANTS OF FITNESS AND REPAIR: SOCIAL LEGISLATION AND THE JUDGES

This article examines the judicial treatment of the covenants of fitness and repair implied by section 6 of the Housing Act 1937 and section 32 of the Housing Act 1961 respectively. It does so in order to assess the ability of the judiciary to advance the aims of social legislation.

The Origins of the Statutory Covenants

The statutory covenants were made necessary by the common law rule that the landlord of unfurnished premises was under no duty to ensure that they were fit for human habitation or in a state of good repair. This rule was based upon three cases in the Court of Exchequer, *Arden* v. *Pullen*,[1] *Sutton* v. *Temple*[2] and *Hart* v. *Windsor*[3] decided in the early 1840s and was justified by three considerations: the existence of cases deciding that the tenant must pay rent even when the premises were destroyed by such things as fire, flood or tempest,[4] a belief in the social philosophy of *caveat emptor*[5] and a fear of the social consequences of finding such a duty.[6] The first consideration, the doctrine of precedent, is unconvincing. The cases relied upon were clearly capable of being distinguished upon the ground that they dealt with unfitness caused not by the landlord's failure to look after his property but by causes beyond his control.[7] In addition, there were other cases more in point which were not followed.[8] The basis of the common

[1] (1842) 10 M. & W. 322; 152 E.R. 492.
[2] (1843) 12 M. & W. 52; 152 E.R. 1106.
[3] (1844) 13 M. & W. 69; 153 E.R. 1114.
[4] See cases cited by Baron Parke *ibid.*, at pp. 86, 1122.
[5] "It is much better to leave the parties in every case to protect their interests themselves by proper stipulations." (per Baron Parke, *ibid.*, pp. 88, 1122). See Baron Alderson in *Arden* v. *Pullen* (1842) 10 M. & W. 322, 326; 152 E.R. 492, 494.
[6] *Infra.*
[7] G. Williams (1942) 5 M.L.R. 194, 195. See counsel for the tenant in *Arden* v. *Pullen* (1842) 10 M. & W. 322, 326; 152 E.R. 492, 495. Note (1959) 103 S.J. 852, 853.
[8] The following cases held the landlord to be under a duty of fitness: *Edwards* v. *Etherington* (1825) Ry. & M. 268; 171 E.R. 1016; *Salisbury* v. *Marshal* (1829) 4 Car. & P. 65; 172 E.R. 609; *Collins* v. *Barrow* (1831) 1 M. & Rob. 113; 174 E.R. 38; *Cowie* v. *Goodwin* (1840) 9 C. & P. 378; 173 E.R. 877; *Smith* v. *Marrable* (1843) 11 M. & W. 6; 152 E.R. 693.
In *Hart* v. *Windsor*, Baron Parke asserted that the earlier cases were not good law and distinguished *Smith* v. *Marrable* on the grounds that it concerned a furnished house though he was forced to recant his own judgment. The highly relevant decisions of the Court of King's Bench and Common

law rule must then be said to be the clear policy ground of the other two considerations.

Laissez faire accorded with the spirit of the age but the judicial fears seem to have been sadly out of step with contemporary realities. The judges were concerned about the effects of an implied duty to repair on agrarian leases,

> " If (a demise) included any such contract as is now contended for, then, in every farming lease . . . there would be an implied condition that the premises were fit for the purpose for which the tenant took them, and it is difficult to see where such a doctrine would stop." [9]

The social reality was that the Industrial Revolution of the previous decades had seen the very structure of English society change from one dependent upon an agrarian economy to one based upon industry.[10] One consequence of this had been the growth of the urban population; between 1801 and 1841, the populations of London, Birmingham, Leeds and Bristol had doubled whilst those of Manchester and Liverpool had trebled.[11] Speculative builders arose to satisfy the housing needs of the new urban population.[12] Houses were built without drains or privies, inferior materials were used and water was often available for only short periods from stand-pipes situated in narrow courts. Space was saved by thrusting families into cellar dwellings. It was at this crucial time of urbanisation and slum formation that the judges looked to the agrarian lease as providing a justification for their decisions.

It is significant that these early cases were decided without reference to the accumulating evidence of social malaise.[13] Throughout the 1830s and 1840s, statistical societies [14] and individuals [15] had drawn attention to urban problems including unfit housing.

Pleas developing the implied warranty in the sale of goods (*e.g. Shepherd* v. *Pybus* (1842) 3 Man. & G. 868; 133 E.R. 1330) were said to have " no bearing " in *Sutton* v. *Temple* and *Hart* v. *Windsor*.

[9] *Sutton* v. *Temple* (1843) 12 M. & W. 52, 65; 152 E.R. 1108, 1113 *per* Baron Parke. See also the judgment of Baron Rolfe at pp. 56, 1113 and Baron Parke's judgment in *Hart* v. *Windsor* (1844) 12 M. & W. 69, 88; 153 E.R. 1114, 1122.

[10] For one contemporary account, see F. Engels, *The Condition of the Working Class in England* (1845) Henderson and Challoner ed. 1958, pp. 9–26.

[11] Asa Briggs, *Victorian Cities* (1963) pp. 59, 86, 89. Royston Lambert, *Sir John Simon 1816–1904* (1963) pp. 57–58.

[12] Briggs *op. cit.* note 11 at p. 267. S. E. Finer, *The Life and Times of Sir Edwin Chadwick* (1952) p. 214. Royston Lambert *op. cit.* note, 11, at p. 58.

[13] For a comprehensive bibliography of literature on the Victorian slums, H. J. Dyos, " The Slums of Victorian London " (1967) 11 Victorian Studies 5. See also S. D. Chapman (ed), *The History of Working-Class Housing* (1971).

[14] Dyos, *op. cit.*, note 13, at p. 12. W. Vere-Hole, " The Housing of the Working Classes in Britain 1850–1914 " unpublished D. of London Ph.D. Thesis (1965) at pp. 15–27. A. S. Wohl, " The Bitter Cry of Outcast London " (1968) 13 Int. Review of Social History 189, 193–195.

[15] *e.g.* Engels, *op. cit.*, note 10. Dr. J. P. Kay, *The Moral and Physical Condition of the Working Classes Employed in the Cotton Manufacture in Manchester*, 2nd ed. 1832.

In 1838, the Annual Report of The Poor Law Commissioners [16] triggered off a series of public inquiries which confirmed the existence of these problems. In 1840, a Select Committee of the House of Commons was appointed [17]; two years later, Chadwick's monumental study of the " Sanitary Condition of the Labouring Population of Great Britain " [18] appeared and, a year later, the Royal Commission into the Health of Towns was set up. The First Report of the Commission [19] which revealed appalling housing conditions was published in the same year as the Court of Exchequer firmly decided not to hold the landlord responsible for the condition of his houses.[20] The widespread agitation over sanitary matters had failed to permeate the judicial mind.

In strong contrast to the backward-looking attitude of the judges were the attempts by Parliament in the 1840s and subsequent decades to deal with the new social problems. Legislation stretching from the Nuisance Removal Act 1846 [21] to the great consolidating Public Health Act 1875 [22] placed the landlord under a duty to care for his property. But this duty was primarily enforced by the local authority and not the tenant,[23] the Acts conferred powers upon administrative bodies not rights upon tenants. The Housing of the Working Classes Act 1885 marked an important change in this policy.

The early 1880s were a period of renewed interest in the living conditions of the poor.[24] As in the 1840s, a Royal Commission

[16] Fourth Annual Report of the Poor Law Commissioners, App. A. P.P. 1837–8, XXVIII. See also Fifth Annual Report, App. C.2, P.P. 1839, XX.

