Partial Constructive Eviction: The Common Law Answer in the Tenant's Struggle for Habitability

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NOTES

PARTIAL CONSTRUCTIVE EVICTION: THE COMMON LAW ANSWER IN THE TENANT'S STRUGGLE FOR HABITABILITY

The threat of overpopulation, although not yet at the level of a national emergency, has not gone unnoticed in our society.\(^1\) The symptoms are most obvious where the demand created by the spiraling population cannot be satisfied with present resources. The shortage of adequate housing in California is illustrative.\(^2\) It does not appear possible to construct enough new housing to accommodate the population,\(^3\) and the resulting distribution over the present facilities creates an unfair advantage on the part of those who own multifamily dwellings. These landlords, virtually assured of a high-paying lodger, may manipulate the conditions of the premises and the lease in their favor. The law, generally the equalizer in such circumstances, allows the landlord a relatively free rein and imposes liability only in extreme cases. Thus, not only are many of the proposed facilities inadequate, but the existing ones are being surcharged and allowed to deteriorate.

California, recognizing the gravity of the situation, has passed statutes requiring the landlord to place the premises in a tenantable condition, and to properly maintain them.\(^4\) This measure would prove

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2. Statistics, although mechanically unerring, tend to distort the exigency of the problem. Even so, a closer examination of some can be illuminating. The 1960 Census showed that 11.1 percent of the dwellings in Los Angeles were excluded from the "sound, with all plumbing facilities" category. Sacramento had 16.9 percent of its housing below standard, and 17.5 percent of San Francisco's dwellings also failed to meet the requirements. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1960 CENSUS OF HOUSING, 1 STATES AND SMALL AREAS 4-5 (1960) [hereinafter cited as 1960 CENSUS]. It is significant, however, that these percentages were higher among the nonwhite population, who fall primarily into the lower income brackets. For example, the same category of dwellings was found to be 17 percent in Los Angeles, 28.1 percent in Sacramento, and 31.2 percent in San Francisco. These figures were even higher in the smaller metropolitan areas densely populated with nonwhites. Stockton was found to have 41.2 percent of its minority dwellings in substandard condition. Id. at 13. This would seem to indicate that the burden falls heavily on the low-income tenant.

3. A recent study by the Department of Housing and Urban Development revealed that California must build 1.5 million new units by mid-1970. Of these, one-half must be built for families with incomes under $8200 a year. If current predictions of 180,000 housing starts for 1969 are accurate, there will be a deficit of some 50,000 units by 1975. San Francisco Examiner, Nov. 21, 1968, § 1, at 13, col. 2.

4. CAL. Civ. CODE § 1941 provides that the lessor of a building intended for
quite effective had the statute not contained a provision whereby the protection offered could be waived by the inclusion of an "agreement to the contrary."\(^5\) Almost without fail, leases recite such a waiver\(^6\) and the tenant is relegated to the same futile position he occupied under the common law.

The purpose of this article will be to examine the tenant's remedies where the action of the landlord has resulted in an interference with the possession or useful enjoyment of the premises. The analysis will reveal the glaring inadequacies of the recourses available to the tenant and the dire need for positive reform. The optimum solution would be legislative action, but the advent of a properly drafted statute does not appear to be imminent. Therefore, it is suggested that an effective, yet uncomplicated, interim solution would be a modification of the tenant's existing common law remedies; specifically, the remedy for eviction arising from a breach of the covenant of quiet enjoyment.

**Development of the Tenant's Basic Right: The Covenant of Quiet Enjoyment**

The tenant has long occupied a precarious legal position. Originally, the purpose of placing someone other than the owner in sole possession of the land was to provide an incentive to the occupant to cultivate it as if it were his own.\(^7\) Presumably, the result would be an increase in both the productivity of the land and the profit for the lord.\(^8\) Having relinquished possession of the land, the landlord was unwilling to surrender anything more. Thus the tenant was said to take the land at his own risk.\(^9\) The law imposed no duty upon the landlord to transfer tenantable premises,\(^10\) or to repair subsequent dilapidations.\(^11\)

human habitation must place the premises in a habitable condition and keep them in repair. **CAL. CIV. CODE** § 1942 allows the tenant to expend up to one month's rent on needed repairs in the event the landlord is unwilling to take action; in the alternative, the tenant may vacate and be absolved from further obligations under the lease.

