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COMMENT

SUBSTANDARD HOUSING: THE NEW PENNSYLVANIA RENT WITHHOLDING ACT AS A SOLUTION

INTRODUCTION

In many large cities the problem created by substandard housing seems nearly insurmountable. These slums[1] constitute physically rundown and neglected dwellings where little or no sanitary or other facilities exist. The 1950 census of housing indicated that 18.7 percent of all urban dwelling units were either dilapidated or lacked a flush toilet or private bath for exclusive use.[2] In essence, most of these individual and collective units can be factually certified as "unfit for human habitation," yet these areas and dwellings are inhabited.

The law in the area of landlord and tenant is anachronistic. In leases the covenants of rent and repair[3] clash unnoticed. The unqualified promise to pay rent for shelter is contrasted with the equally unqualified promise to repair the leased unit so that it may be fit for human habitation. The law has construed the covenants of rent and repair to be independent. As early as 1813, the development of the policy that the promise of the lessor to make repairs and the promise of the tenant to pay rent are independent covenants began. As a result the lessor's performance of his promise is not a condition precedent to his recovery of accrued rent.[4] In reality, as will be shown, this legal separation is impractical.

The Pennsylvania Legislature has recently enacted a Statute[5] which purportedly will reconcile the imbalance created by judicial interpretation of the covenants of rent and repair. This paper is an attempt to illustrate how a more forceful and workable measure could and should have been passed.

THE GENERAL LAW OF RENT AND REPAIR

Generally, the law has dealt with the rent-repair problem consistently. If a unit is unfit for habitation, the tenant has three alternatives: he may vacate the premises and deny liability for future payment of rent;[6] he may

1. "The word 'slum' means a squalid, dirty street or quarter of a city, town, or village ordinarily inhabited by the very poor . . . ; overcrowding is usually a prevailing characteristic." Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938).

2. WALSH AND FURFEY, SOCIAL PROBLEMS AND SOCIAL ACTION 382 (1958).

3. Osso v. Rohanna, 187 Pa. Super. 280, 144 A.2d 862 (1958).

4. Obermyer v. Nicholas, 6 Binn. 159 (Pa. 1813).

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

6. Stevenson Stanoyevich Fund v. Steinacher, 125 N.J.L. 326, 15 A.2d 772 (1940); Dittman v. McFadden, 159 Okla. 262, 15 P.2d 139 (1932); Masser v. London Operating Co., 106 Fla. 474, 145 So. 79 (1932).

remain in possession and refuse to pay rent until the promised repairs are made;[7] or he may remain in possession, continue to pay rent for shelter, and do nothing.[8] Absent agreements to the contrary, the law presumes that the covenants of rent and repair are independent. Existing case law[9] governing the condition of premises let for human habitation favors the landlord; the tenant's only remedy is to quit the premises and search for another unit. The Pennsylvania Courts follow this majority rule.

One area which creates definite problems centers around tenantability. There is no implied condition of tenantability under the majority rule. The refusal to imply this condition is rationalized in Pennsylvania on the grounds that:

> The landlord is under no obligation to make repairs to premises if he has not covenanted to do so or otherwise assumed responsibility for the condition of the premises. Accordingly, unless the landlord has assumed responsibility for the condition of the premises, the tenant is not relieved of his liability for rent by the fact that the premises are untenantable.[10]

Absent the express promise to make the let premises fit for rental the landlord is under no implied obligation either in fact or in law.[11] In regard to leased premises the rule of caveat emptor prevails.

> There is no (implied) warranty, covenant, or condition that a leased dwelling is habitable, and uninhabitability of such premises does not (per se) warrant the abandonment of the premises and is not a constructive eviction. Only when the condition of uninhabitability is due to the wrongful act or omission of the landlord, is this constructive eviction and the tenant may vacate.[12]

While the actual choice to rent or not can be used by the tenant as economic leverage, he is legally bound after the initial occupancy:

7. This is normally an untenable legal position because of the mass of case law indicating an adherence to the separation of covenants of rent and repair. The remaining in possession constitutes a waiver of eviction, and the refusal to pay rent is a breach of the tenant's duty. See Harper & Bros. Co. v. Jackson, 240 Pa. 312, 87 Atl. 430 (1913).

8. This position favors the landlord because he is assured of continued rent payment, and he may choose to repair the premises at his discretion. The tenant's only legal remedy is to vacate. See Lopez v. Gukenbach, 391 Pa. 359, 137 A.2d 771 (1958).

9. For other cases on the tenant's remedy to vacate, see Lynder v. S.S. Kresge Co., 329 Mich. 359, 45 N.W.2d 319 (1951); Goldberg v. Horan, 263 Mass. 302, 160 N.E. 828 (1928); Franks v. Rodgers, 156 Ark. 120, 245 S.W. 311 (1922).

10. Osso v. Rohanna, 187 Pa. Super. 280, 144 A.2d 862 (1958).

11. Lopez v. Gukenbach, 391 Pa. 359, 137 A.2d 771 (1958); Solomon v. Neisner Bros., Inc., 93 F. Supp. 310 (M.D. Pa. 1950), *aff'd.* 187 F.2d 735 (3d Cir. 1950); Stein v. Bell Telephone Co., 301 Pa. 107, 151 Atl. 690 (1930); Rosser v. Cusani, 97 Pa. Super. 255 (1929).

12. 32 AM. JUR. *Landlord and Tenant* § 247 (1941).

