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Covenant of Habitability and the Ohio Landlord-Tenant Legislation

A COVENANT OF HABITABILITY IN RENTAL AGREEMENTS is emerging in Ohio as the tenant's most effective means of obtaining the suitable dwelling which was contracted for and for which the rental payments provide the consideration. Yet, so deeply rooted in history and the common law are the real property concepts of leases as conveyances of possession involving independent agreements between the landlord and the tenant, inherently favoring the landlord or fee owner, that laws and court decisions have only recently begun to reflect the realities of today's urban life.

With one exception noted later,¹ Ohio courts have been loathe to accept the fact that enforcement of housing codes has been singularly ineffective on a large scale. Without an implied covenant of habitability in rental agreements, the indigent tenant today, living in squalid conditions and often lacking a viable alternative, has no effective means of bettering his condition. To remedy this problem, the Ohio legislature, on July 23, 1974, passed Amended Substitute Senate Bill Number 103² defining the respective rights and obligations of landlords and tenants by holding the lessor of residential property³ to an implied covenant of habitability and providing several remedies for enforcing that warranty.⁴ This Note will explore the public policy favoring such a covenant, and also much of the existing common and statutory law already recognizing the seriousness of the plight facing the urban tenant. Additionally, Ohio's landlord-tenant legislation will be examined to determine the respective rights, duties and responsibilities of both parties to a rental agreement.

Present landlord-tenant case law in Ohio draws from theories dating back to English feudal times when the lease was regarded as a grant or conveyance of the premises for a certain period of time, binding the serf to his lord. Under that system, the serf acquired an estate in the land reflected by his possession which was limited in

¹ *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). As this article goes to press a similar decision, citing *Glyco*, was rendered by Judge Ann McManamon of the Cleveland Municipal Court. *Lable & Co. v. Brooks*, Nos. B-89208 and B-89207 (Cleveland Mun. Ct. Ohio, August 20, 1974).

² Am. Sub. Ohio S.B. No. 103, 110th General Assembly, § 5321.04(A)(2) (1973-1974). [hereinafter cited as Ohio Bill 103]. Ohio Bill 103 amends §§ 1923.02, 1923.04, 1923.06, and 1923.14 and enacts 1923.061, 1923.081, 1923.15, and 5321.01 to 5321.19 of the Ohio Revised Code. The Ohio Bill 103 is a compromise of bills originating in the Senate and the House, S.B. 103 and H.B. 796, respectively, necessitated when the Senate refused to approve amendments sought by the House. According to Rep. Harry Lehman, the new law is expected to take effect about Nov. 4, 1974. Letter from Rep. Harry Lehman to *Cleveland State Law Review*, July 25, 1974.

³ *Id.* §§ 5321.01(B), (C), (F) and 5321.07(C).

⁴ *Id.* § 5321.07. But note the exception of § 5321.07(C).

scope by the operation of the common law doctrine of *caveat emptor*.⁵ Once the lease was signed, the landlord's only legal duty was delivery of possession which rendered the tenant liable for rent. The focus of the courts has been on the tenant's mere possession rather than the landlord's "service."⁶ As a result the landlord's failure to maintain or repair the dwelling unit, even if expressly promised in the lease, did not release the tenant from his obligation to pay rent. Furthermore, any such service-oriented covenants have been viewed independently of the covenant to pay rent.⁷

The tenant's duty to pay rent was suspended only if the landlord interfered with the tenant's quiet enjoyment of the land, actually repossessed the property,⁸ or if fraud or mistake in procuring the lease could be proved.⁹ The rule of *caveat emptor* reflects the following facts: that the primary reason for the rental payments during feudal times was use of the land rather than the buildings; that the condition of the land was known or could have been ascertained equally by the landlord and the tenant; and that the buildings were of simple construction without modern conveniences.¹⁰ To a farmer or commercial tenant, perhaps, the land may still be of primary importance, however the urban tenant's principal concern is finding a suitable place to live.¹¹ Not only does the low and middle income tenant lack the specialized maintenance skills of the farmer, but also his relatively short-term interest in the leasehold makes financing of major repairs difficult and impractical.¹²

In today's industrialized urban society, public policy considerations necessitate a second look at the historical common law concept of the lease as only a conveyance of possession rather than as the rental of a suitable place for human habitation. Acknowledging the inadequacy of traditional property law concepts in servicing the needs of the urban, indigent tenant, the courts gradually began to allow various exceptions which softened the harsh effects of strict adherence to the independent covenant theory.¹³ Certain circumstances, they

⁵ See *Pines v. Persson*, 14 Wis. 2d 590, 595, 111 N.W.2d 409, 412 (1961); G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1230 (1959).

⁶ *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 837 (Mass. 1973), citing Note, 56 CORNELL L. REV. 489, 490 (1971).

⁷ See Ohio Bill 103 § 5321.04(A) (4) and (6) in conjunction with § 5321.12.

⁸ See, e.g., *Royce v. Guggenheim*, 106 Mass. 201 (1870).

⁹ See, e.g., *Robbins v. Jones*, 15 C.B.N.S. 221, 240; 143 Eng. Rep. 768, 776 (C.P. 1863).

¹⁰ *Lemle v. Breeden*, 51 Hawaii 426, 429, 462 P.2d 470, 472-73 (1969); see *Berzito v. Gambin*, 63 N.J. 460, 468, 303 A.2d 17, 21 (1973).

¹¹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970).

¹² *Id.* at 1078-79.

¹³ Comment, *Tenant Protection in Iowa — Mease v. Fox and the Implied Warranty of Habitability*, 58 IOWA L. REV. 656 (1973).

concluded, justified holding the landlord to an implied warranty to furnish a place suitable and fit for its purpose as a dwelling. Perhaps the earliest exception arose from the rental of a furnished home for a term of one year or less,¹⁴ as, for example, a vacation cottage. This exception was based on the tenant's expectation of immediate occupancy and enjoyment of the premises, and the lack of an adequate opportunity to inspect it prior to commencement of the lease term.¹⁵ Another exception applied to dwellings leased before the completion of construction, since obviously the uncompleted buildings could not be adequately examined.¹⁶ Exceptions were also recognized in situations where landlords retained at least partial control over common areas found to be defective,¹⁷ and where the landlord had an obligation to disclose to the tenant any known latent defects.¹⁸

Many of these exceptions have been based upon the doctrine of constructive eviction. However, under this theory the only way that a tenant may be permitted to withhold rent due to the landlord's breach of the tenant's quiet enjoyment of the property is if the tenant actually vacates the premises.¹⁹ Many courts still cling to the idea that possession is the key to the lease and only its loss will constitute failure of consideration. This remedy is most inappropriate when the tenant cannot locate or afford another more suitable dwelling.²⁰ This, coupled with the fact that the tenant could remain liable for the balance of the rent if his reasons for vacating the premises were later determined to be inadequate,²¹ makes the remedy of questionable value.²²

Under the recently enacted Ohio legislation, the state has seemingly severed its ties with feudal doctrines. No longer will a lease of residential property in Ohio be regarded as merely a grant of possession; instead, it will now be considered a mutually binding agreement between two contracting parties.²³ On the one hand there is the

¹⁴ *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892); *accord*, *Young v. Povich*, 121 Me. 141, 143, 116 A. 26, 27 (1922).

¹⁵ *Id.*

¹⁶ *Markman v. Hoefler*, 252 Iowa 118, 123, 106 N.W.2d 59, 62 (1960).

¹⁷ *Strupka v. Scheidel*, 244 Iowa 442, 56 N.W.2d 874 (1953). *See also* Ohio Bill 103 § 5321.04(A)(3).

¹⁸ *Wright v. Peterson*, 259 Iowa 1239, 146 N.W.2d 617 (1966).

¹⁹ *See, e.g., Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

²⁰ Consider the effect of Ohio Bill 103 § 5321.03(A)(3) with respect to the landlord's right to maintain an action for possession under Chapter 1923 of the Revised Code. If such right were not granted to the landlord, would compliance with applicable building, housing, health and safety codes requiring alterations, remodeling, or demolition of the premises amount to a constructive eviction? Isn't the legislature then sanctioning such "remedy" even though the validity of the doctrine in today's society is questionable?

²¹ *Berzito v. Gambino*, 63 N.J. 460, 468, 308 A.2d 17, 20 (1973).

²² *See note 20 supra.*

²³ Ohio Bill 103 § 5321.06.

landlord whose objective is to lease the property for profit. The duties and obligations placed upon the landlord by the Ohio legislature²⁴ are intended to be commensurate with that goal. If a realistic, legitimate profit is to be made from the lease of his property, the lessor will be required to provide a suitable dwelling place as one part of the bargain. On the other hand there is the tenant whose sole desire is to find a place to live — a safe, suitable residence conducive to the health and welfare of a family, in exchange for a fair rental price and agreement to undertake specific responsibilities²⁵ in proportion to the quantity and quality of the property received in return.

No one can expect an entrepreneur investing capital in residential real estate to be burdened with oppressive requirements for its maintenance beyond those of providing a fit and habitable place for tenants to live, any more than one should expect a family to accept unsafe and unhealthy conditions over which it may have little or no control. By recognizing this fact, the Ohio legislators have taken a large step toward placing the respective parties to a rental agreement in a position of equality. The new legislation recognizes that both parties to a lease have certain interests which can and must be protected.

The Development of Modern Law

The Lease as a Contract

The finding of a warranty of habitability in a lease today, whether the result of public policy considerations, the weakening of the common law through numerous exceptions, or the logical extension of implementing housing codes, is the recognition of the essentially contractual nature of a lease with mutually dependent promises.²⁶ Under this interpretation, the lease is viewed as a contract between the landlord and tenant whereby the tenant's contractual obligation to pay rent is conditioned upon the landlord's promises, express or implied, to deliver and maintain the leased premises in a manner suitable for habitation.²⁷ Applying this concept to a finding that the tenant did not have a remedy available to him, one court, in *Marini v. Ireland*,²⁸ stated:

²⁴ Ohio Bill 103 § 5321.04.

²⁵ Ohio Bill 103 § 5321.05.

²⁶ *Lemle v. Breedon*, 51 Hawaii 426, 433, 462 P.2d 470, 474 (1969). See also Note, *Contract Principles and Leases of Realty*, 50 BOSTON U. L. REV. 24, 25 (1970); Ohio Bill 103 § 5321.06.

²⁷ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) cert. denied, 400 U.S. 925 (1970); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 842 (Mass. 1973). The new Ohio law, acknowledging this essential mutuality of covenants, would specifically forbid the receipt of rent independent of the landlord's legal obligations.

²⁸ 56 N.J. 130, 265 A.2d 526 (1970).

[A] covenant in a lease can arise only by necessary implication from specific language of the lease *or because it is indispensable to carry into effect the purpose of the lease.*²⁹ (emphasis added).