5. Seldom will the amount of one month's rent be sufficient to repair the more serious defects; thus **CAL. CIV. CODE** § 1942 is of limited value. Section 1941 of the Civil Code, however, places the burden of repair upon the landlord and could serve as a primary source of statutory relief for the tenant. The inclusion of the clause, "in the absence of an agreement to the contrary" subverts the very purpose of the statute, and allows the landlord to avoid this liability simply by including a waiver clause in his lease. Several attempts have been made to alter this, the most recent of which would have upheld the landlord's duty to repair "notwithstanding an agreement to the contrary." A.B. 2069 (1969). The defeat of this amendment, and others like it, can in part be attributed to the landlords' powerful lobby.

6. In fact, most form leases used by the larger enterprises include such a waiver clause automatically. *E.g.*, General Office System Co., *General Form Lease*, provision five, on file with The Hastings Law Journal.

7. 2 BLACKSTONE, COMMENTARIES* 141.

8. *Id.*


10. *Id.*

11. *Id.*
The tenant held the land under a lease, which was an anomalous device from its inception. Being a transfer of land, it possessed the characteristics of a conveyance; yet, the contractual aspect of the landlord-tenant relationship contributed another factor, which prevented simple definition. The result was a division of authority, with some courts considering the lease solely as a conveyance, and others emphasizing its contractual nature.

The lease, although designed to favor the landlord, ironically provided a basis for the first common law protection afforded the tenant. The protection did not improve the tenant's position concerning the safety of the premises, but it did strengthen his right to be there. The law still would not allow the tenant a remedy if the roof fell in on his head, but it would defend to the end his right to stand under it. This limited protection came in the form of a covenant of quiet enjoyment, which initially warranted that the landlord had good title, and that the tenant would not be ousted by any defect therein. Although the covenant has never been extended to guarantee tenantability, it is generally interpreted to include protection from interference with either the possession or the use and enjoyment of the premises.

The covenant was sometimes found in the express language of the lease, but its absence led the courts to imply its existence from the very fact of the hiring. The implication arose upon the recitation of key words such as "grant and demise," or "grant," or even "to lease." As a result, all leases contain an express or implied covenant of quiet enjoyment.

12. See, e.g., In re Edgewood Park Junior College, 123 Conn. 74, 192 A. 561 (1937). "A lease is primarily a conveyance of an interest in land." Id. at 77, 192 A. at 562. Although such an interpretation is common, it is the source of a major pitfall for the tenant. For example, if the premises are destroyed by fire, a strict adherence to the above does not absolve the tenant from the payment of rent, as the subject matter of the conveyance is thought to be only the land.

13. See, e.g., Lewes Sand Co. v. Graves, 40 Del. 189, 8 A.2d 21 (1939). "A lease is a contract by which one person divests himself of, and another takes possession of lands..." Id. at 195, 8 A.2d at 24, quoting 1 H.G. Wood, LANDLORD AND TENANT § 203, at 385 (2d ed. 1888). Such an interpretation is significantly more lenient than the "conveyance interpretation," since it makes available to the tenant the contract defenses of failure of consideration and frustration of purpose.

14. Conner v. Bernheimer, 6 Daly 295 (N.Y.C.P. 1875). "This covenant [of quiet enjoyment] is simply an assurance against the consequences of a defective title, and of any disturbance by reason of such defect." Id. at 299.

15. See Hayner v. Smith, 63 Ill. 430(1872). "The law implies covenants against such acts of the landlord as destroy the beneficial enjoyment of the premises leased." Id. at 432. Goldman v. House, 93 Cal. App. 2d 572, 209 P.2d 639 (1949), stated: "An agreement to let upon hire is an agreement that the hirer may have quiet possession of the thing hired." Id. at 576, 209 P.2d at 641. This is an abbreviated form of California's codification of the covenant of quiet enjoyment in section 1927 of the Civil Code.

enjoyment in the absence of an agreement to the contrary.17

Actual Eviction as a Breach of the Covenant

Once the covenant insuring the tenant of quiet possession was recognized, the question of what would constitute a breach of this covenant arose. The logical answer: any physical ouster of possession; such an ouster was termed an "eviction." The original interpretation was limited to actual displacement by the landlord or one with paramount title.18 As will be shown later, however, this definition has not remained static.

