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Ohio Residential Landlord Tenant Act

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OHIO RESIDENTIAL LANDLORD TENANT ACT

INTRODUCTION

THE LANDLORD-TENANT RELATIONSHIP is derived from English feudal law.¹ In feudal England a lease was primarily a conveyance of an interest in rural land that would be used for farming.² The value of the lease was not measured by any structure on the premises but rather by the land itself. Influenced by this simple arrangement, somewhat rudimentary rules evolved governing leases.³ Later, due to the shift in population from rural to urban areas, leases became more complex and entailed more than the mere conveyance of land.⁴ Today the tenant of an apartment is more concerned with his dwelling than with the land upon which the apartment rests. A modern lease is, therefore, viewed more as a "package of goods and services"⁵ consisting of adequate heating, lighting and plumbing, rather than four walls and a ceiling. Though the needs of the tenant have changed, the law governing leases has remained rooted in archaic property law principles.⁶

While under modern contract law the buyer of goods and services may rely, unless otherwise agreed, on the quality of goods and services furnished to him,⁷ the tenants of residential premises are still burdened with the doctrine of *caveat emptor*.⁸ Though the trend is changing,⁹ the general rule is that there is no implied warranty of

¹ 2 F. POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 115-17 (2d ed. 1898).

² See Comment, *Landlord-Tenant Relationship in Perspective from Status to Contract and Back in 900 Years?* 9 KAN. L. REV. 369, 371 (1961) [hereinafter cited as 9 KAN. L. REV.]. See also Quinn & Phillips, *The Law of Landlord Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 229 (1969) [hereinafter cited as Quinn].

³ See 9 KAN. L. REV., *supra* note 2, at 371.

⁴ See Hicks, *The Contractual Nature of Real Property Lease*, 24 BAYLOR L. REV. 445 (1972); 2 R. POWELL, *REAL PROPERTY* ¶ 221 [1] (1967).

⁵ See *Javins v. First National Realty Corp.*, 138 App. D.C. 369, 372, 428 F.2d 1071, 1074 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

⁶ *Id.*

⁷ See, e.g., UNIFORM COMMERCIAL CODE §§ 2-312 to -316; Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1967). See also *Javins v. First National Realty Corp.*, 138 App. D.C. 369, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Cintrone v. Hertz Truck Leasing*, 45 N.J. 434, 212 A.2d 769 (1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

⁸ 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

⁹ More and more courts have overturned *caveat emptor* in favor of implied warranties of habitability in residential premises. See *Javins v. First National Realty Corp.*, 138 App. D.C. 369, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Green v. Sumski*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968); *Lemele v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Reed v. Classified Parking System*, 232 So. 2d 103 (La. App. 1970); *Rome v. Walker*, 38 Mich. App. 485, 196 N.W.2d 850 (1972);

habitability in a lease of residential premises.¹⁰ Where a tenant secures a covenant to repair from the landlord, that covenant is independent of the tenant's duty to pay rent.¹¹ If the landlord fails to repair, the tenant is still obligated to pay rent. The tenant is a party to a contract which he has little opportunity to formulate.¹² While a buyer in a consumer setting is protected because of his unequal bargaining position,¹³ the residential tenant is not afforded such protection.

The new Ohio Landlord-Tenant Act¹⁴ is the legislature's attempt¹⁵ at correcting the imbalance between landlord and tenant. This new law is Ohio's unique adaptation of the Uniform Residential Landlord and Tenant Act.¹⁶ The thrust of the new act is to abrogate the Ohio common law

Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Foisy v. Wyman, 83 Wash. 2d, 515 P.2d 160 (1973); Pine v. Pierson, 14 Wis. 2d 509, 111 N.W.2d 409 (1961). *Contra*, Pointer v. American Oil Co., 295 F. Supp. 573 (S.D. Ind. 1969); Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972).

¹⁰ See Burdick v. Cheadle, 26 Ohio St. 393 (1875); 1 AMERICAN LAW OF PROPERTY § 3.78 (A. J. Casner ed. 1952).

¹¹ See Lindsey v. Normet, 405 U.S. 56 (1972); Hutcherson v. Lethin, 313 F. Supp. 1324 (N.D. Cal. 1970), *cert. denied*, 399 U.S. 522 (1970); Johnson v. Haynes, 330 S.W.2d 109 (Ky. 1959); Henry v. Pittsburg CC & St. L. RR Co., 20 Ohio N.P. 118, 50 Ohio Dec. 41 (C.P. 1875); *but see* John Mecke & Sons v. American Meat Co., 96 Ohio App. 17, 117 N.E.2d 191 (1958). *See generally* Quinn, *supra* note 2, at 257.

¹² Due to housing shortages and standardized leases, the landlord places the tenant "in a take it or leave it" situation. Javins v. First National Realty Corp., 138 App. D.C. 369, 377, 428 F.2d 1071, 1079 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); 2 R. POWELL REAL PROPERTY § 221[1] (1967). *See generally* Mueller, *Residential Tenants and Their Leases an Empirical Study*, 69 MICH. L. REV. 247 (1970).

¹³ See note 7 *supra*. *See also* Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178, 1181 (1964).

¹⁴ OHIO REV. CODE ANN. § 1923.02, 1923.04, 1923.06, 1923.061, 1923.081, 1923.14, 1923.015, 5321.01-5321.19 (Baldwin Supp. 1974). For the legislative history of the new act, see Blumberg, *The Ohio Struggle with the Uniform Residential Landlord Tenant Act*, 7 CLEARINGHOUSE REV. 265 (1973).

¹⁵ Cincinnati has enacted legislation to deal with landlord-tenant relationships. *See* Cincinnati, Ohio Ordinance No. 314-1973, July 5, 1973, as quoted in Comment, *Landlord-Tenant Reform in Cincinnati*, 43 U. CIN. L. REV. 175 (1974).

¹⁶ The entire Uniform Residential Landlord and Tenant Act may be found in NATIONAL CONFERENCE OF COMMISSIONERS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 210 (1972) [hereinafter cited as URLTA]. The Uniform Act has been adopted entirely or partially in other states. *See, e.g.*, ALASKA STAT. § 34.03.010-380 (Supp. 1974); ARIZ. REV. STAT. ANN. § 33-1301 to 33-1376 (1974); FLA. STAT. § 83.401.70 Supp. (1974); HAWAII REV. STAT. § 521-8 to 521-76 (Supp. 1973); ORE. REV. STAT. § 91.700-.865 (1973); VA. CODE ANN. § 55-248.2 to 55-248.40 (Supp. 1974); WASH. REV. CODE § 59.04.010-.410 (Supp. 1974). Other states have enacted legislation to deal with landlord-tenant relations. *See* DEL. CODE ANN. tit. 25, § 5102-6504 (Non Cum. Supp. 1974); ILL. REV. STAT. ch. 80, § 1-101 (Smith-Hurd 1966); MD. ANN. CODE art. 8, § 203-501 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 239 § 8A (Cum. Supp. 1974); MICH. COMP. LAWS ANN. § 554.139 (Supp. 1974); N.J. REV. STAT. 2A:42.10.1-97 (Supp. 1974); N.Y. REAL PROP. ACTIONS § 770, 755, 782 (McKinney Supp. 1971); N.Y. MULT. DWELL. § 302(a) (McKinney 1974); N.Y. SOC. SERVICES § 143(b) (McKinney 1966); WIS. STAT. ANN. § 704.01-704.40 (Spec. Pamphlet 1974).

of *caveat emptor*¹⁷ and independent covenants¹⁸ and reinterpret residential leases in light of modern contract law.¹⁹

The purpose of this article is to acquaint the reader with the newly defined rights, duties and remedies of the landlord and the tenant. Analysis will be placed on: (1) Ohio case law prior to the act; (2) similar provisions of URLTA, and (3) comparative case and statutes in other jurisdictions emphasizing the new trend in landlord-tenant relations.

SCOPE AND COVERAGE

The Ohio Landlord Tenant Act contains two sections. The first section redefines and broadens the Forcible Entry and Detainer procedures.²⁰ The second section encompasses the rights and duties of both landlord and tenant.²¹ The latter section contains six basic definitions including Landlord, Tenant, Rental Agreement, Security Deposit, Dwelling Unit, and the principal definition of Residential premises.²² The Act does not extend coverage to commercial leases, which are still governed by traditional property law.²³ The rationale for this distinction is that the inequality of

¹⁷ See *Rodeheaver v. Sears & Co.*, 220 F. Supp. 120 (N.D. Ohio 1962); *Godall v. Deters*, 121 Ohio St. 432, 169 N.E. 443 (1929); *Burdick v. Cheadle*, 26 Ohio St. 393 (1875); *Herman v. Albers*, 13 Ohio N.P. 98, 22 Ohio Dec. 429 (C.P. 1912).

¹⁸ See *Dickson v. Hunt*, 9 Ohio Dec. 408 (Dist. Ct. 1899); *Henry v. Pittsburgh CC & St. L. RR. Co.*, 20 Ohio N.P. 118, 50 Ohio Dec. 41 (C.P. 1875).

¹⁹ See generally note 7 *supra*.

²⁰ OHIO REV. CODE ANN. § 1923.02, 1923.04, 1923.06, 1923.061, 1923.081, 1923.14, 1923.15 (Baldwin Supp. 1974); see also OHIO REV. CODE ANN. § 1923.01, 1923.03, 1923.05, 1923.07, 1923.08, 1923.09-.13 (Baldwin 1974).

²¹ OHIO REV. CODE ANN. § 5321.01-.19 (Baldwin Supp. 1974).

²² OHIO REV. CODE ANN. § 5321.01(C):

"Residential Premises" means a dwelling unit for residential use and occupancy and the structure of which it is a part, the facilities and appurtenances therein, and the grounds, areas, and facilities for the use of tenants generally or the use of which is promised the tenant. "Residential Premises" does not include:

(1) Prison, jails, workhouses, and other places of incarceration or correction, including halfway houses or residential arrangements which are used or occupied as a requirement of probation or parole;

(2) Hospitals and similar institutions with the primary purpose of providing medical services and "Homes" licensed pursuant to chapter 3721 of the Revised Code;

(3) Tourist homes, hotels, motels, and other similar facilities where circumstances indicate a transient occupancy;

(4) Boarding schools, where the cost of room and board is included as part of the cost of tuition, but not college and university approved housing and private college and university dormitories;

(5) Orphanages and similar institutions;

(6) Farm residences furnished in connection with the rental of land of a minimum of two acres for production of agricultural products by one or more of the occupants;

(7) Dwelling units subject to the provisions of sections 3733.41 to 3733.48 of the Revised Code;

(8) Occupancy by an owner of a condominium unit.

