Theories of Defense When Tenants Abandon the Premises because of the Condition Thereof

Max P. Rapacz
THEORIES OF DEFENSE WHEN TENANTS ABANDON THE PREMISES BECAUSE OF THE CONDITION THEREOF

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The thought of writing this article evolved several years ago when the writer was gathering the material for an article on constructive eviction.¹ Although it appeared that constructive eviction was the most frequently employed theory of defense there were nevertheless several other theories which were used and in certain types of cases seemed to be more effective and more acceptable to the courts than constructive eviction.² In some of them the facts were not regarded as sufficiently strong to support a constructive eviction, or it did not seem to fit, but nevertheless a defense was made out on another theory.³ Sometimes the courts discussed several theories upon which a decision in favor of the tenant could be supported and it was difficult to determine upon which one the court finally rested its decision.⁴ In quite a number of cases, after a court committed itself to a defense of constructive eviction, it appeared either expressly or in the background of the reasoning that, in reality, the decision had another basis and that the declaration of constructive evic-

¹ 1 De Paul L. Rev. 69 (1951).
² See Anton Petersen v. Slauf Mfg. Co., 251 Ill. App. 202, 207 (1929) wherein the court gave consideration to the possible application of constructive eviction but then decided the case on the theory that a covenant by the lessor to repair the roof before the commencement of the lease was a condition precedent to the vesting of an estate in the lessee; Rosenbloom v. Solomon, 57 Misc. 290, 109 N.Y. Supp. 540 (Co. Ct., 1907) wherein a lease of a room was made to a surgeon with a covenant to furnish hot water and the water was made available only in the hallway. The court preferred not to treat it as a constructive eviction but accepted the defense that it was a breach of the covenant of quiet enjoyment.
³ Park Ave. M.E. Church v. Barrett, 30 N.Y.S. 2d 667 (Co. Ct., 1941) (the court stated that it received little assistance from the constructive eviction cases which were submitted by counsel and thought it best to decide the question of the tenant's rights to elevator service on the basis of what was intended by the parties under the rule of the lease concerning such service).
⁴ See Stevens & Co. v. Pratt, 119 Wash. 232, 205 Pac. 10 (1922).

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tion was but a conclusion to cap the opinion. In still other cases the courts pointed out that the pleading was poor because of the lack of a well formulated theory and that a choice of another theory might have been more appropriate and would have made the marshalling of the evidence and the proof of the tenant's case easier.

Although the doctrine of constructive eviction and other doctrines of defense must have been rather dormant in recent years because of the tight rental situation in the post war years, the writer has been informed by his practicing colleagues that the situation is changing and that lessors who have been defaulting in their promises will be faced with more cases of abandoning tenants. It is hoped that the writer's attempted synthesis of the many cases in the field will prove to be of some value.

Because the doctrine of constructive eviction was fully developed in the earlier article it will be referred to in this paper only for comparative purposes. The same will hold true of the breach of the covenant of quiet enjoyment as a defense. It was frequently used in support of the constructive eviction decisions. It should be added, however, that in some cases a defense has been worked out on the theory of a breach of covenant alone.

It would seem almost too elemental to mention that in making out a defense on any theory a proper regard must be had for the common law on the responsibility of the lessor for the condition of the premises, for the terms of the particular lease and for applicable statutes. At common law there were no implied covenants in leases as to the condition of the premises or the fitness thereof for any purpose. It was left to the tenant, under normal circumstances, to determine the condition and fitness of the premises by inspection and he assumed the full risk as to the condition. Consequently, the duty to pay the stipulated rent continued even if the premises became untenantable at the commencement of the lease or became so later and the tenant could not urge untenantability or unfitness as a defense to suits for rent.

See Kesner v. Consumers Co., 255 Ill. App. 216 (1929) (the basic reasoning was in terms of a nuisance and a breach of the covenant of quiet enjoyment. The lessor had allowed one tenant to store picture films endangering another tenant and his employees).

This study does not include cases which were decided under untenantability statutes. See 2 Powell, Real Property §§ 235-236 (1950) for an up-to-date coverage of such cases.

Hughes v. Westchester Development Corp., 77 F. 2d 550 (App. D.C., 1935); Longwood Towers Corp. v. Doyle, 267 Mass. 368, 166 N.E. 634 (1929); 2 Powell, Real Property § 233 (1950); Taylor, Landlord and Tenant § 372 (1904). But see 1 Ameri-
I. DEFENSES GROUNDED IN CONTRACT THEORY

In resolving cases on basis of contract principles the reasoning generally revolves around whether there was a "failure of consideration" or whether various covenants of the lessor and the covenant of the lessee to pay rent are dependent or independent. Occasionally, a case is decided simply on the general intention of the parties.

The failure of consideration doctrine.—The "failure of consideration" doctrine has been used as a defense in certain types of cases for a long time. It probably first came into the law in the cases of eviction by the lessor or through title paramount. When applied to cases of actual eviction the doctrine seems inherently sound in view of the ancient theory of rents illustrated in the following quotation taken from Mr. Gilbert's treatise on rents:

A rent service is something given away by way of retribution to the lessor, for the land demised by him to the tenant; and consequently, the lessor's title to the rent is founded upon this; that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not: If, therefore, the tenant be deprived of the thing letten, the obligation to pay rent ceases; because such obligation has its force only from the consideration, which was the enjoyment of the thing demised.

How far this doctrine should be carried is something of a problem which the writer will not attempt to answer except to point out that the failure of consideration may be just about as complete in some cases of modern leasing as if the lessor had actually evicted the tenant.

This doctrine of failure of consideration, sometimes referred to as the Michigan doctrine, has at times been used as a sufficient defense in itself while at other times it has been used merely in support of can Law of Property 267 (1952). There are some exceptions to the general rule, the principal one being the "furnished house" doctrine. For other exceptions see said text at 267.

*See Smith v. McEnany, 170 Mass. 26, 48 N.E. 781 (1897); Dyett v. Pendleton, 4 Cow. 581 (N.Y., 1825), on writ of error, 8 Cow. 727 (N.Y. Court for Correction of Errors, 1826); Gilbert, Rents 145 (1838).