The effect of an eviction was twofold. Since it was formally a breach of covenant, an action for damages accrued,19 unless the lessee elected to consider the lease rescinded.20 Damages were limited to those actually resulting from the ouster, but the tenant could assert them affirmatively or as a defense to the landlord's suit for rent.21

An eviction, by definition, also meant the tenant had been deprived of his possession, which was regarded as the consideration for the payment of rent.22 Consequently, the duty of paying rent was suspended until such time as the premises were returned to the tenant.23 Where the tenant was totally deprived of his possession, there could be no other solution. The law did not become any less severe, however, when the eviction, though actual, involved only a portion of the premises. Even if the tenant retained enough land to inhabit comfortably, he sustained no obligation to pay rent. Partial eviction was legally equated with total eviction on the theory that rent was non-

17. See Georgeous v. Lewis, 20 Cal. App. 255, 128 P. 768 (1912). "It may be conceded generally that every lease in the usual and ordinary form carries with it an implied covenant that the lessee will not be disturbed in his possession during the term by the lessor nor any other person having the paramount title. This is so, however, only in the absence of a stipulation in the lease to the contrary . . . ." Id. at 258, 128 P. at 769.

18. Donaldson v. Mona Motor Oil Co., 193 Minn. 283, 238 N.W. 504 (1935). "The acts of the landlord to effectuate eviction must be something more than a mere trespass . . . . The term 'eviction' was formerly used to denote an expulsion by the assertion of a paramount title and by process of law, but it is now generally applied to every class of expulsion or emotion." Id. at 287, 238 N.W. at 506, quoting in part 36 C.J. Landlord and Tenant § 979, at 235 (1924). See also Standard Livestock v. Pentz, 204 Cal. 618, 625, 269 P. 645, 648 (1928) (covenant of quiet enjoyment breached only by eviction).

20. Id.
22. Royce v. Guggenheim, 106 Mass. 201 (1870). "The eviction of a tenant from the demised premises, either by the landlord or by title paramount, is a bar to any demand for rent, because it deprives him of the whole consideration for which rent was to be paid." Id. at 202.
23. See text accompanying note 24 infra.
apportionable and automatically suspended from the point of any in-
trusion.\textsuperscript{24}

\textbf{A Logical Extension: Constructive Eviction}

It eventually became clear that something could disturb the ten-
ant's quiet enjoyment as effectively as actual eviction. The first ju-
dicial recognition of such a possibility appears in an early New York
case. \textit{Dyett v. Pendelton}\textsuperscript{25} was an action by a landlord to recover
rent in arrears. Although no actual ouster was averred, the defendant
denied liability, alleging that he had been evicted from the premises.
He introduced evidence tending to show that the landlord's practice of
encouraging several women of questionable character to frequent the
house cast a shadow of infamy upon it, thereby compelling the tenant
to vacate in the interest of morality. The court held that such inter-
fERENCE did constitute an eviction even though the ouster was a product
of the tenant's discretion, not the result of physical deprivation by the
landlord.\textsuperscript{26}.

\textit{Dyett v. Pendelton} became a precedent for a new type of evic-
tion—constructive eviction. Physical expulsion was no longer an in-
dispensable requirement.\textsuperscript{27} The covenant of quiet enjoyment could be
breached by the landlord's interference with the use and enjoyment of
the premises. The decision represented a major contribution to the
tenant's common law remedies; but as always, the limits of such a
remedy had to be shaped by case law.

The California courts' treatment of the cases invoking this rem-
edy is indicative of the transitional struggle in most jurisdictions. Be-
cause constructive eviction was a novel remedy, the courts were quite
naturally hesitant to employ it in every situation where the tenant
claimed interference.\textsuperscript{28} This reluctance led the courts to impose certain
qualifications that made the remedy highly complex.

First, the acts that were the cause of the tenant's removal had to
be those of the landlord, or someone acting under his instructions.\textsuperscript{29}

\begin{footnotesize}
\begin{enumerate}
tenant was ousted from a portion of the demised premises, the court held that "[t]he
tenant cannot be compelled to pay the rent reserved, for, in such a case, there can be
no apportionment of rent." \textit{Id.} at 548, 85 P.2d at 185, \textit{quoting in part} Skaggs v.
Emerson, 50 Cal. 3 (1875).
\item 25. \textit{Id.} at 734.
\item 26. See, e.g., Levitzky v. Canning, 33 Cal. 299 (1867); Schulte Realty Co. v.
Pulvino, 179 N.Y.S. 371 (Sup. Ct. 1919).
\item 27. The courts usually denied the allegation of constructive eviction by deter-
mining that the acts complained of constituted only a trespass, which was never ade-
quate as a basis for constructive eviction. Kelley v. Long, 18 Cal. App. 159, 122 P.
832 (1912).
\end{enumerate}
\end{footnotesize}
In the absence of an agreement covering such intrusions, the acts of third parties, no matter how annoying, could not serve as a basis for constructive eviction.  

Second, the tenant must show that the landlord intended to interfere with his quiet possession. However, this intent need not be an actual, subjective intent and can be established by inference from the character of the landlord’s acts.