[17] The Select Committee on the Health of Towns (the Slaney Comm.) P.P. 1840, XI.

[18] Published by Poor Law Commission H. of L. 1842, XXVI. Reprinted M. W. Flinn, ed. (1965). This Report had an extraordinary circulation for the time, see Finer *op. cit.* note 12, at p. 210. One would expect the judges to have at least heard of it.

[19] Commission of Inquiry into the State of Large Towns and Populous Districts. First Report P.P. 1844, XVII. Second Report P.P. 1845, XVIII.

[20] *Hart* v. *Windsor* (1844) 12 M. & W. 69; 152 E.R. 1114.

[21] 9 & 10 Vict. c. 96. A beginning had been made in 1840 when R. A. Slaney introduced a " Bill for Improving the Dwellings of the Working Classes " into the Commons. *Hansard* 3rd Ser. vol. 55, col. 780. In 1841, the Marquis of Normanby introduced a Drainage of Towns Bill. *Ibid.*, vol. 56, col. 136. This was put off pending Chadwick's Report. The Health of Towns Bill was presented in 1845 but was a victim of Peel's resignation as Prime Minister. For sanitary reform before the 1840s, see B. Keith-Lucas, " Some Influences Affecting the Development of Sanitary Legislation in England " (1953–4) 6 Econ. Hist.Rev. 290. E. P. Hennock, " Urban Sanitary Reform a Generation before Chadwick? " (1957–58) 10 Econ.Hist.Rev. 113.

[22] 38 & 39 Vict. c. 55. The most important statutes were: Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34); Nuisance Removal Act 1848 (11 & 12 Vict. c. 123); Public Health Act 1848 (11 & 12 Vict. c. 63); Nuisance Removal Act 1855 (18 & 19 Vict. c. 121); Sanitary Act 1866 (29 & 30 Vict. c. 90); Public Health Act 1872 (35 & 36 Vict. c. 79).

[23] But see Nuisance Removal Act 1855, s. 10 and Nuisance Removal and Disease Prevention Amendment Act 1860, s. 13 enabling inhabitants to make complaints of nuisances to local authority and magistrates.

[24] Although the Reports of Select Committees on the Artisans and Labourers' Dwellings Improvement Act 1875 (P.P. 1881, vol. VII *ibid.*, 1882, vol. VII) had turned attention to housing, popular interest seems to have been triggered

confirmed many private accounts of the size and severity of the problem.[25] "In Bristol privies actually exist in living rooms"[26] whilst in Liverpool,

> "houses were described to be in the last stage of dilapidation . . . few of the roofs were rain-tight, and the walls were alive with vermin. In some cases the walls were crumbling away exuding a green slime, and so rotten that a stick might be thrust through."[27]

The common law still gave unfurnished tenants of such premises no redress against their landlords.[28]

The Commission recommended a change in this law. The tenant should be given a power to recover damages for the landlord's "neglect or default in sanitary matters."[29] The Government was quick to act. Clause 13 of the Housing of the Working Classes Bill 1885[30] envisaged just such a remedy. Introducing it into the Lords, the Marquess of Salisbury described it as "a provision of considerable value."[31] Its purpose was to remove "the anomaly" caused by "a curious peculiarity of the law" which implied a warranty of fitness in the letting of furnished but not unfurnished premises.[32] Much was expected from it: "I look to this clause more than to any other to diminish the death-rate that is caused by insanitary dwellings."[33] The provision was subsequently re-enacted in the Housing of the Working Classes Act 1890[34] and amended in 1903[35] and again in 1909.[36] On the latter occasion, the Government spokesman, Earl Beauchamp, compared it with the Old Age Pensions Act and the Employers Liability Act.[37] Clearly, the intention of the Government introducing the provision was that it was more than a mere technical addition to landlord-tenant law and had a valuable role to play in the fight against the slum. The implied warranty of fitness has remained substantially unaltered since 1909[38] and now appears on the statute book as section 6 of the Housing Act 1957.

off by a small anonymous penny pamphlet eptitled "The Bitter Cry of Outcast London" which appeared in 1883. It contained many vivid descriptions of slum conditions and hinted at resulting vice. (Reprinted in *Victorian Library* Series 1970, ed. A. S. Wohl.) See Wohl *op. cit.*, note 14 for very comprehensive account of the impact of this pamphlet. See also Dyos *op. cit.*, note 13, at pp. 19–20.

25 P.P. 1884–45 XXX.
26 *Ibid.*, 11.
27 *Ibid.*, 11–12.
28 *Chappell* v. *Gregory* (1863) 34 Beav. 350; 55 E.R. 681; *Bartsam* v. *Aldous* (1866) 2 T.L.R. 287.
29 *Op. cit.*, note 25, at p. 56.
30 s. 13 of the subsequent Act.
31 *Hansard* 3rd Ser. 1885, vol. 299, col. 892.
32 *Ibid.*
33 *Ibid.*
34 s. 75.
35 Housing of the Working Classes Act 1903, s. 12.
36 Housing, Town Planning, etc. Act 1909, ss. 14, 15.
37 Parl.Deb.H.C. 1909, vol. 2, cols. 1145–1146.
38 Housing Act 1925, s. 1; Housing Act 1936, s. 2.

The statutory covenant to repair was also a direct legislative response to a social problem. Introducing the relevant clauses into the Commons, Mr. Brooke, the Minister of Housing and Local Government explained that they were to put a stop to the practice of a few unscrupulous landlords in attempting to impose unreasonable repairing obligations on their tenants.[39] Furthermore, the Government's view was that, "the right policy is not only to relieve short term tenants of unreasonable obligations, but, in the case of short-term tenancies, to put definite obligations on the landlord."[40] It was considered that in the case of investment property, the landlord was in a better position to bear this burden.[41]

THE JUDGES AND THE STATUTORY WARRANTIES

The remainder of this article will be concerned with the restrictions which judicial decisions have placed upon the statutory covenants. But, first, we shall pause to note an early indication of the judicial attitude provided by Lord Bramwell during the debate in the House of Lords on the 1885 Act.

He described the provision as "contrary to the ordinary principle of *caveat emptor*—altogether an unwarranted interference with freedom of contract (which) would have an injurious effect even on the working classes, for whose benefit it was intended." The learned Lord concluded his protest against "this mischievous, grandmotherly legislation" by urging that, "the best thing for . . . working men was to teach them to look after themselves. They were quite able to do so."[42] Forty years of housing and public health legislation and further evidence of the continued existence of slum housing had not shaken his faith in *laissez faire*.[43]

(1) *Only the tenant can sue*

The first restriction imposed by the courts was the very drastic one that the statutory warranty only applied to the tenant and not his family. It was held in *Middleton* v. *Hall*[44] that the tenant's wife had no cause of action and in *Ryall* v. *Kidwell*[45] that the tenant's daughter was not protected. These decisions are fully in line with the doctrine of privity of contract; the tenant's family could not sue because they were strangers to the contract.[46] But they clearly frustrated the aims of the government which introduced

39 Parl.Deb.H.C. 1961, vol. 637, col. 974. On this practice, see also *ibid.*, col. 1035 (Mr. Skeet), *ibid.*, Standing Committee Reports 1962, vol. 2, col. 981 (Mr. Evans), Audrey Harvey, *Tenants in Danger* (1964), p. 69.
40 *Ibid.*, cols. 974–975.
41 *Ibid.*, col. 976.
42 *Hansard* 3rd Ser. 1885, vol. 301, cols. 5–6.
43 See note 6, *infra*.
44 (1913) 108 L.T. 804. *Cf. Thompson* v. *Arkell* (1949) 99 L.J. 597.
45 [1914] 3 K.B. 135.
46 Note, 82 J.P. 300 (1918), see *e.g. Longman* v. *Blount* (1896) 12 T.L.R. 520. But see, J. Unger, "The Statutory Warranty of Fitness in the Courts" (1942) 5 M.L.R. 266, 269.

the original provision in 1885. The Marquess of Salisbury had said that it would make those letting unhealthy houses liable "for the illness or death of *any person* living in it."[47] Legislation was necessary to reverse these decisions.[48]

(2) *Covenant does not extend to parts under landlord's control*

Another early limitation was the decision in *Dunster* v. *Hollis*[49] that the implied covenant of fitness did not extend to those parts of the premises such as a common staircase which the landlord retained under his control. Many of the worst housing conditions uncovered by the Royal Commission of 1885 were found in multi-occupied premises.[50] It seems reasonable to suggest that its aim of improving these conditions would have been better served by a decision holding the landlord liable for all parts of such dwellings under the covenant. The common law[51] and, later, statute[52] mitigated the effects of this decision.