²³ OHIO REV. CODE ANN. § 5321.01(C) (Baldwin Supp. 1974). Most landlord-tenant acts deal solely with residential premises. See URLTA § 1.101 and Comments thereto. Other states have enacted separate statutes to deal with commercial leases. See FLA. STAT. § 83.001-255 (Supp. 1974). Still other states have made no distinction. See WIS. STAT. ANN. § 704.01 (Spec. Pamphlet 1974).

bargaining power evidenced in residential leases is not manifest in commercial leases.²⁴ However, certainly this proposition is not always true, for the lessor of commercial premises, like his residential counterpart, has knowledge superior to that of the tenant concerning the condition of the rental property.²⁵ Therefore, non-residential tenants should also be afforded some protection.²⁶

While the definition of Residential Premises is broad—"a dwelling unit for residential use and occupancy . . ."²⁷—the act does not cover residential arrangements that are incidental to another primary purpose. Correctional institutions such as jails, prisons and halfway houses, as well as medical facilities, including hospitals and nursing homes, "orphanages and similar institutions"²⁸ are excluded. The act also specifically excludes transient occupancies such as hotels and motels,²⁹ condominiums,³⁰ farm labor camps³¹ and farm residences employing over two acres of land to agricultural production.³²

The final exclusion from residential premises is: "Boarding schools where the cost of room and board is included as part of the cost of tuition, but not college and university approved housing and private college and university dormitories."³³ The inclusion by the legislature of college approved housing and private college dormitories, through the use of a double negative, is unusual, but even more perplexing is the denial to private college students those remedies granted to other tenants in parallel

²⁴ See *Kruvant v. Sunrise Mkt.*, 112 N.J. Super. 509, 271 A.2d 741 (1970); *cf.*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969). Compare *D. H. Overmeyer Co. v. Frick*, 405 U.S. 174 (1972) (upholding a cognovit against a corporation) with *Feutes v. Shevin*, 407 U.S. 67 (1972) (striking down prejudgment replevin in a consumer setting).

²⁵ See *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 449, 251 A.2d 268, 273 (1969).

²⁶ *E.g.*, the minimum duties of the landlord and the tenant should be applied to commercial leases. See OHIO REV. CODE ANN. § 5321.04, 5321.05 (Baldwin Supp. 1974).

²⁷ OHIO REV. CODE ANN. § 5321.01(C) (Baldwin Supp. 1974). For the full text, see note 22 *supra*.

²⁸ *Id.*

²⁹ OHIO REV. CODE ANN. § 5321.01(C)(3) (Baldwin Supp. 1974). For full text, see note 22 *supra*; *cf.* URLTA § 1.202. See also OHIO REV. CODE ANN. § 5739.01(O) (1973), which defines "transient guest" for sales tax purpose as a "person occupying a room or rooms for sleeping accommodations for less than thirty consecutive days."

³⁰ OHIO REV. CODE ANN. § 5321.01(C)(8) (Baldwin Supp. 1974). For full text, see note 22 *supra*. See OHIO REV. CODE ANN. § 5311.01-.22 (Page 1970) for state regulation of condominiums. *Cf.* VA. CODE ANN. § 55-79.39 to 55-79.103 (Interim Supp. 1974).

³¹ OHIO REV. CODE ANN. § 5321.01(C)(7) (Baldwin Supp. 1974). For full text, see note 22 *supra*. See OHIO REV. CODE ANN. § 3733.41-.48 (Baldwin Supp. 1974), for the state's regulation of farm labor camps.

³² OHIO REV. CODE ANN. § 5321.01(C)(6) (Baldwin Supp. 1974). For full text, see note 22 *supra*.

³³ OHIO REV. CODE ANN. § 5321.01(C)(4) (Baldwin Supp. 1974). For full text, see note 22 *supra*.

situations.³⁴ Since under the new act private college students, who reside in a dormitory, are even denied the right to injunctive relief, the only effective remedy for these students is an action for breach of contract against private college and university landlords who fail to perform their statutory duties.³⁵

A notable subject³⁶ covered by the Act is public housing which, like its private residential counterpart, is often in dire need of reform.³⁷ By comparison, some landlord-tenant acts exclude public housing³⁸ but the trend is to provide coverage to such projects.³⁹ Although state landlord-tenant laws are not applicable to wholly federally owned and operated projects, they are applicable to state and municipally owned housing authorities which receive federal financial assistance.⁴⁰

APPLICATION

Ohio's Landlord-Tenant Act became effective on November 4, 1974. The first problem the courts will face is the law's application to leases entered into prior to the effective date. Under the Ohio Constitution, retroactive application of substantive law is prohibited.⁴¹ Remedial legislation, however, is not similarly limited by this constitutional provision, based upon a distinction between changes in accrued rights and changes in remedies to enforce those rights.⁴² Thus, there is nothing to prevent application of the new Act's remedial measures to causes of action accruing after November fourth, but based upon rights existing prior to that date. For example, obligations breached under a lease entered into prior

³⁴ OHIO REV. CODE ANN. § 5321.01(C) (Baldwin Supp. 1974). The exclusion of tenant remedies applies only to private college and university *dormitories*, which would presumably bring any state college or university approved housing within the purview of the act. See text accompanying notes 92-119 *infra*.

³⁵ *Id.* See OHIO REV. CODE ANN. § 5321.12 (Baldwin Supp. 1974), which allows either party to bring an action for breach of contract or duty imposed by law. See also OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974), which allows a tenant when being evicted for nonpayment of his rent to counterclaim.

³⁶ It is also noteworthy that while the URLTA § 1.202(2) excludes land sale contracts, the Ohio act does not.

³⁷ OHIO REV. CODE ANN. § 5321.01(C) (Baldwin Supp. 1974). For full text, see note 22 *supra*. See Note, *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561, 570 (1968) [hereinafter cited as 68 COLUM. L. REV.].

³⁸ See ARIZ. REV. STAT. ANN. § 33-1308(7) (1973).

³⁹ See URLTA § 1-202; See also DEL. CODE ANN. tit. 25, § 5111 (Non Cum. Supp. 1972); FLA. STAT. ANN. § 83.42 (Supp. 1974-75).

⁴⁰ See 68 COLUM. L. REV., *supra* note 37, at 570-576. See generally for provisions pertaining to federal funding, operation and assistance to public housing projects, 42 U.S.C. § 1401-1435 (1970).

⁴¹ OHIO CONST. art. II, § 28. See *Kilbreath v. Ruby*, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968); *Smith v. N.Y. Cent. R. Co.*, 122 Ohio St. 45, 170 N.E. 637 (1930); *Safford v. Metropolitan Life Ins.*, 119 Ohio St. 332, 164 N.E. 351 (1928).

⁴² See *Smith v. N.Y. Central R. Co.*, 122 Ohio St. 45, 170 N.E. 637 (1930). Compare *Kilbreath v. Ruby*, 16 Ohio St. 2d 70, 742 N.E.2d 658 (1968) (longarm statute) with *Bagarian v. Parker Metal Co.*, 382 F. Supp. 766 (N.D. Ohio 1968) and *Lantsberry v. Tilley Lamp Co.*, 270 Ohio St. 2d 303, 272 N.E.2d 127 (1971).

to the enactment date of the law could be enforced by application of remedial provisions of the new Act.⁴³

The application of the substantive sections of the Act, especially the landlord's duties,⁴⁴ creates a more difficult problem since under the Ohio Constitution, they can not be retroactively applied.⁴⁵ However, there is some basis for making retroactive warranties of habitability in Ohio case law. Other jurisdictions have applied these warranties as a matter of public policy prior to the effective date of legislation creating those duties.⁴⁶ Such a pattern should be followed in Ohio under a 1972 case, *Glyco v. Schultz*,⁴⁷ where the court incorporated warranties of habitability in residential leases.

As to the application of the Act to leases entered into after the effective date, the constitutional issue of impairment of the obligation of contract may arise.⁴⁸ The problem dissipates when one considers that private property rights are not absolute, but subject to the reasonable exercise of the state's police power, and that the state has a general police power to impose regulations provided there is a substantial relationship between the regulation and protection of public welfare.⁴⁹ The Ohio Landlord-Tenant Act meets this test because leases as contracts must be interpreted in light of changing concepts of public welfare.⁵⁰ Similar landlord-tenant laws in other states have withstood constitutional attack on the issue of infringement of contract, since there is a substantial state interest in upgrading landlord-tenant relations.⁵¹ The new landlord-tenant law superimposes reasonable rights and duties upon the traditional landlord-tenant relationship.⁵²

⁴³ Sections of the Ohio Landlord-Tenant Act which could be considered remedial are OHIO REV. CODE ANN. § 1923.04 (Baldwin Supp. 1974), pertaining to notice in Forcible Entry and Detainer; OHIO REV. CODE ANN. § 1923.06 (Baldwin Supp. 1974), pertaining to Summons; and OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974), pertaining to counterclaiming at Trial in Forcible Entry and Detainer. See generally *Michaels v. Morse*, 165 Ohio St. 599, 138 N.E.2d 660 (1956).

⁴⁴ OHIO REV. CODE ANN. § 5321.04(A) (Baldwin Supp. 1974).

⁴⁵ See cases cited note 42 *supra*.

⁴⁶ See *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Berizito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

⁴⁷ 35 Ohio Misc. 25, 32, 289 N.E.2d 919, 925 (Mun. Ct. 1972).

⁴⁸ U.S. CONST. art. I, § 10(1); OHIO CONST. art. I, § 28.

⁴⁹ See *City of El Paso v. Simmons*, 379 U.S. 497 (1964); *Homebuilding and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1933); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Smith v. Jullierat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954); *Akron v. Pub. Utilities*, 149 Ohio St. 347, 78 N.E.2d 890 (1948).

⁵⁰ See *Alkire v. Cashman*, 350 F. Supp. 360 (S.D. Ohio 1972), *aff'd*, 477 F.2d 598 (6th Cir. 1973), *cert. denied*, 414 U.S. 858 (1973). See generally cases cited note 49 *supra*.

⁵¹ See *Troy Hill Village Inc. v. Fischler*, 122 N.J. Super. 572, 301 A.2d 177 (1971).

⁵² See *Teonella v. Rettagliata*, 120 N.J. Super. 400, 294 A.2d 431 (1972).

