

LANDLORD AND TENANT LAWS AND THE SLUMS

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I

To the Federal Government, slums are a menace to health and safety, breeders of crime and disease, and an affront to the conscience of the world's richest nation. This is the substance of numerous messages on housing, and it is the basis for various legislative programs for public housing and urban renewal. To civic leaders in major cities, tenements are "blights" to be removed. To those who find themselves living there, slums are the embodiment of their degradation. To their owners, however, slums are peculiarly valuable property. While they are held, they provide not only income but impressive tax writeoffs. Located in the center of major cities, these properties can be sold at great profit for commercial development. They can also be sold or condemned for urban renewal projects.

The options open to a slum landlord add considerably to the value of his property. For the most part, he can determine whether he wishes to hold his property, sell it for commercial use, or make it available for urban renewal. The residents of course have no say over the disposition of what are, unfortunately, their homes. If the land on which they live becomes the site of an office building, or an urban renewal high-rise apartment, the residents will almost certainly have to move.

Part of the value of slum property is due directly to the effects of federal legislation: The Internal Revenue Code, which makes it profitable to hold slum property, and federal urban renewal legislation, which makes it easy to finance the development of inner city property into land of even greater value. But the law of landlord and tenant has made it possible for the advantages of indecent housing to benefit the landlord while the disadvantages are borne exclusively by the tenants, and ultimately, the public. The mounting frustration of slum dwellers, which has manifested itself in rent strikes and an occasional riot, is directly related to the failure of many landlords to provide their tenants with habitable and safe dwellings. The state of landlord and tenant law has made it possible for landlords to slough off responsibility for making their property fit for human habitation. It is becoming increasingly clear that federal programs alone cannot solve the problem of the slum dweller. A reform of the legal relations between those who own the dilapidated inner city tenements and those who live in them is long overdue.

II

It is not surprising that landlords feel no duty to make slums habitable, for, in general, the law up to now has imposed none. There are scores of cases, mostly dating from the late nineteenth century and early twentieth century, which hold that a landlord has no liability to a tenant injured by such gross defects of the premises as escaping sewerage gases, exploding heaters, collapsing walls, unlighted passageways, and stairs that end before they reach the ground. Some of these cases are collected in 130 A. L. R. 1269; 4 A. L. R. 1456; 29 A. L. R. 52; and 52 A. L. R. 864. These cases provide generally that the landlord must disclose dangerous conditions if he knows them, but he is relieved of liability if the tenant could reasonably have discovered them for himself. He is under no duty to remove them unless he specifically contracts to do so. These cases specifically reject the theory that the holding out of premises for living implies a warranty that the premises are fit for living.

A few exceptions to the general rule have crept into the law. The landlord has been found liable under a negligence theory to a tenant of furnished quarters to be occupied for a limited time. This rule originated in the English case of Smith v. Marrable 11 M and W 5, 152 Eng. Rep. 693 (1843) and appears to apply almost exclusively to summer cottages.

The purpose of the exception has been to benefit local tourist industry. See Young v. Povich 121 M 141, 116 Atl. 26 (1922). But the effect has been to benefit the particular class of tenants who need the protection of the law the least.

There are statutes requiring landlords to maintain multiple dwellings in habitable condition. They normally refer to the conditions of roofs and common passageways and major structural defects. Such statutes exist in Connecticut, Iowa, and New York and several other states. They usually carry criminal penalties for non-compliance. In addition, some of them have been interpreted to give rise to a cause of action against the landlord. In New York, for example, Judge Cardozo found that the Tenement House Law, a criminal statute, did provide a basis for a civil suit in Altz v. Lieberson 233 N. Y. 16. Other cases, however, hold that a statute or ordinance requiring good repair for multiple dwellings does not change the common law rule relieving the landlord of all liability for the effects of disrepair or nonrepair. See Newman v. Sears Roebuck, 43 N. W. 2 411 (1950). See also Statutory Duty to Repair 45 Ill. L. Rev. 205 (1950). Hiram Lesar of the Washington University School of Law of Property, has argued in favor of a tort action arising out of such statutes. He points out that the common law rule "seems archaic when applied in a complicated society to urban dwellings occupied by persons on a salary or a weekly wage."

See Reform in the Law of Landlord and Tenant 35 N. Y. U. Law Rev. 1279 , 1286.