(3) *The standard of fitness*[53]

The standard envisaged by the Marquess of Salisbury was that the house must be healthy. He referred, in particular, to the habit of some speculative builders who conducted all the drains into the centre of the kitchen and left them there causing typhoid fever. This evil would be met by the statutory covenant.[54]

Some of the cases have construed the words "in all respects reasonably fit for human habitation"[55] very strictly. The Divisional Court in *Stanton* v. *Southwick*[56] held that sewer rats which invaded premises from an old drain underneath would not render them unfit unless "they bred there, were regularly there and, as it were, formed part of the house."[57] This test seems both impracticable and arbitrary. Tenants are not normally pestologists able to recognise the reproductive process in the tiniest of mites and only the most prudish would find their sexual activities more repellent than their feeding habits. The same court decided in *Jones* v. *Green* that the Act required "a humble standard. It is only required that the place must be decently fit for human beings to live in."[58]

Summers v. *Salford Corporation*,[59] on the other hand, reveals the House of Lords insisting upon a much higher standard. The tenant had been injured when the sash-cord of the only window in a room broke. It was decided that this defect was sufficient to render the house unfit on the grounds that it is not the amount but the consequences of the disrepair which determines fitness.[60] Lord Atkin thought that the standard connoted not only safety but also reasonable comfort[61] whilst Lord Wright considered it imported some reference to humanity or humaneness.[62] The enlightened judicial attitude shown in this case is considered later.

(4) *The rent limits*

It should be noted that the implied covenant of fitness only applies to premises let at low rents.[63] But even if the tenant is able to show that his net rent is within the section, the Court of Appeal has set a further trap for him. It was decided in *Rousou* v. *Photi*[64] that the rent limits in the section refer to the actual rent payable to the landlord without any deduction of any sum in respect of rates or other outgoings which the landlord may have agreed to pay. The defendant was a weekly tenant and the plaintiff his lodger who was injured by the fall of the ceiling. When sued, the defendant joined his landlords contending that his tenancy came within section 2 of the Housing Act 1936 and that they had failed to keep the premises fit for habitation. The tenant paid £45 10s. a year to his landlords but over £5 10s. of that was to pay the rates. He

47 *Hansard* 3rd Ser. 1885, vol. 299, col. 892 emphasis added.
48 Occupiers' Liability Act 1957, s. 4. See also Defective Premises Act 1972, s. 4 replacing Occupiers' Liability Act 1957, s. 4 as from January 1, 1974.
49 '1918] 2 K.B. 795.
50 The Royal Commission noted "how widely the single-room system for families is established." P.P. 1884-85, XXX, 7.
51 *e.g. Hart* v. *Rogers* [1916] 1 K.B. 646.
52 Occupiers' Liability Act 1957.
53 It should be noted that the following cases were decided upon the old law which provided little statutory guidance as to unfitness (but see the Housing Act 1936, s. 188). Section 9 of the Housing Repairs and Rent Act 1954 provided certain criteria by which unfitness was to be judged. This new standard is now found in the Housing Act 1957, s. 4 as amended by the Housing Act 1969, s. 71.
54 *Hansard* 3rd Ser. 1885, vol. 299, col. 892.
55 See *infra*, p. 385.
56 '1920] 2 K.B. 642.
57 *Ibid.*, p. 646. *Cf. Thompson* v. *Arkell* (1949) 99 L.J. 597, a county court case, in which the tenants recovered for breach of the statutory warranty when they were viciously attacked by fleas. The new statutory definition of unfitness excludes infestation. On the extent of the problem of vermin in slum housing, see *e.g.* Shelter Report "Who are the Homeless? Face the Facts" (1969) (7, 14, 19, 27, 28, 29, 30, 31, 35, 45.) *Ibid.*, "Reprieve for Slums" (1972) (21, 30); Frank Allaun, "No Place like Home" (1972) (105, 110, 118, 128, 132) *e.g.* "I found mice in the children's bed" *Ibid.*, 118.

58 '1925] 1 K.B. 659, 668 (Salter J.)
59 '1943] A.C. 283.
60 *Ibid.*, p. 293 (Lord Wright). *Cf.* the conflicting views taken by the Court of Appeal: *Morgan* v. *Liverpool Corp.* [1927] 2 K.B. 131.
61 '1943] A.C. 283, 289–290.
62 *Ibid.*, p. 293.
63 To come within the section, tenancies created after 1957 must be let at a weekly rent of £1·54 or less in London or £1 or less in the rest of the country. Even in 1957, these annual rents of £80 in London and £52 elsewhere only just covered those tenants paying the average annual rents which were then £73 in London and £14 in the country as a whole: Christine Cockburn, *Rented Housing in Central London*. Occasional Papers on Social Administration, No. 9, p. 20.
Since then rents have risen well above the statutory limits of the section. By 1962, the average rent for uncontrolled premises in the country as a whole was £67 and in 1963, the cheapest type of uncontrolled premises—part of a house or flat—was £122·20 in London. D. V. Donnison, "The Changing Pattern of Housing" *Ibid.*, p. 25. Report of the Committee on Housing in Greater London (1965) Cmnd. 2605, p. 351.
64 [1943] 2 K.B. 379. Noted Blundell (1940) 4 Conv. 433. Notes (1940) 84 S.J. 55, 200.

contended that the rates should be deducted before deciding whether the premises came within the limit of £40 for London. The Court of Appeal rejected this contention and held that no such deduction could be made. Therefore, the section did not apply and the landlords were not liable.

In view of the rise in rents, *Rousou* has ceased to have much practical importance. But, at the time, the decision removed many premises outside the section.[65] This was done at the cost of overruling [66] or distinguishing [67] the only authorities that existed on the matter.

(5) *Statutory covenant restricted to works requiring only reasonable expense*

The decision of the Court of Appeal in *Buswell* v. *Goodwin* [68] shows the court rejecting a tenant's claim under the implied statutory warranty of fitness by a novel piece of judicial legislation. A local authority had made a closing order in respect of a cottage and the landlord had gained possession in the county court. The tenant appealed against this decision and contended, *inter alia*, that the implied warranty had been breached. Widgery L.J. referred to the section and continued,

> "it appears to impose a very wide obligation on the landlord. In literal terms it would seem that a landlord must keep a ruinous house fit for habitation at whatever the cost. But (counsel for the tenant) concedes, and I think he is entirely right in so conceding, that the obligation under section 6 is not so extensive as that, and it is restricted, as is the landlord's obligation under the provisions of the same Act, to cases where the house is capable of being made fit for human habitation at reasonable expense." [69]

Karminski and Davies L.JJ. concurred in this judgement.