LANDLORD'S DUTIES

Under Ohio common law, prior to *Glyco v. Schultz*,⁵³ in the absence of fraud the landlord made no warranty of fitness in residential premises.⁵⁴ Even where the tenant repaired the premises, he had no right of reimbursement against the landlord.⁵⁵ Since covenants in a lease were independent, a substantial breach by the landlord did not relieve the tenant of his obligation for rent.⁵⁶ Until changed by statute, the obligation to pay rent remained even after the premises were totally destroyed.⁵⁷

The sole dependent covenant which relieved a tenant of his covenant to pay rent was "quiet enjoyment." Under this covenant, the landlord promised that neither he nor anyone with title superior to his would interfere with the tenant's possession. In order to be relieved of the duty to pay rent, the breach not only must be a substantial interference with the tenant's use of the land, but must also have required the tenant to vacate.⁵⁸

The three principal obligations imposed on the landlord under the statute are dependent covenants. Under the statute, the landlord is required: (1) to comply with all health, housing and safety codes which materially affect health and safety; (2) to make repairs to keep the premises fit and habitable, and (3) to keep all common areas of the premises safe and sanitary.⁵⁹ When any one of these obligations is

⁵³ 35 Ohio Misc. 25, 289 N.E.2d 919 (Mun. Ct. 1972).

⁵⁴ See *Burdick v. Cheadle*, 26 Ohio St. 393 (1875); *Rotte v. Meirjohan*, 78 Ohio App. 387, 70 N.E.2d 684 (1947); *Mitchell v. Greive*, 25 Ohio Dec. 670 (Super Ct. 1913).

⁵⁵ See *Holder v. Farmakis*, 66 Ohio L. Abs. 279, 117 N.E.2d 491 (Ct. App. 1951); *Cinn. Oak Motor Co. v. Meyer*, 37 Ohio App. 90, 174 N.E. 154 (1930).

⁵⁶ See *Dickson v. Hunt*, 9 Ohio Dec. 408 (Dis. Ct. 1899); *Henry v. Pittsburgh CC & St. L. R.R. Co.*, 20 Ohio N.P. 118, 50 Ohio Dec. 41 (C.P. 1875). The tenant could, however, have a setoff for rent, see *Nye v. Schuler*, 110 Ohio App. 443, 165 N.E.2d 16 (1959).

⁵⁷ See OHIO REV. CODE ANN. § 5301.11 (Page 1970), which overruled the case of *Linn v. Ross*, 10 Ohio 412 (1841).

⁵⁸ See *Nye v. Schuler*, 110 Ohio App. 443, 105 N.E.2d 16 (1959); *South Main Akron v. Lynn Realty*, 62 Ohio L. Abs. 103, 106 N.E.2d 325 (Ct. App. 1951). Compare *Gulf Refining Co. v. Fetschan*, 130 F.2d 129 (6th Cir. 1942), cert. denied, 318 U.S. 764 (1943) with *Thompson v. N.W. Mutual Life Ins. Co.*, 31 F. Supp. 399 (N.D. Ohio 1937). See generally *Hicks, The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 445, 462 (1972).

⁵⁹ OHIO REV. CODE ANN. (Baldwin Supp. 1974) § 5321.04:

(A) A landlord who is a party to a rental agreement shall:

(1) Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in a safe and sanitary condition;

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances and elevators, supplied or required to be supplied by him;

(5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental

breached, the tenant can, after notice and failure of the landlord to remedy the situation within a reasonable time not exceeding 30 days, pursue the tenant remedies under the statute.⁶⁰ These remedies include the right to deposit all rent payments with the clerk of municipal or county courts.⁶¹ Among other remedies, the tenant has in certain circumstances a statutory right to counterclaim for breach of these dependent covenants.⁶²

The landlord's obligations are not as burdensome as they seem on first reading. The landlord must correct only those housing code violations which materially affect health and safety.⁶³ The landlord has always had this duty. Prior to the enactment of this statute, however, the landlord's duty was owed to the state⁶⁴ and not to the tenant.⁶⁵ The duty to repair also is limited. It extends no further than to keep the premises fit and habitable.⁶⁶

The extent of the landlord's duty to meet housing code regulations and to provide repairs in general will directly depend on the interpretation of the statutory language of "materially affects health and safety" and "fit and habitable." Definitions of these standards may be provided from three sources. The landlord and the tenant may define these standards by agreement, provided that their definitions are not inconsistent with the intent of the statute.⁶⁷ These terms may also be defined by reference to

to the occupancy of the dwelling unit, and arrange for their removal;

(6) Supply running water, reasonable amounts of hot water and reasonable heat at all times except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection;

(7) Not abuse the right of access conferred by division (B) of Section 5321.05 of the Revised Code;

(8) Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary.

(B) If the landlord makes an entry in violation of division (A)(8) of this section, or makes a lawful entry in an unreasonable manner, or makes repeated demands for entry otherwise lawful which have the effect of harassing the tenant, the tenant may recover actual damages resulting therefrom and obtain injunctive relief to prevent the recurrence of the conduct, and if he obtains a judgment, reasonable attorney's fees, or terminate the rental agreement.

⁶⁰ OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1974). See text accompanying notes 92-123 *infra*.

⁶¹ OHIO REV. CODE ANN. § 5321.07(B)(1) (Baldwin Supp. 1974).

⁶² OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974). See text accompanying notes 137-152 *infra*. See also OHIO REV. CODE ANN. § 5321.12 (Baldwin Supp. 1974), which allows the tenant to bring a separate action for breach of contract against a landlord who has breached his statutory duties.

⁶³ OHIO REV. CODE ANN. § 5321.04(A)(1) (Baldwin Supp. 1974). For full text, see note 59 *supra*.

⁶⁴ See OHIO REV. CODE ANN. § 3709.20, 3709.71, 3709.99 (Page 1970).

⁶⁵ *But see* Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Mun. Ct. 1972).

⁶⁶ OHIO REV. CODE ANN. § 5321.04(A)(2) (Baldwin Supp. 1974). For full text, see note 59 *supra*.

⁶⁷ See OHIO REV. CODE ANN. § 5321.06, 5321.13(A), 5321.14 (Baldwin Supp. 1974).

municipal housing codes⁶⁸ and case law from other jurisdictions.⁶⁹

The landlord's third principal obligation, to keep common areas safe and sanitary,⁷⁰ is a codification of the duty imposed upon him by Ohio tort law.⁷¹ Under Ohio case law, a landlord is under a duty to use ordinary care to keep common areas under his control in a reasonably safe condition. He is liable for injuries to the tenant or his guest proximately caused by the failure to perform that duty.⁷² Both the practitioner and the courts may wish to make reference to the landlord's common law tort duty to define his statutory obligation to keep the common areas safe and sanitary.⁷³

Beyond these three principal obligations, the landlord must meet certain other specific statutory requirements. Among these requirements are the duty to provide for the upkeep of plumbing and electrical systems and to provide waste receptacles for buildings containing more than four dwelling units.⁷⁴ The landlord may also have a duty to provide running water, hot water, and heat depending upon the nature of the building in which the dwelling unit is contained. The requirement of providing heat and hot water may also be eliminated depending on who has control of the heating equipment and the nature of the utility hookup itself.⁷⁵ The landlord may also have a duty to maintain appliances furnished to the tenant, but he can pass the responsibility to maintain appliances to the tenant through a stipulation in the lease.⁷⁶

⁶⁸ See, e.g., AKRON CITY CODE § 1820.16(C)(3), which defines unfit as that which creates a "serious hazard to health, morals, safety, or general welfare of the occupants or other residents of the City." See also AKRON CITY CODE §§ 1820, 1828, 1898.99 (1975).

⁶⁹ See *Lemele v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

⁷⁰ OHIO REV. CODE ANN. § 5321.04(A)(3) (Baldwin Supp. 1974). For full text, see note 59 *supra*.

⁷¹ See *Weber v. Schlemmer*, 365 F.2d 323 (6th Cir. 1966); *Cooper v. Roose*, 151 Ohio St. 316, 85 N.E.2d 545 (1949); *Mulaiski v. Brzuchalski*, 117 Ohio App. 480, 192 N.E.2d 669 (1961). Compare *Sidle v. Humphrey*, 13 Ohio St. 2d 45, 233 N.E.2d 589 (1969) with *Oswald v. Jeraj*, 146 Ohio St. 676, 67 N.E.2d 779 (1946).

⁷² See *Young v. Mager*, 41 Ohio App. 2d 60, 70 Ohio Op. 2d 59 (1974).

⁷³ The practitioner should be advised of the possibility of the development of a negligence *per se* tort liability under the statute. The statutory duties defined in OHIO REV. CODE ANN. § 5321.04 (Baldwin Supp. 1974) (for full text, see note 59 *supra*), may become synonymous with "reasonable care." A breach of the statutory duty causing injury to the tenant or his guest may become negligence in itself. See generally PROSSER, THE LAW OF TORTS § 36 (4th ed. 1971), for a discussion of the concept of negligence *per se*.

⁷⁴ OHIO REV. CODE ANN. § 5321.04(A)(4), (5) (Baldwin Supp. 1974). For full text, see note 59 *supra*.

⁷⁵ OHIO REV. CODE ANN. § 5321.04(A)(6) (Baldwin Supp. 1974). For full text, see note 59 *supra*.

⁷⁶ OHIO REV. CODE ANN. § 5321.04(A)(4), 5321.05(A)(7) (Baldwin Supp. 1974). For full text, see note 84 *infra*.

RIGHT OF ACCESS

To enable the landlord to comply with his new obligations, the legislature has provided him with a statutory "right of access,"⁷⁷ which supplements his prior limited right of entry.⁷⁸ The legislature has defined this right by reference to the tenant's duty not to withhold consent in certain situations.⁷⁹ Whether this circular definition is the sum total of the landlord's right of access, the legislature has left unclear.⁸⁰ In any event, the statute provides for a cause of action against both parties. On the landlord's side, he may not abuse his right nor harass the tenant by continually demanding access. If he does abuse his right, the tenant can terminate the lease, obtain an injunction, or, more importantly, sue for actual damages. Upon judgment, the tenant is also entitled to reasonable attorney fees.⁸¹ On the other hand, the tenant may not unreasonably withhold consent. The landlord's remedies mirror those of the tenant where the landlord abuses his right to access.⁸²

TENANT'S DUTIES

Under the common law, the only affirmative duty that a tenant owes to his landlord, outside of the duty to pay rent, is the duty to refrain from committing waste.⁸³ Under the new Act, the tenant retains this duty.⁸⁴ In addition, he must forbid others who are on the premises with his consent

⁷⁷ OHIO REV. CODE ANN. § 5321.04(A) (7) (Baldwin Supp. 1974). For full text *see note 59 supra*.