When one considers the contractual nature of a rental agreement, inherent warranties of habitability and fitness for the particular purpose intended by the lessee are found to be comparable to the warranties of merchantability and quality found in today's sales contracts that protect the purchaser's legitimate expectations.³⁰ Yet, while an implied warranty based on an analogy to sales law offers flexible remedies modeled after the Uniform Commercial Code, such warranties may be subject to a disclaimer of liability. On the other hand, although an implied warranty based on housing codes would preclude disclaimer of liability, such a model may lack the desired remedial flexibility.³¹

In *Lauch v. Morning*,³² an Ohio court regarded the written lease as a contract thereby giving the court jurisdiction under ORC 1901.18(c) to "hear and determine all legal and equitable remedies necessary or proper for a complete determination of the rights of the parties" to the contract.³³ This partial opening of the door to equitable determinations has begun to provide a further basis upon which "just" results can be reached in the landlord-tenant conflict.³⁴

The new Ohio provisions enable the landlord and tenant to agree to anything in the rental agreement provided it is not inconsistent with new Chapter 5321 of the Revised Code or does not contravene any rule of law.³⁵ A court, while reviewing such an agreement in the process of resolving a landlord-tenant dispute may refuse to enforce all or part of the contract, or may limit any of its provisions in such a manner as to avoid an unconscionable result.³⁶ Thus, form agreements of the past which have variously been termed "contracts of adhesion" or "take-it-or-leave-it" leases involving a form of overreach-

²⁹ *Id.* at 143, 265 A.2d at 533.

³⁰ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075-76 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). Such implied warranties are widely accepted and enacted in nearly all states as part of the UNIFORM COMMERCIAL CODE, § 2-314; Bixby, *Implied Warranty of Habitability: New Right for Home Buyers*, 6 CLEARINGHOUSE REV. 468 (1972).

³¹ Comment, *Tenant Remedies — The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710, 726-28 (1971). See Ohio Bill §§ 5321.13(A), (D) and 5321.14.

³² 15 Ohio App. 2d 112, 239 N.E.2d 675 (1968).

³³ *Id.* at 114, 239 N.E.2d at 677.

³⁴ Ohio Bill 103 § 5321.14 provides an ample basis for the courts to "do equity" by avoiding agreements or specific clauses to prevent an unconscionable result.

³⁵ Ohio Bill 103 § 5321.06.

³⁶ Ohio Bill 103 § 5321.14.

ing by the landlord will now have to meet stricter standards. No longer may leases contain "confession of judgment" clauses to recover rent or damages³⁷ nor may either party require the other to pay attorney fees should litigation result from the agreement.³⁸ Exculpatory clauses (often attacked on the basis of unconscionability), limitations of liability, or indemnification of the landlord have also been forbidden.³⁹ Nor may the landlord assign or otherwise encumber the lease with a provision for receipt of rent without also transferring his obligations to provide suitable premises.⁴⁰ Finally, with respect to the landlord's obligations under Chapter 5321, no oral or written rental agreement may be entered into which would modify or waive such provisions.⁴¹ The landlord, however, may agree to assume any of the duties or obligations of the tenant.⁴²

While it may appear that the pendulum has swung in favor of the tenant under the new act, in actuality it has not yet reached the passive midpoint. True, the landlord now has a number of obligations and responsibilities never before imposed upon him.⁴³ There are, however, exceptions to the lessor's obligations which have been built into the legislation as a result of various lobbying interests, the most notable being the exemption of landlords of fewer than four dwelling units and private college and university dormitories.⁴⁴ In no way, however, may the requirements which have been imposed upon a landlord be construed as oppressive or burdensome. Their basis, and the standard to be applied in determining compliance with the legislative intent, is found in the applicable building, housing, health, and safety codes of the locality in which the premises are situated.⁴⁵

Housing Codes as a Vehicle for Granting Relief

Reflecting changes in the previously noted concept of the lease as a grant of possession only, all of the states and most major municipalities have enacted housing or building regulations setting standards for the operation and maintenance of existing buildings and the construction of new structures.⁴⁶ As Justice Holmes observed in 1921:

³⁷ Ohio Bill 103 § 5321.13(B).

³⁸ Ohio Bill 103 § 5321.13(C).

³⁹ Ohio Bill 103 § 5321.13(D).

⁴⁰ Ohio Bill 103 § 5321.13(E).

⁴¹ Ohio Bill 103 § 5321.13(A).

⁴² Ohio Bill 103 § 5321.13(F).

⁴³ Ohio Bill 103 §§ 5321.04, 1923.04 and 1923.06.

⁴⁴ Ohio Bill 103 §5321.07(C) (as to tenant remedies under § 5321.07).

⁴⁵ Ohio Bill 103 § 5321.04(A) (1).

⁴⁶ See Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). See also J. FRIED, *HOUSING CRISES U.S.A.* 136-38 (1971); P. MARTIN, *THE ILL HOUSED*, 1022 (1971); Comment, *IOWA L. REV. supra* note 13. Ohio Bill 103 § 5321.19 provides that the provisions of Chapter 5321 of the Revised Code are not intended to preempt housing.

(Continued on next page)

"Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."⁴⁷ Noting this trend, the Wisconsin court in *Pines v. Perssion*⁴⁸ stated:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, "caveat emptor."⁴⁹

Housing code provisions, to be meaningfully and effectively implemented, must be read into a lease.⁵⁰ The lease of residential property to a tenant should impose upon the landlord a continuous obligation to maintain the premises in compliance with applicable state and local laws,⁵¹ the rationale being that the parties to such a contract, had they thought it necessary, would have expressly incorporated existing laws into the lease.⁵² As a result, many local housing codes and some state statutes establish minimum standards of maintenance which the landlord is legally bound to attain.

Even in a distinctly agricultural state such as Iowa, for example, the law sets state-wide minimum habitability standards, allowing local municipalities to elevate such standards when desired.⁵³ As early as 1873, before the enactment of specific housing codes, a far-sighted California legislature imposed upon the landlord the burden not only of conveying, but also of maintaining the premises in a tenantable condition fit for human occupancy excepting only those conditions caused by the tenant's lack of due care and those repairs expressly

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building, health or safety codes of any municipal corporation. Rather, these codes are relied upon as a basis for determining the obligations of the respective parties in many situations. See, e.g., Ohio Bill 103 §§ 5321.02(A) (1), 5321.03(A) (2), 5321.03(A) (3), 5321.04(A) (1), 5321.05(A) (5), 5321.07(A), 5321.09(A) (3), 5321.09(C), 5321.11 and 5321.19.

⁴⁷ *Block v. Hirsh*, 256 U.S. 135, 136 (1921), cited in *Depaul v. Kauffman*, 441 Pa. 386, 394, 272 A.2d 500, 504 (1971).

⁴⁸ 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

⁴⁹ *Id.* at 596, 111 N.W.2d at 412-13.

⁵⁰ *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972); *Glyco v. Schultz*, 35 Ohio Misc. 25, 31, 289 N.E.2d 919, 925 (Sylvania Mun. Ct. 1972).

⁵¹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970); accord, *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 326-27, 323 N.Y.S. 2d 363 (N.Y. City Civ. Ct. 1971). See Ohio Bill 103 §§ 5321.04(A) (1) and 5321.06.

⁵² *Schiro v. W. E. Gould Co.*, 18 Ill. 2d 538, 544, 165 N.E.2d 286, 290 (1960).

⁵³ IOWA CODE ANN. § 413.125 (1949). Note that Ohio Bill 103 § 5321.19 provides that Chapter 5321 is not intended to preempt any housing, building, health or safety codes of any municipal corporation.

undertaken by the tenant in the written lease;⁵⁴ and over the years the landlord's duties in California have become even more exacting and detailed.⁵⁵ A Minnesota statute is similarly illustrative of those laws holding the landlord to a covenant of habitability, the landlord

⁵⁴ Compare CAL. CIV. CODE § 1929 (West 1954) (enacted 1872, as amended Stats. 1905, c. 454 § 1) and CAL. CIV. CODE § 1941 (West 1954) (enacted 1872, as amended Code Ann. 1873-74, c. 612, § 205) with Ohio Bill 103 § 5321.04(A) (1) and (2) and 5321.03(A) (2) and 5321.05(A) (5).

⁵⁵ See, e.g., CAL. CIV. CODE § 1941.1 (West Supp. 1974). Untenantable dwellings:

A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics:

(a) Effective waterproofing and weather protection of roof and exterior wall including unbroken windows and doors.

(b) Plumbing facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.

(c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, and maintained in good working order.

(f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.

(h) Floors, stairways, and railings maintained in good repair.

§ 1941.2 — Lessee's affirmative obligations:

(a) No duty on the part of the lessor shall arise under Section 1941 or 1942 if the lessee is in substantial violation of any of the following affirmative obligations:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the lessor has expressly agreed in writing to perform the act or acts mentioned therein.

Compare the California statute with Ohio Bill 103 §§ 5321.04 and 5321.05:

Sec. 5321.04. (A) A landlord who is a party to a rental agreement shall:

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

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

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

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

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

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

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

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

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

Sec. 5321.05. (A) A tenant who is a party to a rental agreement shall:

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

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

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

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

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

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

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

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

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

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

agreeing to convey premises "fit for the use intended by the parties" and maintain them "in reasonable repair," and "in compliance with the applicable health and safety laws."⁵⁶

Today there are over ten states in which courts have recognized an implied covenant of habitability in leases.⁵⁷ The Illinois Supreme Court has recognized an implied covenant of habitability which would be effectuated by "substantial compliance" with the relevant sections of the Chicago building code.⁵⁸ Those courts which have found a covenant of habitability based on state or local health and building regulations have usually held that such a warranty cannot be waived by any provision in the lease,⁵⁹ such waiver being illegal, void and against public policy.⁶⁰ However, where such attempted waiver of a landlord's duty to maintain habitable conditions is not found to be void it is to be strictly construed.⁶¹ Such warranties apply to both

⁵⁶ Cf. MINN. STAT. ANN. § 504.18 (West Supp. 1974) :

Subd. 1. In every lease or license of residential premises, whether in writing or parol, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under his direction or control.

(c) To maintain the premises in compliance with the applicable health and safety laws of the state and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under his direction or control.

The parties to the lease or license of residential premises may not waive or modify covenants imposed by this section.

Subd. 2. The lessor or licensor may agree with the lessee or licensee that the lessee or licensee is to perform specified repairs or maintenance, but only if the agreement is supported by adequate consideration and set forth in a conspicuous writing. No such agreement, however, may waive the provisions of Subd. 1 or relieve the lessor or licensor of the duty to maintain common areas of the premises.

Compare the preceding with Ohio Bill 103 § 5321.04(A) (1) and (2) and 5321.13(A).

⁵⁷ California, Colorado, Illinois, Iowa, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, Hawaii, New York, Ohio, Wisconsin and the District of Columbia. At least five jurisdictions have expressly rejected the implied warranty of habitability for fitness for purpose — Connecticut, Indiana, Tennessee, Texas and Washington. See Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?* 40 FORDHAM L. REV. 123 (1971).

⁵⁸ *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *contra*, *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

⁵⁹ See, e.g., *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973). See also Ohio Bill 103 § 5321.13(A).

⁶⁰ *Berger v. Downing*, 1 CCH POV L. REP. § 2210.22 (Boston Mun. Ct., App. Div. Mass. 1968). See MINN. STAT. ANN. § 504.18, Subd. 2, (West Supp. 1974) (this subdivision is quoted *supra* note 56).

