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Tenants' Rights and Remedies under Delaware's New Landlord-Tenant Code

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INTRODUCTION

In Delaware, as in the majority of other states, the landlord-tenant law has undergone relatively little change until recently. The evolution of tenant rights and remedies has been slow and immutably bound to a common law which regarded the real property lease as a legal hybrid: in some respects a conveyance of a non-freehold estate, in others a contract.[1] The conveyance aspect, however, has dominated.

American landlord-tenant law has developed from English common law where the lease was viewed as a conveyance of an estate by the lessor to the lessee.[2] In return for the non-freehold estate in the land for a term the lessee covenanted to pay rent.[3] Other covenants were considered independent of the basic lease obligation.[4] In agrarian, rural England the land was central to the concept of a leasehold and the rent was viewed as issuing from the land.[5] The concept of "rent for possession" worked well in the socio-economic setting of 16th century England.[6] Caveat emptor was the rule of the day.[7] The lessee, however, had equal opportunity to inspect the land and the doctrine of caveat emptor did not, therefore, work so harsh a result. Theoretically, the yeoman farmer tenant was as well equipped as the landlord to repair the few simple defects which could arise. Whereas the property law

1. 1 AMERICAN LAW OF PROPERTY § 3.1 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY]. For an excellent discussion of the historical development of the real property lease, see MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 63-73 (1962); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972).

2. 1 AMERICAN LAW OF PROPERTY § 1.42.

3. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 131 (2d ed. 1923).

4. *See* note 77 and accompanying text *infra*.

5. "[T]he governing idea is that the land is bound to pay for the rent. . . ." 2 F. POLLOCK & F. MAITLAND, *supra* note 3.

6. Originally (1200-1500) the rights of the lessee were contractual in nature, but with the development of the action of ejectment in 1499, the lessee acquired property rights in the lease and a remedy to protect his possessory interest as owner of an estate in the land. *See* Lesar, *The Landlord Tenant Relation in Perspective: From Status to Contract and Back in 900 years?*, 9 KAN. L. REV. 369 (1961).

7. *See* notes 13-15 and accompanying text *infra*.

concepts of the lease served well the needs of an agrarian society, when these same concepts are applied to a predominantly urban, commercial-industrial society where the real property lease is primarily a means of providing shelter and services for the lessee, real problems and unjust results arise.[8]

The desirability of fundamental changes in landlord-tenant law has been dealt with extensively and adequately by other commentators.[9] Recent judicial decisions and legislation in other jurisdictions have significantly altered the obligations, remedies and other substantive aspects of the landlord-tenant relationship.[10] In 1972 the Delaware General Assembly enacted a new Landlord-Tenant Code.[11] The new Code is comprehensive and effects basic changes in both the Delaware common and statutory law. All aspects of the landlord-tenant relationship including rental agreement formation, tenant obligations, landlord obligations, remedies, and procedural matters have been dealt with by the Code. The purpose of this Comment, however, is to consider only the various changes the Code has instituted in Delaware law with regard to tenants' rights and remedies and the probable effect of such changes on existing landlord-tenant relationships.[12]

I. OBLIGATIONS

At common law in Delaware a lessor had very few obligations and owed few duties to a tenant absent express covenants whereby a landlord would voluntarily assume such duties. As will be devel-

8. RESTATEMENT (SECOND) OF PROPERTY, Introduction at 4 (Tent. Draft No. 1, 1973). *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 (1969).

9. *See, e.g.*, A.B.A. Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL. PROP. & TRUST J. 550 (1971); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant—Proposal for Change*, 54 GEO. L.J. 519 (1966). Further indication of the recent concern for reform in landlord-tenant law is evidenced by the recent drafting of the MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969) and the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972).

10. *See, e.g., Special Project—Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689 (1973).

11. DEL. CODE ANN. tit. 25, §§ 5101-6504 (Supp. 1972). The governor signed the bill June 29, 1972 and, 90 days after the governor's approval the act became effective. DEL. CODE ANN. tit. 25, § 5101 (Supp. 1972): This law shall be known and may be cited as the "Landlord-Tenant Code" or "Code."

12. The Code includes a chapter reserving separate rules and discussion for mobile home owners. *See* DEL. CODE ANN. tit. 25, §§ 7001-7014 (Supp. 1972). Discussion of mobile homeowners, landlord remedies, tenant obligations, rental agreement formation, etc., is outside the scope of this Comment and will be discussed only collaterally as they touch on tenants' rights and remedies.

oped later, even the protection offered by these express covenants often proved illusory in the tenant's efforts to achieve a habitable dwelling. This section will examine the extent to which the obligations imposed by the new Code alters the landlord's pre-Code responsibilities to the tenant.

A. *Habitability*

Prior to the adoption of the new Landlord-Tenant Code, the doctrine of caveat emptor prevailed with regard to the leasing of real property.[13] In Delaware's leading case, *Leech v. Husbands*,[14] the tenant of an unfurnished apartment refused to pay rent and eventually was forced to move out prior to expiration of the lease because the apartment was so infested with vermin, bugs, and disease germs as to endanger the health of the occupants and render the premises unfit for human habitation. The Delaware Superior Court said that absent an express covenant, the landlord had no obligation to supply a habitable dwelling.[15] As to an unfurnished apartment then, there was no implied covenant, or even a warranty that it is either reasonably fit or safe for habitation, at the commencement of the term.[16] This same rule was also applied to the lease of a building for commercial purposes.[17]

Closely linked with an obligation of the lessor to provide a habitable dwelling at the start of the term, is a duty to repair. In Delaware where the landlord had no initial duty to provide a habitable dwelling, he logically had no implied duty to repair and thereby maintain, for the duration of the term, tenantable premises.[18] Where there was no obligation to repair imposed on the landlord in the lease, he was under no duty to make them.[19] Where the landlord could be held liable for injuries arising from latent defects of which he had knowledge,[20] disclosure rather than repairs was exacted from him.

That the tenant and landlord were free to contract and to alter

13. *See, e.g.*, Richard Paul Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945); Leech v. Husbands, 34 Del. 362, 152 A. 729 (Super. 1930).
14. 34 Del. 362, 152 A. 729 (Super. 1930).
15. *Id.* at 366, 152 A. at 731.
16. *Id.*
17. Richard Paul Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945).
18. *See, e.g.*, Richard Paul Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945); Grochowski v. Stewart, 53 Del. 330, 169 A.2d 14 (1961); James v. Boines, 294 A.2d 94 (Del. 1972); Old Time Petroleum v. Turcol, 18 Del. Ch. 121, 156 A. 501 (1931).
19. *Id.*
20. *See* notes 52, 53 and accompanying text *infra*.

these common law obligations by express covenants in the lease was of little moment, practically speaking. The shortage of low cost housing and the fact that leases, being either long standard form agreements provided by the landlord or oral bargains, left the tenant in a poor bargaining position.[21] He was, therefore, generally unable to economically coerce the landlord to warrant the fitness of the premises or to covenant to keep them in repair.

The new Code rejects these two traditional rules and imposes an affirmative obligation on the landlord to supply and maintain a "fit" rental unit.[22] Section 5303 of the Code states that the landlord must comply with all applicable provisions of state, or local, statutes and ordinances governing the "maintenance, construction, use, or appearance of the rental unit and the property of which it is a part."[23] In addition to this broad standard, specific duties are enumerated. The landlord is duty bound to maintain in good working order plumbing, electrical appliances, and other facilities provided by him, and he must provide "reasonable amounts" of heat and hot water.[24] Implicit in these provisions to effectively insure continuously habitable premises is a duty of repair. Nevertheless, section 5303 creates an express duty in the landlord to make all repairs necessary to keep the premises in the condition they ought to have been at the commencement of the tenancy.[25]

By placing upon the landlord an obligation to supply and maintain a habitable dwelling, the legislature has recognized and codified a nationwide judicial trend to imply a warranty of habitability

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21. *See* Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 n.2 (1966); Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 893-99 (1967); 56 GEO. L.J. 920 (1968).

22. DEL. CODE ANN. tit. 25, § 5303 (Supp. 1972) provides in part:

a. The landlord shall at all times during the tenancy:
   (1) Comply with all applicable provisions of any state or local statute, code, regulation or ordinance governing the maintenance, construction, use, or appearance of the rental unit and the property of which it is a part;
   (2) Provide a rental unit which shall not endanger the health, welfare or safety of the tenants or occupants and is fit for the purpose for which it is expressly rented;
   (3) Keep in a clean and sanitary condition all areas of his building, grounds, facilities, and appurtenances which are maintained by the landlord;
   (4) Make all repairs and arrangements necessary to put and keep the rental unit and the appurtenances thereto in as good a condition as they were, or ought by law or agreement to have been, at the commencement of the tenancy;
   (5) Maintain all electrical, plumbing, and other facilities supplied by him in good working order;
   (6) If the rental agreement so specifies, provide and maintain appropriate receptacles and conveniences for the removal of ashes, rubbish, and garbage, and arrange for the frequent removal of such waste; and
   (7) If the rental agreement so specifies, supply water, hot water and adequate heat as reasonably required by the tenant.

23. *Id.* § 5303(a)(1).

24. *Id.* § 5303(a)(5), (7).

25. *Id.* § 5303(a)(4).

in a lease for a dwelling.[26] In Delaware legislative bodies have recognized a valid governmental and public interest in the maintenance of decent housing as evidenced by county or municipal housing and building codes. Furthermore, the stated policy of the Landlord-Tenant Code is to maintain and improve the quality of housing in Delaware.[27] Fixing the landlord with an obligation to maintain a fit rental unit recognizes both the tenant's legitimate expectations, and the public's interest in the maintenance of quality housing.[28]

Section 5303, then, sets up general standards of habitability to which the landlord is bound to conform. Incorporated by refer-

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26. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Bonner v. Beechem, CCH Pov. L. REP. ¶ 11,098 (Colo. County Ct. 1970); Lemle v. Breedon, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Authority v. Hemmingway, Mass. , 293 N.E.2d 831 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

In a leading case, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the D.C. Circuit Court of Appeals held that a warranty of habitability measured by standards set forth in the District of Columbia Housing Code Regulations is implied by operation of the law into leases of urban dwelling units covered by the regulations. The opinion noted that when public policy has been enacted into law like the housing code, that policy will usually have deep roots in the expectations and intentions of most people and that by signing the lease the landlord has taken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law. *Id.*

27. 58 DEL. LAWS ch. 472, § 5102 (1972) sets forth the purposes and policies of the Code which provides:

> This act shall be liberally construed and applied to promote its underlying purposes and policies. The underlying purposes and policies of this Act are:
>
> (1) To simplify and clarify the law governing landlord and tenant relationships;
>
> (2) to encourage landlords and tenants to maintain and improve the quality of housing in this State; and
>
> (3) to revise and modernize the law of landlord and tenant to serve more realistically the needs of modern day society.