⁷⁸ At common law, the landlord could enter the premises only to prevent waste. *See Helvich v. Rutherford*, 96 Ohio App. 367, 114 N.E.2d 514 (1953); *Rammell v. Bulen*, 51 Ohio L. Abs. 125, 80 N.E.2d 167 (Ct. App. 1948). *See generally McGuire v. Corn*, 92 Ohio App. 445, 110 N.E.2d 809 (1952); *Coward v. Fleming*, 89 Ohio App. 485, 102 N.E.2d 850 (1951).

⁷⁹ OHIO REV. CODE ANN. § 5321.05(B), (C):

(B) The tenant shall not unreasonably withhold consent for the landlord to enter into the dwelling unit in order to inspect the premises, make ordinary, necessary, or agreed repairs, decorations, alterations, or improvements, deliver parcels which are too large for the tenant's mail facilities, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

(C) If the tenant violates any provision of this section, the landlord may recover any actual damages which result from the violation together with reasonable attorney's fees. This remedy is in addition to any right of the landlord to terminate the rental agreement, to maintain an action for the possession of the premises or injunctive relief to compel access under division (B) of this section.

⁸⁰ *Cf. URLTA* § 3.103 which is specific in defining the landlord's right of access.

⁸¹ OHIO REV. CODE ANN. § 5321.04(B) (Baldwin Supp. 1974). For full text, *see note 59 supra*.

⁸² OHIO REV. CODE ANN. § 5321.05(C) (Baldwin Supp. 1974). For full text, *see note 79 supra*.

⁸³ *See United States v. Bostwick*, 94 U.S. 53 (1877); *Peter v. Durroh*, 28 Ohio App. 2d 245, 277 N.E.2d 69 (1971); *Freedline v. Cielinsky*, 115 Ohio App. 138, 184 N.E.2d 432 (1961).

⁸⁴ OHIO REV. CODE ANN. § 5321.05(A) (Baldwin Supp. 1974):

(A) A tenant who is a party to a rental agreement shall:

(1) Keep that part of the premises that he occupies and uses safe and sanitary;

from committing waste.⁸⁵ The statute also requires the tenant to keep the premises safe and sanitary, to comply with all applicable health and safety codes, to dispose of garbage properly, to keep plumbing fixtures clean, and to operate electrical and plumbing fixtures properly.⁸⁶ The tenant may also assume under the lease the duty to maintain appliances furnished by the landlord.⁸⁷

The most significant requirement imposed upon the tenant is to refrain from disturbing his neighbors.⁸⁸ Since the landlord may enforce this duty,⁸⁹ it may be extremely important to other tenants. Under common law, unless the landlord expressly or impliedly authorized the acts of the tenant, the landlord was not responsible for the tenant's conduct.⁹⁰ Now that the landlord can legally control the tenant, he ought to be responsible for such disturbances to other tenants.⁹¹

TENANT'S REMEDIES

The tenant's basic remedy under the new Act is to withhold rent from the landlord by paying it into the court,⁹² although he does have

(2) Dispose of all rubbish, garbage, and other waste in a clean, safe, and sanitary manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by tenant as clean as their condition permits;

(4) Use and operate all electrical and plumbing fixtures properly;

(5) Comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes;

(6) Personally refrain, and forbid any other person who is on the premises with his permission from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises;

(7) Maintain in good working order and condition any range, refrigerator, washer, dryer, dishwasher, or other appliances supplied by the landlord and required to be maintained by the tenant under the terms and conditions of a written rental agreement;

(8) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises.

⁸⁵ OHIO REV. CODE ANN. § 5321.05(A) (6) (Baldwin Supp. 1974). For full text, see note 84 *supra*.

⁸⁶ OHIO REV. CODE ANN. § 5321.05(A) (2), (3), (4), (5) (Baldwin Supp. 1974). For full text, see note 84 *supra*.

⁸⁷ OHIO REV. CODE ANN. § 5321.05(A) (7) (Baldwin Supp. 1974). For full text, see note 84 *supra*.

⁸⁸ OHIO REV. CODE ANN. § 5321.05(A) (8) (Baldwin Supp. 1974). For full text, see note 84 *supra*.

⁸⁹ OHIO REV. CODE ANN. § 5321.05(C) (Baldwin Supp. 1974).

⁹⁰ See, e.g., *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376 (1909); *Bowers v. Sells*, 125 Ind. App. 282, 123 N.E.2d 194 (1954); *Lancashire v. Garford Mfg. Co.*, 199 Mo. App. 418, 203 S.W. 668 (1918); *Hannon v. Harpy*, 189 Wis. 588, 208 N.W. 255 (1926).

⁹¹ See *Colonial Court Apartments Inc. v. Kern*, 282 Minn. 533, 163 N.W.2d 770 (1968); RESTATEMENT (SECOND) OF PROPERTY § 6.1 (Tent. Draft No. 2, 1974). *Contra*, *Thompson v. Harris*, 9 Ariz. App. 341, 452 P.2d 122 (1969).

⁹² OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1974), which also allows the tenant injunctive relief or to terminate the lease. Rent withholding is prevalent in many jurisdictions. E.g. MASS. GEN. LAWS ANN. ch. 111, § 127a-127h, ch. 239 § 8A (Supp. 1974); MICH. COMP. LAWS ANN. § 125.530, 125.535 (Supp. 1974); MO. ANN. STAT. §§ 441.550-640 (Supp. 1975); N.J. REV. STAT. §§ 2A:42-74 to 2A:42-84 (Supp. 1974);

other remedies.⁹³ The initial step to the tenant's remedies is notice. The tenant may send effective notice under the statute when:

- (1) The landlord has breached the rental agreement or his statutory obligation;
- (2) "[T]he condition of the premises are such that the tenant reasonably believes" that the landlord has breached the rental agreement or his statutory obligations;
- (3) A government agency has found housing code violations which materially affect health and safety.⁹⁴

The notice must specify the condition which the tenant contends represents a violation of the landlord's rental or statutory obligations.⁹⁵ The notice is sent to "the person or place where rent is normally paid."⁹⁶ Upon receipt of the notice, the landlord has 30 days or a reasonable time, whichever is shorter, to rectify the condition.⁹⁷

If the landlord fails to remedy the condition and the tenant is current in rent, the tenant can pursue his remedies under the statute.⁹⁸ The statute presents these remedies in terms of three disjunctive alternatives.⁹⁹ The first and third remedies are very simple: either deposit the rent with the clerk of court, or terminate the lease.¹⁰⁰ The second remedy is a logistician's delight and an attorney's nightmare, in providing the tenant the option to:

Apply to the court for an order directing the landlord to remedy the condition. As part thereof, the tenant may deposit rent pursuant to division (B) (1) of this section, and may apply for an order reducing the periodic rent due the landlord until such time as the landlord does remedy the condition, and may apply for an order to use the rent

N.Y. MULT. DWELL. §§ 302a, 309 (McKinney 1974); N.Y. REAL PROP. ACTIONS § 755 (McKinney Supp. 1974); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1974); VA. CODE ANN. § 55-248.27 (Supp. 1974). *See also* Dreamy Hollow Apart. Corp. v. Lewis, 4 Conn. Cir. 355, 232 A.2d 346 (1966); Burlington Summit Apartment v. Manolato, 233 Iowa 15, 7 N.W.2d 26 (1942); Farrell v. Drew, 19 Misc. 2d 486, 227 N.E.2d 824, 281 N.Y.S. 291 (1967); Himmel v. Chase Manhattan Bank, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (Civ. Ct. 1965); Depaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971), which have upheld rent withholding statutes as constitutional.

⁹³ *See* OHIO REV. CODE ANN. § 5321.12 (Baldwin Supp. 1974), which allows the tenant to bring a separate action for breach of contract against a landlord who breaches his statutory obligation; OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974), which allows tenant to counterclaim in Forcible Entry and Detainer.

⁹⁴ OHIO REV. CODE ANN. § 5321.07(A) (Baldwin Supp. 1974).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974). *See* OHIO REV. CODE ANN. § 5321.18(C) (Baldwin Supp. 1974) (the landlord waives his right of notice if he fails to give the tenant written information as to ownership or managing agent).

⁹⁸ OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974). *See* OHIO REV. CODE ANN. § 5321.09(A) (2) (Baldwin Supp. 1974) (if the tenant is not current in rent or has not given proper notice, the landlord may obtain rent release from the Clerk of Courts).

⁹⁹ OHIO REV. CODE ANN. § 5321.07(B) (1), (2), (3) (Baldwin Supp. 1974).

¹⁰⁰ OHIO REV. CODE ANN. § 5321.07(B) (1), (3) (Baldwin Supp. 1974).

deposited to remedy the condition. In any order issued pursuant to this division, the court may require the tenant to deposit rent with the clerk of court as provided in division (B) (1) of this section.¹⁰¹

A careful deciphering of subsection two reveals that the tenant has these principal options:¹⁰²

- (1) The tenant can seek injunctive relief to compel the landlord to repair the condition and reduce the periodic rent due until the repair is made. Furthermore, rent deposit is unnecessary unless stipulated by the court.¹⁰³
- (2) The tenant can deposit his rent with the court with the understanding that he can later apply for a release of the money to remedy the condition.

How effective will one of the above options (rent deposit, injunctive relief, or termination of the lease) be to the tenant? The first option, simple rent deposit, may motivate the landlord to fix minor defects in order to obtain release of these funds.¹⁰⁴ A more recalcitrant landlord would require the tenant to seek his second option of a court order to compel the landlord to repair.¹⁰⁵ However, the burden is on the tenant to (1) establish the need for repair, and (2) to obtain the court order.¹⁰⁶ This would necessitate the retention of private counsel or legal aid assistance. Since there is no provision for such fees in the Act, the cost involved may and often would exceed the benefit to be gained by the tenant.¹⁰⁷ Besides the expense of the court order, the tenant must first have given the landlord 30 days or a reasonable time, whichever is shorter, to

¹⁰¹ OHIO REV. CODE ANN. § 5321.07(B) (2) (Baldwin Supp. 1974).

¹⁰² *Id.* The alternatives enumerated in the text are not intended to be exclusive. Through the use of ambiguous drafting, subsection two appears to provide the tenant with four options, which are: (1) rent deposit; (2) injunctive relief to compel the landlord to remedy the condition; (3) a court order to have the periodic rent reduced until the landlord remedies the condition, and (4) release of deposited rent to remedy the condition. On its face, the statute allows these four options to be sought individually, together, or in combination. However, there are practical considerations as to the application of all four options together, since certainly the court cannot compel the landlord to repair while at the same time releasing deposited rent to allow the tenant to repair. For further explanation, see URLTA § 4.101, after which, in theory, the Ohio section is modeled.