⁶¹ See *Buckner v. Azulai*, 251 Cal. App. 2d 1013, 1014-15, 59 Cal. Rptr. 806, 807 (Super. Ct. 1967), where a waiver by the tenant regarding her own apartment was strictly construed and found not applicable to other parts of the building from which vermin infestation came. See also Annot., 27 A. L. R. 3d 920 (1969).

latent and patent defects under oral or written leases, for a specific term or at will. As interpreted by the New Hampshire court in *Kline v. Burns*,⁶²

[t]his means that at the inception of the rental there are no latent (or patent) defects in facilities vital to the use of the premises for residential purposes and that these essential facilities will remain during the entire term in a condition which makes the property livable.⁶³

Furthermore, this warranty is an implied promise of continued compliance with local housing laws throughout the lease term, keeping the premises fit, safe and sanitary for living purposes.⁶⁴ It should be noted that the tenant has a corresponding obligation under the contract not to have willfully or negligently caused the defects complained of.⁶⁵ In addition, he must not only give the lessor adequate notice of the defect, but also reasonable time to correct it before initiating remedies.⁶⁶

The enactment of housing codes, however, is not by itself sufficient to either prevent deterioration into slum conditions or bring housing levels up to code standards. Generally, enforcement procedures rely on punishment of violators through fines which are less costly than major repairs and therefore serve as a poor incentive for landlords to undertake extensive repairs.⁶⁷ Enforcement has also often been inadequate, in part due to unwillingness of inspectors and courts to impose financial burdens upon owners or to displace tenants unable to afford decent housing.⁶⁸ Consideration of the Fourth Amendment's protection against unreasonable searches and seizures is also relevant when housing inspections are made. The Supreme Court has upheld the area inspection seeking housing code violations under a

⁶² 111 N.H. 87, 276 A.2d 248 (1971); *accord*, *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

⁶³ *Id.* at 92, 276 A.2d at 248.

⁶⁴ *See Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972). *See* Ohio Bill 103 § 5321.04(A) (2).

⁶⁵ *See* Ohio Bill 103, §§ 5321.03(A)(2) and 5321.05(A)(6). *See also* Ohio Bill 103 § 5321.09(D).

⁶⁶ *Id.*; *accord*, *Hinson v. Delis*, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972). *See* Ohio Bill 103 §§ 5321.07(A) and (B). But note the exception of § 5321.07(C).

⁶⁷ Comment, IOWA L. REV., *supra* note 13 at 656. Consider Ohio Bill 103 §§ 5321.08(D) and 1923.15 establishing the basis for court costs, and the requirements imposed upon a landlord under newly enacted § 5321.04 as well as the tenant's remedies generally under § 5321.07.

⁶⁸ Note, HARV. L. REV., *supra* note 46 at 801-2. The development of slums was also hastened by the restricted investment in existing housing and new construction during the Second World War. *See generally* Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 702 (1969). But consider the effect of Ohio Bill 103 § 5321.03(A)(3), permitting a landlord to commence an action for possession under Chapter 1923 of the Revised Code when compliance with applicable health and safety codes would deprive the tenant of the use of the dwelling unit.

valid search warrant if probable cause existed for its issuance.⁶⁹ The reasonableness of obtaining a search warrant may depend on the age and nature of the building, or on the condition of neighboring areas, rather than on specific knowledge of defective conditions.⁷⁰

One Ohio case, *Glyco v. Schultz*,⁷¹ has held that an existing housing code is to be incorporated into the lease contract by implication, and that under such code the landlord has a legal duty to let and maintain a substantially habitable dwelling.⁷² Failure to do so would be a breach of contract for failure of consideration, entitling the tenant to normal contract remedies.⁷³

Under Amended Substitute Senate Bill 103 of the State of Ohio enacting Section 5321.04 of the Revised Code, the lessor will be deemed to have warranted that the premises are and will be maintained in a fit and habitable condition and in compliance with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety.⁷⁴

The primary concern of the legislature in this area, which should also be among the foremost considerations of any responsible landlord, is with the health and safety of the tenant.⁷⁵ If the dwelling unit fails to meet the requirements of local housing codes, and the governmental agency inspecting the premises determines that such failure materially affects the health or safety of the occupants, the landlord will not only be in violation of the local ordinance, but also of his obligations under the rental agreement imposed by the state.⁷⁶ He must maintain the premises in a fit and habitable condition,⁷⁷ with the housing codes providing one source of standards for determining whether or not the requisite fitness and habitability obligations have been met. Without high standards and vigorous enforcement procedures, however, all the codes in the world will not improve

⁶⁹ See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁷⁰ *Id.*

⁷¹ 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). As previously noted the Cleveland Municipal Court has reached a similar conclusion. *Lable & Co. v. Brooks*, Nos. B-89208 and B-89207 (Cleveland Mun. Ct. Ohio, August 20, 1974).

⁷² 35 Ohio Misc. at 32, 289 N.E.2d at 925. In *Lable & Co. v. Brooks*, Nos. B-89208 and B-89207 (Cleveland Mun. Ct. Ohio, August 20, 1974), Judge McManamon ruled that "failure on the part of the landlord to maintain the premises in accordance with the Codified Ordinances of the City of Cleveland constitutes a breach of an implied warranty. . ."

⁷³ 35 Ohio Misc. at 32-33, 289 N.E.2d at 925. Similarly, Judge McManamon held that the tenant's covenant to pay rent and the landlord's covenant to maintain the premises in an habitable condition were "for all purposes mutually dependent." Accordingly, the actions for forcible entry and detainer, based upon nonpayment of rent, were dismissed upon proof of housing violations. *Lable & Co. v. Brooks*, Nos. B-89208 and B-89207 (Cleveland Mun. Ct. Ohio, August 20, 1974). See also Ohio Bill 103 §§ 5321.03(B) and 5321.12.

⁷⁴ See Ohio Bill 103 § 5321.04(A) (1) and (2).

⁷⁵ See note 61 *supra*.

⁷⁶ Ohio Bill 103 §§ 5321.04(A) (1) and 1923.15.

⁷⁷ Ohio Bill 103 § 5321.04(A) (2).

the lot of the tenant who may be forced to live in filth, squalor and dilapidation merely because he cannot afford better or because his landlord will not or cannot do anything about the conditions. Without a showing of mutual respect for the interests and rights of all parties concerned, and without a willingness to work toward the equally beneficial goal of improving the condition of all residential rental property to at least meet the minimum requirements of the applicable housing codes, it is not likely that conditions will improve, in which case it may fairly be said that the slum is here to stay.

At the heart of the solution is the need for housing codes which are equitable and realistic. Inadequate standards will not resolve the problem of improving the conditions often found in urban tenements. Nor will excessive standards cure the ills which plague the mass dwelling houses of the inner city, for in their vigor to find the remedy, the housing officials may unwittingly become overzealously oppressive, driving the landlord, overburdened by the excesses of an unrealistically stringent housing code, right out of the market. The solution, then, although easily stated and understandably more difficult to attain, is to set the standards of fitness and habitability at such a level as to be economically feasible with respect to the landlord's ability to provide, while at the same time meeting the tenant's reasonable needs to be provided with a safe and healthy shelter. While the problem may be many-faceted (*i.e.*, economic, political, social, and environmental), the solution ultimately boils down to simple economics. The landlord will only invest so much and the tenant can only pay so much in return. The line establishing the criteria for fitness and habitability, therefore, must be carefully drawn to accommodate the reasonable needs and abilities of both parties to the rental agreement. When a condition is substantially dangerous to the health and safety of an occupant, however, there should be no question where such condition fits on the spectrum of obligations. It is the materiality of the condition which must be of concern, therefore, when one considers the possible remedies which should be available for a breach of the covenant of fitness and habitability.

Materiality of the Breach

In ascertaining whether a landlord has committed a breach of a covenant of habitability, it is necessary to examine the nature of the defects. Are they substantial enough to constitute a serious danger to the safety and health of the inhabitants,⁷⁸ or are they mere amenities,

⁷⁸ See *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). See also Moskowitz, *Rent Withholding and the Implied Warranty of Habitability—Some New Breakthroughs*, 4 CLEARINGHOUSE REV. 49 (1970). Note that Ohio Bill 103 and its repeated references to conditions which "materially affect the health and safety" of occupants in §§ 1923.02(H), 5321.02(A)|1, 5321.04(A)(1), 5321.07(A), and 5321.11 as evidence of the materiality of the breach required by the Ohio legislature to be shown in order for the occupant to recover damages or secure compliance by the landlord with the rental agreement or applicable building codes.

unpleasant and unasthetic, perhaps, but not sufficiently serious to establish the existence of a breach.⁷⁹ To create a breach of covenant justifying contractual or statutory remedies a housing code violation must be serious enough to "render the premises uninhabitable in the eyes of a reasonable person."⁸⁰ However, an inspection report certifying the existence of housing code violations which "may endanger, or materially impair health or safety, and well-being of any tenant therein or persons occupying said property" would certainly be strong evidence of the landlord's constructive notice of a material breach.⁸¹ Examples of "amenities" lacking the substantiality required to satisfy the "uninhabitability" test are wall cracks, lack of paint, malfunctioning blinds, shades or curtain rods, water leaks and so forth.⁸² If the landlord expressly agreed in the lease to paint the walls, for example, his failure to do so would entitle the tenant to sue for breach of contract although the tenant would not be justified in withholding rent for such an "amenity."⁸³ And even if a lessee could accept the condition of the premises when conveyed and expressly agreed to make needed repairs except for wear and tear, specifically relieving the landlord of any liability or responsibility for repairs,⁸⁴ such waiver by the lessee has been found by a Louisiana court not to extend to such material, structural defects as garage waterproofing for which the lessor was held liable.⁸⁵

An Iowa court in *Mease v. Fox*⁸⁶ listed the following factors as relevant to the determination of materiality: existence of housing code violations;⁸⁷ seriousness of the deficiency or defect;⁸⁸ its effect on safety and sanitation;⁸⁹ the length of time it has existed; the building's age; rental amount; the existence of a waiver or circumstances for invoking an estoppel;⁹⁰ or any abnormal or malicious use by the

⁷⁹ *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 558 (D.C.N.J. 1970).

⁸⁰ *Berzito v. Gambino* 63 N.J. 460, 469, 308 A.2d 17, 22 (1973); *accord*, *Hinson v. Delis*, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972).

⁸¹ *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973). The severity of defects "materially affecting the health and safety" of an occupant will have to be determined by a case by case evaluation in light of the actual notice requirements established by Ohio Bill 103 § 5321.07.

⁸² *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 558 (D.C.N.J. 1970).

⁸³ See Ohio Bill 103 § 5321.06, 5321.12 and 5321.13(A) and (F).

⁸⁴ Ohio Bill 103 §§ 5321.13 and 5321.14 specifically forbid such waivers and other "unconscionable results."

⁸⁵ *Reed v. Classified Parking System*, 232 So. 2d 103, 106-07 (La. App. 1970), based on LA. CIV. CODE, arts. 2692, 2695 (1952).

⁸⁶ 200 N.W.2d 791 (Iowa 1972).

⁸⁷ See also Ohio Bill 103 § 5321.04(A) (1).

⁸⁸ See also Ohio Bill 103 §§ 1923.02(H), 5321.02(A) (1), 5321.04(A) (1), 5321.07(A), and 5321.11.

⁸⁹ See Ohio Bill 103 § 5321.04(A) (3).

⁹⁰ See also Ohio Bill 103 §§ 5321.06 and 5321.13(A).

tenant.⁹¹ In addition, the possibility of making the residence habitable within a reasonable time and the landlord's (or his agent's) receipt of notice of the breach are factors to be considered.⁹²

In Ohio's *Glyco v. Schultz*,⁹³ an underserviced electrical system, faulty furnace, deteriorating stairs and a weak second floor were found to be sufficiently material to constitute a breach by the landlord due to his repeated failure to repair them.⁹⁴ While the Ohio legislation keys in on building, housing, health and safety code requirements to determine a standard of fitness and habitability, in order to establish a prima facie breach it must be shown that any violation *materially affected the health and safety* of the occupants.⁹⁵ It is not enough that a local requirement has been violated to prove a case of breach of the warranty of habitability, but it must also be shown how such a violation affected the health and safety of the occupants of the dwelling so as to be considered material as a matter of fact. Failure to show that a violation of the housing codes materially affected the health and safety of the lessee-tenant may be fatal in a cause of action alleging breach of landlord obligations.