> Nor is there any implied warranty that premises habitable at the time of initial renting will continue to remain so during the term.[13]

The tenant may elicit an express oral promise to repair from the landlord either at the initial occupancy or at some time during the term when the premises eventually become unfit. However, the form lease[14] used by most landlords renders the oral promise to repair a nullity. It is clear that the covenant of rent is considered entirely independent of the repair covenant. There is no device by which the tenant can compel the landlord to perform his promises. Since the landlord's promise to repair is not a condition precedent to his recovery of accrued rent, rent is paid for shelter whatever the condition of such premises.

The legal actions for delinquent rent payments available to the landlord give him the power to make the separation of the covenants meaningful to him. In the majority of states, the procedure for the collection of rent aligns itself under either assumpsit actions[15] or distress proceedings.[16] Statutes[17] in various states contain provisions for both types of action, and the repair covenant cannot be raised as a matter of defense in either; it is irrelevant to the issue of the tenant's liability for accrued rent.

While some protections exist in distress procedure,[18] the assumpsit proceeding is an invincible method of collection. Since most leases also provide for forfeiture upon non-payment of rent, the landlord may effectively enforce the covenant to pay rent.

When the premises are uninhabitable at the initial occupancy or become so during the term and this condition constitutes a legal breach by the landlord,[19] courts have consistently treated this situation as an eviction.[20] However, a surrender of the leased premises is necessary before a defense

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13. Moor v. Weber, 71 Pa. 429 (1872).

14. There exist certain basic protections in the statutes of Pennsylvania concerning distress proceedings for rent which are designed to insure that the tenant will not be rendered destitute by a rent action by the landlord. The form lease (1040) waives these basic provisions and the intent of the legislature in this respect is circumvented. See PA. STAT. ANN. tit. 68, § 250.401 (1965).

15. Since the covenants of rent and repair are separate, rent may be collected through a basic contract action upon the lease, and the repair covenant (express) cannot be raised in the assumpsit action. See PA. STAT. ANN. tit. 68, § 250.301 (1965).

16. That which is true in assumpsit is likewise true of distress proceedings, with some stated exceptions. See PA. STAT. ANN. tit. 68, §§ 250.302, 250.307, 250.401 (1965).

17. See PA. STAT. ANN. tit. 68, §§ 250.101—397 (1965).

18. *Ibid.* The statute contains a three hundred dollar exemption which the tenant may invoke if he has not waived the exemption by his contract with the landlord.

19. Sherdles v. Grove Hall Kosher Delicatessen and Lunch, 282 Mass. 32, 184 N.E. 673 (1933).

20. *Ibid.*

of constructive eviction can be maintained in an action for rent.[21] If the conditions amount to an eviction and surrender occurs, then the covenant to pay rent is suspended or nullified depending upon present circumstances. The tenant's remedy is to re-locate until conditions are remedied.[22] The legal remedy of the tenant to vacate the leased premises in such a case is expressed in *Minster v. Pennsylvania Co.*;[23]

> The tenant may abandon or surrender the premises, if as a result of the breach by the landlord of his covenant to repair, the leased premises become untenantable, uninhabitable, or unfit for the purpose for which they were leased.[24]

On the other hand the tenant may deprive himself of the right to vacate and avoid liability for future rent by his own conduct:

> Whatever right a tenant may have to terminate his liability for future rent by abandoning the premises on the grounds that they are uninhabitable as a result of the breach of the landlord's covenant to repair, is WAIVED by his remaining in possession after the breach unless . . . induced.[25]

MOVEMENT TOWARD DEPENDENCY

On June 1, 1965, Senate Bill No. 813 was introduced into the General Assembly of Pennsylvania. It provided for the suspension of the tenant's duty to pay rent for dwellings certified unfit for human habitation by either the Department of Licenses and Inspections, the Department of Public Safety or any Public Health Department in cities of the first class or second class, as well as second class A cities.[26] The bill purported

21. Teeter v. Mid West Enterprise Co., 174 Okla. 644, 52 P.2d 810 (1935).

22. Smith v. McEvany, 170 Mass. 26, 48 N.E. 781 (1897).

23. 104 Pa. Super. 301, 159 Atl. 465 (1932).

24. *Ibid.*

25. 32 AM. JUR. *Landlord and Tenant* § 515 (1941).

26. "Notwithstanding any other provision of law, or of any agreement, whether oral or in writing, whenever the Department of Licenses and Inspection of any city of the first class, or the Department of Public Safety of any city of the second class or second class A, as the case may be, or any public health department of any such city or of the county in which such city is located, certifies a dwelling as unfit for human habitation, the duty of any tenant of such dwelling to pay, and the right of the landlord to collect rent shall be suspended without affecting any other terms or conditions of the landlord-tenant relationship, until the dwelling is certified as fit for human habitation or *until the tenancy is terminated for any reason* other than nonpayment of rent. During any period when the duty to pay rent is suspended, and the tenant continues to occupy the dwelling, the rent withheld shall be deposited by the tenant in an escrow account and shall be paid to the landlord when the dwelling is certified as fit for human habitation at any time within one year from the date on which the dwelling was certified as unfit for human habitation. If, at the end of one year after the certification of a dwelling as unfit for human habitation, such dwelling has not been certified as fit for human habitation, any moneys deposited in escrow on account of continued occupancy shall be payable to the depositor." PA. STAT. ANN. tit. 35 § 1700-1 (Supp. 1966) (Emphasis added.).

to meet the general problem of vacation.[27] Furthermore, it permitted retention of possession by the tenant without payment of rent to the landlord in cases of unfit tenements. Senate Bill No. 813, as amended October 4, 1965, was passed on January 24, 1966 as Act No. 536. It is now part of the Landlord-Tenant Act of 1951 and is entitled Rent Shelter Allowance-Sub-Standard Housing.