¹⁰³ OHIO REV. CODE ANN. § 5321.07(B) (2) (Baldwin Supp. 1974). Whenever the tenant seeks a court order, he may be well advised to deposit his rent with the clerk of courts, since he is still obligated on his lease and would otherwise be responsible to pay his rent to the landlord. Although not required to do so, the tenant by depositing his rent may apply even greater leverage against a landlord to repair the premises.

¹⁰⁴ OHIO REV. CODE ANN. § 5321.07(B) (1) (Baldwin Supp. 1974). Repair of the premises by the landlord is the most desirable remedy. See *Javins v. First National Realty Corp.*, 138 App. D.C. 369, 376, 428 F.2d 1071, 1078 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). The act allows for an action for damages in addition to rent withholding. See OHIO REV. CODE ANN. § 5321.12 (Baldwin Supp. 1974).

¹⁰⁵ OHIO REV. CODE ANN. § 5321.07(B) (2) (Baldwin Supp. 1974).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Cf. URLTA §§ 4.101, which allows for attorney fees if the breach by the landlord is willful.

remedy the condition. This delay may be intolerable where emergency situations exist, such as lack of heat in the winter, or inadequate toilet facilities.¹⁰⁸ Even if the tenant wishes to repair the emergency condition using his rent money, he must, under the Act, have court approval.¹⁰⁹ By comparison, other states in such situations allow the tenant to repair, where he can do so in a workmanlike manner, and deduct the amount of the repair from his next month's rent.¹¹⁰ The deduction must be reasonable in relation to the repair and may not exceed one month's rent. Litigation may later arise as to the necessity of the repairs or the reasonableness of the deduction, but at least the premises will be habitable.¹¹¹ "Repair and deduct" statutes provide a simple and more satisfactory remedy to the tenant than the Ohio procedure in which rent is deposited and then released by court order.

The tenant's third option is to terminate the lease and vacate.¹¹² This remedy, while simple and direct, has two disadvantages. First, residential housing is a seller's market and the tenant's ability to quickly find other housing is questionable.¹¹³ Second, if, in fact, the landlord has not breached any of his statutory or lease obligations, the tenant could remain liable on his lease agreement.¹¹⁴

From a social viewpoint, one general problem with the tenant's rent deposit with the court, as well as any increase in tenant's rights and remedies is that it tends to discourage private investment in residential housing.¹¹⁵ In many instances, the profit from residential housing is marginal. Without the continual flow of rent, the landlord can not finance his operation. By allowing the tenant to withhold his rent and deposit it with the court, the landlord may become too financially burdened to

¹⁰⁸ OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974).

¹⁰⁹ OHIO REV. CODE ANN. § 5321.07(B) (2) (Baldwin Supp. 1974).

¹¹⁰ See URLTA § 4.103, which allows repair and deduction for minor defects. See also CAL. CIV. CODE § 1942 (West Supp. 1975); DEL. CODE ANN. tit. 25, § 5306 (Non Cum. Supp. 1972); HAWAII REV. STAT. § 521-64 (Supp. 1974); MONT. REV. CODES §§ 42-201, 202 (1947); N.D. CENT. CODES §§ 47-16-13 (1960); Okla. STAT. ANN. tit. 41, §§ 31, 32 (1954); WASH. REV. CODE § 59.18.100 (Supp. 1973).

¹¹¹ See *Schweiger v. Superior Court of Alameda County*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Jackson v. Riveria*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971).

¹¹² OHIO REV. CODE ANN. § 5321.07(B) (3) (Baldwin Supp. 1974). See OHIO REV. CODE ANN. § 5321.16(B) (Baldwin Supp. 1974), for the tenant's ability to regain his security deposit.

¹¹³ See *Lemele v. Breden*, 51 Hawaii 426, 431, 462 P.2d 470, 475 (1969). See generally ABA Committee on Leases, *Trends in Landlord Tenant Law including the Model Code*, 6 REAL PROPERTY, PROBATE AND TRUST J. 550, 554 (1971) [hereinafter cited as ABA Committee].

¹¹⁴ OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974). However, the right to terminate the lease, one of the tenant's remedies may be based upon a *reasonable belief* due to condition of the premises that the landlord has breached his statutory duties or the rental agreement. See OHIO REV. CODE ANN. § 5321.07(A) (Baldwin Supp. 1974).

¹¹⁵ See ABA Committee, *supra* note 13, at 588, 589.

make needed repairs.¹¹⁶ Other jurisdictions faced with this problem have taken the property into receivership, remedied the condition and placed a lien on the premises.¹¹⁷ The forcing of repairs either by court order or receivership may drive landlords to seek alternative uses for their residential property. Apartment buildings may be torn down and replaced by office buildings, which provide a more attractive investment.¹¹⁸ The net effect of rent withholding and judicial activity may be to increase rents and housing shortages which would frustrate rather than aid the beleaguered tenant.¹¹⁹

In response to the special burden which the tenant's remedies of rent deposit with the court, injunctive relief, and termination of the lease place on smaller landlords, the legislature has exempted landlords of one, two, or three dwelling units.¹²⁰ In order to be exempted, the landlord must send written notice of his ownership of three dwelling units or less to the tenant at the initial time of occupancy.¹²¹ Whether this exemption is a distinct advantage to smaller landlords remains to be seen. When rent is deposited by the tenant with the clerk of court, it is held in escrow, and a landlord who has not breached his obligations can obtain its release.¹²² On the other hand, the tenant of an exempt landlord, who cannot deposit his rent, may nonetheless withhold it, if he feels the landlord has breached his obligations. Thus, the exempt landlord will bring an action in Forcible Entry and Detainer to regain possession and rent due with no guarantee that the tenant will have the money to pay a judgment in the landlord's favor.¹²³ Therefore, is the exempt landlord really granted a benefit by the legislature?

LANDLORD'S ACTION FOR RENTAL RELEASE

The landlord has an effective procedure for obtaining release of

116 Id.

¹¹⁷ See *Community Renewal Foundation, Inc. v. Chicago Title & Trust Co.*, 44 Ill. 2d 284, 255 N.E.2d 908 (1970); ILL. REV. STAT. ch. 24 § 11-31-2 (Smith-Hurd Supp. 1974); *In re Brooke Ave.*, 38 Misc. 2d 589, 236 N.Y.S.2d 833 (Sup. Ct. 1962); N.Y. MULT. DWELL. § 309 (McKinney 1972). See also DEL. CODE ANN. tit. 25, § 5906 (Non Cum. Supp. 1974).

¹¹⁸ See Gibbons, *Residential Landlord Tenant Law: A Survey of Modern Problems with Reference to the Proposed Code*, 21 HASTINGS L.J. 369, 386, 413 (1970).

119 Id.

¹²⁰ OHIO REV. CODE ANN. § 5321.07(C) (Baldwin Supp. 1974). As already mentioned, private college and university dormitories are also excluded. See text accompanying notes 33-35 *supra*.

¹²¹ OHIO REV. CODE ANN. § 5321.07(C) (Baldwin Supp. 1974). The landlord of three units or less is not exempt from the tenant's right to counterclaim in Forcible Entry and Detainer, or the tenant's right to bring a separate action for breach of contract. See OHIO REV. CODE ANN. §§ 1923.061, 5321.12 (Baldwin Supp. 1974).

¹²² OHIO REV. CODE ANN. § 5321.09 (Baldwin Supp. 1974), for the duties of the clerk of court, who may charge 1% of the rent deposited as court costs. See OHIO REV. CODE ANN. § 5321.08 (Baldwin Supp. 1974).

¹²³ OHIO REV. CODE ANN. § 1923.02 (Baldwin Supp. 1974). The unsatisfied judgment creditor-landlord will have to seek the same remedies as any other judgment creditor, such as garnishment. OHIO REV. CODE ANN. § 1911.33 (Page 1968).

funds deposited with the clerk of court.¹²⁴ The landlord may obtain a total rental release in three situations which are:

- (1) The landlord has rectified the condition complained of and the tenant sends written notice to the clerk of courts that the condition has been remedied;
- (2) The tenant did not give proper notice or was not current in rent when he deposited his rent with the clerk of courts, or
- (3) The landlord has not breached his rental agreement, his statutory obligations, or violated any "building, housing, health or safety code."¹²⁵

Upon filing of a complaint for rental release, the tenant is given notice and the right to answer and counterclaim as in "any other civil case."¹²⁶ A trial on the merits must be held within 60 days of the filing of the landlord's complaint.¹²⁷ Once again, the tenant is burdened with the need of legal counsel. This will be both time-consuming and expensive, since there is no provision for recoupment of the tenant's attorney's fees, even if he is successful at trial. However, if the tenant himself has caused the condition upon which he deposited his rent or has acted in bad faith, he is liable for damages plus reasonable attorney's fees.¹²⁸ Altogether, the tenant's remedies are not very attractive.

Further complicating matters, the landlord may, during the pendency of his action for total rental release, apply for a partial rental release.¹²⁹ The landlord may bring an action for partial rental release to meet his usual and customary operating expenses such as mortgages and insurance premiums.¹³⁰ Whether this action is *ex parte* or before both parties is not stated, but certainly the landlord's ability to recoup part of the rent will lessen his incentive to make any necessary repairs. In considering whether to release part of the rent, the court will consider factors such as the amount of rent derived from other dwelling units in the building, operating expense of these units, and the cost to remedy the condition alleged by the tenant.¹³¹ A factor notably not included is the landlord's income obtained from other apartment buildings. Therefore, a seemingly wealthy landlord may recover substantial funds on the narrow criteria enumerated in the statute. The courts will have to consider whether the statute's criteria are exclusive.¹³²

¹²⁴ OHIO REV. CODE ANN. § 5321.09 (Baldwin Supp. 1974).

¹²⁵ OHIO REV. CODE ANN. § 5321.09(A) (1), (2), (3) (Baldwin Supp. 1974).

¹²⁶ OHIO REV. CODE ANN. § 5321.09(B) (Baldwin Supp. 1974).

¹²⁷ *Id.*, although the court may grant a continuance upon a showing of good cause.

¹²⁸ OHIO REV. CODE ANN. § 5321.09(D) (Baldwin Supp. 1974).

¹²⁹ OHIO REV. CODE ANN. § 5321.10(A) (Baldwin Supp. 1974).

¹³⁰ *Id.*

¹³¹ OHIO REV. CODE ANN. § 5321.10(B) (Baldwin Supp. 1974).