While the housing code standard is employed throughout the Ohio legislation, a closer scrutiny of the landlord's obligations and the tenant's remedies under the Act provides further guidance in determining the duties and correlative rights of the parties.⁹⁶ Not only must the lessor comply with the applicable housing codes, but he also must "keep the premises in a fit and habitable condition,"⁹⁷ with the lessee afforded relief for the landlord's non-compliance with that provision,⁹⁸ separate and apart from any violation of the housing codes. It seems logical, however, that the same standards of materiality would apply to the "fit and habitable condition" requirement as with housing codes and, due to the vagueness of the former, the

⁹¹ *Mease v. Fox*, 200 N.W.2d 791, 796-97 (Iowa 1972); *accord*, *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). *See also* Ohio Bill 103 §§ 5321.05(A)(6) and 5321.09(D); Annot., 40 A.L.R.3d 637 (1971).

⁹² *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973). *But see* Ohio Bill 103 § 5321.07(A) and (B). Note the exception of § 5321.07(C).

⁹³ 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). In *Lable & Co. v. Brooks*, Nos. B-89208 and B-89207 (Cleveland Mun. Ct. Ohio, August 20, 1974), violations consisted of the "[l]ack of door closings on exterior doors and lack of adequate and safe electrical wiring . . ."

⁹⁴ *Id.*

⁹⁵ *See* note 48 *supra*.

⁹⁶ While all the specific requirements of § 5321.04 will not be dealt with here in detail, it should be noted that the broad language of sub-sections (A)(1) and (2) may be considered as encompassing the more specific requirements of the remaining landlord obligations detailed in subsections (A)(3) through (8).

⁹⁷ Ohio Bill 103 § 5321.04(A)(2).

⁹⁸ Ohio Bill 103 § 5321.07(B).

latter seems to be the better choice. In any event, the legislative intent is clear. The landlord must provide a reasonably suitable shelter, commensurate with the rent charged by him and paid by the tenant, who now has available to him certain remedies, any one or combination of which may be called into play without first surrendering possession of the premises, if the landlord fails to fulfill his statutorily imposed obligations.

Remedies Available to the Tenant

Under the common law the tenant who signed a rental agreement with full knowledge of patent defects was precluded from remedies against the landlord for failure to let or maintain suitable premises unless the landlord expressly covenanted to do so in the agreement.⁹⁹ However, the situation facing the indigent urban tenant today presents compelling reasons for forbidding any such waiver.¹⁰⁰ The tenant is frequently compelled to negotiate from a position of unequal bargaining power. For example, he often finds either racial or class discrimination severely limiting the areas in which he may seek housing, or an increasingly severe shortage of adequate housing in areas receptive to his arrival.¹⁰¹ Moreover, he is often presented with a lengthy standardized form lease reflecting a "take-it-or-leave-it" situation.¹⁰² To allow a disadvantaged tenant to sign such a lease for substandard housing is to endanger the health and safety not only of the tenant and his family, but also of the nearby community.¹⁰³

Assuming that the latent and patent defects are substantial enough in nature to endanger the health and safety of the tenant and that he is in no way responsible for their defective condition, the

⁹⁹ See, e.g., *Whitehead v. Comstock & Co.*, 25 R.I. 423, 56 A. 446 (1903).

¹⁰⁰ Ohio Bill 103 § 5321.13(A), specifically provides that no provision of Chapter 5321 of the Revised Code may be modified or waived by oral or written agreement except that a landlord may assume any of the tenant's duties or obligations imposed by newly enacted § 5321.05.

¹⁰¹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970).

¹⁰² *Id.* Such "boilerplate" agreements or contracts of adhesion containing clauses to confess judgment, pay the landlord's attorney fees, limit his liability or indemnify him for his losses are forbidden by Ohio Bill 103 § 5321.13(B), (C), (D), and (E); and § 5321.14 forbids unconscionable rental agreements or clauses and provides the courts with authority to limit or refuse to enforce all or part of any such agreement or clause in order to avoid an unconscionable result.

¹⁰³ *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973). While the Senate version would have exempted the lessee of "a single family residence under a tenancy of one year or more" who would have been permitted to "agree to assume responsibility for the performance of specified repairs, maintenance tasks, alterations, or remodeling of the rental premises" (S.B. 103 § 1923.21(E)) this provision was deleted in the compromise bill. With the shortage of adequate housing meeting standards of habitability, allowance of such a waiver could have constituted an unconscionable tool for the lessor in executing a rental agreement with a desperate tenant, and is, therefore, not recommended. However, the provision forbidding legal recognition of any rental agreement containing a limitation of liability clause favoring the landlord is helpful, since a tenant may often unknowingly or willingly enter into such an agreement.

tenant has several remedies available to him.¹⁰⁴ The tenant, nevertheless, must, as a precondition to seeking any remedies, give timely notice to the landlord of such defects, requesting their repair or replacement within a reasonable period of time.¹⁰⁵

The Ohio Legislature has recognized the need for statutory tenant remedies by providing specific recourses available to the tenant should the landlord breach his obligations under the rental agreement or if housing code violations materially affecting the health and safety of the tenant are found.¹⁰⁶ Not only are the remedies for such breach affirmatively established, but the Act also provides remedies available to the tenant should the landlord in any way retaliate against the tenant by increasing the rent, decreasing service, or threatening suit for possession for the tenant's assertion of his remedies for breach of the landlord's obligations.¹⁰⁷ Unfortunately, however, the Ohio legislation fails to incorporate all possible tenant remedies, but rather relies on only a few of the more common approaches which appear to balance the equities in most cases, but which may not always be feasible or practical in others.

It should be clear, assuming a rental agreement is not found to be unconscionable, that if the tenant is paying a "fair" price for a reasonably suitable shelter (*i.e.*, one he can afford) and if for some reason the condition of such dwelling, through no fault of his own, is permitted to deteriorate below the minimum acceptable standards of fitness, habitability, health and safety, then according to the Bill, the landlord will be required to bear the burden of making the needed repairs.¹⁰⁸ The Bill does, however, protect the innocent landlord who willingly undertakes to maintain the premises in a fit and habitable condition by providing that these enumerated remedies are not available to the tenant who intentionally or negligently causes the damage resulting in the uninhabitable conditions complained of.¹⁰⁹ A landlord will not be subject to the remedies imposed by § 5321.07 of the new legislation where he is the lessor of three or fewer dwelling units and

¹⁰⁴ See generally Ohio Bill 103 § 5321.07 (B). But note the exceptions of § 5321.07 (C).

¹⁰⁵ *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973); *Hinson v. Delis*, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972). See Ohio Bill 103 §§ 5321.07 (A) and (B) and 5321.09 (A) (2), which provide for the notice requirement and the "reasonable" repair period, and the defense of the tenant's failure to give proper notice available to the landlord in his application to the Clerk of Court for release of rent money paid into court by the tenant under newly enacted § 5321.07 (B) (1).

¹⁰⁶ Ohio Bill 103 § 5321.07.

¹⁰⁷ Ohio Bill 103 §§ 5321.02 (A), 1923.15.

¹⁰⁸ Ohio Bill 103 §§ 5321.07, 1923.15.

¹⁰⁹ Ohio Bill 103 §§ 5321.05 (A) (6) and 5321.09 (D).

gives written notice of such fact to the lessee.¹¹⁰ Likewise, the tenant remedies are not available to occupants of private college and university dormitories.¹¹¹

It must be noted that the primary objective of the legislation appears to be the establishment and maintenance of some semblance of equality between the parties to a rental agreement, not only at the initial point of "bargaining" for the provisions to be contained in the rental agreement, but also with respect to the rights and obligations under the agreement and imposed by statute during the lease term. Neither party should be permitted to take undue advantage of the other. The remedies outlined in the Ohio Bill hopefully will be interpreted and applied in such a manner as to promote such equality — a fair month's shelter for a fair month's rent.

Abandonment of the Premises by the Tenant (Constructive Eviction)

As noted earlier, the only remedy a tenant had under a standard residential lease was to vacate the premises before withholding rent, or, if there was a breach of an express covenant, to seek damages for such breach.¹¹² Today, if the tenant does abandon the premises, where a material breach is present, the tenant's damages before evacuation are measured by the difference between the fair market value as warranted and the "as is" value.¹¹³ After vacating, however, the condition of the premises is no longer relevant. The tenant, assuming he had an advantageous lease, has lost the "benefit of the bargain" and may recover only the difference between the warranted fair market value and the promised rent computed for that period.¹¹⁴ At present, if the tenant is in a jurisdiction where the courts or legislature have recognized an implied covenant of habitability in a lease, the tenant may withhold rent in a variety of methods without abandoning the premises,¹¹⁵ thereby denying the landlord his rental payments until he has brought the premises into substantial compliance with the housing codes.¹¹⁶

It should appear obvious that abandonment of the premises and withholding of rent under the theory of constructive eviction is not a viable alternative in the arsenal of tenant remedies. For the disadvantaged lessee living at minimum subsistence level standards for whatever reason, such a choice is simply impossible. For the more

¹¹⁰ Ohio Bill 103 § 5321.07 (C).

¹¹¹ *Id.*

¹¹² See Ohio Bill 103 § 5321.12.

¹¹³ *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972).

¹¹⁴ *Id.*

¹¹⁵ Quinn and Philips, *Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 228 (1969).

¹¹⁶ See Ohio Bill 103 § 5321.07.

advantaged tenant, it is merely impractical and inconvenient. As a result of this doctrine, the cards have long been stacked in favor of the lessor and against the lessee. Now, however, the Ohio tenant need not vacate the premises in order to contest the landlord's fulfillment of his obligations.¹¹⁷ His remedy lies elsewhere, but he may be comforted by the fact that while he is asserting those statutory remedies he will at least have a place to sleep.

A tenant may be forced to vacate the premises, returning possession to the landlord, only in accordance with the applicable provisions of Chapter 1923 of the Revised Code.¹¹⁸ The lessor may not threaten suit for possession in retaliation against the tenant for asserting his various rights under Chapter 5321.¹¹⁹ One possible situation which may result under the new Bill in the tenant's forced vacation of the dwelling unit would be when compliance by the landlord with applicable health and safety codes would deprive the tenant of the use of the dwelling unit, in which case the landlord may commence an action for possession under Chapter 1923 in order that those repairs can be made.¹²⁰ It appears, however, that not only would the tenant under such circumstances recover damages for the landlord's violation of the rental agreement,¹²¹ but it also seems that the tenant should be able to recover possession upon repair of the unsuitable condition should he so chose, although such option is not specifically stated in the Bill.¹²²

Withholding of Rent

In *Amaniensis, Ltd. v. Brown*,¹²³ the court recognized three situations where tenants have valid defenses to eviction proceedings for nonpayment of rent: the presence of substantial violations of housing codes affecting the habitability of the premises accompanied by the landlord's lack of any bona fide remedial efforts; the ineffective implementation of housing code enforcement procedures; and the intentional neglect of the premises to force the tenant's abandonment.¹²⁴ If the landlord has in good faith begun repairing the premises, however, the tenant has an obligation to resume payment of rent.¹²⁵ Mere nonpayment by the tenant may render him vulnerable to an eviction action necessitating a countersuit for damages in order to obtain any

¹¹⁷ Ohio Bill 103 §§ 1923.06(B), 1923.061(B), 1923.14, 5321.02 and 5321.03(B).