This decision quite clearly conflicts with the legislative intent and, indeed, goes so far as to reintroduce words into the section which Parliament had specifically repealed. The 1885 Act provision and its subsequent re-enactments had required the landlord to keep the premises "in all respects reasonably fit for human habitation." The Housing Repairs and Rents Act 1954 repealed the words "in all respects reasonably" [70] thus imposing an absolute, even unreasonable, obligation of fitness.[71] Judicial interpolation of words into statutes is always evidence of daring, but reintroducing words which Parliament has cast aside might be thought foolhardy.

[65] B. Plummer (1946) 9 M.L.R. 42, 45.
[66] Dictum by Lewis J. in *Jones* v. *Nelson* [1938] 2 All E.R. 171.
[67] *Sheffield Waterworks Co.* v. *Bennett* (1872) L.R. 7 Ex. 409; L.R. 8 Ex. 196. Relied upon by trial judge [1940] W.N. 20.
[68] [1971] 1 W.L.R. 92. Noted (1971) 87 L.Q.R. 152, 471.
[69] *Ibid.*, pp. 96–97.
[70] s. 54. Fifth Sched.
[71] W. A. West (1971) 87 L.Q.R. 471, 472–473.

It is submitted that the decision also conflicts with a previous decision of the Court of Appeal. In *John Waterer Sons & Crisp Ltd.* v. *Higgins*,[72] the Court of Appeal was faced with the same situation as faced the court in *Buswell* v. *Goodwin*. The landlord had allowed his property to fall into such decay that the local authority made a closing order and his action for possession brought forth a counterclaim for damages made under the statutory covenant. The court rejected the tenant's action on the basis that the type of damages sought were not recoverable, but at no time was it suggested that the making of a closing order (and, therefore, the determination by the local authority that the premises could not be made habitable by reasonable expense) was a defence to the action.

Buswell v. *Goodwin* presents a number of practical problems. It was assumed by Widgery L.J. that the local authority was to determine the question of reasonable expense; the only way the tenant could get round the restriction on the statutory covenant would be to challenge the basis of the closing order made by them. It is not clear why local government officials should be permitted to so decide the rights of two private persons without any statutory authorisation. Is their decision appealable on this point? Must they use the same criteria for deciding this question and whether to make a closing or demolition order? [73] Are the parties to seek their determination before taking action under the statutory covenant? Should the tenant get a certificate that the premises are capable of repair at reasonable expense before he commences his action? Is the authority the sole arbiter of this question? These and several other questions remain unanswered by the decision.

The Court of Appeal has now deprived many of the worst-off tenants of their statutory protection. If the landlord has failed to honour his obligation under the statutory covenant and has allowed the premises to fall into such a state that a closing order is necessary, the tenant loses his home and with it the security of tenure which he has enjoyed as a protected tenant.[74] His furniture and other possessions may also have been damaged by the condition of the house; he may have been seriously injured. The risks are greater where the degree of neglect is so great. Yet that tenant is to be refused his statutory protection precisely because he is the victim of the most substandard of substandard housing. Without citing any authority and relying only upon an inapt analogy,[75] the court has denied protection to those who most require it.

[72] (1931) 47 T.L.R. 305.
[73] See Housing Act 1957, s. 30 (1).
[74] Housing Act 1957, s. 27 (5). *Cf.* s. 158. The fear of homelessness is one reason why some local authorities do not enforce housing and public health law strictly. See *e.g.* Elizabeth Burney, *Housing On Trial* (1967) pp. 91, 128–129. This is an old problem, see *e.g.* Alexander P. Stewart, *The Medical and Legal Aspects of Sanitary Reform* (1867) pp. 50, 54, 76. The authority may now be under a duty to rehouse: Land Compensation Act 1973, s. 39.
[75] Widgery L.J. referred to "the landlord's obligation under other provisions of

(6) *Are statutory tenancies within the statutory covenants?*

Statutory tenancies are those tenancies which have ceased to be contractual and yet which continue because the Rent Act prevents the landlord removing the tenant.[76] Normally, they will have ceased to be contractual because the landlord has served notice to quit and so terminated the tenancy; the tenant's right to stay on will then depend solely upon statute. It will be seen that all the majority of landlords need do to convert a contractual tenancy into a statutory one is to serve the necessary four weeks' notice.[77]

Dicta in *Strood Estates Co.* v. *Gregory*,[78] which states that the implied warranty of fitness does not extend to statutory tenancies, therefore assume enormous importance. The question in that case was the amount of rent which the landlord of a statutory tenancy could legally recover, and it became necessary to decide whether the statutory warranty applied. Sir F. Boyd Merriman P. said it did not because the "statutory tenancy" was not, properly speaking, a tenancy at all; it merely conferred "a status of irremovability" on the tenant.[79] Just why this should exclude the statutory warranty is not clear and there are no other cases on the point. It has been submitted that the warranty applies to statutory tenancies in the same way as an express covenant by the landlord to repair [80]; it is one of "the terms and conditions of the original contract of tenancy" within the relevant statutory definition of a statutory tenancy.[81]

(7) *The need to give notice*

Section 12 of the Housing of the Working Classes Act 1885 contained neither a requirement of notice from the tenant of defects nor a right of inspection on the part of the landlord. This was the cause of complaint by Lord Bramwell during the debate in the Lords:

> "Then, again, the tenant was likely to be the first to find out whether there was anything wrong. From indolence and indifference he took no notice; somebody might fall ill and die, and the first knowledge the landlord might have of anything being wrong in the sanitary arrangement of the house would be a claim by the tenant who could come and say—'You were bound by law to let me the house in a sanitary condition.'" [82]

The right of inspection was, however, conferred by section 15 (2) of the Housing, Town Planning, etc. Act 1909. This modification was the result of an amendment moved in the Lords by Viscount St. Aldwyn.[83] It was strongly opposed by Keir Hardie and other Labour M.P.s on the grounds that it was based on the false assumption that working people needed to be compelled by Act of Parliament to admit the landlord to view the property.[84] The government spokesman justified it by saying it was impossible for the landlord to exercise fully and freely his responsibility to both the tenant and the local authority without such a right.[85] Later statutes re-enacted the right of inspection but none of them required the tenant to give notice of the defect.[86]

Under section 32 of the Housing Act 1961 there is again no requirement to give notice but a right of inspection was conferred upon the landlord in the same wording used in the 1957 Housing Act.[87]

(a) The notice requirement in the courts. The first case to consider the requirement of notice in the case of a *statutory* duty to repair was *Fisher* v. *Walters*,[88] decided by the Divisional Court in 1926. Owing to a latent defect, the ceiling of a house fell and damaged the tenant's furniture. The court held that absence of notice did not preclude the tenant from recovering. In the words of Finlay J.:

> "This being a latent defect, no notice could be given by the tenant because he had not discovered and could not with reasonable diligence have discovered it." [89]

In the same year, the Court of Appeal decided *Morgan* v. *Liverpool Corporation*.[90] The tenant was injured by a defective sash-cord. He had given no notice to the landlord of its condition before the accident. The members of the court were unanimous in

the same Act" to justify the restriction. But, as was observed by Lord Romer in *Summers* v. *Salford Corp.*, the implied warranty provision "is not an enactment designed for the purpose of clearing slum areas but is . . . a provision designed for the purpose of compelling landlords . . . to see that their tenants are properly and decently housed." [1943] A.C. 283, 297. See also W. A. West, *op. cit.*, note 71 at p. 472.

76 Rent Act 1968, s. 3. See generally, R. E. Megarry, *The Rent Acts*, 10th ed. (1967) Chap. 6.

77 Rent Act 1957, s. 16.

78 [1936] 2 K.B. 605. Decision affirmed on another point by House of Lords [1938] A.C. 118.