The revisors of the DEL. CODE ANN. pursuant to authority vested in them in DEL. CODE ANN. tit. 1, § 211 (Supp. 1972) have omitted the declaration of policy from DEL. CODE ANN. tit. 25, §§ 5101-6504 (Supp. 1972) (originally enacted as 58 DEL. LAWS ch. 472).

28. When American city dwellers both rich and poor seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and maintenance.

Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See generally* RESTATEMENT (SECOND) OF PROPERTY, Introductory note at 167 (Tent. Draft No. 1, 1973).

ence into this provision are standards dictated in various county and municipal housing and buiding codes.[29] These various housing code requirements are often detailed and specific, and the task of measuring compliance is relatively simple. However, absent local building and housing codes, determination of compliance becomes more complex.[30] Where such codes fail to exist, the landlord has an overall obligation to provide a rental unit which shall not endanger the health, welfare, or safety of its occupants, and which is fit for the purpose for which it is rented.[31] This latter standard by the very generality and vagueness of its terms, "health, welfare and safety" suggests a less rigorous standard than that provided in the more detailed housing codes.

Section 5309 provides that evidence of compliance with an applicable housing code is prima facie evidence that the landlord has complied with his obligation.[32] But where there is something less than strict compliance with the housing codes or where there are no applicable housing codes, judicial interpretation will be required to further delineate this latter standard.[33] It is clear, however, that minor discrepancies with the applicable codes are de minimus. Before the landlord breaches his obligation to supply and maintain a fit rental unit, there must be a substantial failure to conform to the rental agreement or material non-compliance with pertinent codes or statutes.[34]

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29. NEW CASTLE COUNTY, DEL., CODE §§ 10-1 to 10-120 (1972); WILMINGTON, DEL., CODE §§ 34-1 to 34-82 (1969).

30. Presently New Castle County has a housing and building code as does Wilmington and several of the incorporated towns in the county. Kent and Sussex Counties do not, however, have county housing codes although some towns within these counties do. DEL. CODE ANN. tit. 31, § 4021 (Supp. XII, 1970) has formally recommended adoption of a statewide housing code. As of this writing such a code has not been promulgated.

31. DEL. CODE ANN. tit. 25, § 5303(a)(2) (Supp. 1972).

32. DEL. CODE ANN. tit. 25, § 5309 provides:

> Evidence of compliance with an applicable housing code shall be prima facie evidence that the landlord has complied with the provisions of this chapter or any other chapter of Title 25.

33. To discern legislative intent one would naturally turn first to the committee reports and written records of hearings preceding passage of 58 DEL. LAWS ch. 472 (1972) (The Landlord-Tenant Code). Such records did not, however, accompany passage of this act. Few hearings were held, and they have been recorded on tape only. 58 DEL. LAWS ch. 472, § 5101 (1972) offers some guidelines. *See* note 27 *supra*. In that the Code bears much similarity to the MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969) reference to the comments accompanying the MODEL CODE, *supra*, would be useful.

34. DEL. CODE ANN. tit. 25, § 5304 (Supp. 1972). In considering what was an actionable breach of an implied warranty of habitability the Supreme Court of Hawaii in Lemle v. Breedon, 51 Hawaii 426, 462 P.2d 470 (1969), said both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. The New Jersey District Court in considering what nonfeasance of the landlord was substantial enough to be considered a breach of an implied warranty of habitability specifically exempted "amenities," *e.g.*, malfunction of venetian blinds, water leaks, wall cracks, lack of painting. Academy Squires Inc. v. Brown, 111 N.J. 477, 268 A.2d 556 (1970).

B. *Possession*

Once a tenancy has commenced, there has been general agreement at common law that neither the landlord, anyone acting under him, nor a holder of better title may withhold possession from the lessee.[35] This is known as a covenant of quiet enjoyment. Normally this covenant is explicit in a lease, but absent such a provision it generally will be implied by the courts.[36] Clearly, if the landlord is prevented from delivering title due to the presence of someone rightfully claiming under him, the covenant of quiet enjoyment would be breached.[37] However, where a prior tenant wrongfully holds over or a trespasser denies the tenant entry and possession, American jurisdictions are sharply split as to the landlord's obligation to deliver possession.[38]

The majority of jurisdictions presently favor the English Rule.[39] Under this rule, absent express provisions to the contrary, there is an implied covenant on the part of the lessor that when the time comes for the lessee to take possession, the premises shall be open to his entry without impediment.[40] Failure to deliver such possession breaches the covenant of quiet enjoyment.[41] The rationale for the rule is that the tenant does not expect to purchase a law suit.[42]

However, a minority of courts follow the so-called American Rule under which the landlord is not bound to deliver actual possession.[43] The landlord is bound only to put the tenant in legal possession, so that no obstacle in the form of a superior right of posses-

35. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, at § 3.37. *See* Schwartzman v. Wilmington Stores Co., 32 Del. 7, 117 A. 739 (Super. 1922).

36. Standard Livestock Co. v. Pentz, 204 Cal. 618, 269 P. 645 (1928); Lundry v. Wooden, 178 Kan. 179, 284 P.2d 586 (1955); Burofsky v. Turner, 274 Mass. 574, 175 N.E. 90 (1931); L-M-S Inc. v. Blackwell, 149 Tex. 348, 233 S.W.2d 286 (1950).

37. *See* Schwartzman v. Wilmington Stores Co., 32 Del. 7, 117 A. 739 (Super. 1922).

38. *See* Comment, *The Rights of a Reversionary Lessee Excluded From Possession by a Holdover Tenant: The Pennsylvania Position*, 75 DICK. L. REV. 144 (1971); Annot., 70 A.L.R. 151 (1931).

39. *E.g.*, King v. Reynolds, 67 Ala. 229 (1880); Cohn v. Norton, 57 Conn. 480, 18 A. 595 (1889); Herpolshiemer v. Christopher, 76 Neb. 352, 107 N.W. 382 (1906); Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (1936); Sloan v. Hart, 150 N.C. 269, 63 S.E. 1037 (1909); Whitefield v. Gay, 253 S.W. 2d 54 (Tex. Civ. App. 1952). Delaware has not addressed this precise issue.

40. King v. Reynolds, 67 Ala. 229, 232 (1880).

41. *Id.*

42. Coe v. Clay, 5 Bing. 440, 130 Eng. Rep. 1131 (C.P. 1829).

43. *E.g.*, Playter v. Cunningham, 21 Cal. 229 (1862); Rice v. Biltmore, 141 Md. 507, 119 A. 364 (1922); Snider v. Deban, 249 Mass. 59, 144 N.E. 69 (1924); Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

sion will intervene to prevent the tenant from obtaining actual possession of the demised premises.[44] The theory offered to support this rule is that the covenant of quiet enjoyment does not make the landlord liable for independent acts of a third person unless he has expressly so contracted.[45] The tenant's remedy, then, under this rule is against the trespasser or holdover tenant and not the landlord as was the case under the English Rule.

The new Landlord-Tenant Code adopts essentially the English Rule. Section 5301 of the Code requires that the landlord must supply the rental unit bargained for and put the tenant into "full" possession.[46] "Full" possession clearly describes something more than legal possession. That the landlord is required to "put" the tenant in possession demonstrates that it is primarily his obligation and not the tenant's to insure that there are no obstacles to prevent the latter's entry. In expressly placing such an affirmative duty upon the landlord, the courts no longer need resort to finding by implication a covenant warranting delivery of possession in a lease; the duty arises out of the landlord-tenant relationship. Section 5302 provides the tenant a remedy if the tenant's inability to enter is cause by the landlord's substantial failure to conform to the existing housing or building codes.[47] Considering Section 5301 in conjunction with Section 5302, it is clear that the landlord has not placed the tenant in "full" possession of the rental unit if the rental unit substantially fails to conform to existing building and housing codes.[48] The new Code, in effect, goes beyond the English Rule. Full possession requires not only actual possession, but also entry into a rental unit complying with applicable housing standards. Consequently substantial non-compliance with such codes amounts to a constructive denial of possession.

C. *Liability for Defective Premises*

Just as the doctrine of caveat emptor applied to the condition of the premises at the commencement of tenancy,[49] it likewise was applicable with respect to conditions of the premises during ten-

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44. Cases cited note 43 *supra.*

45. Hannan v. Dusch, 154 Va. 356, 363, 153 S.E. 824, 828 (1930).

46. DEL. CODE ANN. tit. 25, § 5301 (Supp. 1972) provides: "The landlord shall supply the rental unit bargained for at the beginning of the term and put the tenant into full possession."

47. *Id.* § 5302 provides in part:

> If the landlord fails to put the tenant into full possession of the rental unit at the beginning of the agreed term, the rent shall abate during any period the tenant is unable to enter and:
>
> . . .
>
> (2) If such inability to enter is caused wrongfully by the landlord . . . for substantial failure to conform to existing building and housing codes, the tenant may recover reasonable expenditures necessary to secure adequate suitable housing for up to one month.
>
> . . .

48. *See* notes 40, 47 *supra.*

49. *See* note 13 and accompanying text *supra.*

ancy. The general rule was that the landlord was not liable to a tenant, to a member of the tenant's family, or to a guest of the tenant for personal injury or property damage due to the defective condition of the demised premises.[50]

This general rule was subject to various exceptions. The landlord of an apartment building who demised separate portions of the building to separate tenants, expressly or impliedly reserving to himself control of common areas, had a duty to exercise reasonable care over such areas.[51] As to the demised premises specifically, the landlord was liable for latent defects which he knew or had reason to know existed at the time the premises were let, provided the tenant did not know or have reason to know such a condition existed.[52] The burden, however, was upon the tenant to allege and prove absence of knowledge of the latent defect, which if not met would relieve the landlord of responsibility.[53] Liability was also imposed upon the landlord if he voluntarily or at the tenant's request negligently made repairs on the leased premises resulting in injury to the tenants.[54] Naturally where the tenant had the burden of maintaining and repairing the leased premises under a covenant of repair, neither the tenant nor those claiming under him could recover from the landlord for injuries occurring on the leased premises.[55] Manifestly, the tenant's ability or right to bring an action against the landlord for damages to his person or his property was severely limited. Subject to the foregoing exceptions, the landlord had no duty and therefore incurred no liability for failure to repair defective premises.