¹¹⁸ Note the applicable provisions to that Chapter which have been amended by Ohio Bill 103.

¹¹⁹ Ohio Bill 103 §§ 1923.06(B) and 5321.02.

¹²⁰ Ohio Bill 103 § 5321.03(B).

¹²¹ Ohio Bill 103 § 5321.02(B)(2).

¹²² *But see* Ohio Bill 103 § 5321.02(B)(2).

¹²³ 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. 1971).

¹²⁴ *Id.* at 23, 318 N.Y.S.2d at 19. *See* Ohio Bill 103 § 5321.03(A)(3).

¹²⁵ *Riley v. Nelson*, 256 S.C. 545, 183 S.E.2d 328 (1971).

suitable relief.¹²⁶ Such a remedy is costly and time-consuming for the indigent tenant and, therefore, somewhat unrealistic.¹²⁷ The Massachusetts landlord-tenant legislation reflects current thinking and permits the tenant to withhold rent without eviction for cited code violations not caused by the tenant provided such tenant gave timely notice to the landlord.¹²⁸

If the tenant ceases to pay rent, often the landlord will sue for the rent or recovery of possession for its nonpayment,¹²⁹ in which case the uninhabitability of the premises may be asserted as a defense and set off by the tenant to such action.¹³⁰ If the tenant sues the landlord to recover all or part of the rental payment or initial deposit, the tenant will still be charged with the "reasonable rental value in its imperfect condition during his period of occupancy,"¹³¹ that is, the difference between the actual rental value of the premises in its defective condition and the amount contracted for under the lease.¹³² In *Academy Spires, Inc. v. Brown*,¹³³ the court, acknowledging the lack of expert testimony as to the reasonable value of the premises and noting the lack of authority to cite in its acceptance of the percentage diminution approach, suggested the withholding of one-

¹²⁶ See Ohio Bill 103 § 1923.06(B) in conjunction with §§ 1923.061(B) and 5321.03(A) (1).

¹²⁷ See Ohio Bill 103 §§ 1923.061(B) and 5321.03(A)(1). See also Ohio Bill 103 § 1923.06(B), advising of available legal assistance to the indigent tenant.

¹²⁸ MASS. GEN. LAWS ANN. ch. 239, § 8A (Cum. Supp. 1973):

There shall be no recovery under this chapter, pursuant to a notice to quit for nonpayment of rent or where the tenancy has been terminated without fault of the tenant, of any tenement or lot in a mobile home park rented or leased for dwelling purposes if such premises are in violation of the standards of fitness for human habitation established under the state sanitary code or any ordinance, by-law, rule or regulation and if such violation may endanger or materially impair the health or safety of persons occupying the premises; provided, however 1) that the person occupying the premises, while not in arrears in his rent, gave notice in writing to the person to whom he customarily paid his rent (a) that he would, because of such violation, withhold all rent thereafter becoming due until the conditions constituting such violations were remedied and (b) that a report of an inspection of such premises has been issued . . . 2) that such violation was not caused by the person occupying the premises or any other person acting under his control. . . .

See CONN. GEN. STAT. ANN. § 47-24 (1960). See also Ohio Bill 103 § 5321.07.

¹²⁹ See Ohio Bill 103 § 5321.03(A) (1).

¹³⁰ *E.g.*, *Fritz v. Warthen*, 213 N.W.2d 339 (Minn. 1973). See Ohio Bill 103 § 1923.061(B).

¹³¹ *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973); *Pines v. Perssion*, 14 Wis. 2d 590, 597, 111 N.W.2d 409, 413 (1961). In *Ianacci v. Pendis*, 64 Misc. 2d 178, 315 N.Y.S.2d 399 (N.Y.C. Civ. Ct. 1970), the tenant was held entitled to the return of his security deposit without ever having taken possession.

¹³² *E.g.*, *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). For example, the court allowed a 20% reduction in *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971) and a 25% decrease in *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (D.C.N.J. 1970).

¹³³ 111 N.J. Super. 477, 268 A.2d 556 (D.C.N.J. 1970).

quarter of the accrued rent during the period of failure (lack of hot water and heat), based upon guidelines in the *Model Residential Landlord-Tenant Code*.¹³⁴

It seems reasonably certain that the Ohio legislature, in balancing the competing equities, has decided not to accord withholding rent the stature it may or may not deserve by elevating it to the level of a statutory remedy. The closest the new legislation comes to sanctioning the "withholding" of rent is the provision enabling a complaining tenant to apply to the court for a rent reduction,¹³⁵ which should in turn trigger the court's inspection powers under Chapter 1923.¹³⁶ Such a remedy, however, presupposes a willingness by the court to violate the sacredness of the "freedom to contract" doctrine. The court is more likely to assert its option under any order it issues to require a rent deposit in lieu of reduction.¹³⁷ Such an order would not overly burden the landlord who, willingly or as a result of the court's direction, attempts to make the necessary repairs but requires working capital, the source of which is the incoming rental payments, to complete them. The rent withholding or reduction remedy deprives the lessor of the needed capital with which to accomplish the task of repairing and reconditioning the property. It is not likely that the court would opt for the withholding or reduction alternative except in extreme circumstances, and then more in the form of a "penalty" or "civil punishment" in order to achieve the desired results of bringing the property within the minimum standards of fitness and habitability, and only where it knows that the landlord can financially bear the burden of such withholding or reduction and still achieve the desired result. Subjective as it may seem, the legislature, nevertheless, has provided for such a determination with respect to the disposition of rents paid into court during the pendency of the action.¹³⁸ The fact remains, however, that the rent deposit is the tenant's strongest and surest remedy.

¹³⁴ *Id.* at 488, 268 A.2d at 561-62. Sec. 2-207(1)(b) of The Model Residential Landlord Tenant Code which would permit the tenant to obtain substitute housing for the period while the landlord remained liable for any additional expense up to one-half the amount of the abated rent. It was suggested by one writer that any Model Code should include a provision rendering the landlord liable for moving costs if the continuation of the lease violations resulted in the tenant's evacuation. See Note, *Model Residential Landlord-Tenant Code (Tent. Draft 1969)*, 26 RUTGERS L. REV. 647 (1973). The Model Residential Landlord-Tenant Code was the result of a 1968-69 research project of the American Bar Federation directed by Julian H. Levi of the University of Chicago. In 1970 a subcommittee of the National Conference of Commissioners on Uniform State Laws, with Professor Levi as reporter-draftsman, continued research which included circulation of four successive drafts of a uniform act for comments by various representatives of the several interest groups. Final approval of the Uniform Residential Landlord and Tenant Act for submission to the states was made at the annual meeting of the National Conference on Aug. 10, 1972. Copies may be obtained by writing 645 North Michigan Ave., Chicago, Ill. 60611.

¹³⁵ Ohio Bill 103 § 5321.07(B)(2).

¹³⁶ Ohio Bill 103 § 1923.15.

¹³⁷ Ohio Bill 103 § 5321.07(B)(2).

¹³⁸ Ohio Bill 103 § 5321.10.

Escrow Arrangement (Rent Strike)

In order to ensure against an eviction judgment for wrongful withholding of rent, the tenant may prefer an escrow arrangement, sometimes called a "rent strike," whereby rental payments are deposited with a third party, as for example, a clerk of court,¹³⁹ or a credit union fund,¹⁴⁰ to remain in escrow until the landlord has made the necessary repairs. Under this theory the landlord's right to the money in escrow is conditioned upon his bringing the premises into compliance with housing code standards.¹⁴¹ A statutory example of the escrow method currently employed in other jurisdictions, is the Pennsylvania Rent Withholding Act, applicable when a dwelling has been certified as unfit for human habitation, and setting a six month limit to the escrow period after which the money is to be returned to the tenant if the necessary improvements have not been made.¹⁴²

In *DePaul v. Kaufman*,¹⁴³ the court upheld the Pennsylvania Act against a charge of unconstitutional vagueness by saying that standards encompassed within the phrase "unfit for human habitation" were defined by § 7-506 of the Philadelphia Housing Code.¹⁴⁴ Contractual obligations protected by the Constitution are "necessarily subject to the police power," therefore a statute furthering a legitimate purpose (such as the improvement of housing conditions) will

¹³⁹ See, e.g., MASS. GEN. LAWS ANN. ch 11 § 127F (1967); N.J. STAT. ANN. § 2A: 42-85 (Supp. 1974). See also Ohio Bill 103 § 5321.07(B) (1).

¹⁴⁰ *Dorfmann v. Boozer*, 414 F.2d 1168 (D.C. Cir. 1969).

¹⁴¹ See Ohio Bill 103 §§ 5321.08, 5321.09 and 5321.10.

¹⁴² PA. STAT. ANN. tit. 35, § 1700-1 (Cum. Supp. 1974):

[D]uring any period when the duty to pay rent is suspended, and the tenant continues to occupy the dwelling, the rent withheld shall be deposited by the tenant in an escrow account in a bank or trust company . . . and shall be paid to the landlord when the dwelling is certified as fit for human habitation at any time within six months from the date on which the dwelling was certified as unfit for human habitation. If, at the end of six months . . . such dwelling has not been certified as fit for human habitation, any moneys deposited in escrow on account of continued occupancy shall be payable to the depositor except that any funds deposited in escrow may be used for the purpose of making such dwelling fit for human habitation and for the payment of utility services for which the landlord is obligated but which he refuses or is unable to pay. No tenant shall be evicted for any reason whatever while rent is deposited in escrow.

See Clough, *Pennsylvania's Rent Withholding Law*, 73 DICK. L. REV. 583 (1969); MO. ANN. STAT. § 441.570-80 (Supp. 1974). The Ohio Bill is weak in the effectiveness of this remedy since an escrow deposit is not available as a remedy against a lessor of three or fewer dwelling units or to private college and university dormitories under § 5321.07 (C). An escrow deposit may be available for these latter situated tenants but only after a hearing, Ohio Bill 103 §§ 1923.061 and 1923.15. Since the tenants of a large apartment building may have more strength by sheer numbers to organize against a landlord, it is the single tenant, and small groups of tenants who need the most protection.

¹⁴³ 441 Pa. 386, 272 A.2d 500 (1971).

¹⁴⁴ *Id.* at 393, 272 A.2d at 502. See Note, *DePaul v. Kauffman: The Pennsylvania Rent Withholding Act*, 32 U. PITT. L. REV. 626 (1971).

be upheld although it interferes with existing contract rights.¹⁴⁵ The original six month escrow limitation period can be extended at the tenant's option if the landlord is endeavoring to comply.¹⁴⁶

The New York Real Property Actions and Proceedings Law, authorizing payments to the clerk of court, would allow the deposited moneys, at the court's discretion, to be used to make the repairs, any balance to be turned over to the landlord with a "complete accounting of the rents deposited and the costs incurred."¹⁴⁷ A variation of the rent strike is illustrated by New York's Spiegel Law, authorizing the Public Welfare Department to withhold the rental payments of welfare recipients while the premises contain serious housing code violations.¹⁴⁸

Without doubt, the rent deposit remedy is the Ohio tenant's greatest weapon in the struggle for adequate housing conditions. While no financial benefit inures to the tenant as it would through the non-payment or reduction of his periodic rental amount, the legislature has firmly come down in favor of letting the landlord know of any deficiency in fulfilling his obligations. Once the rent is deposited with the court after proper notice to the landlord of the non-compliance and subsequent failure to remedy the condition within a reasonable time,¹⁴⁹ the lessor must then bring the premises up to the statutorily established standards or forfeit the rent.¹⁵⁰ And lest one think that such remedy is oppressive or at least unreasonable, the legislature has provided for the release of enough of the rent deposit for the landlord to cover the customary and usual costs of operating the premises as a rental unit.¹⁵¹ The landlord will be required, however, to forego receipt of the *profit* as the price of maintaining a fit and habitable, safe and healthy dwelling place for the tenants, but for whom no profit could exist.