*Gilbert, Rents 145 (1838). Italics are ours.

Tyler v. Disbrow, 40 Mich. 415 (1879) (the lessor had covenanted that a house was in good condition and it was not); Vincent v. Central City Loan and Investment Co., 45 Tex. Civ. App. 36, 99 S.W. 428 (1907) (the lessee predicated his defense squarely upon the failure of the consideration doctrine and the lessor countered with the doctrine of independent covenants. The court stated that there was no previously decided Texas case in point and then held in favor of the lessee upon a finding that the lessor had breached his covenant to repair a bakers oven when premises were leased for a bakery. The court relied upon the Michigan case). Accord: Davis v. Shepperd, 196 Ark. 302, 117 S.W. 2d 337 (1938); Whittaker v. Holmes, 165 Ark. 1,
some other theory. In New York the doctrine seemed to have been strongly approved in the early case of *Dyett v. Pendleton*¹¹ but thereafter it has been used mainly in support of the newer theory of constructive eviction which developed very rapidly after that decision. In other jurisdictions there have been considerable variations in the applications of the doctrine.¹² Sometimes, as if not to push the doctrine too far, a court has spoken only in terms of an "impairment" of the consideration but nevertheless allowed the defense.¹³

In calling for any application of the doctrine of failure of consideration it should be remembered that historically most leases of land were for agricultural purposes and that therefore there could not be such a total failure of consideration as may happen in numerous cases of modern leasing of apartments and parts of buildings in urban communities.

**The doctrine of dependent covenants.**—In bilateral contracts generally, a substantial breach of a material covenant, the covenants being mutually dependent under normal circumstances, will excuse the other party from further performance. So if a court can be prevailed upon to accept the application of the same principles to leases, it may offer a good defense to suits for rent in at least certain types of cases if the tenant has abandoned the premises.¹⁴

To obtain an understandable perspective of the doctrine and its application one must take into consideration the historical develop-

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¹¹ See 1 Am. Law of Property 282 (1952).

¹² Dolph v. Barry, 165 Mo. App. 659, 148 S.W. 196 (1912) (held, that a breach of covenant by the lessor to repair a store roof justified abandonment though the repairs could have been easily made by the tenant).

¹³ Berman v. Shelby, 93 Ark. 472, 125 S.W. 124 (1910) (the lessor covenanted to put a hot water heater in the bathroom on the second floor in a rooming house. He installed the heater in the kitchen on the first floor so that to light it the user had to come downstairs. The court considered it to be a material change from the terms of the contract and declared the covenants to be mutual and the breach by the lessor was held to be a complete defense to a suit for rent after the abandonment of the premises). Barnes v. Strohecker, 17 Ga. 340 (1855) (the lessor covenanted to make, seemingly, substantial repairs to a house). Accord: Higgins v. Whiting, 102 N.J.L. 279, 131 Atl. 879 (S. Ct., 1926) (the lessor covenanted to furnish heat in apartment. The court held that the covenants were mutual and dependent). On the legal effect of covenants being interdependent generally, see 1 Tiffany, Real Property 135 (3rd ed., 1939).
ment of covenants in the field of land law and of contract law. Historically, covenants to pay rent and covenants of the lessor have been treated as independent rather than dependent, or as conditions precedent. The lessor was supposed to have furnished the main part of the consideration for the rent when he conveyed the "estate" in the land and a breach of covenant thereafter was regarded as sufficiently compensated for by awarding money damages. The general attitude of the courts came to be that if the lease did not modify the old common law principles, they applied. Sometimes the courts, after deciding against the tenant's defense, added insult to injury by telling him that he could have stipulated about the matter in the lease! The thinking along such lines, which is not realistic anyway, has sometimes been carried to the point of the ridiculous as the following quotation attests:

... And he could have stipulated in his contract that no restaurant should be adjoining him, and that, if one was so established, and by reason thereof his office became infested with rats, or filled with odors therefrom, that the lease should then terminate. ... Not having done so, the defendant was held liable for the office rent subsequent to the abandonment.

The adherence of the courts to the old historical view that covenants in leases are independent has been rather persistent. When the old rule that mutual promises in a bilateral contract are independent and unconditional unless the parties, by some expression of intention, make them otherwise, gave way to the new rule that when two performances are mutually promised in a bilateral contract, they are concurrently conditional and dependent, the courts continued to adhere to the old rule regarding covenants in leases. To ameliorate some of the injustices resulting from the application of the old rule, the courts

15 Lewis & Co. v. Chisolm, 68 Ga. 40 (1881); 1 Tiffany, Landlord and Tenant § 51 (1910); Costigan, Performance of Contracts 63 (1927).
17 Most lessees do not have the bargaining power to obtain the insertion of protective provisions even if they give thought to the matter.
18 Lumpkin v. Provident Loan Society Inc., 15 Ga. App. 816, 84 S.E. 216, 217 (1915) (the court denied a defense of constructive eviction). See also, note 37 Harv. L. Rev. 896 (1924) for the unrealistic view that one who takes a furnished house does not need the protection of an implied warranty of fitness doctrine because he can exact an express warranty.
19 See 3 Corbin, Contracts § 656, at 616 n. 11 (1951) for such a transition in the English courts at about 1792 and Lord Kenyon's thinking that some of the old decisions "outrage common sense."
resorted to other devices, particularly the doctrine of constructive eviction, which, if liberally applied, can attain the same results as the doctrine of dependent covenants. Why the courts did not apply the principle of mutual dependency of covenants to leases after that principle became established for ordinary bilateral contracts is explainable partly on the estate theory of leases and partly on the ground that the principle of independent covenants in leases was thoroughly settled before the law of mutually dependent promises was established in contract law.\(^{20}\)

Nevertheless, in spite of history and the general reluctance of the courts to deviate from principles established in land law, there has been a considerable development of the mutuality of the material covenants in leases, and the current tendency is in that direction. The earliest and the strongest recognition for the doctrine seems to have been obtained in cases involving covenants of the lessor to make repairs. *Barnes v. Strohecker*\(^{21}\) is a century old case, wherein the lessor seems to have covenanted to make substantial repairs to a house within a reasonable time and did not do so. The Georgia Supreme Court reversed a judgment for the lessor and determined that the covenants were to be treated as mutually dependent. A more recent case in which the doctrine of mutuality of repair covenants was expounded most vigorously and the tenant excused is *Ingraham v. Fred*.\(^{22}\) The lease was of a storehouse for two years at a rental of $4800 payable $200 a month. The tenant conducted a pawnshop and clothing business and the premises became untenantable during the first year because of a leaking roof which the lessor failed to repair. The Texas Court severely criticized the English Rule of independence of covenants in leases, as being arbitrary and unduly favorable to the lessor, with no legal or equitable basis for it in America.