Third, the tenant must have been in possession of the premises, and the acts complained of must have resulted in a substantial interference with the use and enjoyment of those premises. Anything less than this degree of interference would be insufficient.

Even when the interference is substantial and causally linked to the landlord there can be no assertion of constructive eviction without the tenant’s removal from the premises. Removal must be made within a reasonable time or the tenant risks waiver despite eventual evacuation. The reason generally given for this is that the complaint by the tenant alleges that the landlord has caused the premises to become untenable, and that there can be no better proof of this than timely

30. See Bilicke v. Janss, 14 Cal. App. 342, 112 P. 201 (1910). “A constructive eviction from a leasehold cannot be claimed by a tenant because of the acts of another tenant of a portion of the premises unless the landlord is responsible for what the tenant does.” Id. at 347, 112 P. at 202, quoting French v. Pettingill, 128 Mo. App. 156, 161, 106 S.W. 575, 577 (1907).


32. Pierce v. Nash, 126 Cal. App. 2d 606, 272 P.2d 938 (1954). “But when it is said that in order to constitute a constructive eviction, there must be an intent on the part of the landlord to deprive the tenant of the premises, it is not meant that there must exist an actual subjective intention in the mind of the landlord. It may be inferred from the character of his acts if their natural and probable consequences are such as to deprive the tenant of the use and enjoyment of the leased premises.” Id. at 613, 272 P.2d at 943.


34. See Tregoning v. Reynolds, 136 Cal. App. 154, 28 P.2d 79 (1934). “[T]o constitute a constructive eviction, it is essential that the acts complained of result in depriving the lessee of a substantial as distinguished from an insignificant or inconsequential portion of the leased premises.” Id. at 156, 28 P.2d at 80. Other cases noting this requirement are Lindenberg v. MacDonald, 34 Cal. 2d 678, 214 P.2d 5 (1950); Kelley v. Long, 18 Cal. App. 159, 122 P. 832 (1912).

35. There was some confusion where the landlord’s acts were intentional and the interference substantial, but in a sense privileged, as where the landlord instituted a suit for unlawful detainer that proved unsuccessful. In Black v. Knight, 176 Cal. 722, 169 P. 382 (1917), the court held that the prosecution of an unlawful detainer suit in good faith and without malice did not constitute an eviction, even though the tenant did not retain possession of the premises for a substantial period of time.


37. See Bakersfield Laundry Ass’n v. Rubin, 131 Cal. App. 2d 862, 865, 280
removal.\textsuperscript{38} In addition, this requirement conveniently fulfills the dispossession factor traditionally inherent in eviction.\textsuperscript{39}

Notwithstanding these elaborate requirements, several disruptions have served successfully as a basis for this remedy. These include infestation of the premises with vermin,\textsuperscript{40} unreasonable delay in restoring the tenant to possession after making repairs,\textsuperscript{41} removal of the roof during the rainy season coupled with other acts of harassment,\textsuperscript{42} interference with ingress and egress,\textsuperscript{43} and others.\textsuperscript{44}

\textbf{The Need for Distinction: Actual v. Constructive Eviction}

That both actual eviction and constructive eviction are classified as an "eviction" generates some confusion in differentiation and application. Where the landlord, or someone with paramount title, has physically deprived the tenant of the entire premises, an actual eviction has taken place. Any physical ouster less than this is a partial eviction. In both cases, the liability of the tenant to pay rent ceases immediately, and is not revived for the duration of the eviction.\textsuperscript{45}

Where the disturbance involves the use and enjoyment of the premises, and is attributable to the acts or omissions of the landlord, the character of the eviction is constructive, and the suspension of rent is contingent upon the tenant's removal.\textsuperscript{46}

A concise summary of the court's application of the two types of eviction is found in \textit{American Law Reports}:

Most, if not all, the cases considering the question [of] when the acts complained of constitute an actual partial, and when a