79 *Ibid.*, pp. 623–624.

80 W. A. West, "Statutory Repairing Covenants" (1962) 26 Conv.(n.s.) 132, 148. *Cf.* Hill and Redman, *The Law of Landlord and Tenant*, 15th ed. (1970) p. 217. Megarry, *op. cit.*, note 76, at p. 205.

81 Rent Act 1968, s. 12 (1).

82 *Hansard* 3rd Ser. 1885, vol. 301, cols. 5–6.

83 *Ibid.*, 1909 H. of L., vol. 3, cols. 123–126.

84 *Ibid.*, 1909 H. of L., vol. 12, cols. 1493–1497.

85 *Ibid.*, col. 1494 (Mr. Burns).

86 Housing Act 1925, s. 1 (2); Housing Act 1936, s. 2 (2).

87 Mr. Page moved an amendment to give the landlord a specific right of entry for carrying out repairs as opposed to viewing the condition of the premises and their state of repair. But it was withdrawn when the Minister, Mr. Brooke, pointed out that it was not necessary as the courts have held that a covenant to repair carries with it an implied licence to the lessor to enter upon the premises and occupy them for a reasonable time for the purpose of doing repairs. (See *Saner* v. *Bilton* (1878) 7 Ch.D. 815.) Moreover, the amendment might throw doubt on the meaning of the Housing Act 1957, s. 6 (3) in the same wording. Parl.Deb.H.C. 1961, Standing Committee Reports, vol. 2, cols. 969–972.

88 [1926] 2 K.B. 315.

89 *Ibid.*, p. 318.

90 [1927] 2 K.B. 131.

rejecting his claim, but discovering the ratio of the case is no easy task. There was agreement only on the point that absence of notice was fatal to the plaintiff's case. Although Lord Morris said in *O'Brien* v. *Robinson* [91] that *Morgan's* case must be regarded as a case in which the defect was latent, it is respectfully submitted that the judgments in the case defy such an attempt to find certainty. It is true that counsel for the tenant admitted the defect to be latent [92] but Lord Hansworth expressed much doubt whether the breaking of a window cord could be treated as a latent defect.[93] Atkin L.J. thought it possible that a very careful inspection of the window cords might have revealed the state in which they were.[94] His concern was more with the suddenness of the defect rather than its latency.[95] Lawrence L.J. thought the notice requirement applied to latent as well as patent defects and certainly to the defect existing in the case before him but he did not say which it was.[96] The most that can be said of this case is that notice was required in the particular circumstances and its absence was fatal to the tenant's claim.[97]

In *Summers* v. *Salford Corporation* [98] the tenant had given notice to the landlord of the defect and so the question of notice was not before their Lordships. Every member of the court, however, expressly referred to it as open to the court to decide in a later case whether *Morgan* was correctly decided. Lord Atkin, for example, pointed out that,

> "In the present case the point on which the Court of Appeal in *Morgan's* case decided for the defendant does not arise, namely, that notice of the lack of repair complained of must be given to the landlord before his statutory obligation arises. I can see that different considerations may arise in the case of an obligation to repair imposed in the public interest and I think that this question must be left open, and I reserve to myself the right to reconsider my former decision if the necessity arises." [99]

The second case on the warranty decided by the House of Lords was *McCarrick* v. *Liverpool Corporation*.[1] This case clearly decided

[91] [1973] 1 All E.R. 583, 587, see also Lord Diplock *ibid.*, p. 592.
[92] [1927] 2 K.B. 131, 135.
[93] *Ibid.*, pp. 143–144.
[94] *Ibid.*, p. 150.
[95] *Ibid.*
[96] *Ibid.*, p. 153.
[97] It is significant that the House of Lords did not refer to *Morgan* as a case on latent defects in *McCarrick*, *infra*. For example, Lord Porter observed in that case, "No question of the latency of the defect comes in issue as it did in *Fisher* v. *Walters*. If it did the decision in that case would require to be carefully scrutinised." The lack of specific reference to *Morgan* leads one to think that it was not considered relevant to latent defects.
[98] [1943] A.C. 283, *supra*, p. 388.
[99] *Ibid.*, p. 290.
[1] [1947] A.C. 219. Followed in *O'Neill* v. *Cork Corporation* [1947] Ir. 103. See Notes 22 Ir.L.T. 23, 83 (1948).

that, in the case of patent defects occurring during the term, notice must be given to the landlord. The tenant's wife fractured her leg by falling on two stone steps leading to a back kitchen and the tenant sued in respect of her incapacity. Their Lordships dismissed the action and approved *Morgan's* case on the grounds of absence of notice.

O'Brien v. *Robinson* [2] completes a trio of House of Lords decisions. In 1965 the tenants occupying the rooms above the plaintiffs had had frequent parties with music, dancing, noise and banging on the floors. No defects in the ceiling were or became visible. Three years later the ceiling fell. It was considered by the trial judge that it was probable, though difficult to prove conclusively, that it was the nuisance rather than old age alone which brought down the ceiling. But once this nuisance ceased in 1965 there was nothing to suggest that either the lessor or lessee thought there was need to take any action about the ceiling, or evidence of any apprehension about its condition. In 1965, the tenants had complained to the landlord about the stamping on the ceiling but the judge found that the complaints the tenants then made were not that the structure of the ceiling might already be defective, but that if the stamping continued it would one day bring down the ceiling. The tenants' action for damages was dismissed by Mr. Justice Bristow on the grounds that no notice of the defect had been given to the landlord. The House of Lords upheld this judgment.

(b) Evaluation of the rationale for the notice requirement. In both *McCarrick* and *O'Brien* their Lordships failed to advance any new foundation for the notice requirement and were content to rely upon that in *Morgan* and cases relating to express covenants to repair. Lord Justice Atkin had said in that case,

> "The landlord has given the tenant exclusive occupation of the house. The landlord, therefore, is not in a position to know whether the house is in repair or out of repair, and it is held that it would be quite contrary to justice to impose an obligation of this kind upon a landlord in respect of matters of which he has in fact no knowledge." [3]

Did the landlord's right under the statute to inspect the premises make any difference? The learned judge thought not,

> "I think the power of access that is given, extensive though it may be, does not take the case away from the principle from which the courts have inferred liability is not to arise except on notice." [4]

With respect, it is submitted that the power of access does, indeed, take the case away from the principle on which previous courts had acted.

[2] [1973] 1 All E.R. 583.
[3] [1927] 2 K.B. 131, 150. [4] *Ibid.*

The requirement of notice had its origins in *Makin* v. *Watkinson* [5] decided by the Court of Exchequer in 1870. The landlord had covenanted to repair a mill but had failed to do so. To the tenant's action for damages, he pleaded that no notice of want of repair had been given. To this plea, a demurrer was entered thus raising the issue squarely before the court. Baron Channell was persuaded by principles of common sense that liability to repair depended upon knowledge. Baron Martin energetically dissented, arguing that the court could not change a bargain freely made between the parties. It was Baron Bramwell, stalwart defender of *laissez-faire* and later champion of the Property Defence League,[6] who provided the most detailed justification for imposing a duty to give notice upon the tenant. He had the "strongest objection to interpolate words into a contract" and felt justified in doing so only if "some cogent and almost irresistible reason" existed. But such a reason did exist here:

> "The lessee is in possession, he can say to the lessor, 'You shall not come on the premises without lawful cause' and to come for the purpose of looking at the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed. . . . This is . . . preposterous." [7]

The rationale for the decision was thus the landlord's inability to inspect the premises.