If the doctrine of dependent covenants in leases is accepted in a jurisdiction, there still remains the question of determining whether they be dependent or independent in the particular lease. That determination seems to depend upon the intention of the parties, the materiality of the breach and whether the breach goes only to a part of the consideration which could be compensated in damages.\(^{23}\) If there was generally a substantial performance by the lessor, he can sue for

\(^{21}\) 17 Ga. 340 (1855).
\(^{22}\) 210 S.W. 298 (Tex. Civ. App., 1919).
\(^{23}\) 1 Tiffany, Real Property 135 (3rd ed., 1939).
future rents though the tenant has quit the premises.\(^{24}\) To justify abandonment the breach must be substantial and of some essential covenant.\(^{25}\)

To avail himself of the doctrine of dependent covenants the tenant must vacate the premises, as is the case in constructive eviction.\(^{26}\) If the tenant continues in possession, having had the use of the premises, he is deemed to have waived his rights to stop the payment of rent.\(^{27}\)

*Cases decided on general intent.*—There are a few cases in which the courts apparently proceed upon the general intention of the parties without any express reference to a failure of consideration or dependency of covenants. In a fairly recent case a New York court stated that it received little assistance from constructive eviction cases submitted by counsel and concluded that the question of the tenant's rights concerning elevator service had best be decided on the basis of "what was intended" by the parties under the rule of the lease relative to elevator services.\(^{28}\)

Although the contractual theories of defense in one form or another have not been asserted with great frequency and sometimes not very clearly,\(^{29}\) they would seem to merit further extension and devel-


\(^{25}\) United Cigar Stores of America v. Hollister, 185 Minn. 534, 242 N.W. 3 (1932) (the defendant had a ten year lease for a cigar store, lunch room, soda fountain or drug store at an annual rental of $7200.00. By the terms of the lease, the lessor was not to rent any part of the building for like purposes. The lessor made a lease to another in the remaining part of the building for an old-fashioned, ice-cooled soda fountain of small capacity four months after the defendant had vacated. This, the defendant contended, was such a breach as to terminate his liability for future rents. Held, that such a breach goes only to a part of the consideration, and was merely incidental to the main purpose of the lease, and did not warrant a rescission); United Cigar Stores Co. v. Barr, 142 So. 370 (La. App., 1932). But cf. University Boat Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1915), Comment 10 Il. L.Rev. 61 (1915) wherein the court held that a covenant by the lessor that he would not lease to others who make a specialty of selling pearls, was such a vital part of a "bilateral contract" that the defendant could terminate his lease. The court said that it was idle to say that an action for damages for breach of contract would afford an ample remedy. See 3 Corbin, Contracts 701 (1951) that the question of the materiality of the breach which will justify abandonment differs with the circumstances and that there is a lack of harmony in the decisions.

\(^{26}\) Lee v. Ellis, 169 Ark. 556, 275 S.W. 889 (1925); Banister Real Estate Co. v. Edwards, 282 S.W. 138 (Mo. App., 1926).

\(^{27}\) Lee v. Ellis, 169 Ark. 556, 275 S.W. 889 (1925).


\(^{29}\) See Stanoyevich Fund v. Steinacher, 125 N.J.L. 326, 15 A. 2d 772 (1940) wherein the court simply stated that a breach of covenant by the lessor to repair a furnace justified the tenant in breaching his covenant to pay rent.
opment because an application of the old estate theory of leases seems inappropriate in many cases today. The contract theory of leases is a recognition of the fact that the parties to a modern lease are thinking in terms of contract rather than in terms of the estates concept and decisions are made more on the basis of intention of the parties in each case rather than on technical and sometimes outmoded doctrines of property law.

It is the opinion of the writer that the courts are relying on contractual doctrines to decide cases more than is apparent in the cases. Professor Corbin, the author of a recent treatise on contracts, in discussing constructive eviction, puts the matter much more strongly in the following language:

The word "constructive" shows that it is not the law of property that the court is applying, but the law of mutual dependency in contracts; it is believed that the time has come to recognize this fact openly and to apply the flexible rules of contract law in determining whether a breach by either party is so material as to discharge the other from further duty. . .

The general recognition of contract principles which Professor Corbin desires will not be easily attained. Witness a writer on leases in New York recently stating that the "core" of lease law in the state is that a lease is a conveyance and that we are dealing very little with the law of contracts.

II. FAILURE TO PERFORM CONDITIONS PRECEDENT

The writer deems it advisable to sound a warning at the outset regarding the observation of distinctions between a promise (covenant) and a condition. Professor Williston criticizes strongly a nomenclature which fails to recognize the distinction because of the great differences in legal results if we have the one or the other. The following quotations might be helpful in observing the distinctions:

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80 See 3 Williston, Contracts 2520 (rev. ed., 1936), for a sympathetic attitude toward a greater use of the contract theory. But see, 1 Tiffany, Real Property 135 (3rd ed., 1939) for a statement that the contractual doctrine of dependent covenants would seem to be inapplicable to leases on the ground that a breach of the lessor's covenant goes only to a part of the consideration.

81 3 Corbin, Contracts 701 (1951).