\begin{thebibliography}{9}
\item 38. It would seem that the abandonment must occur before the disturbing condition terminates or the tenant relinquishes his right to assert constructive eviction. \textit{Cf.} Sill Properties Inc. v. CMAI Inc., 219 Cal. App. 2d 42, 33 Cal. Rptr. 155 (1963).
\item 39. See text accompanying note 18 \textit{supra}.
\item 41. Mills v. Richards, 84 Cal. App. 52, 257 P. 542 (1929).
\item 44. A major basis for constructive eviction occurs when a landlord breaches an express covenant. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 155 P.2d 24 (1944) (restrictive covenant not to lease to similar enterprises); Morse v. Tochterman, 21 Cal. App. 726, 132 P. 1055 (1913) (covenant to supply heat). But, as has been noted in the text, such covenants are rarely included voluntarily by the landlord. See text accompanying note 49 \textit{infra}.
\item 46. \textit{Id}.
\end{thebibliography}
constructive eviction, apparently apply as a test . . . whether the act complained of results in the deprivation of some right or appurtenance to the premises to which the tenant was entitled, or whether it constitutes merely an interference with the beneficial enjoyment of the premises by the tenant; if the former, the act constitutes an actual eviction; if the latter, it may constitute a constructive eviction although all wrongful acts of the lessor interfering with the enjoyment of the premises by the lessee do not amount to a constructive eviction. 47

The crucial feature, however, is the requirement of removal in constructive eviction.

**Hypothetical: A Typical Situation**

As expressed at the outset, the purpose of this note is to examine the tenant's common law remedies for interference by the landlord, and to expose their inadequacies. This can best be done with the use of a hypothetical. There are numerous bases for both types of eviction; but for our purposes, attention will be directed to the tenant's supply of heat and water. The common law, which never demanded that the landlord transfer tenantable premises, did not require him to provide either heat or water. 48 The courts probably believed that the parties could covenant for any such additional conveniences. The tenant, however, is often not in an effective bargaining position. He primarily seeks shelter; where the vacancies are limited, he has no choice but to accept the premises on the owner's terms. Frequently, the landlord will not incur liability where he may just as profitably avoid it. The result is an absence of express covenants in a lease for the supply of heat, water, and other essentials. 49

The common law did recognize an exception where the apparatus for furnishing heat or water was in the sole control of the landlord. The courts would imply a covenant to supply heat or water, and thereby justified the tenant's removal if one or both of the services failed. 50 It

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49. The most comprehensive figures in California illustrating this are derived from the 1960 Census, and may be somewhat dated considering the growth of the state over a 10 year period. Figures from that study, however, show that out of a total of some 4.5 million dwellings in urban areas, almost 50,000 had an inadequate supply of water, and over 500,000 had faulty or inadequate heating. In all, 13.5 percent of all the state's dwellings had some major defect in the heating or plumbing. See 1960 Census, supra note 2, at 4, 14. A more recent study confined to San Francisco disclosed that 6 percent of that city's dwellings had one or more of its basic facilities missing. DEPARTMENT OF CITY PLANNING, CITY AND COUNTY OF SAN FRANCISCO, MINORITY GROUP HOUSING PROBLEMS 12 (Feb. 1967).
is doubtful, however, that breach of such an implied covenant would render the landlord amenable to a suit for damages.\(^{51}\)

Unfortunately, there is no California case directly in point indicating whether the interference by the landlord with heat or water constitutes an actionable disturbance. Nevertheless, there is enough case law to indicate a tendency.\(^{52}\)

Let us assume that John Doe lives in a low-rent housing district with his family. Though his dwelling is small and not in the best of repair, it does have the plumbing necessary for hot and cold running water, and is provided with a heating unit from the central heating system.

For this apartment Mr. Doe pays a substantial rent, but can find nothing better for the price.\(^{63}\) Every morning, when Mr. Doe rises, he must wait patiently for an adequate supply of water for shaving, showing, and cooking, because the corroded condition of the pipes, and a similar demand by the other tenants, reduce the water pressure to a mere dribble. Mr. Doe is also careful to wear adequate clothing; the heating unit (which is central and beyond his control) does not operate until 8 A.M.

After Mr. Doe has endured these morning tribulations, the rest of his family must follow in patient succession, in a fashion similar to that of other tenants in the building, and those in the general area. The situation presented is hardly an unbearable one, but it is certainly an interference with Mr. Doe’s enjoyment, especially in light of the inflated rent.

**Employment of Existing Remedies**

Suppose Mr. Doe seeks some sort of redress in a California court. There are no express covenants in his lease pertinent to his action, and by his signature he has agreed to waive all his rights under Civil Code 51. See id. 52. See text accompanying notes 58-61 infra. The absence of a case in point is fairly indicative of the need for reform. Perhaps the explanation is that there is no remedy presently available that would encourage him to bring such a suit. 53. “Excessive payments for rent are made by a substantial number of households, including minorities, the elderly, and others. From 20-25 percent is assumed as a maximum a family can afford. But the number of renter-households paying as much as 35 percent or more of their income ranges from 16.7 percent in Bakersfield to as high as 23.5 percent in San Diego. Almost 40,000 renter-households in 10 standard metropolitan SMSA’s [standard metropolitan statistical area] in 1960 paid 35 percent or more of their income for their shelter . . . .