In several states, including California, Louisiana, Montana, Oklahoma, North Dakota and South Dakota , statutes have been enacted which impose a duty on the landlord to put the premises in habitable condition. Some of these, including California, give the right to the tenant to deduct from the rent for repairs necessary to bring the premises up to the statutory standard. No such right of deduction existed at common law. Atrocious conditions such as vermin and bedbugs may give rise under common law to a constructive eviction, but the remedy, terminating the lease and moving, is not a practical one for the typical slum dweller. And indeed, it is customary for the landlord to provide in the lease that the presence of vermin and insects will not constitute a constructive eviction. Moreover, even where the landlord contracts in the lease to make repairs and fails to make them, or makes them carelessly, only seventeen jurisdictions permit tort recovery by an injured tenant. A slightly smaller number hold that the landlord's failure gives rise only to a right to terminate the tenancy. See Prosser on Torts (1964) p. 422.

III

Even a brief review of the law in this area reveals how hopelessly archaic it is. Yet rules developed in medieval England still define a major economic and social relationship of twentieth century urban society. If we look into the rationale for the common law rules which produce a bizarre and unjust results just outlined, we find that they are based on notions that have been utterly discredited in other areas of American Law. If we examine some of the historical conditions in which these rules were conceived, we must conclude that it would be only by the wildest coincidence that these same rules could serve our own society well.

The basic justification for rejecting an implied warranty of fitness in leases for dwellings is the old principle of caveat emptor. Let the buyer beware! As Judge David Bazelon put it in his dissent in Bowles v. Mahoney 202 F2 320, at 325: "The common law still lags behind modern notions that in general one who sells an article is presumed to warrant that it is good for the purpose for which it is sold... the law should recognize that the parties contemplate... that the dwelling will be safe and habitable." The old notion that a buyer must fend for himself in his dealings with sellers and that the law will not relieve him of his folly if he deals with sellers of bad merchandise has been decisively rejected in the area of personal property.

In MacPherson v. Buick Motor Co. 217 N. Y. 302, 111 N. E. 1050 (1916) Judge Cardozo overruled centuries of authority to hold that the manufacturer of defective automobiles was liable in tort to a person injured thereby despite the absence of a contract between them. "We have put aside the notion that the duty to life and limb... grows out of contract and nothing else. We have put the source of the obligation where it out to be. We have put its source in the law." Following this landmark case, warranties have been implied in law with respect to all sorts of products, and the right to recover has been extended to persons having only the remotest connection with the manufacturer or original seller. A duty of care has been found in cases involving the sale of cigarettes, perfume, ladders, and a host of other products less central to human existence than a man's home. See Carter v. Yardley 319 Mass. 92. Employees of the purchaser and even subsequent purchasers of these products have been allowed to recover. See McLeod v. Linde Air Products 15 N. W. 2 122. Originally, the defendants in such cases prevailed by resort to the caveat emptor doctrine. Indeed, cases of outright fraud and misrepresentation were successfully defended on similar grounds. See Sherwood v. Salan 1805, 2 Day, Conn. 128; Page v. Parker 1869, 42 N. H. 363.

There are a number of reasons for extending implied covenants of fitness to landlord and tenant law. First, the tenant in urban society often has little choice as to where he is to live. If he works in the city and has little money, he is considerably restricted as to location. Indeed, it is the shortage of housing for low-income groups which of course gives the slum landlord his considerable economic advantage and power. Thus the landlord is more in a position of a sole supplier with respect to a tenant than is the manufacturer of an automobile or a can of soup who are held to a warranty of fitness. Thus he should be under a duty at least as high as they are not to hold out to the public a facility which, if used for the purpose for which it is intended, will cause injury.

Second, there is a clear public interest in requiring landlords to furnish a safe and habitable dwelling. The present state of the law encourages landlords to continue conditions which breed disease, encourage crime, frustrate educational and other programs for which great sums are expended. Archaic rules covering landlord and tenant relations are helping to develop in the heart of our cities a growing population alienated from the rest of the society which is increasingly prone to try violence as the solution to their problems. City ordinances, state statutes, and federal policy are all aimed at keeping city dwellings in a reasonable state of repair.

But criminal statutes are difficult and expensive to enforce. Local authorities often wink at violations because of the power of the landlords in the community. The level of compliance could be greatly improved if tenants themselves had the right to bring a suit against landlords for proper repair.

Third, unless the landlord is under a duty to repair which can be vigorously enforced by those who have a strong interest in doing so, the repairs will not be made. The tenants lack the funds to make them. Federal rehabilitation programs are so cumbersome and so expensive that they often take years to get underway. And when they do, the character of the neighborhood changes so sharply and the rents mount so steeply, that the tenants are often forced to move. Moreover, no individual tenant is in a position to make the repairs even if he had the funds since most of the major hazards involve structural defects affecting the common areas not under the control of any single tenant.