The Bill has incorporated ample protection for the interests of both parties to the agreement, yet the legislative intent remains clear — neither party should be placed in a position, by the courts or

¹⁴⁵ *Id.* at 399, 272 A.2d at 506. See Ohio Bill 103 § 5321.06 allowing landlords and tenants to agree to anything in their rental agreements not inconsistent with the requirements imposed by the newly enacted Chapter 5321 of the Revised Code or any other applicable rule of law.

¹⁴⁶ Klein v. Allegheny County Health Dept., 441 Pa. 1, 269 A.2d 647 (1970).

¹⁴⁷ See Ohio Bill 103 § 5321.10.

¹⁴⁸ N.Y. SOC. SERV. LAW § 143-b (McKinney 1966); the constitutionality of this law authorizing rent abatement for welfare recipients was upheld in *Farrell v. Drew*, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1971). See *Simmons, Passion and Prejudice: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572 (1969). See also ILL. ANN. STAT. ch. 23 § 11-23 (Smith-Hurd Cum. Supp. 1974), authorizing a welfare agency to withhold rent allowance from the recipient or directly from the landlord if the recipient was living in premises violating housing codes, and prohibiting retaliatory eviction.

¹⁴⁹ Ohio Bill 103 § 5321.07.

¹⁵⁰ Ohio Bill 103 § 5321.09.

¹⁵¹ Ohio Bill 103 § 5321.10.

otherwise, to take undue advantage of the other. That the landlord has an obligation to provide a dwelling unit in suitable condition as one part of the bargain is evident. That the tenant's part of the agreement is to pay a fair price commensurate with what is received is also a sound principle. But when a disadvantaged lessee who is barely able to meet the periodic rental obligations is forced to stand by and watch the very habitation which was contracted for deteriorate due to a lack of concern on the part of the landlord then the only alternative remaining for the tenant is to deposit the rent with a party who will ensure that at least an effort is made to maintain the property in a suitable condition for human habitation. In Ohio, that party has been determined to be the courts, and hopefully now the tenant will find the relief he was unable to gain or could not afford in the past.

Repair and Deduction

Where the landlord is unwilling or unable to properly maintain the premises, another option for the tenant, provided he can afford it, is to make the necessary repairs himself and deduct their cost from his next rental payment.¹⁵² For example, in *Marini v. Ireland*,¹⁵³ the court sanctioned repairs by the tenant at the landlord's expense of "vital facilities" if "reasonable in the light of the value of the leasehold" subsequent to timely notice.¹⁵⁴ In *Garcia v. Freeland Realty*,¹⁵⁵ the court allowed reimbursement for repairs made where it was reasonably foreseeable that injury from lead poisoning would occur due to the landlord's repeated refusal to paint the premises.¹⁵⁶ The court reasoned that where there was a threat to the safety of children and a housing shortage limiting the tenant's options, the prevention of an injury, for which the landlord could be liable in a tort action for negligence, warranted reimbursement of costs for such preventable repairs.¹⁵⁷

Some landlords purposely make the tenant's notice requirement difficult to fulfill.¹⁵⁸ In one extreme example, all complaints, even those concerning vital services, and all rental payments had to be sent

¹⁵² See Ohio Bill 103 § 5321.07(B) (2), authorizing the tenant to apply to the court "for an order to use the rent deposited to remedy the condition."

¹⁵³ 56 N.J. 130, 265 A.2d 526 (1970).

¹⁵⁴ *Id.* at 144, 265 A.2d at 535.

¹⁵⁵ 63 Misc. 2d 937, 314 N.Y.S.2d 216 (N.Y.C. Civ. Ct. 1970).

¹⁵⁶ *Id.* at 941-42, 314 N.Y.S.2d at 220-22.

¹⁵⁷ *Id.* See Note, *Housing Codes and a Tort of Slumlordism*, 8 HOUSTON L. REV. 522 (1971).

¹⁵⁸ See Ohio Bill 103 § 5321.18 requiring the landlord to give written notice in the rental agreement or otherwise of his or his agent's name and address to the tenant and providing that in the absence of such notice to the tenant, the landlord will be deemed to have waived his right to notice by the tenant under newly enacted §§ 5321.07(A) and 5321.08(A).

through the mail to a post office box listed under an assumed name.¹⁵⁹ The court upheld informational picketing outside the landlord's residence as a reasonable means of effectively protesting his manner of house-letting.¹⁶⁰

The California statutes sanction this combined tenant remedy of repair and deduction where the landlord has failed to respond or comply within a reasonable time (thirty days) after notice.¹⁶¹ However, the statute not only limits its use to once in any twelve month period, but also permits repair expenditures under this method not to exceed more than the amount of one month's rent. Although public policy forbids the tenant's waiver of statutory rights with respect to any condition which would render the premises untenable,¹⁶² the landlord and tenant may provide for the tenant's undertaking certain improvements, repairs and maintenance of all or stipulated portions of the dwelling as partial consideration for the rental.¹⁶³ The parties may also agree in writing to arbitration of the controversy relating to a claimed untenable condition.¹⁶⁴

The Ohio Legislature has provided that the tenant may apply to the court for an order allowing the use of rent deposited with the clerk to remedy the condition complained of.¹⁶⁵ Assuming the court grants the application after a finding that the condition is one which is included within the landlord's statutory obligations or the housing code requirements, the tenant may then have the repairs made and deduct from the periodic rent an amount equal to such cost. However, several problems are immediately apparent. First, if the dwelling unit is in such poor condition as to materially affect the health and safety of its inhabitants or to be considered unfit and uninhabitable, it is not likely that the repair and deduction remedy will be very successful, for the cost of upgrading such a structure to meet only the minimum standards required may very well be staggering and unattainable by the average tenant, let alone the disadvantaged one. Further, the landlord may reasonably contend that the conditions

¹⁵⁹ *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 252 A.2d 622 (1969).

¹⁶⁰ *Id.*

¹⁶¹ CAL. CIV. CODE § 1942 (West 1954).

¹⁶² *See also* Ohio Bill 103 § 5321.13(A).

¹⁶³ Presumably, such agreements would be upheld by a court under Ohio Bill 103 § 5321.06, unless found to be "unconscionable" under § 5321.14 or otherwise in contravention of legislative intent or the tenant's statutory rights under Chapter 5321 of the Revised Code.

¹⁶⁴ Other statutes authorizing repairs and deductions are LA. CIV. CODE art. 2694 (1952) and MONT. REV. CODES ANN. § 42-201-202 (1947). *Cf.* GA. CODE ANN. § 61-111-112 (1966) requiring the landlord to repair premises, making him liable for substantial improvements made by the tenant with his consent and for all damages resulting from failure to repair.

¹⁶⁵ Ohio Bill 103 § 5321.07(B)(2).

which the tenant seeks to have repaired and deducted are not material or are not such as to render the premises unfit and uninhabitable, and although the remedy is not available without court order, it would require the court to evaluate each condition in order to determine materiality prior to deciding whether or not to issue an order granting the repair and deduction.¹⁶⁶ And finally, even if the court issues such an order, there is no corresponding obligation for the tenant to have the repairs completed at the best available price. Does the tenant have any obligation to minimize the cost of repairs? May he do the work himself and deduct the cost of the materials supplied as well as the value of his labor? And, what voice, if any, does the landlord have in the whole matter of repair and deduction? The argument, of course, will be made that the landlord has forfeited or waived the right to protest if the condition is not remedied after proper notice of its existence followed by a reasonable time to correct. But what about the honest dispute of fact over the materiality of the breach of the landlord's (or tenant's, for that matter) statutory obligation which is bound to occur and will probably predominate in this area?

Because of the problems posed above and others not so evident, it does not appear likely that the courts will automatically employ the repair and deduct remedy. More likely, as has already been pointed out, the courts will resort to the rent deposit approach, leaving the burden on the landlord to repair the premises as a precondition to the receipt of the rent.¹⁶⁷ An alternative approach to either of these remedies is to place the premises in the hands of an independent and disinterested third party who has no obligation to landlord or tenant. The objective of improving the condition of substandard housing may thereby be more effectively met particularly in the inner city where the cost of repairing the premises and rehabilitating the area may be totally prohibitive to both landlord and tenant.

Appointment of a Receiver

Some jurisdictions, notably New York and Illinois, have enacted receivership laws which generally authorize a designated municipal agency or private individual to initiate proceedings appointing a receiver after the landlord's failure to repair housing code violations.¹⁶⁸

¹⁶⁶ See Ohio Bill 103 § 5321.09(A) (3).

¹⁶⁷ See Ohio Bill 103 § 5321.09(A) (1).

¹⁶⁸ Special Project, *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689, 750 (1973). One New York receivership law, N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1972) was held constitutional in *In re Dept. of Bldgs.*, 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964). N.Y. REAL PROP. ACTIONS LAW, § 778 (McKinney Supp. 1973) is illustrative of a specific authorization for a receiver:

1. The court is authorized and empowered . . . to appoint a person other than the owner, a mortgagee or lienor, to administer the rent moneys or security deposited with the clerk subject to the court's direction. Such person shall be an

(Continued on next page)

While the New York Real Property Actions and Proceedings Law is a good example of a *specific* authorization, the Illinois statute gives the municipality *broad* powers to apply for an injunction requiring compliance with local housing ordinances or for "such other order as the court may deem necessary or appropriate to secure such compliance."¹⁶⁹ Thus, Illinois courts have upheld the appointment of a receiver as an appropriate exercise of this *broad* equity power in the public interest.¹⁷⁰ A city in one case sought to allow the receiver to issue notes or certificates authorized under the Illinois Municipal Code if the rental was insufficient to accomplish the necessary repairs.¹⁷¹ In addition, the city requested that purchasers of such certificates be considered holders of first liens on the premises superior to others except for the payment of taxes.¹⁷² The court upheld the constitutionality of this interference with the contractual rights of mortgagees as a reasonable exercise of the police power to promote the marketability of the certificates, and to make rehabilitation more feasible.¹⁷³

The receivership laws, however, have not been entirely successful. Receivers willing to invest the necessary funds are hard to locate; the selection of appropriate buildings for rehabilitation, rather than demolition, is difficult; and the entire procedure is time consuming.¹⁷⁴ One possible solution to these problems is to have the municipality itself assume the role of a receiver, but repairs are often more costly

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attorney and counsellor at law duly qualified to practice law in this state or a certified public accountant or a real estate broker licensed in this state. Such administrator is authorized and empowered in accordance with the direction of the court, to order the necessary materials, labor and services to remove or remedy the conditions specified . . . and to make disbursements in payment thereof. Such administrator, shall, upon completion of the work prescribed . . . file with the court a full accounting of all receipts and expenditures for such work.

2. The court may allow from the rent moneys or security on deposit a reasonable amount for the services of such administrator.

3. The administrator so appointed shall furnish a bond, the amount and form of which shall be approved by the court. The cost of such bond shall be paid from the moneys so deposited.