The Code significantly alters the duties existing between the landlord and the tenant with regard to the defective condition of the premises and liability for injuries arising therefrom. Section 5303 of the Code fixes the obligation to repair and maintain the demised premises squarely on the landlord.[56] Apparently in recognition of the fact that inequities in the bargaining position between

50. *E.g.*, Young v. Saroukos, 55 Del. 149, 185 A.2d 274 (Super. 1962); Grochowski v. Stewart, 53 Del. 330, 169 A.2d 14 (Super. 1961); Seligman v. Simon, 46 Del. 301, 83 A.2d 682 (Super. 1951).

51. Young v. Saroukos, 55 Del. 149, 165, 185 A.2d 274, 282 (Super. 1962).

52. Brandt v. Yeager, 57 Del. 326, , 199 A.2d 768, 771 (Super. 1962); Grochowski v. Stewart, 53 Del. 330, 333, 169 A.2d 14, 16 (Super. 1961).

53. Brandt v. Yeager, 57 Del. 326, , 199 A.2d 768, 771 (Super. 1962).

54. *Id.*; Fulmele v. Forrest, 27 Del. 155, 159, 86 A. 733, 734 (Super. 1913); Hysore v. Quigley, 14 Del. 348, 350, 32 A. 960, 962 (Super. 1892).

55. Grochowski v. Stewart, 53 Del. 330, 335, 169 A.2d 14, 17 (Super. 1961).

56. DEL. CODE ANN. tit. 25, § 5303(d)(4) (Supp. 1972). *See* note 21 and accompanying text *supra*.

landlord and tenant often exist,[57] Section 5515 of the Code provides that every agreement either within or connected with the lease exonerating the landlord from liability for injuries to persons or property resulting from his acts or omissions in the operation and maintenance of the rental unit is unenforceable.[58] Delaware courts have in the past looked in disfavor upon clauses which exonerate a party from the consequences of his own negligence or that of his agent.[59] The courts have very narrowly construed such clauses.[60] Section 5515 codifies this policy, declaring the exculpatory clause unenforceable, thereby relieving the courts of the necessity to resort to strained interpretations evident in *Blum v. Kauffman*[61] to avoid unconscionable results.

Although the landlord under the Code cannot disclaim liability for the negligent performance of his obligation to maintain the rental unit, he can by agreement shift his duty to repair. Section 5303 allows the landlord and tenant by independent agreement to place the duty of repair upon the tenant with certain limitations.[62] The landlord absolutely cannot bargain away his duty to keep the rental unit in compliance with the local housing or building codes.[63] However, the tenant can, by separate agreement and for adequate consideration apart from the rental agreement, assume the obliga-

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57. *See* note 21 and accompanying text *supra*.

58. DEL. CODE ANN. tit. 25, § 5515 provides:

> Every agreement between landlord and tenant in or in connection with a rental agreement exempting the landlord from liability for damages for injuries to persons or property caused by or resulting from the acts or omissions of the landlord, his agents, servants or employees, in the operation or maintenance of the rental unit or the property of which it is a part shall be unenforceable.

59. Blum v. Kauffman, 297 A.2d 48 (Del. 1972); Wilmington Housing Authority v. Williamson, 228 A.2d 782 (Super. 1967); Pan American World Airways v. United Aircraft Corp., 53 Del. 7, 163 A.2d 582 (Super. 1960).

60. In so construing such an exculpatory clause in Blum v. Kauffman, 297 A.2d 48 (Del. 1972), where the lease provided that the lessors would not be liable for any damage, compensation or claim arising out of any robbery or theft, the court ruled that this claim did not exonerate the lessors of liability for lessee's loss as a result of a burglary. *Id.* at 49.

61. 297 A.2d 48 (Del. 1972). *See* note 60 *supra*.

62. DEL. CODE ANN. tit. 25, § 5303 (Supp. 1972) provides in part:

> . . . .
>
> (b) The landlord and tenant may agree by a conspicuous writing independent of the rental agreement that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling, but only if:
>
> (1) The particular work to be performed by the tenant is for the primary benefit of his rental unit, and will be substantially consumed during the remaining tenancy;
>
> (2) The work is not necessary to bring a noncomplying rental unit into compliance with a housing or building code, ordinance or the like; and
>
> (3) Adequate consideration apart from any provision of of the rental agreement is exchanged for the tenant's promise. In no event under this subsection may the landlord treat performance of this agreement as a condition to any provision of this rental agreement.

63. *Id.* § 5303(b)(2).

tion to make repairs and improvements which he will substantially consume during the tenancy.[64] An agreement in compliance with these latter provisons would not only relieve the landlord of his duty to repair in such instances, but would also logically relieve him of liability for injuries resulting from defective premises incident to the tenant's work. The Code's restrictive treatment of the landlord's ability to disclaim or shift his repair obligation to the tenant reflects judicial attitudes toward seller warranty disclaimers in consumer transactions.[65] The reluctance of the Code to permit disclaimer of repair obligations and liability recognizes the impregnable bargaining position usually occupied by the landlord,[66] and assumes that any responsibility placed on him which can be disclaimed, will be.[67] Thus, the landlord's limited ability to bargain away repair obligations would not effectively defeat the Code's intent to place liability for breach of the obligation to repair on the landlord.

Although the landlord is obligated to repair and cannot exonerate himself from liability for his own negligence or that of his servants, Section 5506 of the Code recognizes an obligation in the tenant to inform the landlord of defective conditions in the premises.[68] For this duty of notification to arise the defective condition of the premises must be: (1) known to the tenant; (2) one which he believes is unknown to the landlord; (3) and one which he reasonably believes is the duty of the landlord or other tenant to repair.[69] If these prerequisites are met and the tenant fails to inform the landlord, thereby breaching his duty, responsibility shifts to the tenant for any liability or injury resulting to the landlord from the ten-

64. *Id.* § 5303(b)(1)(3).

65. *See* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); UNIFORM COMMERCIAL CODE § 2-315 (disclaimers); § 2-302 (unconscionability). *See generally* 46 CORNELL L. REV. 607 (1961). In Hennigsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960) the court found an implied warranty of fitness for purpose in a contract for the sale of a car. Noting that where judicial process has recognized a right to recover damages for personal injuries arising from breach of warranty, waiver of this obligation signified a studied effort to frustrate that protection. Where waiver of this warranty was secured through coercive use of disproportionate bargaining power, the court ruled the disclaimer invalid.

66. *See* note 21 and accompanying text *supra*; MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-203, Comment (Tent. Draft 1969).

67. CAL. CIV. CODE § 1941 (Cum. Supp. 1973) contains a provision similar to DEL. CODE ANN. § 5303 (Supp. 1972). *See* note 22 *supra*. However, the landlord's obligation to repair may be waived by an agreement to the contrary. Almost without fail leases recite such a waiver placing the tenant in the same position he occupied at common law. Note, 21 HASTINGS L.J. 417-18 n. 1-6 (1969).

68. DEL. CODE ANN. tit. 25, § 5506 (Supp. 1972).

69. *Id.*

ant's failure to inform.[70] Consequently the liability for keeping dwelling units in good repair does not rest exclusively with the landlord. Prior to enactment of the Code, the tenant was under no such tort duty. The Model Residential Landlord-Tenant Code[71] in recognizing the same duty, notes that tenant cooperation is essential to the detection and prompt correction of dangerous conditions.[72] Imposition of such an obligation is in apparent recognition of the duty to warn or rescue implied from a special relationship existing between the parties.[73] Considering the mutual interest of both the landlord and tenant in maintaining safe premises, the tenant's duty to inform appears to be not only equitable but necessary in accomplishing the Code's stated policy of improving the quality of housing in Delaware.[74]

II. REMEDIES

Although the Code provides several new obligations to be performed by the landlord, not previously recognized in Delaware, the practical utility of the Code will largely be measured by the degree to which the remedies provided can effectively protect the tenant's newly created rights. The legislature enacted several new remedies and defenses designated to benefit the tenant in securing habitable premises or protecting his possessory interests. In light of their intended design, this section will examine the extent to which such provisions modify the tenant's pre-Code remedies.

A. *Lease-Contractual Nature*

Whether to treat a lease as a conveyance or a contract has generated considerable confusion and inconsistency in the handling of leases by the courts. The divergence of attitudes has been particularly evident with respect to what remedies arise upon breach of specific covenants in a lease. A lease has been defined as "a contract by which one person divests himself of and another person

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70. *Id.* provides in part: "The tenant shall be responsible for any liability or injury resulting to the landlord as a result of the tenant's failure to report."

71. MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-306, Comment (Tent. Draft 1969).

72. *Id.*

73. There is a trend in tort law to recognize a duty in one to come to the aid of another in danger when a special relationship exists between the parties. *E.g.*, Yu v. New York N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958) (carrier-passenger); Szabo v. Pennsylvania R. Co., 132 N.J.L. 331, 40 A.2d 562 (1945) (employer-employee); *see* W. PROSSER, THE LAW OF TORTS § 56 (4th ed. 1971). The logical conclusion of such a trend approaches a general holding that the mere knowledge of serious peril, threatening death or great bodily harm to another which an identified defendant might avoid with little inconvenience, creates a sufficient relation recognized by every moral and social standard, to impose a duty of action. W. PROSSER, *supra* at 343.

