

FORWARD

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Until relatively recently, it has not been easy for a “sometimes” teacher of first-year Property to say anything of much use or interest about the law of Landlord and Tenant. To me, the most interesting aspect of the topic relates to remedies; notably the summary proceedings that have long existed to aid landlords seeking to recover rent or possession from tenants. Here is where the impact of rules on people is most obvious. But this topic, of principal practical importance to lessors of marginal property, has not been given much attention by authors of conventional treatises or casebooks. The teacher of the introductory Property course is invited to concentrate on theory, and theory turns out to be a rather unstable blend of contract, tort, statutes and some ancient lore associated with the words “covenants running with the land.” The approach is not particularly conducive to interesting overviews.

What is the unique principle that is supposed to link cases involving little old ladies who rent the other side of their double houses to strangers, and cases involving long term leases of valuable business real estate? The common denominator is a set of words; words from long ago that have been repeated many times: “A lease is a conveyance.” Standing alone, the words do little more than remind us that agreements between landlords and their tenants have always been considered a part of the law of Property rather than Contracts. Expanded, they mean that the law of Landlord and Tenant has been characterized by many odd, historic quirks; legal premises derived from long ago that, unless made irrelevant by statute, impel careful draftsmen to obtain and express the full agreement of those they represent. A tenant’s interest is freely transferrable. A landlord may collect full rent for periods occurring after a tenant has abandoned the premises, even though he sits idly by making no attempt to recoup his loss through use or re-letting, but if he seeks to so protect himself, he risks “surrender” and loss of all right against the defaulting tenant. A tenant, rather than the landlord, has the burden of making repairs that can be characterized as minor, or possibly ordinary. Rent is non-apportionable, and continues to fall due though the principal building on the leased land may be destroyed without fault, or though the major portion of the place be taken in condemnation proceedings. Promises in leases may be breached without effect to the other party’s obligation to perform his apparently reciprocal undertaking. A tenant

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takes premises as they are, and may not complain if they prove to be unsuitable to his purposes. And so on.

Why have these and other curiosities of the rules governing real property leases lasted so long? Perhaps, the old points of black-letter law function satisfactorily. Or, can it be that they have lingered because they have had little meaning for any except those in law schools? Perhaps the combination of careful contracts for high value leases, and the high cost of "justice" for parties to everyday rental arrangements mean that the basic rules rarely govern conduct or aid in the resolution of disputes. It may be saying the same thing to suggest that until relatively recently there has been no concentration of thought about the historic rules of real property rentals.

But, times change, and new topics of interest develop. Surges in numbers, expectations and demands of the nation's urban poor have set forces in motion that seem destined to remake our cities. Because urban tenements are usually rental property and because it is easier to rewrite laws than to finance adequate housing for all, it is not surprising that the old rules of Landlord-Tenant are currently being reconsidered. And, it will not shock seasoned observers of the legal scene when they learn that many of the resulting rule changes seem to have only the slimmest of connections to the sad plight of ghetto tenants whose protests have spurred the current legal turmoil in the area. For example, consider California's new statutory rules governing cases of tenant abandonment. Under them, the old rule that relieved landlords of any obligation to mitigate damages is shrunk so as to be applicable only when it is expressly called for in leases creating interests that are transferrable by the tenant. It seems highly unlikely that the new rule will improve life for the tenant of marginal property, for common sense has long moved practical landlords to look first to the possibility of keeping the property productive, rather than to some possible, technical liability of a defaulting tenant. Also, landlords having the bargaining power to be able to compel deposits to secure future rent payments surely will be able to get tenants to agree to use of forms that meet the new formula.

Other newly developed (or developing) ground rules, including those attributable to recent decisions recognizing implied warranties of fitness for purpose in leases, appear related to the physical condition of rental property, and hence, more responsive to the concern about the quality of urban housing. But, will new duties for landlords improve housing or merely drive private capital from a market where circumstances prevent the shifting of new costs to tenants in the form of increased rent? If the latter proves to be the case, the principal consequence of new rules relating to the condition of premises also may be merely cosmetic; a rephrasing of basic rules that will bring joy to

the hearts of writers and publishers of legal materials, but do little by way of adjusting economic burdens between landlords and tenants.