The newly enacted Ohio legislation does not specifically treat the possibility of receiverships. § 5321.19 would prohibit any Municipal Corporation from enacting any ordinance in conflict with Chapter 5321 of the Revised Code, or that would regulate the rights or obligations of parties to any rental agreements covered by the provisions of Chapter 5321.

¹⁶⁹ ILL. ANN. STAT. ch. 24, § 11-31-2 (Smith-Hurd Cum. Supp. 1974).

¹⁷⁰ *Community Renewal v. Chicago Title & Trust Co.*, 44 Ill.2d 284, 291, 255 N.E.2d 908, 913 (1970).

¹⁷¹ *Id.*

¹⁷² *Id.*; *accord*, *Oyola v. Combo Creditors*, 64 Misc. 2d 727, 315 N.Y.S.2d 666 (N.Y.C. Civ. Ct. 1970).

¹⁷³ *Community Renewal v. Chicago Title & Trust Co.*, 44 Ill. 2d 284, 293, 255 N.E.2d 908, 913 (1970).

¹⁷⁴ Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 828-29 (1965).

for a municipality (as opposed to private receiver) and the limited availability of municipal funds frequently impedes substantial progress.¹⁷⁵

The new Ohio legislation is mute on the subject of receiverships. One section, however, provides that municipal corporations may not enact or enforce any local ordinance in conflict with the objectives of the new Chapter 5321 or which attempt to regulate the rights of parties to a rental agreement encompassed within that chapter.¹⁷⁶

The appointment of a receiver, private or governmental, however, to deteriorated urban housing areas, and cloaking such receiver with the attendant obligations imposed upon a landlord under Chapter 5321 of the Revised Code, seems to be an attractive possibility. Moreover, by providing tax benefits for the investment of capital in such enterprises, such as those available for the purchase of municipal bonds, the necessary funds could be made available to make substantial progress toward the rejuvenation of our urban slum areas. While no firm answer to the receivership question is yet available, it seems almost inevitable that such a remedy, although not one directly available to the tenant, might be utilized more in the future if legislatures decide to seek new and imaginative solutions to poor housing conditions.

Tenant Unions

Recently tenant unions, similar to neighborhood associations and special interest groups, have had some success in gaining compliance with housing codes, usually with local building departments initiating the court proceedings.¹⁷⁷ In *Crescent Park Tenants Ass'n v. Realty Equities Corp.*,¹⁷⁸ however, the tenant union itself was allowed to bring suit in the nature of a class action since the issues involved only matters of common interest rather than individual tenant complaints; and also, the tenant association balanced the bargaining power between the landlord and the tenants.¹⁷⁹

A Massachusetts statute explicitly recognizes the right of such tenant groups to be heard:

A housing authority or its designee shall meet at reasonable times with tenant organizations to confer about complaints and grievances; provided, that if there is more than one tenant organization in any housing project, said authority

¹⁷⁵ *Id.* at 829.

¹⁷⁶ Ohio Bill 103 § 5321.19.

¹⁷⁷ 1 CCH Pov. L. REP. 2235, at 3222 (1972).

¹⁷⁸ 58 N.J. 98, 275 A.2d 433 (1971).

¹⁷⁹ *Id.* at 103, 275 A.2d 438.

or its designee shall not be obliged to meet with more than two organizations in each project which represent, as the housing authority may determine, the largest number of tenants in that project. The housing authority shall inform the tenant organizations of its decisions on any matters presented.¹⁸⁰

Other states have given the tenant statutory protection from any retaliation by the landlord for tenant initiatives in reporting to a municipal authority health or building code violations.¹⁸¹

The new Ohio legislation makes only one obscure reference to the use of tenant groups to balance the bargaining position of the disadvantaged tenant with that of the landlord. Under the Ohio Bill the lessor may not retaliate against the lessee if the tenant joins with others to collectively deal with the landlord.¹⁸² Nowhere, however, does it specifically provide that a tenant group may file an action or protest the inaction of the landlord in the name of the group, although it seems obvious that the effect on the court would be the same whether a group of tenants complained as individuals or as an organized unit.

The effect of the union remedy is probably greater in the dealings between the tenants and their landlord than with the courts, for it is in the direct, personal negotiations over leases, repairs, and so forth between the two parties that the tenant union can provide the clout necessary to maintain a respectable bargaining position. In the past, however, tenants have negotiated in groups with the specter of retaliation constantly before them. Now, however, there should be no reason why tenant groups cannot flex the same economic muscle as do the landlords. The disparity, however, still remains between the relative economic strengths of the opposing groups. It is not likely, therefore, that tenant unions will go far economically in resolving the plight of their members without first having attained the cooperation of the landlords and the courts.

Invalidation of the Rental Agreement (Rescission)

The origin of one further tenant remedy is based upon the common law contract theories of rescission, which restores the parties to the *status quo ante* the lease, or illegality which renders the contract

¹⁸⁰ MASS. GEN. LAWS ANN. ch. 121, § 43 (1968). See also CAL. CIV. CODE § 1942.5 (West Supp. 1974).

¹⁸¹ ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd Supp. 1974). Although the Ohio Bill forbids eviction or rental increase by the landlord in retaliation against a complaining tenant, it is silent as to the method of proving retaliation, as opposed to legitimate increases reflecting higher operating costs. See also Ohio Bill 103 § 1923.06(B) and § 5321.02(A), prohibiting retaliation by the landlord against a tenant.

¹⁸² Ohio Bill 103 § 5321.02(A)(3).

void *ab initio*.¹⁸³ An oft-cited case, *Brown v. Southall Realty*,¹⁸⁴ held that where violations of a housing code exist at the inception of the lease agreement, a lease of such premises, forbidden under the District of Columbia Housing Regulations was void,¹⁸⁵ reflecting the theory that a contract violating laws enacted in the public interest bestows no enforceable rights on the parties to the contract.¹⁸⁶ An exception applies where one party is ignorant of the statutory prohibition designed primarily to protect such party, or where an unequal bargaining position necessitates acquiescence. In such a situation the wronged party is not *in pari delicto* and not precluded from recovering damages if he should elect cancellation of the lease rather than a form of rent withholding, for example, as his remedy.¹⁸⁷

The *Brown* illegality was not based solely on the existence of code violations, since "minor" violations would not have invalidated the lease, but rather on the effect of such violations on the purpose of the regulations to prohibit the letting of uninhabitable premises.¹⁸⁸ Voiding the lease, rather than warranting automatic rescission and eviction of the tenant, merely precludes either party from enforcing its covenants through the medium of the courts.¹⁸⁹ If the lease is void, the tenant becomes a tenant at sufferance thereby allowing the landlord to terminate the relationship after reasonable notice, since a landlord cannot be compelled to rent his property.¹⁹⁰ Of course, under this theory the tenant has the option of rescinding the contract after giving the landlord proper notice. Although the landlord is not en-

¹⁸³ Although the recently enacted Ohio Landlord-Tenant legislation does not specifically provide for rescission or invalidation of the lease by the parties, § 5321.07 (B) (3) permits the tenant to terminate the rental agreement as a remedy to the landlord's failure to fulfill his obligations under § 5321.04. The same remedy is likewise available to the landlord under § 5321.11 when the tenant fails to remedy conditions caused by him under § 5321.05. The courts, moreover, may refuse to enforce all or part or in any manner limit the applicability of any section of an agreement under its powers in § 5321.14.

¹⁸⁴ 237 A.2d 834 (D.C. App. 1968).

¹⁸⁵ *Id.* at 837. D.C. Housing Regs. § 2301 states that no owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations, *accord*, *Longercke v. Hardin*, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970).

¹⁸⁶ *See Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972).

¹⁸⁷ *Id.* at 51, 289 N.E.2d at 934; *accord*, *Stevens v. Berger*, 255 Wis. 55, 37 N.W.2d 841 (1949).

¹⁸⁸ *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. Ct. App. 1969).

¹⁸⁹ *Id.* at 495; *accord*, *Reed v. Classified Parking System*, 232 So. 2d 103 (La. App. 1970), where the court, interpreting LA. CIV. CODE art. 2729 (Slovenko 1961), found that in order for a tenant to seek dissolution of a lease based on the landlord's failure to fulfill his obligations under the lease, he had to prove his possession substantially disturbed and the premises no longer fit for the purpose for which leased. In this latter case, the cancellation of the lease by the tenant was held justified.

¹⁹⁰ *Id.*

titled to rental payments under a void lease, the tenant at sufferance is liable for the reasonable value of the premises during the period of occupancy.¹⁹¹

Ohio's only reference to the invalidation of a lease in its recently enacted landlord-tenant legislation is to the authority of the court to make a determination that a rental agreement or specific clause therein is unconscionable. The court may refuse to enforce all or any part of the agreement or limit its provisions in any manner so as to avoid an unconscionable result.¹⁹²

Likewise, while a landlord and tenant may agree to anything in their lease not contrary to the rights and obligations of each imposed by Chapter 5321 of the Revised Code,¹⁹³ there are specific prohibitions incorporated into that chapter which in the past have been notorious for weakening the contractual position of the tenant to the advantage of the landlord. Such provisions as enumerated in the statute are strictly forbidden and if found in the rental agreement will be deemed to be unlawful,¹⁹⁴ thereby rendering the lease either void *ab initio* or unenforceable due to its overreaching nature. At any rate, those provisions specifically prohibited by statute will be stricken and their inclusion may be considered in the court's determination of unconscionability with respect to the remaining parts of the rental agreement.

Conclusion

As has been illustrated, substantial inroads have been made into the traditional independent covenant theory of landlord-tenant relationships both in statutory law and court decisions. In modern urban America, the many reasons favoring equalizing the landlord-tenant relationship seem persuasive and the trend towards that objective seems unmistakably clear.

Nevertheless, from the landlord's viewpoint, holding him to high standards of habitability is not without attendant risks. If the landlord must make costly repairs in a limited amount of time, while simultaneously paying off the mortgage, and is deprived of his rental payments during the period, he may opt or be forced to abandon the properties.¹⁹⁵ Or, to redeem the amounts spent on repairs and interest

¹⁹¹ *William J. Davis, Inc. v. Slade*, 271 A.2d 412, 416 (D.C. App. 1970). A Maine statute ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 1972), authorizes the rescission of the rental contract and proportional recovery of rents.

¹⁹² Ohio Bill 103 § 5321.14.

¹⁹³ Ohio Bill 103 § 5321.06.

¹⁹⁴ Ohio Bill 103 § 5321.13.

¹⁹⁵ *Samuelson v. Quinones*, 119 N.J. Super. 338, 343, 291 A.2d 580, 583 (App. Div. 1972). See Ohio Bill 103 § 5321.10(A) which permits a court to release enough of the deposited rent to cover mortgage principle and interest, taxes, insurance, utilities, repairs and other customary costs of operating the premises as a rental unit. Such discretion would enable a court to ensure that a landlord who endeavors to correct the conditions complained of by the tenant does not experience unnecessary financial hardship beyond the cost of necessary repairs.

charges, if borrowing was necessary, the landlord may have to raise rents, resulting in even fewer adequate low-income housing units in urban areas already facing serious shortages.¹⁹⁶ Stringent maintenance standards could force a small landlord into financial bankruptcy¹⁹⁷ or discourage investors from venturing into the housing market.¹⁹⁸

Even a cooperative landlord may require aid to meet his obligations. He may need helpful advice from housing inspectors concerning the extent of damage and immediacy of needed repairs, and the obtaining of reasonable estimates and reliable workmen.¹⁹⁹ In addition, agency financial advisors should provide aid for qualifying the prospective landlord for Federal Housing Administration mortgage guaranties, and perhaps readjusting the landlord's debt structure to lower his mortgage payments and lessen the amount of debt financing.²⁰⁰

Although the damage resulting from willfully destructive acts by the tenant or his family are usually readily distinguishable from that caused by the ravages of age and neglect,²⁰¹ there may be some defects the source of which is difficult to determine; as is the proper remedy. To allow the landlord, under the watchful eye of the court, to use the deposited escrow funds for the required repairs would appear to be an equitable compromise.²⁰² In *Levangard v. District of Columbia*,²⁰³ the court answered such landlord arguments this way:

[O]ne who chooses to use his property as a dwelling place for others to produce profit for himself cannot avoid compliance with the safety standards properly established for such use merely because it is expensive or difficult.²⁰⁴

In other words, the court was implying that "if you can't take the heat, get out of the kitchen!"