74. *See* note 27 *supra*.

takes possession of lands for a term whether long or short."[75] The tenant acquires a possessory estate and, naturally, possessory actions designed to protect his possession.[76] The typical lease, however, has often included in addition several covenants on the part of the landlord and tenant pertaining to heat, repairs, maintenance and other essential elements. Yet, by regarding the lease as primarily a conveyance of a possessory interest, these other covenants have been considered as merely incidental. When they were breached the traditional common law approach has been to interpret these covenants as mutually independent.[77]

If, however, the lease was viewed as primarily contractual in nature, such that the rules pertaining to breach of contract actions were applicable, a different result would be observed. In a bilateral contract where the covenants are normally interpreted as mutally dependent, a substantial breach of a material covenant excuses the other party's performance.[78]

The Code has clarified this inconsistent state of the law in Delaware. Its approach towards the lease is fundamentally contractual in nature. Material promises and obligations in the lease are interpreted as mutual and dependent conditions to the performance of material obligations and promises of the other party.[79] Thus, in

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75. Lewes Sand Co. v. Graves, 40 Del. 189, 192, 8 A.2d 21, 24 (1939).

76. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.38; *see* notes 149, 160 and accompanying text *infra*.

77. *See* Susswein v. Pennsylvania Steel Co., C.C., 184 F. 102 (3d Cir. 1910); Brady v. Brady, 140 Md. 403, 117 A. 882 (1922); 1 H. TIFFANY, LANDLORD AND TENANT § 59 (1st ed. 1919); 6 WILLISTON, CONTRACTS § 890 (3d ed. 1962).

Thus, applying the doctrine of independent covenants, the court in Richard Paul Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945), said that the plaintiff's covenant to pay rent is an independent covenant and not dependent upon the defendants' covenant to repair. The breach of the landlord's covenant to repair did not relieve the tenant of his obligation to pay rent; nor did it give the tenant a right to terminate the lease. The tenant's only remedy was a suit for damages for breach of covenant. *Id.* at 257.

78. RESTATEMENT OF CONTRACTS §§ 267, 274 (1932). In Reeve v. Hawke, 136 A.2d 196 (Del. Ch. 1957), the lessor covenanted not to lease any of his other land to a competing business of the lessee. The court found that this covenant was an integral part of the lease. The court, recognizing the dependency of the covenants in the lease, noted that the lessee could *inter alia* treat the violation of the covenant as putting an end to the contract for purposes of its performance and sue for damages. *Id.* at 202.

79. DEL. CODE ANN. tit. 25, § 5112 (Supp. 1972) provides in part:

> (a) Material promises, agreements, covenants, or undertakings of any kind to be performed by either party to a rental agreement shall be interpreted as mutual and dependent conditions to the performance of material promises, agreements, covenants and undertakings by the other party.

addition to the usual remedy of damages, the landlord's breach of covenants to repair, warranties of habitability, and other material obligations or promises in the rental agreement justify the tenant's termination of the rental agreement and present a valid defense to any action for rent.[80]

Section 5112 does not make clear, however, whether the landlord's breach of a material promise in the rental agreement authorizes, in addition, rent-withholding or rental abatement[81] while the tenant continues in possession. Generally, rent-withholding is tightly controlled and authorized only by statute.[82] Often official authorization and payment of rent into escrow are conditions precedent to lawful rent-withholding by the tenant.[83] Nevertheless, rent-abatement to the fair market value of the premises has been recognized by a recent trend in judicial decisions where the landlord has breached an implied warranty of habitability in the lease.[84] On the basis of this interpretation of dependent covenants, and the express intent of Section 5112 to interpret material covenants in the lease as mutually dependent, it is fair to infer that Section 5112 authorizes rent-abatement when the landlord breaches a material

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80. Several other jurisdictions have interpreted the lease as a contract, interpreting the covenants as mutually dependent, the breach of which gives rise to the usual breach of contract remedies. *E.g.*, Lemle v. Breedon, 51 Hawaii 426, 462 P.2d 470 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961). In *Lemle* the court found an implied warranty of habitability and held that an infestation of rats was a material breach of the implied warranty, allowing the tenants the right to rescind the contract and recover their prepaid rent. In *Pines* the defendant tenants having abandoned the premises successfully defended against an action for rent by the landlord. The landlord's material breach of the implied covenant justified the tenant's termination of the lease and the tenant was only liable for the reasonable rental value of the premises during the time he remained in actual occupancy.

81. Rent abatement and rent withholding are not generally regarded as synonomous. Rent abatement relieves the tenant of all obligation to pay rent for the duration of the breach. Rent withholding allows the tenant to retain the rent or pay it into escrow until the landlord remedies the breach. *Special Project—Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689, 740 (1973).

82. *See, e.g.*, Rent Withholding: N.Y. MULT. DWELL. LAW § 302A (McKinney Supp. 1972-73); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1972-73); WILMINGTON, DEL. CODE § 34-34 (1969). Rent Abatement: LA. CIV. CODE ANN. art. 2700 (1952); WIS. STAT. ANN. § 704.07(4) (Spec. Pamphlet 1972).

83. Cases cited note 82, *supra*.

84. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Academy Squires Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970); Jack Spring Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). Such a breach was held to be a valid defense to the landlord's action for possession. In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), the court, in applying contract law to the lease, recognized the dependency of covenants and decided that the rental covenant was dependent on the landlord's covenants. Similarly, in Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), the Illinois court permitted the defense of breaches of covenants of habitability and repair to a forcible detainer action for possession by the landlord, noting that liability for rent depends upon the landlord fulfilling his covenants.

covenant in the rental agreement.[85]

In addition to rejecting the conveyance concept of the lease in favor of a contractual interpretation as to the dependency of covenants, the Code likewise adopts a contractual approach when the tenant abandons the premises. The tenant is said to abandon the premises when he relinquishes possession of the premises and no longer continues to pay rent.[86] If the landlord accepts the tenant's offer to surrender the duration of his estate upon his abandonment, then both the estate and rental agreement are terminated and the tenant is not liable for rent after that time.[87] If, however, the lessor refuses to accept the tenant's surrender of the premises, the tenant is obligated to pay rent for the remainder of the term.[88] Interpreting the lease as a conveyance the tenant remains liable for the rent as it falls due whether he is in actual possession or not, so long as the landlord does not interfere with the tenant's right to possession and does not breach his covenant of quiet enjoyment by evicting the tenant.

Delaware courts have not decided the precise issue as to whether the landlord has a duty to mitigate the tenant's damages by obligating the landlord to exercise due diligence to re-rent the premises.[89] Several jurisdictions rejecting the conveyance approach in favor of a contractual interpretation of the lease have held the landlord under a duty to mitigate the tenant's damages by making reasonable efforts to re-rent.[90] The policy behind the principle of avoidable consequences in the law of contract damages is to discourage injured persons from passively suffering monetary loss which could be averted by reasonable diligence and thereby conserve the economic welfare of the entire community by the maximum utilization of available resources.[91]

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85. At least one other commentator reached a similar conclusion interpreting an identical provision in the MODEL CODE, *supra*, note 9. *See* Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 387 n.100 (1970).

86. Conner v. Jordin, 37 Del. 203, 181 A. 229 (Super. 1935).

87. Fell v. Dantzel, 16 Del. 137, 42 A. 439 (Super. 1895).

88. Chavin v. H.H. Rosin & Co., 246 A.2d 921, *appeal after remand*, 257 A.2d 228 (Del. 1968); Conner v. Jordin, 37 Del. 203, 181 A. 229 (Super. 1935); Lefland v. Emory, 2 Del. 227 (Super. 1837).

89. *Cf.* Chavin v. H.H. Rosin Inc. & Co., 246 A.2d 921, *appeal after remand*, 257 A.2d 228 (Del. 1968); Curran v. Smith-Zollinger Co., 18 Del. Ch. 220, 157 A. 432 (1931).

90. *E.g.*, Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968); Weinstein v. Griffin, 241 N.C. 161, 84 S.E.2d 549 (1954); Wright v. Baumann, 239 Ore. 410, 398 P.2d 119 (1965); St. Regis Apartment Corp. v. Sweitzer, 32 Wis. 2d 426, 145 N.W.2d 711 (1966); *see* Annot., 21 A.L.R.3d 534 (1965).

91. *See, e.g.*, Richard Paul Inc. v. Union Improvement Co., 59 F. Supp.

By adopting a contractual interpretation the Code impliedly places the landlord under a duty to relet the premises to mitigate his damages. Specifically, Section 5508[92] provides that the tenant's liability for rent cannot exceed the difference between the fair rental value and the rent agreed to in the rental agreement plus reasonable expenses accrued during the time necessary to re-rent and incidental to re-renting.[93] The fact that the landlord cannot recover more than this sum regardless of whether he relets the premises or not,[94] makes it incumbent upon the landlord to make every diligent effort to mitigate his losses by reletting.

B. *Habitable Premises*

Prior to enactment of the Code, the tenant's remedies in the event the premises became uninhabitable were limited to: (1) a suit for breach of covenant,[95] (2) a constructive eviction action[96] and (3) those remedies provided by housing codes.[97] These remedies were fraught with difficulty, and although they either compensated the tenant for damages or relieved him from liability for rent, their ability to supply the tenant with a habitable dwelling was questionable.

Since there was no obligation upon the landlord to supply a habitable or fit rental unit, there was no remedy when he failed to do so.[98] If the landlord expressly covenanted in the lease to make repairs to the demised premises, a cause of action for damages in breach of contract accrued to the tenant if the landlord neglected

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252, 256 (D. Del. 1945); Wise v. Western Union Telegraph Co., 37 Del. 209, 214, 181 A. 302, 305 (1935); McCormick, *The Rights of the Landlord upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 221, 222 (1925).

92. DEL. CODE ANN. tit. 25, § 5508 (Supp. 1972) provides in part:

> . . . .
> (d) If the tenant wrongfully quits the rental unit and unequivocally indicates by words or deeds his intention not to resume the tenancy, he shall be liable for the lesser of the following for such abandonment:
> (1) The entire rent due for the remainder of the term, and reasonable renovation expenses other than for normal wear and tear incurred in preparing the apartment for a new tenant;
> (2) All rent accrued during the period reasonably necessary to rerent the premises at a fair rental, plus the difference between such fair rental and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises. This subsection shall apply notwithstanding that the landlord did not rerent the premises.