The procedure under the act is as follows: 1) a complaint is received by the County Health Depatment or any other appropriate agency, or the unfit tenement is discovered by a routine inspection conducted by one of the agencies. 2) Investigation and inspection by staff members from any of the above agencies is conducted. 3) A determination by the agency follows as to whether the dwelling was in need of (a) only minor repair, and therefore still fit for human habitation, or (b) major repair and unfit for human habitation or (c) an imminent hazard so as to render it unfit for human habitation which requires an order to the tenants to move out immediately.

If a determination is made that the dwelling is in need of major repair and hence unfit for human habitation as described in (b) above, then the landlord and tenant are given notice of the determination and an order for correction is issued to the landlord and a copy is also given to the tenant. In addition the tenant is given notice by the agency that if he wishes to withhold the rent in an escrow account, he should notify the agency making the inspection of his intent to do so within ten days and he will then be given an escrow account number by the agency. This number is then used by the tenant in opening a rent withholding escrow account into which he pays his rent at a designated bank. The date of initial inspection by either agency which certifies a dwelling as unfit for human habitation is the starting date for the one year rent withholding period.

When and if the landlord repairs the property within one year from the certification, thus rendering the property fit for human habitation, as again determined by inspection by both city and county, the designated banks will be notified and will then pay over to the landlord the money held in the escrow account. If the property was not repaired as certified by the city or county, then the money, at the end of the one year period, would be paid over to the tenant. If the landlord elected not to renew the tenant's lease, the money held in escrow is kept there for one year unless the landlord corrected the violations, in which event the money would be paid to him. If repairs are not made within the year, the escrow funds are once again given back to the tenant at the end of the period.

27. The problem of reconstruction of housing for tenants forced to vacate their present premises and those willing to follow due to poor living conditions is discussed in *Hearings Before the Subcommittee on Low Income Families of the Joint Committee on the Economic Report*, 84th Congress, 1st Sess. (1955).

In Allegheny County political subdivisions are responsible for enforcing the provisions of the act in conjunction with the Allegheny County Health Department Rules and Regulations. The procedure applied in Allegheny County has been designed in such a manner that the Health Department in no way enters into the administration of the escrow accounts. The Health Department's sole function is to certify that specific violations do or do not exist. It was hoped that this certification would not influence the decision of the county as to prosecuting the owner in regard to violations of their own rules and regulations.[28] For purposes of certification by the Health Department the meaning of the phrase "unfit for human habitation" is to be limited to specific violations in Article VI of their Rules and Regulations.[29]

There are numerous objectives for the Act and its specific procedure. It was the intention of the drafters to relieve the problem of the wandering tenant, secure his possession through the continued payment of rent, avoid the legal effect of waiver, and possibly to exert economic pressure which would cause the landlord to make the units fit for human habitation before renting. Under the protection of the Act the tenant cannot be removed for non-payment of rent and the Act applies not withstanding any other provision of law, or any agreement, whether oral or in writing.[30] The Act will be particularly effective against absentee owners living in another state or section of Pennsylvania, who are beyond the jurisdiction of local aldermen and cannot be served with a warrant.

OTHER REMEDIES THAT COULD HAVE BEEN USED

Examination of the Statutes of Some Other States

There are methods other than the one adopted by Pennsylvania for the solution of the rent-repair problem. The way in which the legislatures of other states have met this problem helps to point out the advantages and disadvantages of the Pennsylvania law.

The Illinois statute is an excellent example of one means of ensuring a fairly broad *effective* compliance with the statute. It provides that

> A Supervisor of General Assistance . . . may withhold direct rent payments to an owner, lessor or agent (when) . . . (he) has . . . reason to believe that a building . . . occupied by a (welfare) . . . applicant or recipient violates any (fire, health, safety, or building law) and by reason thereof is in a condition detrimental to life or health . . .[31]

28. Allegheny County Health Department Rules and Regulations, Article VI, Housing and Rooming Houses (1966).

29. *Ibid.*

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

31. ILL. REV. STAT. ch. 23, § 401.2 (1965).

The Supervisor, when having such a reasonable belief, may procure an inspection report from the proper municipal agency, and, if that report establishes the existence of violations, the Supervisor notifies the owner, lessor or agent that rent will be withheld in ten days if the violation is not corrected.[32] Furthermore, once the report confirms the existence of violations, the tenant himself may not be sued for non-payment of rent, and he has the right to ask the Supervisor of General Assistance or the Department of State to intervene and aid him in his defense.[33] This statute is a major step toward effective rehabilitation of slum conditions. The tenant himself is freed of the burden involved in the initial decision to restore the premises, since the initiation of proceedings is the duty of the Department of General Assistance in seeking to protect its own interests, since the money paid for rent is its own money and not the tenant's. This fact is important since, because of it the Department has a direct and personal interest in every case. Similarly, many, if not a majority, of people who live in "run-down" dwellings are on public assistance;[34] the Department by means of field inspections by its staff workers or merely questionnaires sent to each recipient of welfare funds can easily uncover a multitude of violations which must be corrected. This method is undeniably a much more effective practice than depending solely on the haphazard inspections of a municipal department of the spotty, perhaps fearful, reporting of each affected tenant.