One of the arguments for imposing no duty on the landlord was on the premises and hence had both knowledge of any defects and control over repairs. Such a rationale had an air of plausibility about it in rural England where the leased premises were typically farms owned by distant landlords and occupied by a single tenant. But the typical urban dwelling is in an apartment building in which the tenant has neither access to the whole structure nor the resources to make repairs. The landlord, on the other hand, even in the absence of special legislation, has a duty to be informed about the state of the premises in order to comply with fire regulations and other safety ordinances. It seems clear, therefore, that quite apart from elementary considerations of equity, he is in a better position to bear this burden than the tenant.

The other principal argument for continuing to relieve a landlord of responsibility for failure to keep his premises fit for habitation is that the contrary rule would discourage investment in an ownership of real estate, particularly private dwellings. (see dissent by Bazelon, C. J. in Bowles v. Maloney 202 F2 320, 325). But the prevailing public policy, as expressed in Presidential messages, federal legislation, state statutes, and local ordinances is not intended to favor the private investor who wishes to profit from the perpetuation of squalor. The government and many private groups are spending millions of dollars in an effort to get rid of indecent housing. There is no public policy served by continuing to make slums an attractive investment.

IV

Thus there is very little that can be said for the present rule relieving a landlord of the obligation to provide safe and habitable premises to a tenant from whom he is collecting rent, except that for the most part it has long been the law. This argument must of course always be met and rejected in any area of the law needing reform. (See the dissent of Bartlett, Jr. in the MacPherson case 217, N. Y. 382.) Fortunately, there have been a number of expressions of out rage by judges and commentators about the state of the law in this area. An occasional case has distinguished or ignored the general rule and has implied a warrant of habitability. In Delameter v. Foreman 239 N. W. 148 (1931) the Minnesota Supreme Court held that the landlord was liable under an implied covenant of habitability because of the presence of bedbugs. The court reasoned that the tenant could not have dealt with the problem himself because the bugs had infested the common areas that were beyond the control of any single tenant. In Revel v. Deegan (See 26 ALR 2 468) the Court held the landlord to a duty to maintain the common areas such as stairs and passageways.

It is significant that there has been relatively little recent comment about this problem and few recent cases. One possible explanation is that tenants have lacked the funds and legal resources to test the law. There is a strong assumption among slum dwellers that you can't beat the landlord in the courts. They see the Tenants Court as the landlord's agent for evicting them rather than as an instrument of justice. But the climate in the cities has changed. The smouldering resentment that has characterized the slum dweller has now and again flamed into social action such as rent strikes. Sometimes, especially where the issue takes on powerful racial overtones as in Harlem during the summer of 1964, the result is riot. As techniques of civil disobedience spread and the federal government commits itself further to the war on poverty, those who live in the slums will grow bolder in dramatizing and fighting against the squalor of the inner city.

V

The time is ripe, therefore, for a renewed effort through the courts to redefine the landlord and tenant relationship, at least for multiple dwellings in urban areas. What is needed is a concerted campaign to dramatize the inequities of present law by means of a series of suits. The political climate of the country is now extremely favorable to judicial reform in this area.

If the issue whether a landlord has a duty to his tenants and to the community to keep his tenement from remaining a menace to health and safety is squarely presented to a judge, he need have neither the ingenuity nor the courage of a Cardozo to bring the law into reasonable alignment with the obvious necessities of modern city life.

Tenants could sue the landlord for injury to health either under a contract or tort theory. Under the contract theory tenants might argue that an implied warranty of fitness or habitability was inherent in the lease and that they should receive damages because of a violation of an implied promise. One difficulty with such a theory is that the implied warranty might be overcome by an express provision in the lease relieving the landlord of liability.

Therefore a tort theory might be a better basis for such suits. The obligation to the tenants would not flow from the lease, but it would flow, just as in the MacPherson case, from a basic public policy expressed in law. There are questions as to what the basis of the tort would be. It should not be necessary to prove that the landlord acted carelessly but merely that he failed to meet the standard imposed by law and that his failure caused injury. Even if it were necessary, however, to prove carelessness in failing to provide habitable quarters, such carelessness could probably be established by showing that the landlord was on notice of the defects which caused the injury.