93. *Id.*
94. *Id.* § 5508(d)(2).
95. *E.g.*, Richard Paul Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945).
96. *E.g.*, Leech v. Husbands, 34 Del. 362, 152 A. 729 (Super. 1930).
97. *See* notes 29, 30 *supra.*
98. *See* notes 13-17 and accompanying text *supra.*

to make the promised repairs.[99] If the promised repairs were minor, the tenant's measure of recovery was limited to the amount the tenant expended in making the repairs himself.[100] In any event, the tenant was under a duty to mitigate his damages when the landlord breached his covenant to repair and could only recover losses which he could not avoid.[101] However, since the covenant to pay rent and the covenant to repair were generally considered independent, the tenant was required to continue paying rent in spite of the breach.[102]

Constructive eviction offered the tenant faced with untenantable premises a more effective remedy. When the intentional wrongful acts of the landlord deprived the tenant of the beneficial enjoyment of the premises such as to necessitate the tenant's abandonment within a reasonable time, constructive eviction occurred.[103] Constructive eviction relieved the tenant of his obligation to pay rent.[104] In *Leech v. Husbands*,[105] however, the tenant was held to be liable for the rent when her defense of constructive eviction failed when she was unable to prove the landlord's actions were intentional.[106] Failure of the tenant to successfully assert this defense in *Leech* is illustrative of the hazards incident to this remedy. The lessee is required to determine at his peril what circumstances amounted to a constructive eviction and then to actually abandon the premises, possibly at some expense. Should the tenant's determination that the landlord's acts amounted to a constructive eviction be incorrect, then he was deemed to have wrongfully abandoned the premises and thus remained liable for the rental payments.[107] Abandonment itself was often an unsatisfactory remedy particularly for the indigent tenant in that he may not have been able to find a more suitable dwelling, nor afford the expense incident to abandonment and acquisition of a new dwelling.[108] Thus, both the tenant's right to sue for breach of covenant and construc-

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99. Richard Paul Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945).
100. *Id.*
101. *Id.*; *cf.* Wise v. Western Union Telegraph Co., 37 Del. 209, 181 A. 302 (Super. 1935).
102. *See* notes 77, 78 and accompanying text *supra.*
103. *E.g.*, Leech v. Husbands, 34 Del. 362, 152 A. 729 (Super. 1930); Rowbotham v. Pierce, 10 Del. 135 (Super. 1876).
104. *See* Leech v. Husbands, 34 Del. 362, 152 A. 729 (Super. 1930).
105. *Id.*
106. *Id.* at 374, 152 A. at 735.
107. *See* notes 86-91 and accompanying text *supra.*
108. *See generally* Academy Squires Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970).

tive eviction had distinct shortcomings as effective remedial measures in achieving habitable premises.

Housing and building codes also offered the tenant potential relief. Housing codes generally set forth minimum standards relating to space, fire safety, cleanliness, heat, plumbing and other essential elements regarding the health, safety and welfare of housing occupants. Housing code enforcement, however, with its system of relatively light criminal penalties, has traditionally been ineffective in achieving habitability standards for the tenant.[109]

By comparison, the Code in addition to fixing the landlord with the primary obligation to supply and maintain habitable premises,[110] provides the tenant with several remedies designed to secure compliance. Damages, termination, rent-withholding and receivership are remedies specifically provided to the tenant by the Code. Section 5510 provides the tenant with a general remedy for either breach of the rental agreement or the Code by giving the tenant the right to maintain a cause of action for damages in any court of competent civil jurisdiction.[111] Furthermore, Section 5103 states that any written or oral agreement in conflict with the provisions of the Code is declared unenforceable.[112]

The tenant may terminate the rental agreement in the event the landlord breaches any one of several of his obligations. If, at the commencement of the term, the landlord has failed to substantially conform to the rental agreement or materially comply with applicable codes or statutes, Section 5304 allows the tenant to terminate the rental agreement at any time during the first month of occupancy.[113] Language in Section 5304 suggests, however, that the

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109. *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

As to housing codes generally in Delaware, *see* notes 3, 30 *supra*. The housing code of Wilmington, Delaware, is an exception and would appear to be an effective source of relief for the tenant faced with uninhabitable premises. *See, e.g.*, WILMINGTON, DEL. CODE §§ 34-34 (rent-withholding where the landlord is in violation of city ordinances), 34.7.1 (retaliatory eviction), 34-8 (stiff criminal penalties).

110. *See* sections A and B *supra*.

111. DEL. CODE ANN. tit. 25, § 5510 (Supp. 1972) provides in part: "(a) For any violation of the rental agreement, this Code or both by either party, the injured party shall have a right to maintain a cause of action in any court of competent civil jurisdiction."

112. *Id.* § 5103 provides in part:

> . . . . Any agreement, whether written or oral, shall be unenforceable insofar as the agreement or any provision thereof conflicts with any provision of this code and is not expressly authorized herein. Such unenforceability shall not affect other provisions of the agreement which can be given effect without such void provision.

113. *Id.* § 5304 provides:

> If the landlord fails to substantially conform to the rental agreement, or if there is a material noncompliance with any code, statute, ordinance, or regulation governing the maintenance or operation of the premises, the tenant may, on written notice to the landlord, terminate the rental agreement and vacate the premises at

tenant may waive this right and be estopped from terminating if, in view of such conditions, he remains in possession without reliance on the landlord's promise to remedy the breach, or in any event longer than one month.[114] Section 5305 allows the tenant to terminate at any time during the tenancy if a condition exists which deprives the tenant of a "substantial part of the benefit and enjoyment of the bargain."[115] This section is substantially a codification of the constructive eviction doctrine, and is subject to the same criticism.[116]

Deprivation of a "substantial part of the bargain" is basically the same standard required at common law.[117] Thus, the tenant invoking this section to terminate his rental agreement runs the same risk of wrongful abandonment existing at common law.[118] Assuming, however, that the tenant does rightfully abandon the premises due to conditions caused intentionally or negligently by the landlord, Section 5305 eases the burden and expense which was incident to abandonment prior to the Code,[119] by providing the tenant reasonable expenditures for substitute housing.[120]

The Code also provides that the tenant may withhold rent in the event the landlord breaches certain specific obligations. For minor repairs and conditions short of requiring termination, the tenant may avail himself of a repair-and-deduct remedy, *i.e.*, the tenant may correct the condition at his own expense and deduct

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any time during the 1st month of occupancy so long as he remains in possession in reliance on a promise, whether written or oral, by the landlord to correct all or any part of the condition or conditions which would justify termination by the tenant under this section.

114. *Id.*

115. *Id.* § 5303 provides:

(a) If there exists any condition which deprives the tenant of a substantial part of the benefit and enjoyment of his bargain, the tenant may notify the landlord in writing of the situation and, if the landlord does not remedy the situation within 15 days terminate the rental agreement, after proceeding in a justice of the peace court. Such notice need not be given when the condition renders the rental unit uninhabitable or poses an imminent threat to the health, welfare or safety of any occupant. The tenant may not terminate for a condition caused by the want of due care of the tenant, a member of his family, or other person on the premises with his consent.

116. *See* notes 106-108 and accompanying text *supra.*

117. *Id.*

118. *See* notes 86-91 and accompanying text *supra.*

119. *See* note 91 and accompanying text *supra.*

120. DEL. CODE ANN. tit. 25, § 5305(b) (Supp. 1972) provides:

(b) If the condition referred to in subsection (a) was caused willfully or negligently by the landlord, the tenant may recover any damages sustained as a result of the condition, including, but not limited to, reasonable expenditures necessary to obtain adequate substitute housing for the term of the rental agreement.

a reasonable sum from the rent not to exceed fifty dollars.[121] This is a desirable solution to trifling defects which often arise. It provides the tenant a relatively fast, effective remedy short of more drastic measures designed to remedy material violations or substantial non-compliance to the rental agreement. Section 5307 allows the tenant to withhold one-fourth of the rent accruing during any period the landlord fails to provide heat, water, or hot water.[122] The tenant also may procure substitute housing in which case the entire rent abates and the landlord is liable for reasonable cost of substitute housing up to one-half of the abated rent.[123] In the case

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121. *Id.* § 5306 provides:

(a) If the landlord of a rental unit fails to repair, maintain, keep in sanitary condition the leased premises, or perform in any other manner required by statute or as agreed to in a rental agreement, and fails to remedy such failure within 30 days after being notified in writing by the tenant to do so, the tenant may further notify the landlord of his intention to correct the objectionable condition at the landlord's expense and immediately do or have done the necessary work in a workmanlike manner. The tenant may deduct from his rent a reasonable sum, not exceeding $50, for his expenditures by submitting to the landlord copies of his receipts covering at least the sum deducted.

(b) In no event may a tenant repair at the landlord's expense when the condition complained of was caused by the want of due care of the tenant, a member of his family, or other person on the premises with his consent.

122. *Id.* § 5307 provides:

(a) If the landlord substantially fails to provide hot water, heat, or water in violation of the rental agreement or in violation of an applicable housing code to a tenant for 48 hours after the tenant notifies him in writing of the failure, the tenant may:

(1) Upon written notice to the landlord, immediately terminate the rental agreement; or

(2) Upon written notice to the landlord, keep ¼ of the rent accruing during any period when hot water, heat or water is not supplied. The landlord may avoid this liability by a showing of impossibility of performance.

(b) If the landlord fails to provide a reasonable amount of water, hot water or adequate heat to the rental unit as specified in the applicable city or county housing code, in violation of the rental agreement, the tenant may:

(1) Upon written notice to the landlord, immediately terminate the rental agreement; or

(2) Upon notice to the landlord, procure adequate substitute housing for as long as heat or water or hot water is not supplied, during which time the rent shall abate and the landlord shall be liable for any additional expense incurred by the tenant, up to ½ of the amount of abated rent. This additional expense shall not be chargeable to the landlord if he is able to show impossibility of performance.

Impossibility of performance is a defense to failure to provide the required heat, hot water, etc. What exactly constitutes impossibility is not set forth. As a rule, mere inconvenience or substantial increase in the cost of compliance would not ordinarily relieve a promisor of his duty to perform his obligations. Ridley Investment Co. v. Croll, 56 Del. 208, 192 A.2d 925 (1963); Hudson v. D. & V. Mason Contractors Inc., 252 A.2d 166 (Super. 1969).