The New York statute is a better example of effective protection. It provides that the Public Welfare Department may pay the landlord directly in the case of public assistance recipients eligible for a rent subsidy.[35] This thus relates to *all* public assistance recipients who are given a rent subsidy, unlike the Illinois statute which provided that the Department of General Assistance could pay the rent subsidy to the tenant (who then paid the landlord) or the landlord. While the Illinois statute provides for the withholding of rent subsidies in either case,[36] it subjects the tenant to certain practical pressures from the landlord, whereas the New York Statute does not. While the New York act is similar to the Illinois act in all other respects,[37] this added provision would seem to provide an even more meaningful solution to the problem of slum housing.

While the statutes referred to above are examples of good practical solutions to a pressing problem, it is submitted that they are far from ideal. There are two distinct disadvantages common to both the Illinois

32. *Ibid.*

33. *Ibid.*

34. Comment, 53 CALIF. L. REV. 304 (1965).

35. N.Y. SOCIAL WELFARE LAW § 143-b.

36. ILL. REV. STAT. ch. 23, § 401.2 (1965).

37. *Compare* N. Y. SOCIAL WELFARE LAW § 143-b *with* ILL. REV. STAT. ch. 23, § 401.2 (1965).

and New York statutes. Primarily, these statutes do not embody sanctions that are strict enough to compel a landlord to take an active interest in keeping his holdings in the best condition. Under the usual health and building codes, a landlord would usually be told to make necessary repairs or suffer a fine, and often the landlord would accept the fine since it was in an amount much less than the cost of the needed repairs.[38] These statutes eliminate that vice: until repairs are made, no rent will be received. However, this method only results in an amendment to the older public health and building codes by eliminating the provisions for fines. These statutes will still induce the landlord to neglect his property until compelled to repair, because, at worst, he will have to make repairs, and, after he has done so, all withheld rent will be repaid, as follows:

> . . . rent payments . . . (may be withheld) . . . (upon violation of) any fire, health, or building law . . .
>
> Upon proof that all violations have been corrected, the Supervisor . . . shall pay all of the rent so withheld.[39]

or

> 2) Every public welfare official shall have power to and may withhold rent in any case where he has knowledge that there exists (a) violation of law in respect to the building (occupied by the welfare recipient).
>
> . . .
>
> 3) Nothing . . . shall prevent the . . . department from making provisions for payment of the rent . . . (withheld) . . . upon proof . . . that the . . . violation was actually corrected . . .[40]

Since the object of these statutes is to provide decent housing for the lower income groups they are self-defeating to the extent that they encourage owners to avoid providing such housing as long as possible.

The solution is a provision restricting the landlord's right to collect rent until repairs have been made; after he has repaired the premises, he should be entitled to rent. In short, what is needed is a *forfeiture* of rent during the period of disrepair. A memorandum to the New York statute makes it clear that the New York legislature intends the landlord to have no right to rent withheld during periods of violation, and the legislature passed the statute to overrule those cases that hold that the landlord may recover the rent withheld if he can establish correction of the violations, either at trial or to the proper municipal department.[41] However, the decided cases in New York, while not referring to this postdated memorandum

38. Comment, *supra* note 34, at 316.

39. ILL. REV. STAT. ch. 23, § 401.2 (1965).

40. N. Y. SOCIAL WELFARE LAW §§ 143-b(2), 143-b(6).

41. N.Y. Sess. Laws, 1965, ch. 701, Legislative Memorandum, p. 2078. [McKinney's 1965 Session Laws of New York, p. 2078.]

permit the landlord to recover his back rent after he makes the repairs,[42] and it remains to be seen how the courts will deal with future offenders. The necessity for a statute which will effectuate the intent of the New York legislature has been frequently recognized as necessary to ensure the broader provisions of better housing.[43]

Secondly, the New York and Illinois statutes apply only to recipients of public welfare.[44] While it is true that public welfare recipients constitute a significant percentage of aggrieved tenants, it would seem that tenants not on public welfare are felt without any remedy. While there is no denial of equal protection of the laws in making rent-withholding available to public assistance recipients while not making it available to others,[45] the failure to so provide does seriously hamper the efforts of the self-sustaining citizen to acquire habitable, low-cost private housing. Thus, it appears that a significant disadvantage of the New York and Illinois statutes is their failure to provide meaningful relief to those people whose incomes are high enough to keep them off the relief roll but not sufficient to enable them to acquire housing generally free of the usual problems of repair.

A Consideration of the Pennsylvania Statute

There is no doubt that a feature of the statute is assurance to the tenant that he no longer need move to the town of Erehwon[46] when living conditions become unbearable. It is this constant problem which has plagued the Department of Public Assistance and re-development planners over the years. People evicted from slum housing in reality have no place to go. In very rare instances dwellings may be provided for them,[47] but the vacation of non-conforming buildings has been a stumbling block to any organization whose purpose was the removal of low-income tenants from the effects of poverty in housing. All persons involved were aware that, generally speaking, slum clearance is extremely expensive and the implementation of comprehensive housing codes is a slow process.[48]

In the past the normal methods of implementation of housing codes involved fines, the vacation of the non-conforming buildings, improvements by the municipality or a lien upon the said premises. The first solution was the slowest since the inspection teams were understaffed and

42. Milchman v. Rivera, 39 Misc.2d 347, 240 N.Y.S.2d 859 (1963).

43. Comment, *supra* note 34, at 328.

44. ILL. REV. STAT. ch. 23, § 401.2 (1965); N. Y. SOCIAL WELFARE LAW § 143-b.

45. Schaeffer v. Montes, 233 N.Y.S.2d 444 (1962).

46. WALSH AND FURFEY, SOCIAL PROBLEMS AND SOCIAL ACTION (1958).

47. SIEGEL AND BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION, THE PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS 11 (1953).