Later cases have also justified the notice requirement on the ground that the landlord had no right of access to the premises. In *Tredway* v. *Machin*, Collins M.R. explained the requirement as resting upon the principle,

> "that the landlord is not the occupier of the premises and has no means of knowing what is the condition of the premises unless he is told because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair." [8]

This statement was quoted with approval by Lord Atkinson and Lord Parmoor in *Murphy* v. *Hurley*.[9] Lord Sumner said in that case,

> "The tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time." [10]

[5] (1870) L.R. 6 Ex. 25. See also *Moore* v. *Clark* (1813) 5 Taunt. 90; 128 E.R. 620; *Vyse* v. *Wakefield* (1840) 6 M. & W. 442; 151 E.R. 485.

[6] See his *Economics* v. *Socialism* (1888) and *Laissez Faire* (1884) published by the League. For a biography, see Charles Fairfield, *Some Account of George William Wiltshire, Baron Bramwell of Hever and His Opinions* (1908).

[7] (1870) L.R. 6 Ex. 25, 28-29.

[8] (1904) 91 L.T. 310, 311.

[9] [1922] 1 A.C. 369, 383, 396.

Though there is much truth in the observation by Lord Diplock in *O'Brien* that the cases on the notice requirement "do not show a continuing logical development in the law nor any great consistency in reasoning," [11] there appear to be only two cases on express covenants which deny that right of access is equivalent to notice. They are *Torrens* v. *Walker* [12] and *Hugall* v. *McLean*.[13] Two other cases cited by Lord Porter in *McCarrick* [14] are not really on the point; in *Broggi* v. *Robins* [15] there is no mention in the report of any right to enter, express or implied, on the part of the landlord and *London and S.W. Ry.* v. *Flower* [16] concerns not the common law of landlord and tenant but construction of a private Act of Parliament. But *Torrens* and *Hugall* are true exceptions. In both cases notice was required from the tenant although the landlord had the means to discover the defect. Indeed, *Hugall* went so far as to say that the requirement applied even where the tenant had no means of knowing of the defect but the landlord did have such ability. It is doubtful how far *Hugall* and *Torrens* which followed it can be reconciled with the decision of the House of Lords in *Murphy* v. *Hurley* in which Lord Sumner pointed out that the court in *Hugall* felt that it was carrying the rule to its extreme limit.[17] The *Murphy* decision repudiated the absolute rule of notice enunciated in the earlier case by holding that the rule was not inherent in the landlord-tenant relationship and depended upon the facts existing in every case.[18] One relevant fact would, of course, be the landlord's right to inspect the premises.

As the rationale of these cases on express covenants by the landlord to repair rested upon his inability to gain access to the premises and his status as a trespasser if he should do so without the tenant's consent, it seems clear that they are not applicable to the statutory covenants of fitness and repair. Since 1909 the landlord liable under such covenants has had the right to go upon the premises to see their condition. Entry for this purpose does not make him a trespasser. Therefore, the requirement of notice should not apply even as a matter of pure analysis.

There are persuasive reasons why the requirement of notice should not extend to the statutory covenants. In the first place, the covenant of fitness first enacted in 1885 was designed to equate the letting of furnished and unfurnished premises.[19] Since the tenant of a furnished house does not seem to be under a duty to

[10] *Ibid.*, p. 388. See also the Canadian case of *Hett* v. *Jensen* (1892) 22 O.R. 414 and Note (1927) 43 L.Q.R. 433.

[11] [1973] 1 All E.R. 583, 592.

[12] [1906] 2 Ch. 166.

[13] (1885) 53 L.T. 94.

[14] [1947] A.C. 219, 225.

[15] (1879) 11 T.L.R. 224.

[16] (1875) 1 C.P.D. 77.

[17] [1922] 1 A.C. 368, 389.

[18] *Ibid.*, p. 375.

[19] *Supra*, p. 380.

give notice,[20] it may be argued that nor should those protected by the statutory covenants. Second, there is no requirement of notice in the case of defects in those parts of the premises retained by the landlord under his control such as common stairs and, it is submitted, shared W.C.s and bathrooms in multi-occupied houses.[21] Some American cases suggest that the landlord's right to inspect the premises carries with it sufficient control to render the notice requirement inapplicable.[22]

Even if we accept that the notice requirement is justified by well-established cases where the defect is within the knowledge of the tenant, it does not follow that such cases justify the extension of the requirement to latent defects, *i.e.* " of such a nature that the tenant did not know and could not have discovered by reasonable examination that the premises were out of repair." [23] Of the cases on express covenants, only *Hugall* seems to go so far. With regard to cases on the statutory warranty, *Fisher* v. *Walters* expressly decided that notice need not be given of latent defects. As already observed, it is not clear whether the Court of Appeal regarded the defect as latent in *Morgan's* case. In *McCarrick*, the defect was a patent one of which the tenant had knowledge but of which the landlord was unaware. It was not necessary, therefore, for their Lordships to decide whether the requirement would apply to latent defects and both Lord Porter and Lord Uthwatt were careful to note that their judgments did not cover this point though Lord Simonds criticised but did not overrule *Fisher's* case. In the light of this analysis, it is respectfully submitted that Lord Diplock was wrong in thinking in *O'Brien* v. *Robinson* that *Morgan* and *McCarrick* had already applied the notice requirement to latent defects.[24] By so extending it, the House of Lords was breaking new ground.

(c) The justice of the rule. Although Lord Morris expressed sympathy for the tenants in *O'Brien*, Lord Diplock said he was not persuaded that the requirement of notice led to unjust results.[25]

It is suggested that reference to relevant social studies would have revealed the injustice to tenants of the rule requiring notice of defects. A survey carried out for the Milner Holland Committee investigating London's housing problem in 1968 contains this revealing passage,

> " Where repairs and decorations were needed and were the landlord's responsibility, although he had not been asked to do them, the tenant was asked why he had not asked the landlord. Half of the tenants said that they did not consider the repair or decoration was needed sufficiently urgently to inform the landlord, the other half did not believe that asking for it to be done would have any effect." [26]

A further survey carried out in 1970 for the Francis Committee investigating the working of the Rent Acts revealed that some 12 to 15 per cent. of tenants, while saying work needed attention, had not asked their landlord to do it. Of these, one in four (*i.e.* 3 to 4 per cent. of all tenants) in the London stress areas but rather less in the conurbation as a whole said it would be a waste of time to ask because the landlord would refuse.[27]

It seems unjust that tenants should have to bear the consequences of accidents caused by disrepair because their opinions as to the seriousness of the work needed turns out to be wrong. Research by Ken Coates and Richard Silburn into a poverty area of Nottingham suggests that poor tenants do not complain over apparently trivial matters. Quite the reverse,

> " We did not find that . . . complaints were unduly pernickety. Rather the contrary: people were wont to accept conditions which we would have judged intolerable, as if they were perfectly normal. When they did complain, it was for cause." [28]

Only *exceptional* damp, *unusual* cold, *excessive* rot, and decrepitude to the point of collapse were felt to be legitimate causes of complaint. They suggest that continual subjection to sub-standard housing leads to tenants regarding such conditions as " normal." [29] If this be so, one can only conclude that it is most unjust that such forbearance is rewarded by loss of the protection of the statutory covenants.

The second reason given in the surveys also casts doubt upon the justice of the requirement. If the landlord has refused to carry out repairs requested in the past, is the tenant to be penalised because he has given up an apparently fruitless ritual? In addition, the type of landlord who refuses to do repairs may also be the type who would not be unwilling to serve notice to quit or resort to harassment or unlawful eviction in order to remove a troublesome tenant insisting on his rights.[30]

[20] *Sarson* v. *Roberts* [1895] 2 Q.B. 395. It should be noted that the implied warranty of fitness in such cases only applies to defects existing at the commencement of the lease.