The distinction between a promise or a covenant on the one hand, and a
collision on the other, both in their legal effect and in their wording, is ob-
vious and familiar. Breach of promise subjects the promisor to liability in
damages, but does not necessarily excuse performance on the other side.
Breach or non-occurrence of a condition prevents the promisee from acquir-
ing a right or deprives him of one, but subjects him to no liability.\textsuperscript{34}

A condition precedent is one calling for performance of some act after the
contract is entered into on performance of which the obligation depends.\textsuperscript{35}

Whether certain language in a lease creates a condition or a promise
is a matter, as in other contracts, of intention and construction.\textsuperscript{36} In
making the determination one must bear in mind the familiar principle
that the courts do not like to find conditions precedent unless com-
pelled to do so by the language of the lease\textsuperscript{37} or contract.\textsuperscript{38} The
equities of the case and the possibility of injustice resulting from find-
ing a condition precedent also receive due consideration.\textsuperscript{39}

The condition precedent may be a condition to the existence of
any lease or a prerequisite to a duty of immediate performance under
an existing lease.\textsuperscript{40} As to the former, it may be shown by parol evi-
dence that the writing was never executed or delivered as a lease.\textsuperscript{41}
The parties may make performance of a comparatively trivial duty
a condition precedent and the contract will be dealt with as made.\textsuperscript{42}

\textsuperscript{34} 3 Williston, Contracts 1909 (rev. ed., 1936).
\textsuperscript{35} Elson v. Jones, 42 Idaho 349, 350, 245 Pac. 95, 96 (1926); See also, Costigan, Per-
fomance of Contracts 12 (1927).
\textsuperscript{36} McIsaac v. Hale, 104 Conn. 134, 132 Atl. 916 (1926); Petersen v. Slauf Mfg. Co.,
(the court was unable to determine whether it was a covenant or condition because
of poor pleading and insufficient evidence as to the language of the lease).
\textsuperscript{38} 3 Williston, Contracts 1910 (rev. ed., 1936); Rest., Contracts § 261 (1932).
\textsuperscript{39} In McIsaac v. Hale, 104 Conn. 134, 132 Atl. 916 (1926) the court concluded that
it could deal out more justice to the parties according to the equities of the case by
holding that certain language did not create a condition precedent to the payment
of an increased rent upon the completion of specified improvements. See also Doo-
little v. Selkirk, 7 Misc. 72, 28 N.Y. Supp. 43 (N.Y. C.P., 1894) (a promise by the
lessor to put in a new furnace did not produce a condition precedent that it would
effectively heat the place but merely gave an independent covenant. The court deemed
it more just to treat it as a covenant because the tenant could have made repairs to
the new furnace at a cost of $25.00 which would have brought forth the necessary
heat).
\textsuperscript{40} Costigan, Performance of Contracts 1-4 (1927); 3 Williston, Contracts 1913 (rev.
\textsuperscript{41} Hagen v. Moch, 249 Mich. 511, 229 N.W. 629 (1930); 9 Wigmore, Evidence,
§ 2410 (3rd ed., 1940); Friedman, The Nature of a Lease in New York, 33 Cornell
L. Q. 165 (1947).
\textsuperscript{42} Watzman v. Unatin, 101 W. Va. 41, 131 S.E. 874 (1926); 3 Williston, Contracts
If a condition is found it must be strictly complied with or no liability can arise on the promise which the condition qualifies.\textsuperscript{48}

The doctrine of conditions precedent has been used with particular effectiveness in cases where lessors covenanted to make substantial improvements or repairs prior to the beginning of the term when the premises have been leased for a known use.\textsuperscript{44} In \textit{Papanastos v. Heller},\textsuperscript{45} a lessor agreed to "fix up the demised premises above the store in good and satisfactory condition" which the parties understood as meaning before the beginning of the lease. The court stated that considering the facts and circumstances and the language used, it could not be considered as the "usual" covenant to repair—that it was a condition precedent to any estate vesting in the lessee. The following excerpt is indicative of the attitude of the courts in such cases:

We think on principle it may be laid down as a general rule that where a landlord demises premises for a known use on the part of the lessee and the lessor and lessee covenant that repairs of a substantial nature should be made prior to the beginning of the term, it must be held to be the intention of the parties that the provision for repairs be construed to be a condition precedent rather than a covenant, and that failure on the part of the lessor to keep such promise will justify an abandonment and rescission of the lease.\textsuperscript{46}

Under another view such a lease may be treated as an executory contract to take a lease.\textsuperscript{47}

Instead of being a condition precedent to the vesting of an estate in the lessee, the condition may be precedent to the payment of rent under an existing lease.\textsuperscript{48} So where tenants in possession quit the

\textsuperscript{48}Bacon v. Albany Perforated Wrapping Co., 22 Misc. 592, 49 N.Y. Supp. 620 (S. Ct. Tr. Term, 1898) (the lessor provided that in case of partial destruction of the premises, the lessor should rebuild "as speedily as possible" and that rent should cease in the meantime. Held, that the lessor's performance within a reasonable time was a condition precedent and the tenant was justified in abandoning the lease and the obligation to pay rent ceased).

\textsuperscript{44}Brown v. DeGraff, 183 App. Div. 177, 170 N.Y. Supp. 445 (3rd Dep't, 1918) (involved the erection of a certain type of building by the lessor. Parol evidence was allowed to show that it was a condition precedent); La Farge v. Mansfield, 31 Barb. Ch. 345 (N.Y.S. Ct., 1859) (the lessor agreed to make a store, already under construction at the time of the leasing, ready for occupancy by a certain date and fire destroyed it before said date).

\textsuperscript{45}227 Mass. 74, 116 N.E. 732 (1917).


\textsuperscript{48}Epping v. Devaney, 28 Ga. 422 (1859); Obermeyer v. Nichols, 6 Binn. 159, 6 Am. Dec. 439 (Pa., 1813). See also Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 155 P. 2d 24 (1945) (the lessor covenanted not to "let or permit" occupation of any other space or storeroom in the same building for the purpose of conducting a furniture store. The court held the provision to be a condition precedent
premises after the lessor failed to repair fire damage "forthwith" or "as speedily as possible," as called for by the leases, the tenants were held justified in quitting and terminating their leases on the grounds that the promises were conditions precedent to the obligations to pay rents. The court stated, in the second case, that any other view would be unfair to the tenants.