48. See Gillian, *Legal Procedures for Elimination of Unsafe Buildings*, 17 NATIONAL INSTITUTE OF MUNICIPAL OFFICERS MUNICIPAL L. REV. 343 (1954).

discovered only a small percentage of violations. The vacation solution did not work to relieve the problem due to the overall widespread lack of housing. The latter solution also involved constitutional problems of due process.[49] Therefore, the Pennsylvania Act constitutes a major advance, since it recognizes the problem confronting a tenant. He need no longer search for shelter with the threat that his new home may someday be the focal point of a conflict exactly like the one which *caused* him to embark on the search. In this regard proponents of the Act assert that the practical aspects of slum housing and the legal solution offered by this measure have become one entity. For this reason they insist that the bill will stand the test of time.

Although the Act substantially meets the vacation problem and causes partial dependency of the covenant of repair upon the covenant of rent, there are distinct major and minor disadvantages in it.

An examination of the Pennsylvania statute indicates that it applies broadly to all tenants and landlords, as the Act states that ". . . (when a dwelling is certified as unfit) . . . the duty of any tenant . . . to pay, and the right of the landlord to collect rent shall be suspended . . . ."[50] This language is broad enough to encompass the entire spectrum of landlord and tenant relationships. Although the act supersedes other provisions of law and cannot be abrogated by any separate oral or written agreement, specific language[51] in the Act makes it dependent upon the tenancy and therefore subservient to the terms of the lease. Where a termination clause exists, the tenancy may be terminated and the effect of the Act as to the initiating tenant shattered. While express language in the Act provides that the tenancy cannot be terminated for non-payment of rent, litigation will result in cases of oral leases; and where termination provisions occur in written leases, they will control. What period of time will the landlord decide is an adequate means of preventing a tenant from proceeding under the Act? Will the effect of the Act be impaired by the signing of leases designated specifically to by-pass the Act just as the form lease today causes the tenant to waive major benefits of the 1951 Landlord-Tenant Act in Pennsylvania?[52] These questions will involve litigation; litigation

49. The Pennsylvania act does not present a constitutional problem since no pressure is placed upon the landlord to make the repairs so long as he does not create a health or safety problem by renting the premises. The police power of the municipality to protect the health, safety and morals of its citizens has been well established. See In re Dep't of Buildings of City of New York, 14 N.Y.2d 291, 200 N.E.2d 432 (1964). Constitutional problems arise when the repairs are forced upon the landlord and prior liens are displaced by the municipality's lien for the cost of repairs. See Central Savings Bank v. City of New York, 279 N.Y. 266, 18 N.E.2d 151 (1938). The constitutional due process and impairment of obligations of contracts arguments are not problems in the Pennsylvania act.

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

51. *Ibid.*

52. PA. STAT. ANN. tit. 68, § 250.101—397 (1965).

will involve both time and money, and the tenant may well consider the burden of implementation too great a price to pay.

Most of the tenants who reside in dwellings which will be affected by this Act are "slum-dwellers," and most of them are recipients of public assistance.[53] Such people generally are unaware of their rights under this act. Although procedures do exist under which the tenant may seek relief, those procedures depend on the tenant's initiation of the process as a condition precedent to becoming operative. Therefore, it is practically impossible for the Act to be implemented on a significantly large scale until a massive program of educating the tenant as to his rights under the Act is carried out. Until this is done, virtually every tenant who could be helped by this Act will probably not even be aware of its existence, and even if he is, the Act will be useless to him until he is carefully taught what his rights are and how to employ the various procedures to take advantage of them.

Obviously, educational systems will of necessity be needed to inform the tenant of the legal potholes of form leases, of termination provisions within leases, and of tenancy terms and the possible effect of implementation if the tenant incurs the wrath of the landlord. The Act must have a basis in order to prove effective and unless the initiators are educated in the procedures and effects of the Act it will fail. There is no doubt that the tenant may seek legal assistance before attempting to implement the Act, but the likelihood of his seeking such legal advice before renting is slim.

Remembering that most of these people are recipients of public assistance, one may wonder why the Department of Public Assistance is not given some power over the situation. This device is used in other states, both to overcome the individual tenant's reluctance to initiate action against his landlord and to more effectively bring about compliance by putting the weight of the State government behind the enforcement of the statute to protect its pecuniary interest as well as the public welfare.