123. DEL. CODE ANN. tit. 25, § 5308 (Supp. 1972) provides:

When the rental unit or any of the property or appurtenances necessary to the enjoyment thereof are rendered partially or wholly unusable by fire or other casualty which occurs without fault on the part of the tenant, a member of his family, or other person on the premises with his consent, the tenant may:

of fire or casualty damage rendering only a portion of the premises unusuable, the rent abates to the market value of the premises which the tenant continues to occupy.

Prior to the adoption of the Code, the landlord in Delaware had two remedies, granted and controlled by statute, by which he could render ineffective unilateral rent withholding actions on the part of the tenant. The landlord had a right of distress for any rent in arrears whereby he could seize the tenant's personal property to satisfy the unpaid rent.[124] The Code, however, has abolished the landlord's right of distress for rent in the case of residential tenancies.[125] Without this abolition the landlord could easily bypass and defeat any rent-withholding attempt by simply seizing the tenant's property in satisfaction of the withheld rent.

Alternatively the landlord had a summary proceeding remedy under a forcible entry, detainer, holding over statute.[126] Having given proper notice to quit to the tenant who has withheld his rent the landlord could pursue summary proceedings with possession and forcible detainer the only triable issues.[127] By the very summary nature of the proceedings, and the fact that covenants were mutually independent, the tenant was not allowed to raise the landlord's breach of a material covenant in defense of the tenant's rent-withholding.[128]

The Code has amended the Delaware law by deleting this stat-

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(1) Immediately quit the premises and notify the landlord, in writing, of his election to quit within 1 week after vacating, in which case the rental agreement shall terminate as of the date of notice. If the tenant fails to notify the landlord of his election to quit, he shall be liable for rent accruing to the date of the landlord's actual knowledge of the tenant's vacation or impossibility of further occupancy; or

(2) If continued occupancy is otherwise lawful, vacate any part of the premises rendered unusable by the fire or casualty, in which case the tenant's liability for rent shall be no more than the market value of that part of the premises which he continues to use and occupy.

Recognition of a remedy for the tenant when the premises have been totally or partially destroyed by fire or casualty is further evidence of the Code's assault on the rent-for-possession doctrine. Previously the rule in Delaware was that a tenant had no remedy under such circumstances since the accidental destruction of the premises was not an eviction by the landlord which would relieve the tenant of his covenant to pay rent. Peterson v. Edmundson, 5 Del. 378 (Super. 1852).

124. DEL. CODE ANN. tit. 25, §§ 5501 *et seq.* (1953) (repealed).

125. DEL. CODE ANN. tit. 25, § 6103 (Supp. 1972). The Code retains a distress provision for the landlord in the case of commercial tenancies. *Id.* at §§ 6301-6310.

126. DEL. CODE ANN. §§ 9651 *et seq.* (1953) (repealed).

127. *Id.* §§ 9661, 9663.

128. *Id.*; *cf.* Pefkaros v. Harman, 20 Del. Ch. 238, 174 A. 124 (Del. Ch. 1934) (equitable defenses).

ute and enacted in its place a summary proceeding for possession which safeguards the tenant from forfeiting possession.[129] The landlord is still authorized to bring a summary proceeding against the tenant for failure to pay rent.[130] However, the tenant is now clearly permitted to raise any legal or equitable defense or counterclaim in answer to the landlord's petition for possession.[131] By thus allowing the tenant to raise legal defenses, the propriety of withholding rent in response to the landlord's breach of a material covenant would be properly in issue. Should the tenant be found at the summary proceeding to have wrongfully withheld his rent and a judgment for possession is given to the landlord, Section 5714 provides for a stay of proceedings by the tenant.[132] So long as the tenant has acted in good faith in withholding his rent, although wrongfully, he may stay execution of the judgment by paying all rent due at the date of the judgment without forfeiting possession.[133] Rent-withholding in some form could be a very effective remedy by which the tenant could coerce the landlord into complying with the terms of the rental agreement. Its intended effect, however, would be diminished considerably if forfeiture of possession was an incident risk. The redemption provision of Section 5715 largely relieves this risk, enhancing the effectiveness of rent-withholding as a viable remedy.

In addition to damages, termination, and rent abatement or rent-withholding provided in the Code, a remedy providing for tenant's receivership has been enacted.[134] Although a powerful deterrent, its focus differs from the other remedies available to the tenant, in that it seeks to correct uninhabitable or dangerous conditions rather than coerce the landlord's compliance through threat of a civil suit for damages or termination of the rental agreement. Any tenant or group of tenants may petition for establishment of a receivership when for five days or more the landlord has violated a duty to provide adequate heat, light, running water, electricity,

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129. DEL. CODE ANN. tit. 25, §§ 5701-5715 (Supp. 1972) (summary proceeding for possession).

130. *Id.* § 5702.

131. *Id.* § 5709 provides:

> At the time when the petition is to be heard, the defendant or any person in possession or claiming possession of the rental unit, may answer. . . . The answer may contain any legal or equitable defense or counterclaim.

132. *Id.* § 5715 provides:

> When a final judgment is rendered in favor of plaintiff in a proceeding brought against a tenant for failure to pay rent, and the default arose out of a good faith dispute, the tenant may stay all proceedings on such judgment by paying all rent due at the date of judgment and the costs of the proceeding, or by filing with the court his undertaking to the plaintiff, with such assurances as the court shall require to the effect that he will pay such rent and costs within 10 days. At the expiration of said period, the court shall issue a warrant of execution unless satisfactory proof of payment is produced by the tenant.

133. *Id.*

134. *Id.* §§ 5901-5907.

sewage facilities or any other conditions imminently dangerous to life, health, or safety of the tenant.[135] The receivership provision is designed to place the control of seriously deteriorated buildings in the hands of the Division of Consumer Affairs acting as receiver,[136] who manages and rehabilitates the building until the cost of repair is recovered through collection and use of all rents and profits of the property.[137] Unlike other state receivership statutes,[138] the petition for receivership is tenant initiated,[139] rather than municipally initiated, recognizing the compelling personal interest the tenant has in regaining habitable premises. Section 5902 by requiring the joining in the petition of all parties who have an interest in the property capable of being protected, satisfies the due process requirement of proper notice to interest holders enabling them to protect or defend their interests in the receivership proceeding.[140] Upon appointment, the receiver must make an independent determination of whether correction is feasible. If an affirmative finding is made, it must be filed with the recorder of deeds and thereby constitutes a lien on the property.[141] If the re-

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135. *Id.* § 5901 provides:

> Any tenant or group of tenants may petition for the establishment of a receivership in a justice of the peace court upon the grounds that there has existed for 5 days or more after notice to the landlord:
>
> (1) If the rental agreement or any state or local statute, code, or regulation or ordinance, places a duty upon the landlord to so provide, a lack of heat, or of running water, or of light, or of adequate electricity, or of adequate sewage facilities;
>
> (2) Any other conditions imminently dangerous to the life, health, or safety of the tenant.

136. *Id.* § 5905.

137. *Id.* § 5906.

138. *E.g.*, ILL. REV. STAT. ch. 24, § 11-31-2 (Supp. 1972) (municipally initiated); N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1973) (municipally initiated).

139. DEL. CODE ANN. tit. 25, § 5901 (Supp. 1972); *see* note 135 *supra*.

140. *Id.* § 5902 provides in part:

> a. Petitioners shall join as defendants:
>
> . . .
>
> (2) All parties whose interest in the property is
> (i) a matter of public record and (ii) capable of being protected in this proceeding.

In Central Savings v. City of New York, 279 N.Y. 266, 18 N.E.2d 151 (1938), *remittitur amended*, 280 N.Y. 9, 19 N.E.2d 659, *cert. denied*, 306 U.S. 661 (1939), the court declared the New York receivership statute unconstitutional in that it assessed the cost of receivership as a lien prior to existing mortgages without affording the mortgagee an opportunity to be heard. An amended version of the statute satisfying the notice requirements was upheld in *In re* Dept. of Buildings, 14 N.Y.2d 291, 200 N.E.2d 432, 252 N.Y.S.2d 441 (1964).

141. DEL. CODE ANN. tit. 25, § 5905 (Supp. 1972) provides:

> The receiver shall be the division of consumer affairs of the State or its successor agency.

ceiver determines that the future profits of the property will not cover the costs of correction the receiver may be discharged and appropriate action including vacation of the building or termination of the rental agreement may be taken.[142]

The generally agreed intent of a receivership provision is to make expensive repairs and rehabilitate rental housing in serious disrepair where a landlord, owner, or mortgagee is unwilling or unable to comply.[143] To the extent that this is the intended result of the Delaware receivership provision, its success is questionable. One tenant in a multi-tenanted complex can apparently petition for receivership if his dwelling alone meets the prerequisites set forth in Section 5901.[144] Although receivership would surely be successful it would be legislative overkill.[145] To order into receivership an entire complex to restore one unit does not appear to justify so drastic a remedy.

On the other hand, to the extent receivership is intended to restore dilapidated premises, the provision, presently lacks the nec-

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(1) Upon its appointment, the receiver must make within 15 days an independent finding whether there is proper cause shown for the need for rent to be paid to it and for the employment of a private contractor to correct the condition complained of in § 5902 and found by the court to exist.

(2) If the receiver shall make such a finding, it shall file a copy of the finding with the recorder of deeds of the county where the property lies and it shall be a lien on that property where the violation complained of exists.

(3) Upon completion of the aforesaid contractual work and full payment of the contractor, the receiver shall file a certification of such with the recorder of deeds of the appropriate county, and this filing shall release the aforesaid lien.

(4) The receiver shall forthwith give notice to all lienholders of record.

(5) If the receiver shall make a finding at such time or any other time that or any reason the appointment of a receiver is not appropriate, it shall be discharged upon notification of the court and all interested parties, and shall make legal distribution of any funds in its possession.

Id. § 5906 provides in part:

The receiver shall have all the powers and duties accorded a receiver foreclosing a mortgage on real property and all other powers and duties deemed necessary by the court. Such powers and duties shall include, but are not necessarily limited to, collecting and using all rents and profits of the property, prior to and despite any assignment of rent. . . .

142. *Id.* § 5907 provides in part:

(c) If the court determines that future profits of the property will not cover the costs of satisfying clauses (1) and (2) subsection (a), the court may discharge the receiver and order such action as would be appropriate in the situation, including but not limited to terminating the rental agreement, and order the vacation of the building within a specified time. In no case shall the court permit repairs which cannot be paid out of the future profits of the property.