This right of a lessee to require the lessor's compliance with the covenant to improve or to repair the premises as a condition precedent to the obligation to pay rent may be waived if the tenant takes possession or retains possession unduly knowing of the breach of the condition. If the repairs are to be made after the commencement of the lease, as within a reasonable time, there is no waiver by taking possession and the tenant may quit later if the lessor defaults.

It was previously stated that the doctrine of conditions precedent has been used with particular effectiveness in cases where substantial repairs or improvements were covenanted. The opinions of the Appellate Courts give almost no indication that the doctrine has been urged in cases wherein the promised repairs or improvements are not so significant. It seems that the application of the same principles of construction and enforcement of conditions in leases as in other contracts could broaden the application of the doctrine and would be justified in modern leasing. It may be queried whether the courts are attaching undue significance to the materiality of the covenant and the degree of lessened enjoyment in the same manner as in the cases of conditions. If so, Professor Corbin's observations on the distinctions between covenants and conditions are to the point. A disregard of a condition and the consequent right to rescind a lease or to abandon the premises, places the tenant at a great disadvantage. Suits for damages are not a very satisfactory recourse for the average tenant and so he is constrained to remain making the best of a situation which is not to his liking and not in accord with his bargain.

to the payment of rent and sustained a finding of constructive eviction by the trial court upon a breach by the lessor and abandonment of the premises by the tenant). Accord: University Boat Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914).


There are two cases, *Papanastos v. Heller*[^58] and *Craven v. Skobba*[^64] which might well be made more frequently applicable to modern leases of apartments or houses. In the first there was a ten year lease of a store building with seven rooms used for habitation on the second floor. The lessor had covenanted to "fix up the demised premises above the store in good and satisfactory condition." This not being done before the commencement of the term as contemplated by the parties, the court held that the covenant was a condition to the vesting of the estate in the lessee, although the court stated that the extent of the contemplated repairs did not appear. The tenant was allowed to rescind the lease and to recover the rent paid in advance on the first month. In the second case the lessor had covenanted to do what is commonly referred to as "decorating and painting" within and outside of a house which had been leased for one year beginning September 1st at $40 per month. The defendant took possession on September 9th at which time all the work was done except the outside painting which was not done when the defendant abandoned the premises on November 9th after several requests that the work be completed. The court held that the defendant was not liable for the balance of the term. The court seems to have treated the covenant as a condition. It emphasized that the degree of lessened enjoyment was not important and that the rights of the parties were to be measured by the terms of their written contract and not by the consequences flowing from the breach thereof.

### III. FRAUDULENT CONCEALMENT AND REPRESENTATION

There is a variety of cases in which tenants have been held justified in terminating a lease and abandoning the premises because of fraudulent concealment of the condition or because of fraudulent representations made prior to the inception of the lease. In a few of these cases it has been stated that such conduct results in a constructive eviction but more generally the disposition is made simply on the basis of fraud. There is close scrutiny of all allegations of fraud and on occasion the courts have warned against false allegations by lessees.[^55] A careless or liberal application of the doctrine of fraud could result in a virtual denial of the doctrine of caveat emptor.

[^58]: 227 Mass. 74, 116 N.E. 732 (1917).
[^64]: 108 Minn. 165, 121 N.W. 625 (1909).
[^55]: Fifty Associates v. Berger Dry Goods Co., Inc., 275 Mass. 509, 176 N.E. 643 (1931) (the tenant alleged defective drainage but the court concluded that he had quit for
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Generally speaking, neither party to a contract . . . is bound to disclose facts known to him which might prevent the other from entering into such a contract, and where no confidential relationship exists between them actual misrepresentations are, therefore, usually necessary to constitute fraud. . . .

To constitute fraud and justify abandonment the concealment must be of material facts which could not be discovered by an ordinary inspection and which seriously interfere with the enjoyment. It has been said that it would be unconscionable and unjust to apply the doctrine of caveat emptor in such cases. But a nondisclosure of some objectionable feature, where the lessee had the same opportunity to observe it as the lessor, and the lessor having made no promises or assurances, is not a fraudulent concealment. As to whether there is any duty to disclose objectionable past history of the premises there are differences of opinion.

Where the lessee is in a better position to ascertain the condition than the lessor because of the nature of the business to be carried on

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business reasons). See Stovall v. Newell, 158 Ore. 206, 75 P. 2d 346 (1938) (the court characterized the oral representations of the lessor's agent, that an apartment was in first class condition, as mere "puffing or dealers' talk.").

Leech v. Husbands, 34 Del. (4 W. W. Harr.) 362, 365, 152 Atl. 729, 732 (1930) (involved the question of whether a failure of the lessor to disclose infestation of an apartment with vermin would constitute a fraud. The court expressed a view strongly unfavorable to the defense).

Wallace v. Lent, 1 Daly 481 (N.Y. C.P., 1865) (a case with an excellent analysis. The lessor had failed to disclose that a house was untenable because of sewer gas and that the previous tenant had quit because of it). Accord: Capitol Amusement Co. v. Anheuser Busch Inc., 94 Colo. 372, 30 P. 2d 264 (1934); Perkins v. Marsh, 179 Wash. 362, 37 P. 2d 689 (1934) (the lessor had failed to disclose seepage in a basement in rainy seasons which interfered with conducting the business of retailing automobiles for which purpose the premises were leased. Held, a fraudulent concealment); Scudder v. Marsh, 224 Ill. App. 355 (1922) (the lessor failed to disclose inadequacy of a furnace in a house, a thing which could have been determined only by experts); Haines v. Downey, 86 Ill. App. 373, 374 (1899).

Scudder v. Marsh, 224 Ill. App. 355 (1922); Wallace v. Lent, 1 Daly 481 (N.Y. C.P., 1865).