¹³² *Id.*

LANDLORD'S REMEDIES

Under prior Ohio law, the landlord had a quick summary remedy, in Forcible Entry and Detainer, to evict a tenant who was wrongfully holding possession by either holding over his term or being in default of his rent payments.¹³³ The new law does not disturb this basic landlord remedy, but expands both the scope and procedure in Forcible Entry and Detainer to respond to the new rights and duties on the landlord and the tenant. The scope of the landlord's remedy in Forcible Entry and Detainer is expanded to include (1) breaches by the tenant of his statutory duties which materially affect health and safety, and (2) breaches by the tenant of the rental agreement.¹³⁴

From a procedural standpoint, the complaint must specify the alleged breach since the notice requirement differs depending upon which section the landlord bases his action.¹³⁵ It is also necessary that proper summons containing the new statutory language be served on the tenant, five days prior to the trial date instead of the former three days.¹³⁶

(A) TENANT'S RIGHT TO COUNTERCLAIM AND RAISE DEFENSES IN FORCIBLE ENTRY AND DETAINER

The landlord often used his remedy of Forcible Entry and Detainer to both evict a tenant who failed to pay rent, while at the same time adding

¹³³ OHIO REV. CODE ANN. § 1923.02 (Baldwin Supp. 1974).

¹³⁴ OHIO REV. CODE ANN. § 1923.02(H)(I) (Baldwin Supp. 1974). The landlord may not write tenant's duties into leases to shorten the notice requirement; this would be prohibited as an inconsistent provision. See OHIO REV. CODE ANN. § 5321.06 (Baldwin Supp. 1974).

¹³⁵ OHIO REV. CODE ANN. § 1923.02(H)(1) (Baldwin Supp. 1974). Thirty days notice is required for an alleged breach of the tenant's duties, within which the tenant can remedy the condition. See OHIO REV. CODE ANN. § 5321.11 (Baldwin Supp. 1974). Three days notice must be given for a breach of the rental agreement. See OHIO REV. CODE ANN. § 1923.04 (Baldwin Supp. 1974). Notice must have the proper statutory language in a conspicuous manner: "You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance."

In order to terminate month to month tenancy, 30 days notice is required. Seven days is required for a week to week tenancy. See OHIO REV. CODE ANN. § 5321.17 (Baldwin Supp. 1974).

¹³⁶ OHIO REV. CODE ANN. § 1923.06 (Baldwin Supp. 1974). The language must be present in a conspicuous manner:

A complaint to evict you has been filed with this court. No person shall be evicted unless his right to possession has ended and no person shall be evicted in retaliation for the exercise of his lawful rights. If you are depositing rent with the clerk of this court, you shall continue to deposit such rent until the time of the court hearing. The failure to continue to deposit such rent may result in your eviction. You may request a trial by jury. You have the right to seek legal assistance. If you cannot afford a lawyer, you may contact your local legal aid or legal service office. If none is available, you may contact your local bar association.

There is an issue of whether summons must be served under the Civil Rules. Compare *Cotterman v. Fahrig*, 28 Ohio Misc. 237, 277 N.E.2d 466 (Mun. Ct. 1971) with *Jansen v. Barclay Square*, 34 Ohio Misc. 14, 295 N.E.2d 443 (Mun. Ct. 1973).

a supplemental action to recover the rent due.¹³⁷ Since the primary action was the landlord's right to regain possession, this action was normally tried separate and apart from the action for rent.¹³⁸ Prior to *Glyco v. Schultz* the landlord generally made no covenant as to the condition of the premises.¹³⁹ The only defense available to the tenant, at a trial for possession, was payment of rent.¹⁴⁰ Thus, the landlord could successfully evict the tenant, who had no valid counterclaim against the landlord's action for possession.¹⁴¹

Under the new Ohio law, whenever the tenant fails to pay his rent while in possession, and the landlord responds by seeking to evict the tenant or bring a separate action for rent due, the tenant is given a statutory right to counterclaim and raise defenses.¹⁴² Thus, a practical effect of the new act is that the landlord now joins his primary action to regain possession along with his supplemental action for rent.¹⁴³ At the hearing, the tenant can counterclaim for breaches by the landlord of his statutory duties or the rental agreement along with the right, in proper circumstances, to raise the defense of retaliatory eviction.¹⁴⁴

If a tenant wishes to counterclaim, he must pay special attention to rule 13 of the Ohio Rules of Civil Procedure and the effects of *res judicata*.¹⁴⁵ The unchanged section of Forcible Entry and Detainer states that a judgment is "not a bar to a later action brought by either party."¹⁴⁶ However, when the landlord adds the second cause of action for rent to his primary action for possession, the nature of the tenant's counterclaims may change from permissive¹⁴⁷ to compulsory counterclaims.¹⁴⁸ In such

¹³⁷ OHIO REV. CODE ANN. § 1923.02(A), (B) (Baldwin Supp. 1974).

¹³⁸ See *Lindsey v. Normet*, 405 U.S. 56 (1972); *ex rel Jenkins v. Hamilton County Ct.*, 114 Ohio App. 231, 173 N.E.2d 186 (1958); *Cotterman v. Fahrig*, 28 Ohio Misc. 237, 277 N.E.2d 466 (Mun. Ct. 1971).

¹³⁹ 35 Ohio Misc. 25, 289 N.E.2d 919 (Mun. Ct. 1972). See text accompanying notes 53-58 *supra*.

¹⁴⁰ See *Lauch v. Monning*, 15 Ohio App. 2d 112, 239 N.E.2d 675 (1968); *Schmidt v. Hummell*, 81 Ohio App. 167, 73 N.E.2d 806 (1947). See also *Meyer v. Carmichael*, 29 Ohio App. 2d 183, 279 N.E.2d 622 (1971).

¹⁴¹ See *Lindsey v. Normet*, 405 U.S. 56 (1972); *Central Park Place v. McDowell*, 38 Ohio App. 2d 29, 311 N.E.2d 533 (1974). But see *Kuhn v. Griffin*, 3 Ohio App. 2d 165, 209 N.E.2d 824 (1964).

¹⁴² OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974). See also URLTA § 4.105; *Rome v. Walker*, 38 Mich. App. 485, 196 N.W.2d 850 (1972). But see *Lindsey v. Normet*, 405 U.S. 56 (1972).

¹⁴³ OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974).

¹⁴⁴ *Id.*

¹⁴⁵ OHIO R. CIV. P. 13.

¹⁴⁶ OHIO REV. CODE ANN. § 1923.03 (Page 1968).

¹⁴⁷ OHIO R. CIV. P. 13(a). See *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961); *Waltham Industries Corp. v. Thompson*, 53 F.R.D. 93, 95 (D. Conn. 1971).

¹⁴⁸ OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974); OHIO R. CIV. P. 13(b)). See *Rosenthal v. Fowler*, 12 F.R.D. 388 (S.D.N.Y. 1952).

a case, the tenant's counterclaims arise out of the same cause of action, namely, the lease, and are therefore compulsory counterclaims, which if not raised at trial will be barred from later suits.¹⁴⁹ The tenant should be careful to raise his counterclaims at the proper time.

In the event the tenant counterclaims, the court may require the depositing of "past due rent and rent becoming due during the pendency of the action."¹⁵⁰ While the concept of prepayment of rent as a condition precedent to counterclaiming is not unique to the Ohio law, there remains a substantial question as to what circumstances necessitate rent deposit.¹⁵¹ In New York, for example, a state court struck down as unconstitutional a statute which required the mandatory depositing of funds as a condition precedent to asserting a counterclaim.¹⁵² Other states have been reluctant to impose such a burden on the tenant and only require prepayment in order to protect the landlord's interest.¹⁵³ The Ohio courts should follow this example by examining the potential merits of each case before requiring deposit.

(B) EQUITY POWER OF THE COURT TO INSPECT RESIDENTIAL PREMISES

In order to aid the court in ascertaining the condition of the residential premises, the statute authorizes the court to order an inspection of the premises by an appropriate government agency.¹⁵⁴ In addition, the court at its discretion is authorized to order restoration of the premises to a habitable condition and where the tenant has vacated, it may refuse to allow any rerental until the premises are habitable.¹⁵⁵ While this procedure is permitted in the case where the landlord brings suit in Forcible Entry and Detainer, it is deleted from the already discussed tenant's remedies.¹⁵⁶ Certainly, a court-ordered inspection of the premises to expose housing code violations would ease the burden on the tenant to obtain injunctive relief.¹⁵⁷ The courts should consider using their equity power to supplement the tenant's remedies.

¹⁴⁹ OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974). See *Dindo v. Whitney*, 451 F.2d 1 (1st Cir. 1971); *Mesker Bros. Iron Co. v. Donata Corp.*, 401 F.2d 275 (4th Cir. 1968). See generally Wright, *Estoppel by Rule: Compulsory Counterclaim under Modern Pleading*, 38 MINN. L. REV. 423 (1954); WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1417 (1971).

¹⁵⁰ OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974).

¹⁵¹ *Id.*

¹⁵² See *Amanuensis Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971), which held unconstitutional N.Y. MULT. DWELL. § 302(c) (McKinney 1971).

¹⁵³ See *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970). See also *Cooks v. Fowler*, 459 F.2d 1269 (D.C. Cir. 1971).

¹⁵⁴ OHIO REV. CODE ANN. § 1923.15 (Baldwin Supp. 1974).

¹⁵⁵ *Id.*

¹⁵⁶ OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1974).

¹⁵⁷ *Id.*

(C) JUDGEMENTS WHEN THE TENANT COUNTERCLAIMS
IN FORCIBLE ENTRY AND DETAINER

As already discussed, the new act provides for a joinder of the landlord's two causes of action, possession and rent, while at the same time allowing the tenant to counterclaim and raise defenses.¹⁵⁸ Regardless of who prevails in the litigation, the tenant can still have possession of the premises if he pays into the court the amount necessary to satisfy the judgment for rent obtained by the landlord.¹⁵⁹ The landlord may not refuse the money and evict the tenant. Thus, the tenant may leave his rent unpaid, be successfully sued by the landlord in Forcible Entry and Detainer, and then, upon paying the amount due under the judgment into the court, be in the same position as if he had paid his rent on time.¹⁶⁰

Under this procedure, a well-advised tenant may refuse to pay his rent rather than use the tenant's remedies (rent deposit with the court, injunctive relief, terminating lease)¹⁶¹ if he feels the landlord has breached any of his obligations. The tenant may notify the landlord of the breach and that no rent will be paid until the condition is remedied. The landlord is placed in the perplexing position of deciding between the time and expense of Forcible Entry and Detainer and remedying the condition. The end result in either case is that the tenant will still be in possession of the premises.¹⁶² In the meantime, the tenant can deposit his rent money with the bank, rather than the clerk of courts.