143. *See* McElhaney, *Retaliatory Evictions: Landlords, Tenants and Law Reform*, 29 MARYLAND L. REV. 193, 199-202 (1969); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 828-30 (1965).

144. *See* note 135 and accompanying text *supra*.

145. Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URBAN LAWYER 577, 582-83 (1971).

essary authority or economic ability to accomplish this intent. It is unlikely that the rents and profits issuing from a seriously run-down dwelling could finance its rehabilitation. The receivership section makes no provision for state financing, nor does the receiver have express authority to publicly finance through issuance of bonds or receiver certificates.[146] Section 5907 provides that in no case will repairs be permitted which cannot be paid out of future profits of the property.[147] Private investment is unlikely in that the statute enacts no provision making the receivership lien a first lien, thus seriously jeopardizing the security of the potential loans.[148] The ability to underwrite repairs of delapidated dwelling units is a critical problem which the present statute seems unlikely to solve. Nevertheless, the threat of receivership can be an extremely effective stimulus, inducing otherwise reluctant landlords to make required repairs.

C. *Possession*

The Code's impact on the remedies available to the tenant by which he could protect his possessory interest is difficult to measure.[149] Although the common law remedies exercisable by the tenant when possession was denied or interfered with at the commencement of or during the course of the tenancy have become well settled in other jurisdictions, Delaware has few cases addressed to this point.[150] Thus a valid comparison with Code rem-

146. "Very frequently the rehabilitation requires some major 'front money'; it requires some major input at the very beginning because you simply can't make major repairs out of the current rents." *Id.* at 577, 582 (1971). The Illinois receivership statute authorizes the receiver to issue receivership certificates to finance repairs. ILL. REV. STAT. ch. 24, § 11-31-2 (Supp. 1973). In addition to the recoverable rents and profits issuing from the property in receivership, the Division of Consumer Affairs has been funded with only $1,000 to finance receivership actions. Interview with Mrs. Francis West, the Director of the Division of Consumer Affairs of Delaware, in Wilmington, February 2, 1974.

147. *See* note 142 *supra.*

148. The constitutional validity of receivership statutes making the receiver's lien prior to pre-existing mortgages is in question. *See* Rosen, *Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People*, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 311, 322 (1968). However both the Illinois and New York statutes have provisions making the receivers lien prior to pre-existing mortgages. *See* ILL. REV. STAT. ch. 24, § 11-31-2 (Supp. 1973); N.Y. MULT. DWELL. LAW. § 30942 (McKinney Supp. 1973-74).

149. That the lessee under a presently existing lease is owner of a possessory estate, *see* 1 AMERICAN LAW OF REAL PROPERTY, *supra* note 1, at § 3.38.

150. *See, e.g.*, Colt Lanes of Dover Inc. v. Brunswick Corp., 281 A.2d 596 (Del. 1971); Schwartzman v. Wilmington Stores Co., 32 Del. 7, 117 A. 739 (Super. 1922).

edies is difficult. Perhaps, the most significant contribution of the Code with regard to these remedies is clarification.

Where the lessor or another acting under the lessor, or one asserting paramount title prevents the lessee from taking possession at the commencement of the term, a cause of action for damages has been recognized.[151] In Delaware this cause of action has been based upon breach of an implied warranty to deliver possession.[152] However, Delaware courts have not addressed the issue as to whether the tenant has a remedy where possession is denied by a third person such as a holdover tenant at the commencement of the term.[153] Nevertheless, Section 5301 places the duty on the landlord to supply full possession at the beginning of the term.[154] Where the landlord breaches this duty Section 5302 provides the tenant several remedies.[155]

Section 5302 permits rent abatement during any time the tenant is unable to enter and the tenant has the option to terminate the rental agreement.[156] In addition, where the tenant is denied entry he may recover the costs of substitute housing, or deduct such costs from his rent not exceeding the cost of one month's rent.[157] Section 5302 also allows the tenant to maintain a summary proceeding for possession against the holdover tenant.[158] Although there is no case precisely on point, it appears that prior to adoption of the Code, the tenant had no remedy against a holdover tenant under the forcible entry, detainer, holding over statute.[159] The multi-

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151. *See* Schwartzman v. Wilmington Stores Co., 32 Del. 7, 8, 117 A. 739, 740 (Super. 1922).

152. *Id.* at 10, 117 A. at 740.

153. *See* notes 35-37 and accompanying text *supra.*

154. *See* notes 46-48 and accompanying text *supra.*

155. DEL. CODE ANN. tit. 25, § 5302 (Supp. 1972) provides:

> If the landlord fails to put the tenant into full possession of the rental unit at the beginning of the agreed term, the rent shall abate during any period the tenant is unable to enter, and:
>
> (1) Upon notice to the landlord, the tenant may terminate the rental agreement at any time he is unable to enter into possession; and
>
> (2) If such inability to enter is caused wrongfully by the landlord or by anyone with the landlord's consent or license for substantial failure to conform to existing building and housing codes, the tenant may recover reasonable expenditures necessary to secure adequate substitute housing for up to 1 month. In no event shall such expenditures exceed the agreed upon rent for 1 month. Such expenditures may be recovered by appropriate action or proceeding or by deduction from the rent upon the submission of receipts for same.
>
> (3) If such inability to enter results from the wrongful holdover of a prior tenant, the tenant may maintain a summary proceeding for possession against the wrongful occupant. The expenses of such proceeding and substitute housing expenditures, as provided in subsection (2), may be claimed from the rent in the manner specified in subsection (2).

156. *Id.* § 5302(1).

157. *Id.* § 5302(2).

158. *Id.* § 5302(3).

159. Clearly the landlord had a right to proceed against the holdover tenant under the old Code. DEL. CODE ANN. tit. 10, § 9651(c) (1953) (re-

ple remedies in Section 5302 are comprehensive and are better adapted to compensating the tenant denied entry at commencement of the rental agreement than the sole pre-Code remedy of damages.

Once the tenant acquired possession, he was in a better position to protect it. The tenant was owner of a possessory estate, even as against the landlord.[160] Consequently the tenant could maintain an action against a third person or the landlord in trespass[161] or a summary proceeding under the forcible entry or detainer statute[162] where the tenant's possession was interfered with or the tenant was wrongfully evicted from the premises. The Code has abolished the forcible entry, detainer, holding over statute,[163] and has enacted in its place a summary proceeding for possession by which the tenant may regain possession if wrongfully evicted.[164] Prior to enactment of the Code, the tenant was able to recover only possession under the forcible entry, detainer statute; the tenant had to recover damages in another action.[165] Recognizing the fact that recoverable damages often will not justify the expense and time of a separate action, and that the summary proceeding is designed to provide a fast, inexpensive remedy, the Code permits the tenant to recover both possession and damages when the summary proceeding is founded on forcible entry or forcible holding out allegations.[166]

At common law the tenant's possession was protected by a

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pealed). However, the fact that a conventional relation of landlord and tenant was a prerequisite to the statutory action, would appear to have precluded the new tenant from asserting the statute. *Cf.* Knight v. Haley, 36 Del. 366, 176 A. 461 (Super. 1935). No confusion exists under the new Code where § 5302(3) clearly provides a summary proceeding of possession for the tenant against the holdover tenant. *See* note 158 *supra.*

160. Lewes Sand Co. v. Graves, 40 Del. 189, 195, 8 A.2d 21, 24 (1939). *See* note 149 *supra.*

161. Morris v. Hazel, 24 Del. 324, 77 A. 766 (Super. 1910).

162. Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) (dictum); DEL. CODE ANN. tit. 10, § 9662 (1953) (repealed).

163. *See* note 11 *supra.*

164. DEL. CODE ANN. tit. 25, § 5702 (Supp. 1972) provides in part:

> Unless otherwise agreed in a written rental agreement, a special proceeding may be maintained under this Chapter [§§ 5701-5715].
>
> . . . .
>
> (b) The defendant has wrongfully ousted the petitioner who is the rightful tenant of the rental unit.

Id. § 5701 provides:

> A summary proceeding to recover the possession of premises may be maintained in a justice of the peace court in the county where the property is located.

165. DEL. CODE ANN. tit. 10, § 9657 (1953) (repealed); Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) (dictum).

166. DEL. CODE ANN. tit. 25, § 5711(c) (Supp. 1972).

covenant of quiet enjoyment which was implied or expressed in leases.[167] Entry by the landlord, one under him, or one with paramount title would not necessarily breach this covenant;[168] although if it were not privileged it would constitute at least a trespass.[169] The Code rejects this concept of an absolute possessory interest in the tenant. Such a concept is unreasonable where the landlord is obligated to repair and maintain a habitable dwelling.[170] Section 5513 grants the landlord reasonable access to the tenant's rental unit for inspection, repairs, and exhibition to prospective tenants or purchasers.[171] Reasonableness includes consent and two days notice, except in emergencies, as well as good faith exercise of this right.[172] Although not absolute, reasonableness is the standard by which impairment of the tenant's possessory interest may be measured. Repeated demands for unreasonable entry or entry without the tenant's consent amount to essentially a constructive eviction warranting termination of the rental agreement or injunction against further harassment.[173]

D. *Eviction*

Prior to adoption of the Code, assuming the proper notice to quit had been extended, the periodic tenant or tenant at sufferance could be lawfully evicted for any reason or no reason.[174] The landlord's motive for giving the tenant notice to quit was unimpor-

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167. *See* notes 35-38 and accompanying text *supra.*

168. *See* 2 R. POWELL, THE LAW OF REAL PROPERTY 236-37 (Rohan ed. 1973).

169. Morris v. Hazel, 24 Del. 324, 77 A. 766 (Super. 1910).

170. *See* notes 22-25 and accompanying text *supra.* Entry was privileged at common law where the landlord reserved a right of entry to make repairs. *See, e.g.*, Peterson v. Edmundson, 5 Del. 378 (Super. 1852).