Weeks v. Braverman, 1 Daly 99 (N.Y. C.P., 1860) (a failure to disclose that a house had been used for prostitution with the assent of the lessor, was not a fraudulent withholding of information because, said the court, there was no obligation to disclose it, and caveat emptor governed). Accord: Twibill v. Brown, 1 Pa. Co. Ct. Rep. 350 (1886) (the lessor had failed to disclose that the premises had been previously used as an opium den. The court thought that it was up to the tenant to inquire about the previous uses). But see, Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 38 Am. St. Rep. 476, 478 (1892) in support of a contrary view on the ground that such things are not open to inspection and there may be nothing to put a tenant on inquiry.
by the lessee, there is no duty of disclosure.\textsuperscript{61} All the more if a lessor is not aware of the alleged defects, there can be no fraudulent concealment.\textsuperscript{62} Defects resulting from adjoining premises not owned by the lessor raise no duty of disclosure.\textsuperscript{63}

To take advantage of the defense of fraudulent concealment, the tenant may have to rescind the lease within a reasonable time after discovery of the defective condition and quit the premises.\textsuperscript{64}

As in cases of fraudulent concealment, so in cases of fraudulent representation, a lessee may abandon the premises and he will have a good defense to suit for subsequent rents if he can prove his allegations.\textsuperscript{65} The parol evidence rule cannot be invoked to prevent a showing of fraud in the execution of the lease, it not being an attempt to vary a written lease but rather to show that the lease was procured by fraud and therefore has no legal effect.\textsuperscript{66}

In determining whether a defense of fraudulent representation has been made out the courts are again ever mindful of the doctrine of caveat emptor and of allowing it proper scope. So a representation made in regard to a condition which could readily be seen has been held not to constitute fraud.\textsuperscript{67} But any intentional misrepresentation of material facts when the lessee does not have access to means of information will vitiate the lease regardless of the lessor’s lack of knowledge that it was true or false.\textsuperscript{68} If a lessee enters into a lease upon false representations of the lessor, who has superior means of information, the doctrine of caveat emptor does not apply because the lessee did not have an equal opportunity to pass judgment.\textsuperscript{69} So when a lessee was told by the lessor that a house was in “good condition” after being

\textsuperscript{61} Chapin Publicity Corp. v. Saybrook Holding Corp., 103 N.J. Eq. 65, 142 Atl. 184 (1928) (involved the strength of a wall).

\textsuperscript{62} Home Life Ins. Co. v. Franklin, 303 Ill. App. 146, 24 N.E. 2d 874 (1940).

\textsuperscript{63} Hazlett v. Powell, 30 Pa. (6 Casey) 293 (1858).


\textsuperscript{65} Gamble-Robinson Co. v. Buzzard, 65 F. 2d 950 (C.A. 8th, 1933); Goldberg v. Reed, 97 N.J.L. 170, 116 Atl. 429 (Ct. of Err. & App., 1922).

\textsuperscript{66} Gamble-Robinson Co. v. Buzzard, 65 F. 2d 950 (C.A. 8th, 1933) (a building leased for storage purposes deteriorated so that it became unsafe. The court allowed proof of the lessor’s oral representations that the building had been overhauled and repaired before the lease was made and that it was suitable for the lessee’s purposes); Meyers v. Rosenback, 5 Misc. 337, 25 N.Y. Supp. 521 (N.Y. City Ct., 1893).


\textsuperscript{68} Purcell v. Teller, 10 Cal. 488, 51 Pac. 436 (1897).

\textsuperscript{69} Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717 (1849).
informed by the lessee that the lessee was not a good judge of such things and preferred to rely upon the lessor, the court held that the case should have gone to the jury as to such representations being made—that it was to be regarded as a strong feature of the tenant's case if he relied upon the lessor. Likewise, where a prospective tenant was suggesting that he wished to employ a plumber to inspect a drain pipe and the lessor assured him that everything was in "good order," the tenant had a good defense if he abandoned the premises because of sewer gas arising therefrom.

Sometimes lessors try to preclude the use of the defenses of fraudulent representation and concealment by inserting provisions which seemingly waive them. Such provisions do not fare well in the courts. So a provision in a lease that the lessee received the premises in "good order" did not bar the lessee from showing that the lease was procured by fraud. Likewise a provision that the lessee was not influenced by any representations did not bar rescission of a lease which was procured by fraudulent representations. The fraudulent representations vitiate the lease, and one cannot contract against fraud nor prevent a showing of fraud by estoppel.

IV. THE NUISANCE DOCTRINE

As in other fields of law, the nuisance concept has been bandied about rather loosely in the field of landlord and tenant relations and is therefore not a very satisfactory tool to work with. Nevertheless, there are quite a number of cases wherein the abandonment has been justified on the theory of a nuisance in one manner or another. A court may make a finding that the lessor created the nuisance or that he consented and connived in creating one, or that it resulted

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70 Jackson v. Odell, 12 Daly 345 (N.Y. C.P., 1884).
71 Wolfe v. Arrot, 109 Pa. 473, 1 Atl. 333 (1885).
72 Purcell v. Teller, 10 Cal. 488, 51 Pac. 436 (1897).
73 Oceanic Villas, Inc. v. Godson, 148 Fla. 454, 4 So. 2d 689 (1941).
74 Purcell v. Teller, 10 Cal. 488, 51 Pac. 436 (1897); Meyers v. Rosenback, 5 Misc. 337, 25 N.Y. Supp. 521 (N.Y. City Ct., 1893).
75 Oceanic Villas, Inc. v. Godson, 148 Fla. 454, 4 So. 2d 689 (1941).
76 Allott v. Bowers, 168 Ill. App. 573 (1912) (the lessor was noisy in entertaining guests in his apartment which was above the lessee's apartment); Donovan v. Koehler, 119 App. Div. 51, 103 N.Y. Supp. 935 (2nd Dep't, 1907) (the lessor installed a bowling alley in his saloon, below the lessee's apartment).
through an agency under his control and then declare that it was a constructive eviction as a result of his acts or that the nuisance affected the consideration of the contract.