[21] *Murphy* v. *Hurley* [1922] 1 A.C. 369; *Bishop* v. *Consolidated London Properties* (1933) 102 L.J.K.B. 251; *Melles* v. *Holmes* [1918] 2 K.B. 100.

[22] *Thatch* v. *Montefiore Hospital* (1943) 289 N.Y. 367; 46 N.E. (2d) 333; *Weiner* v. *Lerose Realty Corp.* (1938) 279 N.Y. 127, 17 N.E. (2d) 796.

[23] *O'Brien* v. *Robinson* [1973] 1 All E.R. 583, 593, per Lord Diplock.

[24] *Ibid.*, p. 598.

[25] *Ibid.*, pp. 590, 598.

[26] Report of the Committee on Housing in Greater London (1965) Cmnd. 2605, p. 326.

[27] Report of the Committee on the Rent Acts (1971) Cmnd. 4609, p. 274.

[28] Ken Coates and Richard Silburn, *Poverty: the Forgotten Englishmen* (1970) p. 68. Further support is provided by the results of the survey carried out for the Francis Committee: 80 to 90 per cent. of all landlords giving replies thought requests made by tenants for repairs were, on the whole, reasonable for both controlled and registered unfurnished tenancies. Requests by tenants of furnished properties were considered reasonable by 93 per cent. of individual landlords, *op. cit.*, note 27, at pp. 335, 340.

[29] *Op. cit.*, note 28, at pp. 81–82.

[30] The statutory protection of the Rent Act 1965, s. 30, is not always adequate See *e.g.* Francis Committee *op. cit.* note 28, at pp. 107–111.

In the case of latent defects, it seems plainly inequitable to take away statutory rights from the tenant who has failed to give notice. Where the defect is obvious, at least one can say the tenant should have brought it to the landlord's notice. He has only himself to blame if he did not. Where the defect is latent, no such blame attaches. He cannot give notice of defects which he cannot know about.

But the interests of tenants have also been seen to be protected by the notice requirement. Lord Atkin said in *Morgan* that he could not imagine a set of circumstances which

> "would be more intolerable to a tenant, to say nothing of the landlord, if the landlord had repeatedly day by day and so on, in order to protect himself, to survey all his houses for the purpose of seeing whether there was any little defect which might result and cause injury." [31]

Whilst in *McCarrick*, Lord Uthwatt said that the tenant was entitled to remain inert and could hardly have intended that whenever a defect appeared, however trivial, he should be disturbed by the work of reparation whether he wished it or not.[32] Without dismissing the possibility of vexatious inspections or repairs, it may be suggested that the remedy need not be as drastic as the requirement of notice. The landlord could be expected to exercise his powers in a reasonable fashion and, in extreme cases, an action for breach of the implied covenant of quiet enjoyment or prosecution for harassment may be an answer.

What of the landlord's viewpoint? Clearly one must feel sympathy for a landlord who is held responsible for defects of which he was not given notice. Yet there is much in the argument advanced by Lord Denman during the debate on the 1885 Act that it is the duty of every landlord to know the condition of his houses.[33] If the renting of private accommodation was seen not merely in terms of rent-collecting but also as a service involving property management,[34] then imposing a duty as well as a right of inspection would not seem harsh. The tenant will often not be in a position to employ an architect or a surveyor to see whether walls, ceilings, lighting and plumbing have remained in proper repair.[35] The landlord as a property manager should be in a position to offer

[31] [1927] 2 K.B. 131, 151.
[32] [1947] A.C. 219, 232.
[33] Parl.Deb., 3rd Ser. 1885, vol. 301, col. 6.
[34] "If the tenant is no longer required to serve notice of disrepair or bring pressure on his landlord, the latter must undertake routine inspection of his property, in other words become an efficient estate manager." Glanville Williams (ed.), *Law Reform Now* (1951) 124. The Rowntree Trust House Survey of 1968 revealed that in the country as a whole, only 11 per cent. of private tenants reported that landlords organised regular inspection of the property "specially to see if any repairs or decoration should be done" and only 1 per cent. of tenants reported such inspection in the County of London. Milner Holland Report *op. cit* note 26, p. 115.
[35] See *e.g.* Note (1947) 63 L.Q.R. 141, 142; Note (1927) 43 L.Q.R. 433, 434; Note (1947) 91 S.J. 52.

such services. Even in the case of latent defects which defy the skills of such experts, the landlord would normally be in a stronger economic position to bear the loss.[36]

The expectations of both landlords and tenants was seen as the decisive factor in favour of the rule by Lord Diplock in *O'Brien*,

> "*McCarrick's* case has stood for twenty-five years; *Morgan's* case for forty-five years. Landlords and tenants and their insurers have entered into lease and contracts and Parliament has passed statutes on the basis that the law is as stated in those judgments. This House would not be justified in altering it now." [37]

These words recall Lord Simonds' observation in *McCarrick* that conveyancing practices have grown up on the faith of such decided cases.[38] Though this may be undoubtedly true in the case of many landlords and tenants having the benefit of professional advice, it is most unlikely to be true for those tenants who need the protection of the law most: those who live in sub-standard housing. Such tenants do not enter into tenancy agreements on the basis of the established law.[39] Indeed, even if they knew what the law was, they would be in no position to bargain.[40] Abandoning the notice requirement would not shatter the expectations of such tenants except to the extent that they now feel the law is always stacked against them.

It seems unlikely that the legislative intent has been fulfilled by the judicial interpolation of the notice requirement.

The statutory covenants of fitness and repair were designed to remedy the common law which had refused to imply such covenants and had preferred *caveat emptor* to protection of the weak.[41] They were also designed to ensure in the interests of society generally that responsibility for the repair of premises was placed on some party who could carry it.[42] By absolving the landlord on a technical point, this legislative policy has been frustrated by the courts. If notice is not given, then nobody is liable for the premises.

[36] *Supra* p. 381.
[37] [1973] 1 All E.R. 583, 593.
[38] [1947] A.C. 219, 228.
[39] On the failure of legal services to meet the need of low income tenants, see Abel-Smith, Brooke and Zander, *Legal Problems And The Citizen* (1973) p. 219.
[40] On the practice of standard form agreements in private tenancies, see *e.g.* Rex and Moore, *Race, Community and Conflict*, (1967) pp. 139–140; *The Times*, April 11, 1972, April 12, 1972. Council tenants are likewise subject to formidable "conditions of tenancy" usually written into the rent book, see J. B. Cullingworth, *Housing in Transition* (1963), pp. 183–184, 195–196; Bradford S.H.A.R.E., *The Role of a Housing Aid Service in Promoting Policy Change* (1973), pp. 6, 17. (A "Shelter" publication.) *cf.* Ontario Law Commission, "Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies," p. 11 (1968) Nedovic and Stewart, 7 Melbourne U.L.R. 258, 263 (1969) and an empirical study carried out in Michigan: Mueller, 69 Mich.L.R. 247 (1970).
[41] *Supra* p. 377.
[42] *Supra* p. 381.

THE JUDGE AND SOCIAL LEGISLATION

The fate of the statutory covenants in the courts has not been a happy one. With only one or two exceptions,[43] the effect of judicial interpretation has been to confine the warranty of fitness to the narrowest possible limits. It was held not to extend to third parties,[44] nor to defects in common parts,[45] the rental limits were lowered by judicial decision,[46] the standard of fitness restrictively defined [47] and a judicial limitation on cost of repairs imposed.[48] The requirement of notice and its extension to the covenant to repair and latent defects [49] are further additions to this dreary list.