If such suits prove successful, landlords will no doubt seek to rewrite leases to relieve themselves of tort liability. The tenants should argue that it would of course defeat the important public policy served by imposing a duty to provide decent housing if disclaimers in leases were held valid. The Uniform Commercial Code (sec. 2-719 (3)), which although not applicable to leases should be a persuasive analogy, holds that it is unconscionable to contract out of tort liability where injury to the person is involved.

It is difficult to imagine that the archaic and anomolous rules of landlord and tenant law would not yield to a major public campaign for reform. Legal theories and analogies from other areas of the law exist in abundance. What is needed is a concerted effort by tenants to vindicate their rights.

Cooperation on class suits to recover for inhuman living conditions would provide a stronger legal basis for recovery than if suits were brought separately by individual tenants. Moreover, it would also help build a sense of community, for it would mean working on a common task with obvious advantages to all members of a building or a neighborhood.

A formulation of tenants demands in terms of legal theory would make direct action more effective, just as sit-ins acquired legitimacy because they were in furtherance of rights already articulated by the Supreme Court. Class suits would of course have a far greater impact on the conditions of tenants generally than single suits. At the very least, they could dramatize a situation urgently in need of corrective legislation.

The first test cases should be very carefully selected. A preliminary survey suggests that the most promising jurisdictions are New York, Minnesota, and possibly California or the District of Columbia. The best case would be one involving physical injury to a number of tenants in a single building as a result of a defect in the common areas, such as an exploding boiler or a collapsing stairway. The issue is clearest where it is possible to prove that the landlord was on notice of the defect. It would also be desirable to go beyond such a case and to try to establish the landlord's liability for continuing injury to health due to sub-standard conditions. Recovery should be sought for psychological and emotional damage due to inhuman living conditions. The preparation of a brief defailing the human and social costs of indecent housing could focus on public attention on the slum problem and the responsibility of particular individuals for compounding it.

Such suits should be managed by an association representing all the participating tenants. It would be desirable for a building or neighborhood contemplating such a suit to establish a non-profit corporation to take charge of the litigation in behalf of the members and to receive any sums recovered as a result. If the individual tenants agree in advance to permit the community corporation, or community foundation as it has been called, to receive the proceeds as trustee for the tenants to be used for repair of the building or other community projects, the corporation should qualify for tax-exempt status. A prior commitment by the tenants not to demand their individual share would avoid what would otherwise be the likely result in the event the suits were successful: Individual tenants would demand their pro rata share of the recovery and move. Since a major social purpose of such litigation would be to encourage the rehabilitation of slum neighborhoods without making the tenants move, it is important to build neighborhood corporations capable of carrying out repairs before commencing suits against landlords.

If the suits were successful, they could have far - reaching effects. The most important result would be to convert slum property from a profitable investment into a much less attractive one, for the purchaser of every slum dwelling would be taking on an uncertain and possibly vast liability to his tenants.

A LAYMAN'S GUIDE TO
COMMUNITY ORGANIZATION

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If recoveries were substantial, as they should be if numbers of tenants are involved in each individual case, the tenants may have a good chance to end up with some property rights in the building. In some cases the landlord may not be able to raise the funds to pay off a substantial judgment and the tenants may come into possession of the building in satisfaction of the judgment. In other cases the tenants might reach a compromise with the landlord under which the community corporation organized to receive the proceeds might become a co-tenant of the premises.

Since community organization applies generally to inner-city work, an introduction may be necessary for those who are unfamiliar with it. Perhaps it was not until the New Deal era that the plight of the poor in America could be looked not only to the government but to community as well.

The difference being that like Hopkins and Lohr during the depression can be expressed in the following question: Is the function of welfare to bridge the world as it is, or to provide a means by which to enable the poor to work their way out of their situation, as it is? It is this latter idea which is the basis of the New Deal.

The New Deal was half successful. It was able to take over those who had been left behind by the depression but who were temporarily unable to get on their feet. It was relatively unable to lift up persons who were already at the bottom of the heap. The quarter century that has passed since the New Deal began has strengthened the philosophy. In depressed areas and urban ghettos there is now a mass of persons who have been "up and down" all their lives. Indeed, some families have been on the receiving end of substance abuse and various services from public and private agencies for these generations.

It was to be expected that conservative middle and upper middle class bourgeois would cry out at this practice (even though, in essence, they supported it through their donations to charitable causes). The typical reaction might be expressed in a statement like this: "My forefathers worked to earn their way. They didn't have the government providing their easy road. But now you see these inner-city ghettos with no means of support. You see men more interested in