Just what legal effect the maintenance of a nuisance should have upon the tenant's right to quit the premises seems to have been first thoroughly considered in the cases of Pendleton v. Dyett and Dyett v. Pendleton. In the first case the New York Supreme Court rejected evidence offered in support of an allegation by the tenant that the lessor maintained a nuisance in another of his tenements in the same building in bringing or encouraging lewd women to come into it, who caused noises and disturbances at night, because of which the defendant abandoned the premises with his family. The court seems to have relied a great deal upon the fact that the defendant himself could have abated the nuisance and that therefore there was no moral necessity for abandoning the premises. But in the second case the Court of Errors was of the opinion that the evidence should have been admitted for the consideration of the jury to establish a constructive eviction on the reasoning that a lessor ought not to be encouraged to disturb his own tenant, pointing out that even under feudal law a lessor had a duty of protection.

Ever since those two cases there have been considerable differences of opinion and sometimes misunderstandings in respect to two points: (1) What must be the degree of participation by the lessor to constitute a nuisance by the lessor; (2) the duty of the lessor to abate nuisances caused by others. As to the first point it has been asserted that the authorities are uniform that the nuisance must be created by, or due in some measure to, the landlord. Although such assertions are generally true, the courts have found it necessary to warn against misunderstanding such assertions. As to the second point, it is gen-
generally asserted that a mere failure of the lessor to abate a nuisance created by another does not justify abandonment. But, again, such statements cannot be accepted without qualification. There has been a recent tendency, at least in a few jurisdictions, to impose a duty to abate nuisances caused by other tenants, under some circumstances, even though not attributable to the lessor, and a failure to abate gives the tenant a good defense to suits for rent accruing subsequently to the abandonment of the premises.

V. THE INTOLERABLE CONDITIONS DOCTRINE

As a general rule a tenant to justify abandonment must somehow attribute the untenantable condition to his landlord, but in the New York case of In re Barnard Realty Company v. Bonwit, the court justified the abandonment on the ground of an "intolerable condition" which the lessee "neither causes nor can remedy." The untenantability of an apartment was caused by the "nightly meetings and performances of rats in the walls and ceilings coupled with a most offensive odor. . . ." The court, after some prefatory remarks on the

sance is the operative factor, although the opinion in the case, says the court, is clear that it was the landlord's nuisance which led to the decision. The nuisance complained of was sewer gas which escaped because of defective plumbing in an apartment house wherein it was the duty of the lessor to keep the plumbing in repair). Compare, McGlashan v. Tallmadge, 37 Barb. Ch. 313 (N.Y. S.Ct., 1861) wherein it was argued that when a house became untenantable because of offensive odors caused by poor drainage, the lessee should be justified in abandoning the premises even though there was no wrongful act of the lessor. The majority of the court rejected the argument but there was a dissent by Bacon, J. See also, DeWitt v. Pierson, 112 Mass. 8 (1873) (held, that the maintenance of a bawdy house by another tenant did not justify the defendant in abandoning his premises. The court distinguished the Dyett cases on the ground that those cases involved acts of the lessor).


Bruckner v. Helfair, 197 Wis. 582, 222 N.W. 790 (1929) (the boisterous conduct of an overhead tenant was held to be a nuisance which entitled the good tenant to quit. The court regarded the result as "just and reasonable" and the right to quit as settled for Wisconsin). Accord: Home Life Ins. Co. v. Breslerman, 168 Misc. 117, 5 N.Y.S. 2d 272 (S.Ct. App. Div., 1st Dep't, 1938); Maple Terrace Co. v. Simpson, 22 S.W. 2d 698 (Tex. Civ. App., 1929) (a little girl and her mother were afraid of a big police dog kept by another tenant in the building. The court skillfully attributed a nuisance to the lessor, saying that he "sanctioned" the act of keeping the dog when he did not abate the nuisance, as he had a power to do under the terms of the lease). See also, Kesner v. Consumers Storage Co., 255 Ill. App. 216 (1929) (held, that a lessor, as the landowner, had a duty to abate a nuisance arising from the storage of films by another tenant which endangered the defendant tenant's employees. The duty to abate was predicated upon a city ordinance regulating storage of films).

155 App. Div. 182, 139 N.Y. Supp. 1050 (1st Dep't, 1913).
need of elasticity in the application of common law doctrines to meet modern conditions, declared that the facts seemed to warrant the application of the doctrine of constructive eviction.

There is some theoretical difficulty in accepting the conclusion of constructive eviction in the case because it was seemingly allowed irrespective of the landlord's causation. The doctrine has received no support in future cases or texts and the case is being cited only, and with hesitation, as one of constructive eviction. In the later New York case of *Streep v. Simpson*, the court after seemingly approving the *Bonwit* decision, was careful to attribute the presence of the bedbugs to the landlord at least "in some measure" in support of a judgment for the lessee.

In spite of the theoretical difficulty with the *Bonwit* case, it is submitted that it was a realistic and just decision which could well be followed in similar cases on the reasoning of the cases involving leases of parts of buildings wherein the courts impose upon the landlord the duty to keep in condition those parts of the building remaining under his control. Denied relief in such situations, the tenant is faced with the impossibility of enjoyment and a total loss of rent money because usually the tenant's right of possession and control is confined to the inner parts of his apartment and with no control over the approaches, outer walls, ceilings, et cetera. There is little that he can do to correct such situations. On the other hand, the lessor has the necessary control to remedy the defects and he need not take the losses very long, and in the end he may even obtain the full value of any expenditures as owner of the building.

The *Bonwit* case should not be allowed to rest as just another case of constructive eviction. It is suggested that when a court is faced with a similar situation, it might try to find a more acceptable theory to uphold such a decision. Perhaps the "failure of consideration" theory would be better.