Another major disadvantage of the bill involves the Health Department regulations. As the term "unfit for human habitation" is limited to violations in Article VI[54] a serious question arises as to what type of violations to enforce. The Rules and Regulations center themselves around *health* violations stretching from unvented heaters to accumulation of refuse. While these conditions constitute a valid concern, they may not be the chief violations. Most of the infractions which render leased premises "unfit for human habitation," as *commonly* defined, are defects which create, as other statutes indicate, conditions "detrimental, dangerous, or

53. Comment, 53 CALIF. L. REV. 304 (1965).
54. Allegheny County Health Department Rules and Regulations, *supra* note 30.

hazardous to life or health."[55] The County Health Department is beyond its jurisdiction and there is no provision in Article VI for the certification of "unfit for human habitation" on these safety measures. Yet the Allegheny County Health Department is the central agency in its district which will administer certification. It is foreseeable that problems of dual enforcement will occur and the educational process must then filter out what is health as opposed to safety. Limitations have already been placed upon the Pittsburgh agencies as exemplified in drafts[56] which they have released indicating their Department's concern over only one form (health or safety) of violation. Many questions must yet be answered and at each step the tenant must be educated, the landlord informed, and the agencies notified.

Apart from the questions of dual enforcement, what is the tenant's recourse if the tenement is so unfit that imminent danger exists and he must immediately vacate? What will occur in multiple dwellings where as many as five and six families live: which one will ask for certification, realizing the landlord's displeasure may fall upon them all in light of the Act's dependency upon the tenancy? The alleviated problem of vacation, which the bill purports to solve, offers no benefit for the initiating tenant so long as the Act is dependent upon the tenancy. The central reason that this defect exists in Pennsylvania is that the Public Assistance Department pays rent money directly to the tenant rather than to the landlord as is done in other states.[57] The latter procedure would inform the landlord that the initiating tenant is not the sole cause of withholding of rent payments. While the Pennsylvania system of public assistance is aimed at making the tenant responsible for his debts and thus educating him in an attempt to lift him out of poverty, it creates a definite disadvantage under this Act.

Apart from the legal disadvantages, there is a practical inequity which exists within the bill at the present time. The time period allotted for repairs is one year from the time of certification. The repairs must be completed by that year or the rent withheld reverts to the tenant. The rent payments for continued occupancy from that time forward, covering the one year period, are deposited in escrow as full payment. If the repairs are begun and completed in the twelfth month following certification, the requisite time element is met and the entire escrow payment is given to the landlord. What in essence has occurred, is that a tenant (on a one year

55. ILL. REV. STAT. ch. 23, § 401.2 (1965).

56. These drafts are too numerous to cite since they consist of pamphlets and information circulars on the progression of the act in its implementation stages.

57. In New York the payment is made directly to the landlord from the Department. N. Y. SOCIAL WELFARE LAW § 143-b. In Illinois the payment is optional with the Department as to direct payment to the landlord or indirect payment through the tenant. ILL. REV. STAT. ch. 23, § 401.2 (1965).

lease) has lived in dwellings certified as unfit for human habitation for a period of eleven months and the landlord is paid full rent as if repairs had been completed in the same month in which certification occurred. Despite the fact that the building now qualifies, this basic inequity exists. In this respect it was hoped that the escrow account and the district would apply a pro-rata system of repair per each delinquent month, but such has not been the case.

Thus the existing Pennsylvania Act alleviates the problem of vacation in a general way. However, it poses problems resulting from both practical and legal disadvantages which must be solved before the tenant will be released from the slums.

Making The Covenants of Rent and Repair Dependent: A Proposed Solution

It is submitted that the Pennsylvania statute does not satisfactorily resolve the rent and repair dilemma. The following part of this comment will deal with a proposed solution, describing it, advancing arguments for its validity and effectiveness, and showing how this solution offers more substantial relief to those to whom it is directed while at the same time it eliminates certain glaring deficiencies existing in the recently passed Pennsylvania act.

The proposed solution is a combination of provisions now in effect in other jurisdictions. It is submitted that the statute should impose upon the landlord: (1) the duty to deliver the premises in a habitable condition; (2) the duty, with certain exceptions, to keep the premises habitable throughout the term; and (3) liability for any personal injuries received by the tenant for breach of this duty. Furthermore, the statute should offer the tenant: (1) the option to vacate; (2) the option to make repairs and charge them off against rent due; or (3) the option to simply cease paying rent (while retaining possession) until necessary repairs are made.

There is no doubt that a workable statute could be drafted imposing a duty upon the landlord to deliver the premises in a habitable condition, and to so maintain them throughout the lease. In Louisiana, a landlord is bound to

> . . . deliver the thing in good condition, and free from any repairs. . . . To make, during the . . . lease, all the repairs which accidentally became necessary, except those which the tenant is bound to make, as hereinafter directed.[58]

In fact the Civil Code of Louisiana imposes a guarantee in favor of the tenant against all defects, known or unknown to the lessor, no matter

58. LA. CIVIL CODE art. 2693 (1870).

where they arise unless through the lessee's fault.[59] To free the landlord from the trivial demands that could be made on him under such a statute a list of exceptions is included, encompassing small repair items, and the duty to perform all repairs listed therein falls upon the tenant.[60] Significantly, such a statute virtually eliminates the landlord's immunity from tort liability to a tenant who is personally injured due to such defects, and in this respect a number of states have enacted statutes altering the common law relationship of landlord and tenant. For example, in Tennessee a landlord has the duty to turn over to the tenant premises free from dangers of which the landlord knows or should have known and of which the tenant does not and could not have known.[61] In fact, it has even been held that statutes requiring landlords to keep premises in good repair and which assess fines for failure to do so abrogate the common law rule and impose a duty on the landlord that will support an action by the tenant for personal injuries. Although the suit *is not* based on the statute, it is permitted on the theory that the statute has imposed an ultra-contractual duty upon the landlord.[62] Consequently, statutes that make the covenants of rent and repair dependent upon one another can be effective vehicles toward providing the tenant with redress for *injuries* he may suffer due to the defective condition of the premises.