“Despite the payment of rents disproportionate to family incomes, many of the houses for which this excessive rent is paid are below standard. In fact, 57,824 of these housing units were unsound and more than 130,000 were occupied by folk with the family head more than 65 years of age.” GOVERNOR'S ADVISORY COMMISSION ON HOUSING PROBLEMS, REPORT ON HOUSING IN CALIFORNIA 10 (Jan. 1963).
sections 1941 and 1942. He therefore has no statutory or contractual remedy directly in his favor. Any relief must necessarily stem from his basic rights as a lessee. The primary right guaranteed a tenant by the common law and codified in Civil Code section 1927 is the covenant of quiet enjoyment. The mere fact of the hiring raises this covenant. The only legally recognized breach is some form of eviction. Thus, Mr. Doe’s success depends on the discovery of factors characteristic of an eviction.

It may be assumed that Mr. Doe has no basis for alleging actual eviction; there is no physical dispossession, and all California cases in this area have required such an ouster. However, it is possible that the courts would consider such an interference a constructive eviction. The case law at present would lend itself to this type of extension. For example, the California cases repeatedly hold that any substantial interference with the beneficial use and enjoyment will amount to a constructive eviction providing the tenant removes. Certainly the absence of heat or water could reasonably amount to such an interference.

In Clark v. Koesheyan, the court allowed the tenant to remove and assert constructive eviction where the landlord had obstructed the light, air, and water. A more recent case held that the interference with the tenant’s parking facilities and water storage compartment by a subsequent purchaser of a portion of the landlord’s premises amounted to a constructive eviction, even though the lease recited no express reservations concerning the land involved. The court stated that the use of the parking and storage facilities were “reasonably necessary” for the useful occupancy of the premises, and thus a substantial interference with these would be grounds for a constructive eviction.

Adequacy of Remedy

In all probability, then, the courts would extend constructive evic-

54. See note 5 supra.
56. See note 18 supra. There are, however, a few decisions to the contrary. E.g., Moe v. Sprankle, 32 Tenn. App. 33, 221 S.W.2d 712 (1948).
57. Skaggs v. Emerson, 50 Cal. 3 (1875) (landlord refused to relinquish possession of a cottage on the demised premises); Camarillo v. Fenlon, 49 Cal. 202 (1874) (physical ouster of 200 acres of land held to be an eviction); Giraud v. Milovich, 29 Cal. App. 2d 543, 85 P.2d 182 (1938) (landlord deeded away 20-foot strip of demised premises to state for the construction of a highway).
61. Id. at 773, 22 Cal. Rptr. at 582.
tion to Mr. Doe's situation. But the essential problem turns upon the adequacy of the remedy—whether this extension of constructive eviction to Mr. Doe has made his plight any easier. The answer, regrettably, is in the negative.

Constructive eviction evolved as a relaxation of the common law at a time when housing was relatively abundant. Its purpose was to absolve the tenant of his obligations under the lease, and allow him to remove to a more desirable location.

The pressures of the 20th century have substantially negated the effectiveness of constructive eviction as a tenant remedy. The expanding population, the migration to urban areas and the ensuing housing shortage have made the tenant's procurement of adequate housing difficult, if not impossible. Consequently, the tenant is likely to accept certain inadequacies rather than expend more for proper accommodations, or struggle to find better housing in the same price range. Thus, many tenants are currently enduring conditions that might well constitute a basis for constructive eviction.

Even if the tenant does elect to avail himself of constructive eviction, the same factors that force other tenants to endure also operate to make the recourse somewhat of a gamble. If the tenant removes and it is later judicially determined that he did so without cause, he remains liable on the lease in addition to incurring the expense of finding new habitation. If he desires to use constructive eviction as a threat to improve his present living condition, he risks retaliatory eviction by the landlord. The common law allowed the landlord to evict the tenant without reason, or upon such trivial grounds that it amounted to a discretionary power.

Of course the tenant can claim a breach of the covenant of quiet enjoyment and bring an action for damages. But this requires the instigation of a lawsuit, which, in most cases, is beyond the understanding and financial ability of the tenant. In addition, the relief, if any,

62. See note 12 supra.
63. Dyett v. Pendleton, 8 Cow. 727 (N.Y. Sup. Ct. 1827), regarded as the genesis of constructive eviction, was decided in 1827. A frequently cited successor is Christopher v. Austin, 11 N.Y. 216 (1854).
67. See generally Note, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304 (1965). Even if the tenant were to institute a suit and win, the damages would probably be insufficient to cover the necessary repairs. Id. at 313.
would be minimal because the covenants in a lease are generally held to be independent, and the tenant would remain liable on all other obligations of the lease.68

From the above discussion, it would appear that the common law offers no contemporary relief for the tenant. The right to remove when he is fortunate to have found shelter, and the right to institute costly damage suits for what will most likely be insufficient judgments seem valueless for tenants like Mr. Doe.