VI. THAT THE RIGHT TO QUIT IS SIMPLY A QUESTION OF FACT

There are some decisions wherein the courts simply state that untenantability is a "question of fact" without a clear discussion of any

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89 80 N.Y. Misc. 666, 141 N.Y. Supp. 863 (S. Ct. App. Term, 2nd Dep't, 1913) (the defendant's apartment became infested with bedbugs without his fault, the bugs having come up from the apartment underneath while that was occupied by another tenant after whose vacation the lessor, with the cooperation of the defendant and an exterminator, tried to rid the apartment of the vermin but without success).
principle of law upon which the tenant had the right to quit. In still other cases the courts approach the issue in terms of whether the tenant was "justified" in quitting without, again, any discussion of theory. Such decisions and reporting have been criticized because there is no showing that the decision was made upon any legal principle which would excuse the tenant. That there should be some legal principle to rely upon before the facts become relevant, was forcefully pointed out in the dissenting opinion of Bradley v. DiGiocoura, which has become one of the leading cases in constructive eviction. Decided at a time when the courts were still in doubt as to any principle of law which would justify a tenant in quitting because of sewer gas, Larremore, J. stated that he was inclined to the belief that cases of that character would thereafter have to be decided upon the "distinctive facts" in each case and the court then affirmed a judgment of constructive eviction. But Beach, J., dissenting, declared that he could see no legal principle or theory upon which to support the judgment even if the premises were made untenable since there was no implied warranty of fitness, no fraud in the leasing, no nuisance by the landlord, no statute excusing the tenant, and no act of the landlord preventing the tenant from enjoying the premises.

VII. UTILITY OF THE VARIOUS THEORIES

The writer would hesitate to say that any particular case which he read in the preparation of this paper was lost because of a lack of knowledge of the possible applicable theories or because of a poor choice of theory. Nevertheless, the courts did indicate in quite a number of opinions that such may have been the case.

It has been pointed out that a liberal application of constructive eviction may give the same result as the application of the doctrine of dependent covenants. Therefore, in jurisdictions where there is strong adherence to the view that covenants are generally independent, a plea of constructive eviction, if it fits the facts, would seem

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92 Tiffany, Landlord & Tenant 1238-41 (1910).
93 12 Daly 393, 67 How. Pr. 76 (N.Y.C.P., 1884).
preferable. The operative facts necessary for the justification under one theory need not necessarily be as strong as under another. To sustain the defense of constructive eviction the tenant must show that the breach of duty by the lessor was of a serious nature which caused a substantial interference with the possession or enjoyment of the premises. On the other hand it has been asserted in some of the cases justifying abandonment on contractual doctrines that the degree of lessened enjoyment is not material; that the rights are to be measured by the written contract and not by the consequences flowing therefrom.

Whether the choice of theory makes a difference should be particularly scrutinized in cases where a lessor covenants to put the premises in a certain condition or to make substantial repairs before the commencement of the term or within a reasonable time thereafter when the premises have been leased for a known use. The courts seem to be rather liberal in finding such covenants to be conditions precedent. Such a finding obviates the necessity of finding facts which would justify a constructive eviction.

An inadequate understanding or presentation of applicable theories has often resulted in poor pleading with the effect that the courts have sometimes had difficulty in understanding what the defendant was pleading and what result he expected to achieve. At times the plead-
ing has contained nothing more than a conclusion of the pleader with nothing specifically stated upon which to predicate any defense. A plea that the premises became untenantable but which failed to state and prove what caused it and whether the condition occurred before or after the leasing was inadequate. The courts have had occasion to remark upon inadequate pleading most frequently in the cases where tenants sought to justify abandonment because of alleged fraudulent representations or fraudulent concealment. In addition to alleging fraud and concealment as specifically as possible, the pleader must allege the facts which constitute it.

The pleader should not overlook the possibility of more than one string to his bow in choosing theory. He cannot be certain at the outset which theory may prove to be most appealing to the court on a particular set of facts or which theory his evidence will sustain best. If a defense on contract theory is being relied upon, it is

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100 Haines v. Downey, 86 Ill. App. 373 (1899).
102 See also, York v. Stewart, 21 Mont. 515, 55 Pac. 29 (1898) (there was a failure of the water supply and the tenant quit. Held, that the tenant was liable because he had not pleaded or shown why the supply failed).
103 See York v. Stewart, 21 Mont. 515, 55 Pac. 29 (1898) (the tenant was denied the right to go into the question of fraudulent representations because he failed to plead them).
104 Owens v. Ramsey, 213 Ky. 279, 280 S.W. 1112 (1926) (tenant failed to plead fraudulent concealment).
105 Black v. Dick, 15 Mont. 236, 38 Pac. 1072 (1895) (the court pointed out that there was no plea of concealing any fact which the tenant did not have a full opportunity of informing himself); Coulson v. Whiting, 12 Daly 408 (N.Y. C.P., 1884) (the court refused to hear proof of facts which were not pleaded); Leech v. Husbands, 34 Del. (4 W.W. Harr.) 362, 152 Atl. 729 (1930).
106 In Everson v. Albert, 261 Mich. 182, 246 N.W. 88 (1933), it seems that only constructive eviction was relied upon in a jurisdiction very favorable to the failure of consideration doctrine. The facts may also have been sufficient to justify a plea of fraudulent representation and concealment.
107 Hoopes v. Long, 40 Ariz. 25, 9 P. 2d 196 (1932) (the tenant pleaded the invalidity of the lease and lost, the court telling him that had he pleaded the failure of the lessor to furnish an adequate heating system, he might have won by then basing his defense on constructive eviction); Tallman v. Earle, 3 Misc. 76, 23 N.Y. Supp. 17 (C.P., 1893) (the tenant defended unsuccessfully on the ground of surrender but was allowed to get his case to the jury by a timely amendment of his pleading so as to charge a constructive eviction).
important to plead failure of consideration with care because that is the heart of the theory.\textsuperscript{107} Without exhausting the remarks of the courts upon the subject of inadequate pleading, the words of a certain judge concerning several defenses seem most appropriate to conclude the point. Said the judge:

The defenses asserted . . . may actually be without merit, but they are not bad pleading, and they do entitle the defendant to its day in court.\textsuperscript{108}

\textsuperscript{107} Whittaker v. Holmes, 165 Ark. 1, 263 S.W. 788 (1924) is an example of good pleading in such cases.

\textsuperscript{108} Gamble-Robinson Co. v. Buzzard, 65 F.2d 950, 955 (C.A. 8th, 1933). In Stevens & Co. v. Pratt, 119 Wash. 232, 205 Pac. 10 (1922) the court justified the abandonment on the several theories of breach of covenant of quiet enjoyment, failure of consideration, and constructive eviction.