The reason for this restrictive attitude is not difficult to see, the courts have seen the statutory covenants as similar to ordinary covenants and so to be applied according to the general principles of landlord-tenant law. *McCarrick's* case is a clear example. Lord Simonds, for instance, said,

> " I conclude . . . that the provision imported by statute into the contractual tenancy must be construed in the same way as any other term of the tenancy." [50]

These words were quoted with approval by Lord Diplock in *O'Brien's* case.[51] Allied with this traditional theory of construction, there has been the concept of fault liability. This is revealed by the judgment of Lord Justice Atkin in *Morgan's* case whilst discussing the requirement of notice,

> " If in fact the tenant is not able to ascertain the defect, there seems to be no reason why the landlord should be exposed to what remains still the same injustice of being required to repair a defect of which he does not know, which seems to me to be the real reason for the rule." [52]

The social purpose of the covenants is completely ignored.

By contrast, *Summers* v. *Salford Corporation* shows the House of Lords willing to throw off the restrictions imposed by these traditional common law theories. In that case, Lord Atkin (as he was by then) regarded the statutory covenant as " an obligation

[43] In particular, *Summers* v. *Salford Corp. infra*. See also *Walker* v. *Hobbs* (1889) 23 Q.B.D. 458 (recognising that statute gave tenant right to damages) and *Fisher* v. *Walters* [1926] 2 K.B. 315, *supra*.
[44] *Supra* p. 381.
[45] *Supra* p. 382.
[46] *Supra* p. 383.
[47] *Supra* p. 382.
[48] *Supra* p. 384.
[49] *Supra* p. 387.
[50] [1947] A.C. 219. Lord Thankerton and Lord MacMillan expressly concurred. See also Lord Thankerton at p. 233, Lord Reading C.J. in *Ryall* v. *Kidwell* [1914] 3 K.B. 135.
[51] [1973] 1 All E.R. 583, 593. He also said, " But although created by statute the legal nature of this obligation was contractual. Its characteristics were the same as those of an obligation created by a repairing covenant in a lease." *Ibid.*, p. 591.
[52] [1927] 2 K.B. 131, 151. See also Bankes J. in *Middleton* v. *Hall* (1913) 108 L.T. 804.

to repair imposed in the public interest " and thought that, with regard to the notice requirement, different considerations might arise for that reason.[53] Lord Wright declared,

> " The subsection must, I think, be construed with due regard to its apparent object, and to the character of the legislation to which it belongs. . . . Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object." [54]

His conclusion was,

> " Nor . . . must the condition be construed in the same way as conditions in ordinary cases in the law of landlord and tenant." [55]

The social purpose of the legislation was uppermost in his mind.

It is submitted that the *Summers* decision shows a more sympathetic approach to social legislation.[56] The statutory covenants are alien to the very essence of the traditional theory of contract as a bargain, an agreement between consenting minds. They are implied even where the parties have attempted to exclude them, they override their express and declared intentions. Lord Romer said in *Summers* that the implied warranty of fitness was enacted " for the purpose of *compelling* landlords of small dwellings . . . to see that their tenants are properly and decently housed." [57] Compulsion strikes at the very roots of common law contracts. Fault liability is also out of place in this context. Social legislation involves " the sacrifice of liability based on individual fault so as to place loss in accordance with social justice and economic expediency." [58] The guilt of an individual landlord is quite irrelevant in this context.

Prior to *O'Brien*, the highest court in this country had delivered two decisions in fundamental conflict. In *McCarrick*, the House of Lords applied the traditional common law principles of construction and fault liability and ignored the social purpose of the statutory covenants. In *Summers*, these traditional concepts were rejected in favour of implementing the legislative aim of social amelioration. The House of Lords had a clear choice in *O'Brien*. It can only be profoundly regretted that the opportunity was not taken by English judges to join in the fight for better living conditions.[59]

[53] [1948] A.C. 283, 290. *Supra*, p. 388.
[54] *Ibid.*, p. 298.
[55] *Ibid.*, p. 295.
[56] See the excellent note by J. Unger, " Statutory Warranty of Fitness in the Courts " (1942) 5 M.L.R. 266 and the study by Ivor Jennings of the judicial response to housing law generally, " Courts and Administrative Law—The Experience of English Housing Legislation " (1936) 49 Harvard L.R. 426.
[57] [1943] A.C. 283, 297.
[58] Unger, *op. cit.* note 56, at p. 269.
[59] Their inaction stands in strong contrast to the judicial activism displayed in the last few years by many American courts in an attempt to find legal remedies for the slum tenant: see *e.g.*, *Lemle* v. *Breeden* (1969) 462 P. 2d 470

Further, it is suggested that the fate of the statutory covenants of fitness and repair at the hands of the judges provides support for Professor Laski's view that the present methods of statutory interpretation

> " make the task of considering the relationship of statutes, especially in the realm of great social experiments, to the social welfare they are intended to promote one in which the end involved may easily become unduly narrowed either by reason of the unconscious assumptions of the judge, or because he is observing principles of interpretation devised to suit interests we are no longer concerned to protect in the same degree as formerly." [80]

Their fate also gives emphasis to his suggestion that

> " the method of interpretation should be less analytical and more functional in character; it should seek to discover the effect of the legislative precept in action so as to give full weight to the social value it is intended to secure." [81]

J. I. REYNOLDS.*

(Hawaii); *Marini* v. *Ireland* (1970) 265 A. 2d 526 (New Jersey); *Javins* v. *First National Realty Corp.* (1970) 428 F. 2d 1071; *Brown* v. *Southall Realty* (1968) 237 A. 2d 834 (District of Columbia).

[80] " Report of the Committee on Ministers' Powers " (Cmnd. 4060) P.P. 1931–32 vol. XII Annex V, p. 185.

[81] *Ibid.*, p. 187. One way to achieve this would be for counsel to refer to social surveys such as those mentioned *supra*, p. 393 which show the effect of law in its social context. For statutory interpretation generally, Scottish and English Law Commissions, " The Interpretation of Statutes " (1969).

* LL.B. Lecturer in Law, London School of Economics.

CHOICE OF LAW IN CONTRACT MATTERS— A QUESTION OF POLICY

THE LAW AND POLICY, IN GENERAL

SEVERAL factors dictate the decision of an English court in a given case. Statute or binding precedent may be decisive.[1] And yet the courts in interpreting and applying the law are often called upon to analyse its underlying policy. In this country, such analysis is usually covert. In *Donoghue* v. *Stevenson* the House of Lords held that the law imposed a duty to take reasonable care to avoid acts or omissions which one could reasonably foresee would be likely to injure one's neighbour. Lord Atkin recognised that such a rule was one of extreme generality:

> " The liability for negligence, whether you style it such or treat it as in other systems as a species of ' culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy." [2]

Such rules have indeed arisen, on the basis of principles developed by the courts, but it is often difficult to apprehend the precise criteria which the judges apply in defining the extent of negligence liability. They have often settled for a generalised statement of their discretion in the matter. As Lord Wright put it in *Bourhill* v. *Young*:

> " The general concept of reasonable foresight as the criterion of negligence or breach of duty (strict or otherwise) may be criticised as too vague, but negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete, not an abstract, idea. It has to be fitted to the facts of the particular case." [3]

This claim to exercise discretion in the matter is in reality a refusal to rationalise, or subdivide, the rule. Such subdivision of the rule would be made easier if the policy objectives of loss distribution were articulated in greater detail. Other jurisdictions are not so reticent in examining the criteria which affect the application of an accepted rule, or even the continued existence of one

[1] But the House of Lords may depart from its own previous decisions, see [1966] 3 All E.R. 77.

[2] [1932] A.C. 562, 580.

[3] [1943] A.C. 92, 107.