It is true, however, that while safety is an important consideration, what most affected persons need is an effective means of acquiring premises that are habitable in the sense of being sanitary, healthful and generally "fit to live in." Here the problem is developing some effective way to force the landlord to deliver and keep the premises in repair so that they can be used by the tenant for the purposes for which they were leased. The proposed solution is to offer the tenant certain options which he may exercise under the "dependency" statutes described above.

Perhaps the most practically meaningful thing to do is to permit the tenant to remain in possession, free of any duty to pay rent as soon as the premises fall into disrepair. This approach has been attempted to a limited extent. In Connecticut, if leased property becomes untenantable through no fault of the lessee, the lessee may remain in possession without paying rent until the landlord makes the repairs or until the lease expires, whichever occurs first; however, this statute imposes no duty on the landlord to repair.[63] If this limited provision is added to a statute making the covenants of rent and repair dependent on one another, irresistible economic pressure could be brought to bear on the landlord. He could not afford to

59. LA. CIVIL CODE art. 2695 (1870).

60. LA. CIVIL CODE art. 2716 (1870).

61. Campbell v. Francis, 53 Tenn. App. 80, 378 S.W.2d 790 (1964).

62. Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960); Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925).

63. CONN. REV. STAT. tit. 47, § 47-24 (1959).

let his tenants live for free for very long, and until he made repairs, any demand or suit for rent could be defended by showing the failure to repair. In many cases, it is submitted, the landlord would repair simply from a financial point of view.

In a significant number of cases, though, the tenant may not care to live in untenantable premises, even for free. There should be some way that he could obtain performance of the landlord's covenant to repair. Here, however, the problem becomes mired in legal difficulties. Mandatory injunctions are rarely issued because of the general reluctance of courts of equity to engage in the supervision of repair work, and because of the belief that adequate relief at law in the form of damages is available. However, if the tenant were to sue for damages, even the best judgment that could result would merely permit him to pay as rent the reasonable value of the premises in their current state of disrepair.[64] This approach still leaves him without any means to have the repairs actually performed. There is one way to aid the tenant with this specific problem; the tenant may exercise the option to make the repairs himself and charge them off against future rent due. This is presently done in Louisiana, as follows:

> . . . If (the lessor) refuses or neglects to make (necsssary repairs), the lessee himself may cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price . . . was just and reasonable.[65]

A somewhat similar statute is in effect in Oklahoma,[66] although in both states it is held that the statutes are the tenant's exclusive remedy; he must either repair and charge off against rent, or vacate—he cannot remain in possession, do nothing and not pay rent.[67] However, by combining this rent chargeback provision with the provision previously discussed, i.e., permitting the tenant to remain in possession free of the duty to pay rent, this defect is remedied, and the tenant is given a meaningful choice.

A consideration of this proposal shows that it could be a useful remedy. Under the Connecticut statute previously mentioned,[68] the tenant would have the duty to pay rent after repairs are made; so also, if the tenant exercises the option to make repairs himself, as soon as he makes them, the duty to pay rent is imposed on him, but with the added benefit that the tenant may then charge off his repair bill against the rent. After making the covenants of rent and repair dependent on one another, an additional step is taken in that, instead of having to file a counter-claim for damages

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64. McDanel v. Mack Realty Co., 315 Pa. 174, 172 Atl. 97 (1934).

65. LA. CIVIL CODE art. 2694 (1870).

66. OKLA. REV. STAT. ch. 41, §§ 31, 32 (1961).

67. Ewing v. Cadwell, 121 Okla. 115, 247 Pac. 665 (1925); Lorenzen v. Woods, 1 McGloin 373 (La. 1881).

68. CONN. REV. STAT. tit. 47, § 47-24 (1959); Lesser v. Kline, 101 Conn. 740, 127 Atl. 279 (1925).

when sued for rent by his landlord, a tenant is able to take his damages "in kind." The landlord is in no worse position than if the court itself subtracted the tenant's damages from the rent due to the landlord, and the tenant knows that the repairs will be made. In any event the tenant has the rent due on the balance of his lease as security that the repairs will be made.

Finally, if for some reason the tenant desires to vacate the premises once they become unfit to live in, there should be no reason why he could not do so. The courts of Louisiana have consistently interpreted the Louisiana Civil Code to permit this step.[69] The same results have been reached in other states where the covenants of rent and repair have been made dependent on one another either by statute or by express agreement between the landlord and tenant.[70]

While it has been suggested that such a statute represents a worthwhile solution, it cannot be denied that even here there are certain practical difficulties that must be overcome. The proposed statute in no way solves the problems alluded to in the discussion of the New York and Illinois statutes, namely, the education of tenants of their rights, of the extent of the relief available to them under the law, and of the fear and reluctance of the tenant to incur the wrath of the landlord if the tenant does try to assert his rights. While there is no doubt that this problem could be solved simply by including in the proposed statute a provision granting the Department of Public Assistance the authority to pay (and withhold) the rent of a welfare recipient, as was done in New York, the problem of the "non-welfare" tenant would still exist. Perhaps such an ideal solution can never be reached; perhaps we should be content with the knowledge that inclusion of the grant of such authority to the Department of Public Assistance will solve the problem of personal education, reluctance and ignorance. While it is admitted that this problem will not be completely solved by the proposed solution, it is felt that the proposal, when drafted in conformity with the withholding provisions of statutes like the one in force in New York and Illinois, would be significantly more effective than the Act recently passed in Pennsylvania.