Statutory Solutions

Mr. Doe's dilemma is not unknown in other jurisdictions, and various solutions have been proposed. Some states have resorted to legislative action. Retaining the interference with heat and water as an example, a Connecticut statute illustrates the progress in this area. It provides:

When any building or part thereof is occupied as a home or place of residence . . . a temperature of less than sixty eight degrees . . . shall . . . be deemed injurious to the health of the occupants thereof . . . . The owner of any building . . . the lease or rental agreement whereof, by its terms, express or implied, requires the furnishing of heat, hot water or light to any occupant of such building or part thereof, who, wilfully and intentionally, fails to furnish such heat to the degrees herein provided, hot water or light and thereby interferes with the comfortable or quiet enjoyment of the premises . . . shall be fined . . . . 69

Massachusetts law requires a determination by the board of health that the water supply is inadequate. Upon such a finding, the landlord is required to remedy the situation or be subject to a fine.70 New York, which feels the burden of the housing shortage perhaps more than any other jurisdiction at the present time, has elaborate legislative measures to alleviate the tenant's plight.71

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68. 3A A. Corbin, Contracts § 686 (1960); 6 S. Williston, Contracts § 890 (3d ed. 1962). Some authors have analyzed the doctrine of constructive eviction as a covert attempt to make the covenants in a lease dependent. See Bennett, The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants), 16 Texas L. Rev. 47 (1938). While this would seem to be an adequate explanation, it does not account for the requirement of removal by the tenant. A purely contractual interpretation would suspend the rent immediately upon breach by the landlord, regardless of the tenant's removal.

69. Conn. Gen. Stat. § 19-65 (Supp. 1969). It should be noted that the statute contains the words "wilful and intentional." This does not mean that the act of the landlord must be affirmative. The statute is criminal in nature and the words are included to preclude a conviction for mere negligence. The statute creates a duty on the part of the landlord; the breach of this duty, by act or omission, will confer criminal liability. See R. Perkins, Criminal Law 595 (2d ed. 1969).


71. The New York Multiple Dwelling Law is quite comprehensive in its cov-
Judicial Solutions

Legislation is the most direct method to remedy the situation, but it is also the most difficult to procure. The real solution should stem from the elasticity of the common law and the imagination of the courts. Some courts have attempted just such a step, particularly in New York.

In *Majen Realty Corp. v. Glotzer* the dwelling of the tenant had been extensively damaged by fire. Because of the severe housing shortage, he could not find a place to relocate, and was forced to inhabit only a small portion of his fire-damaged apartment. The landlord brought an action for rent for a period inclusive of this displacement. The court acknowledged the necessity of removal for a defense of constructive eviction, but suggested that such a requirement should be relaxed where the housing shortage precludes compliance. The court further stated that since the tenant was unable to use a large portion of the premises, there was an abandonment sufficient to satisfy the removal of the facilities and general upkeep of the tenements in the state. Some of the statutory requirements are as follows: Section 75 requires an adequate water supply; section 76, a water closet and bath accommodations; section 77, adequate plumbing and drainage; and section 79, proper heating. In addition, section 302a, entitled the Rent Abatement Act, allows the tenant to withhold rent if there exists on the premises a "rent impairing violation." Section 309 calls for the appointment of a receiver to make any necessary repairs on the tenement where it is found to be "a serious threat to health and safety." The receiver is then granted a lien that has priority over all liens or mortgages until paid. The most controversial provision is the so-called Spiegel Law, section 143-b of the New York Social Welfare Law, which allows welfare officials to withhold rental allotments for the welfare recipients living in buildings which are "dangerous, hazardous or detrimental to health or life."

Additional solutions are found in the American Bar Foundation's tentative draft of the Model Residential Landlord-Tenant Code:

"If the landlord fails to provide a reasonable amount of water or . . . heat [in the colder months] to the roomer, boarder, or apartment building tenant, when the building is equipped for the purpose, the tenant may:

(a) upon written notice to the landlord, immediately terminate the rental agreement, or

(b) upon notice to the landlord, procure adequate substitute housing for as long as heat or water is not supplied, during which time the rent shall abate and the landlord shall be liable for any additional expense incurred by the tenant up to [one half] the amount of the abated rent." AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-207(2) (Tent. Draft 1969).