The May 1970 decision of the U.S. Court of Appeals (D.C. Circuit) in *Javins v. First National Realty Corporation* seems destined to accelerate the recasting of old landlord-tenant rules through the decisional process. The case also raises questions that illustrate the difficulties of efforts to connect new legal rules to social and economic impact. The court held that general contract principles and the policy of the housing code of the District of Columbia supported the conclusion that a landlord was contractually bound to his tenants to perform obligations imposed on him by legislation in relation to the condition of the premises. Rejecting the notion that leases are different than bilateral contracts in general, the court concluded that tenants who remained in possession were justified in withholding rent when landlord violations remained uncorrected. The new remedy of rent withholding by tenants to force landlord compliance with housing code requirements was justified, at one point in the opinion of Judge J. Skelly Wright, "in order to reach results more in accord with the legitimate expectations of the parties and standards of the community . . ." At another point, the opinion alludes to the need to secure enforcement of housing regulations that were designed to correct deplorable housing conditions in the District of Columbia. "This [the housing code] regulatory structure was established by the Commissioners because in their judgment, the grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective."

The opinion reflects a refreshing willingness by a court to use current ideals regarding the expectations of persons in the resolution of current problems. But, if the new remedy approved by the case is conceived to be a source of important new pressure for use by tenants against landlords, other questions are suggested. Will private capital respond positively to the whipsaw of demand for community decency, on the one hand, and inability or unwillingness to pay, on the other? Should private capital be driven from the low-cost housing market? Are community standards of decent housing as hammered out by various "representatives" sufficiently sensitive to the needs and capacities of all who will be affected by them to replace what individuals might accept on their own? Conceding that private capital has not met current demands, what is the value of moves that may eliminate cold-water flats and other substandard housing before there is money for better facilities. Can expectations of the non-affluent be satisfied as easily as they can be stimulated by forceful assertions of community goals?

But, perhaps the case has no bearing on any of these problems.

Arguably, the economic and social issues, and the message for investors, were resolved when the District's housing regulations were adopted. After all, the Code imposed the landlord's duties and provided the basis for judging costs and returns. Perhaps, the case adds a mere remedy—an unimportant tack to a framework already firmly nailed down.

Or, conceding that remedies are important, should a court ponder their social and economic implications, when the simplest form of the issue before it is whether law should be enforced?

In any event, is it not important that a court strike a blow in favor of keeping legal rhetoric in line with the surging, moralistic demands of the times? After all, if as national news reports indicate, private capital is already abandoning the low rental housing market, little will be served by retaining its empty, legal forms. And, there may be gain in establishing new ground rules to govern housing arrangements that are provided through some form of community enterprise. Moreover, the acceptance of new rules may relieve lawyers who are straining for improvement of the human condition of the distracting notion that old laws are the cause of modern housing problems.

There are other questions for the legal technician who, with only passing concern for the question of whether the general community will be aided by the effort, would welcome the opportunity to align landlord-tenant rules to modern sentiments. How best may the opportunity to review and recast old rules be handled? Is it sufficient for the needs of lawyers who will occasionally counsel landlords and tenants simply to announce that leases are like any other bilateral contract? Should a line be drawn between leases of urban, residential property, and other leases for the purpose of determining where new rules should start or stop? Is a uniform law along the lines of the Model Residential Landlord-Tenant Code recently produced under the auspices of the American Bar Foundation necessary or desirable? Or, is it too early for any move that might stifle local experimentation with various, new ground rules?

Perhaps the point has been made that the law of Landlord and Tenant, at least as far as it touches housing, has been moved from under the cover of history and bone-dry rules that have long characterized it. The questions aired by the student writers who have selected various facets of the field for analysis in the papers that follow, and others that will occur to persons whose work or interests touch the subject, characterize the current ferment. These questions invite thought and discussion that must occur if the legal community is to perform its traditional role of providing viable guidelines for solutions of today's problems.