Since the new Act provides a better remedy for the tenant in refusing to pay his rent, than in paying his rent to the clerk of courts, the Ohio courts will have to decide whether this is the true intent of the statute. The courts may have to impose a good faith requirement on the tenant counterclaiming, to parallel the same requirement imposed on the tenant's rent deposit,¹⁶³ and to avoid tenant misuse.¹⁶⁴ If the courts do not impose such a requirement, the elaborate rent depositing procedure as well as the other tenant remedies may not be utilized.

RETALIATORY ACTION

In order to protect the tenant in the exercise of his new statutory

¹⁵⁸ OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The only disadvantage to a tenant by not being current in rent is that he loses the defense of retaliatory eviction. See OHIO REV. CODE ANN. § 5321.02, 5321.03(A) (1) (Baldwin Supp. 1974).

¹⁶¹ OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1974).

¹⁶² OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974). If the tenant can pay the judgment, he still retains possession after the landlord's action.

¹⁶³ OHIO REV. CODE ANN. § 5321.09(D) (Baldwin Supp. 1974), which states that if the tenant has deposited his rent in bad faith, he will be liable for the damages caused the landlord plus reasonable attorney fees.

¹⁶⁴ See URLTA § 1.301(4), which defines good faith as "honesty in fact in the conduct of a transaction concerned." See also URLTA § 4.105, which requires the tenant to counterclaim in good faith.

rights and to promote the reporting of housing code violations, the new Act restricts¹⁶⁵ the landlord's absolute right to terminate a periodic tenancy.¹⁶⁶ Traditionally, some landlords would respond to a complaining tenant by terminating the lease. The effect of termination was to silence that particular tenant while setting an example for other tenants. Since retaliatory eviction on the part of the landlord has the potential to undermine the entire Landlord-Tenant Act, the legislature has prohibited such conduct.¹⁶⁷

More specifically, the landlord is prohibited from increasing rent, decreasing services, evicting or threatening to evict in response to a tenant who asserts one of his protected rights, which are: (1) complaining to a government agency of a violation which materially affects health and safety; (2) complaining to the landlord concerning a breach of his statutory obligations, and (3) joining a tenant union.¹⁶⁸ Upon a successful showing of retaliatory conduct on the part of the landlord, the tenant can either regain possession, if he has been evicted by the landlord, or terminate the lease or, in appropriate circumstances, raise retaliatory action as a defense to a landlord's eviction suit in Forcible Entry and Detainer.¹⁶⁹ In addition, the tenant can recover actual damages plus reasonable attorney fees.

While the purpose behind the Ohio statute is commendable, it may not afford the tenant the necessary protection from the landlord's retaliatory conduct, since there are three decided loopholes for the landlord.¹⁷⁰ The first is that he is only prohibited from retaliating against a tenant who complains to a government agency of a violation which in actuality materially affects health and safety.¹⁷¹ Conversely, under a strict reading of the statute, the landlord can retaliate against a tenant who in good faith complains to a government agency of violations which are not

¹⁶⁵ OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1974).

¹⁶⁶ Calvin v. Martin, 64 Ohio L. Abs. 265, 11 N.E.2d 786 (Ct. App. 1952).

¹⁶⁷ See Robinson v. Diamond Housing Co., 463 F.2d 853 (D.C. Cir. 1972); Edwards v. Haib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 106 (1969). See also Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971); Fredman v. Clore, 13 Ill. App. 3d 903, 301 N.E.2d 7 (1973); Markese v. Cooper, 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972); Cornell v. Dimmick, 73 Misc. 2d 384, 342 N.Y.S.2d 275 (Civ. Ct. 1973); Tom Point Apart. v. Goudward, 72 Misc. 2d 478, 339 N.Y.S.2d 281 (Civ. Ct. 1972); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

¹⁶⁸ OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1974).

¹⁶⁹ *Id.* The tenant may not use retaliatory eviction as a defense to a landlord's eviction proceeding in four situations: (1) the tenant is in default in rent payments; (2) the tenant is holding over his term; (3) the tenant himself or others on the premises with his consent were the primary cause of applicable code violations, and (4) in order for the landlord to repair the premises, the tenant must vacate. However, the tenant can still bring an action for any damages caused by the landlord's retaliatory conduct. See OHIO REV. CODE ANN. § 5321.03 (Baldwin Supp. 1974).

¹⁷⁰ OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1974).

¹⁷¹ OHIO REV. CODE ANN. § 5321.02(A)(1) (Baldwin Supp. 1974). However, URLTA § 5.101 is worded the same way.

code violations or not serious code violations. Thus, paradoxically, under a statute designed to promote the reporting of housing code violations, the tenant, who has no expertise in housing code regulations, may be reluctant to report a violation since if he is incorrect in his assertion of a violation, he will have no protection under the statute.¹⁷²

Secondly, the landlord may be provided a loophole since the statute does not enumerate what constitutes a prima facie case of retaliatory conduct.¹⁷³ By comparison, many states aid the tenant by creating a rebuttable presumption that the landlord's motive is retaliatory when, within a specified period of time after the tenant has asserted a protected right, the landlord brings an action for eviction or increases the rent.¹⁷⁴ The Ohio law affords the tenant no such protection and grants the landlord the unrestricted right to increase "the rent to reflect the cost of improvements" or "the cost of operation of the premises."¹⁷⁵ Since the Ohio law allows the landlord economic grounds to increase the rent, the tenant appears to have the difficult burden to show: (1) he asserted a protected right; (2) the landlord knew he asserted that right, and (3) the action taken by the landlord was for the sole purpose of retaliation.¹⁷⁶

The third loophole for the landlord is that, since he can increase the rent to reflect the costs of improvements or increased operating costs on the premises, he may use this right to pass back onto the tenant the expense of any repairs made necessary by tenant complaints.¹⁷⁷ Whether needed repairs are to be termed "improvements" or increased operating expenses will be left for the court to decide.¹⁷⁸ However, to allow the landlord the right to make the tenant pay the costs of repairs may stifle any further attempts by the tenant to complain about the need to repair.

SECURITY DEPOSITS

The landlord in a landlord-tenant relationship will require the tenant

¹⁷² OHIO REV. CODE ANN. § 5321.02(A) (1) (Baldwin Supp. 1974). However, the tenant is allowed to pursue his remedies based upon reasonable belief due to the condition of the premises. See OHIO REV. CODE ANN. § 5321.07(A) (Baldwin Supp. 1974).

¹⁷³ OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1974).

¹⁷⁴ See URLTA § 5.101; CAL. CIV. CODE § 1942.5 (West Supp. 1975); CONN. GEN. STAT. REV. § 19-375a (Supp. 1975); DEL. CODE ANN. tit. 26, § 5516 (Supp. 1972); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1975); MASS. ANN. LAWS ch. 239, § 2A (Supp. 1975); MINN. STAT. ANN. § 566.03 (Supp. 1975); N.H. REV. STAT. ANN. §§ 540:13-a-b (1974); N.J. STAT. ANN. § 242-10.10 (Supp. 1975); N.Y. UNCONSOL. LAWS §§ 8590, 8609 (McKinney 1974); PA. STAT. ANN. tit. 35 § 1700-1 (Supp. 1975).

¹⁷⁵ OHIO REV. CODE ANN. § 5321.02 (C) (Baldwin Supp. 1974).

¹⁷⁶ Cf. MASS. ANN. LAWS ch. 239, § 2A (Supp. 1974); MINN. STAT. ANN. § 566.03 (Supp. 1974); URLTA § 5.101; Robinson v. Diamond Housing Co., 463 F.2d 853 (D.C. Cir. 1972); Applestein v. Quinn, 281 N.E.2d 228 (Mass. 1972); Brown v. Olson, 291 Minn. 546, 192 N.W.2d 188 (1971); Pine Realty Co. v. Guarino, 126 N.J. Super. 134, 312 A.2d 898 (1973); Silberg v. Lipscomb, 117 N.J. Super. 491, 285 A.2d 86 (1971).

¹⁷⁷ OHIO REV. CODE ANN. § 5321.02(C) (Baldwin Supp. 1974).

¹⁷⁸ *Id.* Cf. URLTA § 5.101 which allows the landlord no absolute right to increase rent.

to deposit a sum with him in order to secure the tenant's performance.¹⁷⁹ While the new Act does not abrogate this right, it does create a duty, under certain circumstances, to pay interest at a rate of 5% per annum on portions of the deposit which are in excess of \$50.00 or one month's rent, whichever may be the greater.¹⁸⁰ While this can be seen as a minor deterrent to the landlord's charging of an excessive amount, it actually is of little value to the normal tenant since the majority of deposits demanded are generally one to two months' rent or an even lesser amount.¹⁸¹

The new Act codifies what was previously a common law concept in Ohio, and allows the landlord to apply the deposit toward past due rent and to any damages which the tenant may have caused by a violation of the statutory duties as itemized in section 5321.05,¹⁸² or other duties contained in the rental agreement between the parties.¹⁸³ When the landlord does so elect to make a deduction from the security deposit at the termination of the relationship, he must itemize and identify in writing the purpose for which each and every deduction is made and forward the same with the amount remaining within 30 days.¹⁸⁴ The tenant also has an obligation, under this section, to give the landlord written notice of his new or forwarding address to which the deposit and itemized list may be sent.¹⁸⁵

When the tenant has thus given notice and the landlord fails to comply with his statutory duties, the landlord is subjected to the tenant's right to recover the security deposit due him. In addition, the court may grant damages in an amount equal to that sum wrongfully withheld, and reasonable attorney's fees expended in the tenant's effort to regain his property.¹⁸⁶ Conversely, if the tenant does not give the required notice, he loses his right to punitive damages and compensation for attorney's fees and may recover only the security deposit due him from the landlord.¹⁸⁷

A strict reading of the statute reveals that the landlord is penalized

¹⁷⁹ See OHIO REV. CODE ANN. § 5321.01(E) (Baldwin Supp. 1974), which defines security deposit as "any deposit of money or property to secure performance by the tenant under a rental agreement."

¹⁸⁰ OHIO REV. CODE ANN. § 5321.16(A) (Baldwin Supp. 1974). This section also requires the landlord to pay annually the interest on the deposit to tenants who remain in possession over six months.

¹⁸¹ See Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 825 (1974), where the author points out that the majority of leases are limited to security deposits not in excess of one month's rent. For example, under OHIO REV. CODE ANN. § 5321.16(A) (Baldwin Supp. 1974), if the monthly rent due is \$100 and the security deposit is \$110, the landlord pays interest on \$10.00.

¹⁸² See *Cain v. Brown*, 105 Ohio St. 264, 136 N.E. 916 (1922); *Tuteur v. P. & F. Enterprises, Inc.*, 21 Ohio App. 2d 122, 255 N.E.2d 284 (1970).

¹⁸³ For a full discussion, see text accompanying notes 83-91 *supra*.