72. See note 5 & accompanying text supra.

73. The willingness of the courts to devise new remedies from the common law has recently been demonstrated by the rise of the implied warranty of habitability. See generally Levine, The Warranty of Habitability, 2 CONN. L. REV. 61 (1969). This warranty was viewed favorably in a recent California decision. See Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (Super. Ct. App. Dep't 1967).


75. Id. at 197.
requirement, at least regarding the damaged portion. This was termed a "partial constructive eviction," which did not absolve the tenant from the whole of the rent, but did allow a substantial reduction of his liability.

A subsequent case with remarkably similar facts also aroused the court's sympathy in favor of the tenant. Here too, the court, in an emotionally charged opinion, advocated the elimination of the removal requirement. Since the tenant did not remove, however, he was held liable for a reduced rent.

An entirely different approach was taken by another New York court. In *Levanthal v. Straus* the landlord had built a porch above the tenant's windows and substantially obstructed the light and air. Traditionally, such interference would be with the use and enjoyment of the premises, and thus provide grounds only for a constructive eviction. Rather than struggle with the intricacies of constructive eviction, however, the court held that such an interference constituted an actual partial eviction, and the rent was suspended from that point without a requirement of removal.

Another case following this same line of reasoning is a 1969 New York case, in which a landlord's deprivation of air-conditioning facilities in a sealed, highrise office building was at issue. The landlord refused to supply the tenant, who happened to be a lawyer, with circulated fresh air on weekends and after normal business hours. The offices became stuffy and allegedly untenantable. Again, tradition would indicate that the tenant would be limited to constructive eviction. Nevertheless, the court found a partial eviction, and required no removal for the full suspension of rent.

These cases are by no means a conclusive argument for an im-

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76. *Id.*
77. *Id.*
81. *Id.* at 800, 95 N.Y.S.2d at 886.
83. The traditional viewpoint was urged by the dissenting judges. They regarded the situation as constituting only a basis for constructive eviction, and were in favor of finding for the landlord in the absence of a removal by the tenant. *Id.* at 344-47, 298 N.Y.S.2d at 156-58.
mediate reversal of the law as it now stands. At most, they indicate that the problem of the tenant's lack of effective remedies at common law has reached a stage where the courts can no longer ignore it, but must attempt some revision.

Conclusion

In light of the inadequacy of the tenant's remedies, fostered mainly by their obsolescence, it is submitted that what is needed is a new remedy, a totally new legal device, which would protect the tenant from the potential oppression present in many leases. Given the evolutionary process of the common law, an effective device might be contrived from a synthesis of the tenant's rights upon eviction where the covenant of quiet enjoyment has been breached. The name "partial constructive eviction" might be borrowed from the New York court\textsuperscript{84} that first recognized its need, although the similarity would be only superficial. What is required today is a far more comprehensive type of relief. Synthesizing the two types of eviction yields just such a product. If the tenant were allowed a remedy whereby the grounds for constructive eviction provided the same relief as does partial eviction, his burden would be mitigated. An interference with the use and enjoyment of the premises would then result in the total and automatic suspension of his rental obligation, independent of his removal. This would essentially guarantee him either adequate living conditions or an effective legal alternative. In turn, pressure would be exerted upon the landlord to keep the premises in repair despite the leniency of the common law or any statutory waiver. To fail to do so would result in a decrease, if not a total abatement, of the landlord's income.

This remedy should not be without limitations. The same requirements of substantiality and causality necessary for constructive eviction should be retained to preclude a clogging of the docket with trivial or unfounded complaints. But the tenant who possesses a just complaint and who would be unable to comply with the removal requirement of constructive eviction for financial or other reasons, would have access to a common law remedy that would offer very tangible, much needed relief.\textsuperscript{85}

Such a measure is at present only a suggested solution, and in California, a highly theoretical one. The author is not so naïve as to


\textsuperscript{85} The suggested remedy's effectiveness is contingent upon some limitation of the landlord's power to evict, or some means by which the tenant could counteract a retaliatory eviction. Connecticut has indicated a possible solution by giving the tenant an affirmative defense in an action for summary process if the eviction resulted from the tenant's efforts to improve his living conditions through proper legal channels. Public Act. No. 315, [1969] Conn. Acts 339.
predict the immediate, or even the eventual, adoption of such a remedy. But, as was evidenced by the rise of products liability, the courts are not impervious to rather dramatic reversals, and will perhaps consider the proposed solution when the factors mentioned above force a similar change in the field of landlord-tenant.

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