171. DEL. CODE ANN. tit. 25, § 5513 (Supp. 1972) provides:

> (a) The tenant shall not unreasonably withhold his consent to the landlord to enter into the rental unit in order to inspect the premises, make necessary repairs, decorations, alterations, or improvements, supply services as agreed, or exhibit the rental unit to prospective purchasers, mortgagees, or tenants.
>
> (b) The landlord shall not abuse this right of access nor use it to harass the tenant. Insofar as it is practicable to do so, the landlord shall give the tenant at least 2 days' notice of his intent to enter, except for emergencies and repairs requested by the tenant, and shall enter only between 8:00 a.m. and 9:00 p.m., after announcing his presence and being admitted, except in the case of an emergency.

172. *Id.* § 5513(b).

173. *Id.* § 5514 provides in part:

> (c) Repeated demands for unreasonable entry, or any entry which is unreasonable and not consented to by the tenant, may be treated by the tenant as grounds for termination of the rental agreement. Any court of competent jurisdiction may issue an injunction against this kind of harassment on behalf of 1 or more tenants.
>
> (d) Every agreement or understanding between a landlord and a tenant which purports to exempt the landlord from any liability imposed by this section, except consent to a particular entry, shall be null and void.

174. As to requisite notice to quit under Code, see *id.* §§ 5407(c), 5502.

tant.[175] Recently several states by judicial decision,[176] and several others by statute[177] have recognized the defense of retaliatory eviction. Retaliatory eviction permits the tenant to raise the landlord's retaliatory motive as a defense to the latter's action for eviction. It is designed to prevent landlord reprisal where the tenant has sought enforcement of housing and building codes by complaints to the authorities or by demanding repairs from the landlord who is duty-bound to perform.[178] Clearly the possibility of such reprisals would exert an inhibiting effect on a tenant seeking compliance or enforcement of the obligations inhering to the landlord under the Code by virtue of the landlord-tenant relationship.

The defense of retaliatory eviction has been justified on policy grounds[179] and in the case of public housing on constitutional grounds.[180] In a leading case, *Edwards v. Habib*,[181] the District of Columbia Circuit Court of Appeals before resting its holding on policy grounds, discussed the possibility that state court enforcement of a landlord's action to evict a tenant in retaliation for complaints to the authorities of housing code violations constituted state action and a denial of the tenant's first amendment rights of free speech and right to petition the government for redress of grievances in violation of the first and fourteenth amendments. Had the issue been decided on constitutional grounds it would presumably be the law nationwide. Instead, the court justified the holding on public policy grounds noting that effective enforcement of the health and housing codes depends upon private initiative;

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175. There was one exception to this general rule where the landlord's motive was indeed an important factor. DEL. CODE ANN. tit. 25, § 6705 (1953) (repealed) provided for a $500 fine or one year imprisonment if the landlord refused to rent, cancelled the lease, or raised the rent because the tenant had children in his family. A similar provision has been enacted in the new Code with civil remedies where the landlord cancels a lease for reasons of race, creed, color, sex, national origin, age, occupation, or children in the family. *See* DEL. CODE ANN. tit. 25, § 6503 (Supp. 1972).

176. *E.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1968); State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (1969); Dickhut v. Norton, 173 N.W.2d 297 (Wis. 1970).

177. *E.g.*, CAL. CIV. CODE § 1942.5 (West Supp. 1973); N.J. STAT. ANN. §§ 2A:42-10.10 to .12 (Supp. 1973); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1973).

178. Edwards v. Habib, 397 F.2d 687 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1968).

179. *Id.*

180. For cases decided on the grounds of public policy see note 176 *supra*; on constitutional grounds *see, e.g.*, McQueen v. Drucker, 438 F.2d 781 (1st Cir. 1971); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969).

181. 397 F.2d 687 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1968).

to permit retaliatory eviction would clearly frustrate the effectiveness of the housing code.[182]

Section 5516 expressly permits the assertion of retaliatory eviction and retaliatory rent increases as a defense.[183] Recognizing the difficulty inherent in proving a retaliatory motive the Code provides that affirmative actions in the form of rent increases, eviction, or decreases in required services are presumed to be retaliatory and in violation of the Code if they take place within ninety days of the tenant's good faith request for repairs or complaint to proper authorities concerning housing code or ordinance violations.[184] The retaliatory eviction provision goes to great length to limit its scope to retaliatory motives only and thereby protect the landlord's interests. Several specific instances where the landlord would clearly have a good faith reason to raise rent or evict the tenant are set forth and the landlord may act accordingly notwithstanding the presumption raised.[185]

The Code also provides for a cause of action to the tenant where the landlord has acted with a retaliatory motive.[186] Where the landlord has successfully recovered possession from the tenant in violation of the section, the tenant is entitled to recover three months rent or treble damages and the cost of the suit.[187]

Not only recognizing a new right in the tenant not to be evicted for a retaliatory motive, the Code also provides that a tenant may be evicted only by a valid court order.[188] Originally in Delaware

182. *Id.* at 701.

183. DEL. CODE ANN. tit. 25, § 5516 (Supp. 1972) provides in part:

(a) Notwithstanding that the tenant has no written rental agreement or that it has expired, so long as the tenant continues to tender the usual rent to the landlord or proceeds to tender receipts for rent lawfully withheld under Chapter 59 of this Code, no action or proceeding to recover possession of the rental unit may be maintained against the tenant, and the landlord shall not (1) otherwise cause the tenant to quit the rental unit involuntarily, (2) demand an increase in rent from the tenant, or (3) decrease the services to which the tenant has been entitled after:

(i) The tenant has complained in good faith of conditions in or affecting his rental unit which constitute a violation of a building, housing, sanitary, or other code or ordinance to an authority charged with the enforcement of such code or ordinance; or

(ii) Such authority has filed a notice or complaint of such violation; or

(iii) The tenant has in good faith requested repairs as provided herein.

(b) Within 90 days after any complaints as enumerated in subparagraphs (i), (ii) or (iii) above, if the landlord institutes any of the affirmative actions set forth in subsection (a) above, such conduct shall be presumed to have been in violation of this section.

184. *Id.* § 5516(b).

185. *Id.* § 5516(c), (e).

186. *Id.* § 5516(d).

187. *Id.* § 5517 provides:

If removed from the premises or excluded therefrom by the landlord or his agent, except under color of a valid court order authorizing such removal or exclusion, the tenant may recover possession or terminate the rental agreement, and in either case, recover treble damages sustained by him, and the costs of the suit.

188. *See* note 187 *supra.*

the landlord could lawfully expel a holdover tenant without judicial process.[189] However, in *Malcolm v. Little*[190] a holdover tenant brought an action against the landlord who had locked him out of his apartment. The Delaware Supreme Court interpreted the enactment of the forcible entry, detainer, and holding over statute to be in derogation of the common law rule and therefore, to be the exclusive lawful means of regaining possession from a holdover tenant.[191] The tenant's action was in tort and the right violated was the right to noninterference with peaceable possession except by lawful means.[192] Section 5517 is consistent with the result in *Malcolm*. If the tenant is removed or excluded from the premises except under color of a valid court order, Section 5517 permits the tenant to recover possession or to terminate, and in either case to recover treble damages.[193]

Conclusion

The Code has effected several fundamental changes in the landlord-tenant relationship; tenants rights have been strengthened as a result. The most significant changes have focused on the habitability aspects of the tenant's premises. First, in recognition of the fact that the landlord was under no obligation to supply a habitable dwelling, the Code sets forth several express obligations running from the landlord to the tenant. The Code makes the landlord duty-bound to supply not only possession, but also a habitable dwelling during the course of the tenancy.[194] Arising by virtue of the special landlord-tenant relationship existing between the parties, such duties are imposed by law and are generally not subject to waiver or modification in the rental agreement.[195]

Secondly, the Code rejects the antiquated doctrine that the tenant pays rent for only possession and the covenant of quiet enjoyment. That in today's society the tenant expects to receive in consideration for his rent not only physical possession but also heat, plumbing and other essential services seems all too obvious. The Code by providing that covenants in the lease be interpreted as mutually dependent lays to rest the doctrine of "rent-for-posses-

189. State v. Stansborough, 1 Del. Cas. 129 (1797).
190. 295 A.2d 711 (Del. 1972).
191. *Id.* at 713.
192. The tenant recovered $3,000 in compensatory damages and $6,000 in punitive damages later reduced by remittitur to $3,000 punitive damages. *Id.* at 714.
193. *See* note 187 *supra.*
194. *See* notes 22-25, 46-48 and accompanying text *supra.*
195. *See* notes 111, 112 and accompanying text *supra.*

sion" and its corollary of mutually independent covenants.[196] By thus rejecting the conveyance concept of a lease in favor of a contractual interpretation the Code expands the remedies available to the tenant when the landlord does in fact breach the rental agreement. Should the landlord default in his primary obligations, a number of remedies are made available to the tenant: damages, summary proceeding for possession, termination of the rental agreement, rent abatement, repair-and-deduct and receivership. The pre-Code remedies of damages and constructive eviction were often inadequate in either failing to provide habitable premises or requiring abandonment at some cost and risk to the tenant. The Code, in addition to modifying these common law remedies, offers several alternatives designed to achieve habitable premises through actual repairs rather than by mere tenant threats of damage suits or lease termination.[197]

Finally, the tenant's ability to seek enforcement of his newly created rights set forth in the Code is preserved and strengthened by adoption of the retaliatory eviction provision. The absence of such a provision could in the final analysis render nugatory, particularly for the short term tenant, those obligations and remedies designed to achieve habitable premises for the tenant.[198]

The Code is comprehensive and the changes wrought in Delaware landlord-tenant law are great, exerting a profound, beneficial effect on tenant's rights. Whether the mere adoption of such a Code, however, will act as an immediate incentive to the landlord to provide better quality rental housing, is uncertain. Section 6504 of the Code requires the landlord to give the tenant along with the lease a summary of the Code prepared by the Attorney General.[199] The extent to which this provision is effective in educating the tenant in his newly created rights and remedies should measure to a large degree the landlord's response to the new obligations imposed upon him by the Code. Regardless of any time lag between its enactment and full compliance therewith, the Code is the essential first step toward providing the tenant with enforceable rights with which he can secure habitable premises.

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196. *See* notes 75-80 and accompanying text *supra*.
197. *Compare* notes 98-109 and accompanying text *supra, with* notes 113-148 and accompanying text *supra*.
198. *See* notes 174-187 and accompanying text *supra*.
199. DEL. CODE ANN. tit. 25, § 6504 (Supp. 1972).