¹⁸⁴ OHIO REV. CODE ANN. § 5321.16(B) (Baldwin Supp. 1974).

¹⁸⁵ *Id.*

¹⁸⁶ OHIO REV. CODE ANN. § 5321.16(C) (Baldwin Supp. 1974).

¹⁸⁷ OHIO REV. CODE ANN. § 5321.16(B) (Baldwin Supp. 1974).

only when he fails to forward to the tenant an itemized list of the deductions and the amount of the security deposit remaining after the deductions.¹⁸⁸ Thus, deductions which are nonetheless frivolous but itemized and sent to the tenant along with the remaining security deposit will not subject the landlord to the penalty section.¹⁸⁹ In any case, by imposing the most severe penalty in the act, the statute has aided the tenant in his quest to regain his deposit, by providing him with the opportunity to have a clear written record of all damages which the landlord has allegedly incurred during the tenant's possession.

SELF-HELP PROHIBITED

Under the common law, the landlord was deemed to have a quick remedy against tenants through the self-help eviction.¹⁹⁰ Provided, of course, that the landlord did not breach the peace in the utilization of this method, he saved both the time and expense which otherwise would have been involved if the matter were litigated in the courts. The new Act not only enlarges the rights of tenants in Forcible Entry and Detainer,¹⁹¹ but also limits the common law right by prohibiting self-help evictions even in situations where the tenant's right of possession has ceased.¹⁹²

While distress for rent has been given a certain amount of recognition in other states, it has never gained the support of the judiciary in Ohio.¹⁹³ This concept is continued in the Act by prohibiting summary seizure of the tenant's property by the landlord for the purpose of securing past rent due except pursuant to a court order.¹⁹⁴

The prohibition against self-help remedies as contained in the Act is not merely an empty right. Section 5321.15(C) includes a penalty for the landlord's violation of either the self-help or the distress provisions. That particular section grants to the tenant a cause of action for all damages

¹⁸⁸ OHIO REV. CODE ANN. § 5321.16(B) (Baldwin Supp. 1974).

¹⁸⁹ OHIO REV. CODE ANN. § 5321.16(C) (Baldwin Supp. 1974). However, there may be an alternative interpretation of the application of the penalty section against landlord misconduct, since punitive damages are equal to the undefined term "wrongfully withheld" amount. In view of the expanded rights for tenants under the new act, a fair interpretation of the amount "wrongfully withheld" may subject the landlord to penalty when he deducts for frivolous but itemized deductions, or itemized deductions for damages which are outside the tenant's statutory or lease obligations. In either case, such itemized deductions from the security deposit by the landlord may imply bad faith and a wrongful withholding of the security deposit, which should subject him to penalty. However, while the interpretation provided in the text is more in line with a strict reading of the statute, this point seems destined to be determined by litigation in the courts. See URLTA § 2.101.

¹⁹⁰ See *Smith v. Hawkins*, 2 Ohio Dec. Reprint 733 (1862); Note, *Forcibly Ejected Tenant—Damages, Possession, Both, or Nothing*, 28 U. CIN. L. REV. 369 (1959). But see *Edwards v. C. N. Investment Co.*, 27 Ohio Misc. 57, 272 N.E.2d 652 (Mun. Ct. 1972).

¹⁹¹ OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974).

¹⁹² OHIO REV. CODE ANN. § 5321.15 (Baldwin Supp. 1974).

¹⁹³ 1 AMERICAN LAW OF PROPERTY § 3.72 (A. J. Casner ed. 1952).

¹⁹⁴ OHIO REV. CODE ANN. § 5321.15(B) (Baldwin Supp. 1974).

arising from wrongful acts of the landlord plus reasonable attorney fees incurred in prosecuting the action. Such a provision should serve to make an errant landlord wary of impeding the tenant's statutorily recognized rights.

FUTURE LEASES

The drafters of leases which are utilized subsequent to the enactment date of the act, should concern themselves with specific compliance with four particular stipulations added to the Ohio code by the new Act.¹⁹⁵ The first of these sections requires that the residential tenant be given written notice of the name and address of the owners of the rental premises and the owner's agent.¹⁹⁶ The underlying purpose of such a requirement is not only to enable the tenant to ascertain the true identity of his landlord, but also to afford an efficient method of initiating the legal proceedings against the landlord which are authorized under the new Act.¹⁹⁷ By failing to comply with this section, the landlord waives his right to notice from the tenant that rental funds have been deposited with the clerk of courts,¹⁹⁸ and the right to notice by the clerk that the funds have been so deposited,¹⁹⁹ each of which would otherwise be mandatory.

The second relevant provision prohibits the inclusion within the rental agreement of exculpatory and cognovit clauses and agreements whereby the tenant must pay the attorney's fees of the landlord.²⁰⁰ Each of these clauses would otherwise limit the liability of the landlord to a great extent. In addition, the landlord may not transfer his interest in the premises by rental agreement, assignment, conveyance, trust, deed, or security instrument free of his statutory duties.²⁰¹ While the statute is unclear as to whether the original landlord retains responsibility for the fulfillment of his statutory duties, it is certain that the landlord remains liable on his express covenants, such as those to repair the premises, even after an assignment to a third party.²⁰²

The third factor evolved by the legislature was created in an attempt to protect the tenant and insure that all of the statutory rights created in the act remain available. Basically, the majority of leases entered into by the tenant are set forth in standardized forms which are provided by the landlord on somewhat of a "take it or leave it basis."²⁰³ Even in cases

¹⁹⁵ OHIO REV. CODE ANN. § 5321.06, 5321.13, 5321.14, 5321.18 (Baldwin Supp. 1974). See Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836 (1974).

¹⁹⁶ OHIO REV. CODE ANN. § 5321.18 (Baldwin Supp. 1974).

¹⁹⁷ See URLTA § 2.102, and comments thereto.

¹⁹⁸ OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974).

¹⁹⁹ OHIO REV. CODE ANN. § 5321.08(A) (Baldwin Supp. 1974).

²⁰⁰ OHIO REV. CODE ANN. § 5321.13(B) (C) (D) (Baldwin Supp. 1974).

²⁰¹ OHIO REV. CODE ANN. § 5321.13(E) (Baldwin Supp. 1974).

²⁰² For discussion of this concept, see BURBY, REAL PROPERTY § 58 (3d ed. 1965).

²⁰³ See *Javins v. First National Realty Corp.*, 138 App. D.C. 369, 377, 428 F.2d 1071, 1079 (D.C. 1970), cert. denied, 400 U.S. 925 (1970); Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970).

where the lease is not on a standardized form, but is drawn up on an individual basis, it would seem likely that its contents would be found to be more favorable to the landlord. In order to counter this, the Act provides that no lease may contain a provision inconsistent with or prohibited by the Act,²⁰⁴ nor may it provide for the modification or waiver of rights expressly granted in the Act.²⁰⁵ The only exception to this mandate allows a clause whereby the tenant's duties are expressly assumed by the landlord.²⁰⁶

The fourth and most interesting provision involves a carryover of the aspects of unconscionability, which are included within section 2-302 of the Uniform Commercial Code.²⁰⁷ This was accomplished in the new Act by substituting the words "rental agreement" wherever "contract" appeared and retaining the remaining text of UCC 2-302 in its entirety.²⁰⁸ Prior to this addition of the Code concept of unconscionability, which was initially drafted merely for use in the sales area,²⁰⁹ it had met with only limited success when applied by analogy to real estate rental agreements.²¹⁰ While this may serve as a drawback in some situations, the new Act will conceivably allow the varying concepts of economic duress,²¹¹ one-sidedness²¹² and deceptive forms²¹³ to be applied to lease arrangements. Since this is arguably intended to provide the same protection to the tenant as is afforded to the consumer in the sales arena, the courts should strictly scrutinize individual leases to fulfill the intentions of this section.²¹⁴

²⁰⁴ OHIO REV. CODE ANN. § 5321.06 (Baldwin Supp. 1974).

²⁰⁵ OHIO REV. CODE ANN. § 5321.13(A) (Baldwin Supp. 1974).

²⁰⁶ OHIO REV. CODE ANN. § 5321.13(F) (Baldwin Supp. 1974).

²⁰⁷ OHIO REV. CODE ANN. § 5321.14 (Baldwin Supp. 1974).

²⁰⁸ Compare OHIO REV. CODE ANN. § 5321.14 (Baldwin Supp. 1974) with UNIFORM COMMERCIAL CODE § 2-302.

²⁰⁹ See Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 806-821 (1974).

²¹⁰ See Seabrook v. Commuter Housing Co., 71 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972); see also 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (Sup. Ct. 1973).

²¹¹ See *In re Elkins Dell Mfg. v. Dorsett Steel*, 253 F. Supp. 864 (E.D. Pa. 1966).

²¹² See Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

²¹³ See Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAAMI L. REV. 121, 139-42 (1968).

²¹⁴ See note 13 *supra*; Williams v. Walker Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); RESTATEMENT (SECOND) LAW OF CONTRACTS § 234 Comment(d) (Tent. Draft Nos. 1-7 (1973)).

CONCLUSION

The new Ohio law has brought the landlord-tenant relationship into the twentieth century. The nature of the relationship is now governed by statute instead of common law. By creating rights and duties for both the landlord and tenant, the legislature has established a policy of promoting fit and decent housing. The purpose of this article has not been to criticize this new legislation, but to point out to the court and to the practitioner the possible interpretations of the new Act.²¹⁵

ROBERT J. CROYLE

FOUR YEARS OF ENVIRONMENTAL IMPACT STATEMENTS: A REVIEW OF AGENCY ADMINISTRATION OF NEPA

INTRODUCTION

THE FEDERAL GOVERNMENT, through its presence in almost every phase of the nation's activity, is shaping the character of the future. This is perhaps nowhere more true than in the field of environmental concerns where choices about uses of our physical resources are frequently irrevocable. Recognizing this, Congress set out to impose on the federal government a course of "preventive and anticipatory"¹ decision making with respect to the environment. This effort took the form of the National Environmental Policy Act of 1969 (hereinafter NEPA or the Act).² The Act officially declares environmental quality to be a national priority and lists as goals for the nation to:³

- (1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

²¹⁵ The last section of the new act preempts municipal ordinances which conflict or regulate the relationship between landlord and tenant. See OHIO REV. CODE ANN. § 5321.19 (Baldwin Supp. 1974). For a somewhat analogous situation, see the State's regulation of trailer parks. OHIO REV. CODE ANN. § 3733.02 (Page 1974); Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964).

¹ 115 CONG. REC. 40416 (1969) (remarks of Senator Jackson).

² National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) [hereinafter cited as NEPA].

³ NEPA § 4331(b).