Likewise, this new solution is subject to the defect that once the tenant's term is at an end, so are his rights under the statute. In short, the argument is that, since the tenant must vacate at the end of his lease, which in many cases may be for a short duration, or subject to a termination provision, or periodic, it may not be feasible for him to start repairs because he will not be in possession long enough to see them through, or to enjoy them. Since the main problem here is one of inadequate housing, the complaint is made that such a statute is hollow comfort indeed. To be

69. King v. Grant, 43 La. Ann. 817, 9 So. 642 (1891).

70. McDanel v. Mack Realty Co., 315 Pa. 174, 172 Atl. 97 (1934); Ewing v. Cadwell, 121 Okla. 115, 247 Pac. 665 (1925).

sure, it has been proposed that a judicially-created tenancy should be allowed by permitting the tenant to interpose the breach of the covenant to repair as a defense to an action by the landlord to recover possession at the end of the term.[71] Since this step was taken in certain situations, so it is said, it could be done on a larger scale, but, unfortunately, the solution is not that simple; this was done in wartime, thus providing ample justification for the action taken.[72] That the same thing could be done in a less pressing case, based on welfare rather than necessity, is quite another matter. In short, no perfect legal solution to the problems posed by the natural expiration of the tenancy seems to exist. However, even if leases are of short duration, tenants, although they might not make repairs simply because the balance of rent due under their lease would not cover the cost, could refuse to pay any rent at all. Even if the landlord were able to remove a tenant after only a month, the economic loss to him would be prohibitive if this happened as infrequently as three times a year. Furthermore, where the slumlord operates, he rents to a high percentage of welfare recipients, and the authority proposed to be given to the welfare department would wreak economic havoc upon him if he persisted in his refusal to repair. It would simply be cheaper to make repairs, because then he is assured of a steady supply of paying tenants, and the continuing cost of repair would not be so staggering. This problem, then, could have been, and can be, solved. But the Pennsylvania Legislature chose a solution which merely provides for different evasive tactics by the landlord.

CONCLUSION

The problem of the low income tenant gave rise to a total attack upon the antiquated position of separate convenants in housing. The legislature realized that the independency of covenants had led to practical consequences which produced serious housing problems. It acknowledged that any remedy consisting only of basic demands for repairs and economic pressure in the form of flat refusal to pay rent but not backed by force of law was hollow, since other legal devices destroyed its effectiveness. Vacating to other premises normally meant a shift in the problem and no movement toward solution. The most stifling question in the final analysis was—vacate to where? The insurmountable truth was, and to a large extent today still is, that the newest dwelling entered is a repetition of the latest unit vacated.

The tenant must be assured that for the rent he pays he will receive the basic repairs he needs and that the unit he is forced to occupy will be fit to live in. It was with this objective that the Pennsylvania act was passed. However, it is evident that a more forceful and workable measure could and should have been passed.

71. Comment, *supra* note 34, at 331.
72. Bowles v. Willingham, 321 U.S. 503 (1943).

The legislative intent is laudatory. However, before these aims will be realized, the educational system which must precede it must be implemented. Any superficial, far-spaced advertising will make the implementation process that much harder. The educational system must result in the ability of tenants who come within the purview of the act to be able to discuss its essential procedure clearly. If this basic education cannot be filtered down to those people, the purpose of the act will be lost because of fear and distrust engendered by unfamiliarity.

This basic problem of education, if solved, must be coupled with review by the Public Assistance Department of the basic scheme with respect to affected tenants. If the process of education is slow, the Department should initially withhold rent rather than subject the initiating tenant to an unfamiliar procedure. This policy may aid in establishing an air of confidence in those people whom the act is to benefit, but in the end, *education must result*, and tenants must be made to realize that the law has recognized their plight and has moved toward a solution by making the covenants of rent and repair at least partially dependent.

Similarly, the Pennsylvania statute is rendered ineffective by the fact that it has no compelling force once the tenancy is at an end, and in the usual case of expiration clauses or monthly leases, the tenancy can be put to an end by the landlord at any time. This defect is, in reality, insurmountable since there is no way to abrogate such power in the landlord. While this defect is apparent in the proposed solution as well as the Pennsylvania act, the various options open to the tenant in the proposed solution give him enough economic leverage so that the landlord dare not risk the loss of a month's rent, even infrequently, since his profit basis is founded upon a constant, uninterrupted occupancy of the dwellings he owns. This fact alone shows that the commendable intent inherent in the Pennsylvania act could have been more fully realized by enacting a statute similar to the proposed one.

Finally, the proposed solution represents a great improvement over the Pennsylvania act for the simple reason that it puts in the tenant's hands directly various effective means by which to attain what he wants. It ends the ancient, problem-creating independence of covenants and at the same time makes the dependency meaningful to the tenant. It is at this point that the Pennsylvania statute fails, and it is here that failure can least be tolerated. The existence of effective leverage on the tenant's behalf gives him a direct means of attainment as well as an indirect, but effective means of attacking the landlord economically. In such a critical area, this is what is needed, and it is here that Pennsylvania, for all its good intentions, falls short of the mark.

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