¹⁹⁶ *Id.* Compare Ohio Bill 103 § 5321.02(A) with § 5321.02(C), wherein the landlord, prohibited from increasing the tenant's rent in retaliation against some tenant action, is enabled to "increase the rent to reflect the cost of improvements installed by the landlord in or about the premises or to reflect the increase in other costs of operation of the premises."

¹⁹⁷ RUTGERS L. REV., *supra* note 134 at 655.

¹⁹⁸ Snook, *Real Estate Interests Fight Tough Tenant Bill for Ohio*, The Plain Dealer (Cleveland), January 21, 1974, at 1A col. 5. The Ohio Bill gives more than adequate attention to protecting the landlord, spelling out the duties and obligations of the lessee with equal specificity as those of the lessor. See Ohio Bill 103 §§ 5321.04 and 5321.05.

¹⁹⁹ Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 858 (1965).

²⁰⁰ *Id.*

²⁰¹ Ohio Bill 103 § 5321.05(A) (6) requires the tenant to refrain from "intentionally or negligently" damaging the premises.

²⁰² Ohio Bill 103 § 5321.10(A) provides for the release of rent deposits by the court for the purpose of making required repairs.

²⁰³ 254 A.2d 728 (D.C. Ct. App. 1969).

²⁰⁴ *Id.* at 729.

Since Ohio's case law equalizing the landlord-tenant relationship is virtually non-existent, without the enthusiastic enforcement of the new landlord-tenant legislation the tenant's hopes for fair and equal treatment will lie in a sympathetic court or jury unshackled by tradition. An example of the importance of obtaining statutory remedies and standards is illustrated by a recent Louisiana case in which the court limited the tenant's damages for a landlord's failure to provide property fit for living purposes to damages for "emotional discomfort, loss of convenience, humiliation."²⁰⁵ The tenant was denied an injunction restraining the landlord from eviction proceedings because there was no legal basis for one.²⁰⁶ Furthermore, the court found there was no law empowering the court to order substandard housing repaired to meet code standards, so the tenant was denied a judgment against the landlord ordering such repairs.²⁰⁷

Without such legislation, too many courts will find a rationale for their decisions in *stare decisis*, *caveat emptor*, "freedom of contract," and other common law concepts rooted in our history, rather than explore the challenges and face the realities of the present. If the low-income tenant is ever to find a "place in the sun" in Ohio, the courts now must listen to, and heed, the philosophy of Justice Cardozo:

A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.²⁰⁸

How soon the effects of the new Ohio law will be felt by both landlord and tenants depends in part on whether the legislation is given retroactive, or merely prospective application. That is, are tenants and landlords whose leases were executed prior to the effective date of the law, but still continuing after such date, automatically bound by the obligations, and entitled to the remedies enunciated in the new Act? For example, where tenant damage to prop-

²⁰⁵ *Evans v. Doll Brothers Realty*, 2 CCH POV. L. REP. § 18, 196 (Ct. App. La. 1973).

²⁰⁶ *Id.*

²⁰⁷ *Id.* Ohio Bill 103 § 1923.15 gives the court such authority by providing that: the court may order an appropriate government agency to inspect the residential premises. If the agency determines and the court finds conditions which constitute a violation of § 5321.04 [landlord duties and obligations], and . . . if the court finds that the tenant may remain in possession, the court may order such conditions corrected.

²⁰⁸ CARDOZO, *THE GROWTH OF THE LAW* 136 (1927), cited in *Jack Spring Inc. v. Little*, 50 Ill. 2d 351, 367, 280 N.E.2d 208, 217 (1972).

erty occurred prior to the Act, will the reasonably high standard of "materially affecting the health and safety" be necessary to warrant an eviction proceeding subsequent to the effective date?²⁰⁹ Again, is the notice requirement of § 5321.11 necessary concerning a subsequent eviction proceeding for a prior breach of tenant obligations?²¹⁰

Although § 28 of Art. II of the Ohio Constitution prohibits the Ohio General Assembly from passing retroactive laws, courts have generally applied this limitation only to laws affecting substantive rights in contrast to laws remedial in nature.²¹¹ Remedial laws are generally procedural, providing "rules of practice, courses of procedure, or methods of review."²¹² In a broader sense, the term "remedial" connotes the means utilized to enforce a right or redress wrongs and abuses.²¹³ Remedies are concerned with the *methods* by which existing rights are recognized, guarded and enforced, rather than with the *substantive* rights themselves.²¹⁴ A remedial law should be liberally construed so as to most effectively accomplish the remedial purposes intended.²¹⁵

A substantive statute creating or interfering with vested rights or imposing new obligations concerning past transactions and relationships would forbid any retroactive application under this prohibition.²¹⁶ But the new Ohio Law, it could be argued, rather than impairing substantive rights, merely clarifies and delineates existing duties and obligations initiating only new procedures or remedies for their enforcement.²¹⁷ There is no vested right in a specific remedy. The obligations of landlords were previously created with the pas-

²⁰⁹ Ohio Bill 103 §§ 1923.02(H), 5321.11.

²¹⁰ Ohio Bill 103 § 5321.05.

²¹¹ *Payne v. Keller*, 18 Ohio App. 2d 66, 68-69, 247 N.E.2d 311, 313 (1969); *State v. Morse*, 165 Ohio St. 599, 604, 139 N.E.2d 660, 664 (1956). *See also* *Kacian v. Illes Construction Co.*, 24 Ohio App. 2d 43, 263 N.E.2d 680 (1970).

²¹² *Kilbreath v. Reedy*, 16 Ohio St. 2d 70, 72, 242 N.E.2d 658, 660 (1969); *State v. Morse*, 165 Ohio St. 599, 605, 139 N.E.2d 660, 664 (1956); *Payne v. Keller*, 18 Ohio App. 2d 66, 69, 247 N.E.2d 311, 313 (1969). *See also* *State v. Industrial Comm.*, 11 Ohio St. 2d 175, 179, 228 N.E.2d 621, 623 (1967).

²¹³ *O'Hara v. Alberto-Culver Co.*, 6 Ohio Misc. 132, 215 N.E.2d 735, 737 (1966).

²¹⁴ 10 O. JUR. 2d *Attorneys at Law* § 568 (1954); *See* *State v. Industrial Comm.*, 11 Ohio St. 2d 175, 179, 228 N.E.2d 621, 623 (1967).

²¹⁵ *In re Clark* (Prob.), 74 Ohio L. Abs. 460, 141 N.E.2d 259 (P. Ct.), *aff'd* 102 Ohio App. 200, 141 N.E.2d 890 (1956); *Mercer v. Jones*, 18 Ohio App. 2d 57, 61, 246 N.E.2d 583, 586 (1968). *See also* OHIO REV. CODE ANN. § 1.11 (Page 1969).

²¹⁶ *E.g.*, *Perk v. City of Euclid*, 17 Ohio St. 2d 4, 8, 244 N.E.2d 475, 477 (1969); *State v. Industrial Comm.*, 11 Ohio St. 2d 175, 179, 228 N.E.2d 621, 623 (1967). *General Industries v. Jones*, 89 Ohio App. 43, 100 N.E.2d 703 (1951).

²¹⁷ *See* *Bagsarean v. Parker Metal Co.*, 282 F. Supp. 766, 769 (N.D. Ohio 1968), *citing* *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

sage of housing codes. The procedural remedy of rent withholding has merely been created to provide the tenant with a means of enforcing the landlord's duties.

If this new Act is to be remedial, then the retroactive application of its provisions to existing leases and security deposits would be entirely consistent with the Ohio Constitution as it has been interpreted by the courts. Such retroactivity would provide the tenant today with the means of obtaining a habitable place to live tomorrow.

Barbara Hall Nahra

CORRECTION:

The above discussion of retroactivity is incomplete. Retroactive operation of a statute means that it may apply to causes of action which arose prior to its effective date. Conversely, prospective operation limits application of the statute only to those *causes of action* which arise after its effective date. *See State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 138 N.E.2d 660 (1956); *Sigenfuse v. Jeffrey Manufacturing Co.*, 32 Ohio N.P. (N.S.) 246 (1954). The distinction between a cause of action and a right of action should be noted. A right of action is a "primary legal right in Plaintiff." *Swankowski v. Diethelm*, 98 Ohio App. 271, 273, 129 N.E.2d 182, 184 (1953); *Baldrige v. Toombs*, 189 N.E.2d 177,179 (C.P. Ohio 1962). A cause of action, on the other hand, consists of every fact which must be established to sustain a claim for the judicial relief sought. *State v. Preston*, 173 Ohio St. 203, 181 N.E.2d 31 (1962).

Section 1.48 of the Ohio Revised Code creates a presumption that statutory enactments operate prospectively unless a clear legislative intent to the contrary is indicated in the statute. It may be argued that this statutory rule of construction merely codifies the long-standing judicial unwillingness to grant retrospective application where no express or unequivocal legislative intent is evidenced. *See Smith v. Ohio Valley Insurance Co.*, 27 Ohio St. 2d 268, 272 N.E.2d 131, *cert. denied*, 405 U.S. 921 (1971); *Buckeye Churn Co. v. Abbott*, 115 Ohio St. 152, 152 N.E. 391 (1926). However, Ohio case law has followed the common law exception to this preference. That is, statutes of a remedial or procedural nature (as opposed to those which affect substantive rights) are applied to all proceedings after the effective dates of such statutes regardless of when the cause of a action arose. *State ex rel. Holdridge v. Industrial Comm'n*, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967); *Smith v. New York Central Railroad Co.*, 122 Ohio St. 45, 170 N.E. 637 (1930); *Elder v. Shoffstall*, 90 Ohio St. 265, 107 N.E. 539 (1914). *See Bagasarian v. Parker Metal Co.*, 282 F. Supp. 766 (N.D. Ohio 1968), for a general discussion of Ohio common law. Therefore, the courts may allow retrospective operation where a statutory provision is purely remedial. In determining whether a statute is remedial or substantive, the court will weigh the effect that the law in question would have on substantive rights. *Gregory v. Flowers*, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972). *See OHIO REV. CODE ANN. § 1.58* (Page Supp. 1973). Thus, a provision which appears procedural may be deemed substantive if it injures the rights of one party.

If Ohio Bill 103 operates prospectively only, it will apply to causes of action arising after the effective date which involve rental agreements entered into prior to the effective date. Although there are constitutional prohibitions against the impairment of the obligation of contracts, U.S. CONST. art. I § 10; U.S. CONST. amend. XIV; OHIO CONST. art. II § 28, these provisions do not prevent a legitimate governmental exercise of the police power. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *DePaul v. Kaufman*, 441 Pa. 386, 272 A.2d 500 (1971); *Benjamin v. Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957).