Origin and Evolution of Constructive Eviction in the United States

Max P. Rapacz
ORIGIN AND EVOLUTION OF CONSTRUCTIVE EVICTION IN THE UNITED STATES

MAX P. RAPACZ

The writing of this survey, covering a century and a quarter of constructive eviction cases, was induced by the frequent observations of the courts upon the conflicts and the uncertainty of the law in the field and the thought, that because of the conflicts, a general organization of the material on the subject might have some practical value.

Constructive eviction seems to be by far the most frequent defense offered to suits for rent where tenants quit the premises because of the condition of the premises or some condition about the premises which makes the leased premises undesirable or untenantable. Although there are cases involving thousands of dollars in annual rentals on business properties, most of the cases may be looked upon as so-called small cases. They, nevertheless, present a very practical problem for the tenant and probably deserve more careful attention on the part of lawyers and courts than they have received. To the tenant it may be a very serious matter for if he remains in occupation of the premises he will be liable for the stipulated rent and his only recourse for defaults of the lessor will be in damages. But suits for damages are not likely to be very fruitful if the tenant has continued in possession in spite of the frequent assertions by the courts that there are other adequate remedies short of quitting the premises. Juries are not sympathetic toward tenants who have had the use of the premises even though under trying conditions. The real remedy, in normal times, lies in abandoning the premises if the situation is such that the defense of eviction can be supported.

The origin and development of constructive eviction are closely intertwined with the early common law doctrines on the lessor's respons-

1 It has been said that Dyett v. Pendleton, 4 Cow. (N.Y.) 581 (1825), on writ of error, 8 Cow. (N.Y.) 727 (Court for Correction of Errors, 1826) is the first American case of constructive eviction. See Delmar Investment Co. v. Blumenfeld, 118 Mo. App. 308, 316, 94 S.W. 823, 826 (1906).

MR. RAPACZ is Professor of Law at De Paul University College of Law. He received his A.B. and M.A. at the University of Minnesota, and his LL.B. and S.J.D. at Yale Law School.
sibility for the condition of the premises and the tenant’s liability to pay the stipulated rent. The doctrine of constructive eviction can neither be understood nor intelligently applied without a due regard for the fundamental general principles of the common law in regard to the condition of the premises and the duty to pay the rent. Constructive eviction evolved in a continuous tug-of-war between the old and the newer doctrines necessitated by modern life.

The main objective of this article was to give consideration to all the applicable principles of law which come into play in deciding cases rather than to attempt a coverage of all the varied and numerous operative facts which may give rise to a constructive eviction. However, many typical factual situations have received full treatment. It is hoped that what is said here as to whence we have come and where we are “trending” may enable the reader to establish his position in regard to a particular set of facts a little more readily.

I. THE COMMON LAW AS TO THE CONDITION OF THE PREMISES AND THE LIABILITY FOR RENT

As a general rule, at common law, there are no implied warranties as to the condition or fitness of the leased premises. A person taking a lease was regarded as a purchaser who was bound to inspect the property. He took the risk of its condition unless he had an express agreement to the contrary. The rule of caveat emptor applied in the absence of covenants, and the lessee could not ordinarily complain that the premises were not in a tenantable condition, or were not adapted to the purposes for which they were leased. As a consequence thereof, the lessee’s duty to pay the rent according to his covenant continued even if the premises were untenantable at the inception of the lease or became so later. A lease was regarded as a conveyance of an estate in the land and the tenant was regarded as primarily interested in the land from which the rents were said to issue. The main consideration for the rent of the lessee was regarded as furnished by the lessor when he conveyed the estate for years. The land was considered the principal subject

2 See Sweeting v. Reining, 235 Ill. App. 572, 581 (1924), wherein the court embarked upon an analysis of the problem of constructive eviction with these words: “Do the facts, with the applicable principles of law constitute a constructive eviction?”
4 1 Taylor, Landlord and Tenant § 372 (1904).
5 See 1 Tiffany, Landlord and Tenant § 16 (1910).
matter and the buildings were regarded as merely incidental, and consequently any destruction or injury thereto did not relieve the tenant from the duty to pay the stipulated rent.\footnote{Coogan v. Parker, 2 S.C. 255 (1871).} Covenants of the tenant to pay rent, and covenants of the lessor as to the condition of the premises were treated as independent rather than dependent or as conditions.\footnote{Lewis v. Chisolm, 68 Ga. 40 (1881).}

The common law conceptions of a lease and the tenants liability for rent did not fit modern conditions when a considerable proportion of our people undertook to live in urban centers where the thing which tenants were bargaining for primarily was a building and the right to enjoy it. The New York courts were the first to give forceful recognition to the new conditions of life in the famous case of\textit{Dyett v. Pendleton}\footnote{Note 1 supra.} by holding that there may be such a thing as constructive eviction by the lessor if the tenant could lay the responsibility of maintaining a bawdy house at his lessor's door.\footnote{In spite of early criticisms that it was.} In spite of early criticisms that it was

\footnote{7Coogan v. Parker, 2 S.C. 255 (1871). \hspace{1cm} 8Lewis v. Chisolm, 68 Ga. 40 (1881).}

The factual situations in which the doctrine of constructive eviction has been invoked since Dyett v. Pendleton are varied and numerous. Other new situations will continue to arise as conditions of living change. Typical of cases in which the doctrine has been successfully asserted many times are: Bradley v. Di Giocoura, 12 Daly 393, 67 How. Pr. (N.Y.) 76 (C.P., 1844) (sewer gas and other foul odors); Delameter v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931) (bed-bugs in a modern unfurnished apartment). But cf. Ben Har Holding Corp. v. Fox, 147 N.Y. Misc. 300, 263 N.Y. Supp. 695 (N.Y. Munic. Ct., 1939) (wherein less loathsome insects, crickets, did not cause an eviction). In re Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y. Supp. 1050 (1st Dep't, 1913) (walls of a new modern apartment infested with rats); Wade v. Herndl, 127 Wis. 544, 107 N.W. 4 (1904) (leasing for incompatible purposes; art studio was leased to the first tenant and a noisy garage to the second tenant); Ferguson Bros. & Forshay v. Ward, 147 N.Y. Supp. 869 (S. Ct., App. Term, 3d Dep't, 1914) (dampness in bedroom of high-class apartment); Gibbons v. Hoefeld, 299 Ill. 455, 132 N.E. 425 (1921) (failure of a lessor to make basement of a store water-tight); Viehman v. Boelter, 105 Minn. 60, 116 N.W. 1023 (1908) (breach of a covenant to repair); Valentine v. Woods, 59 N.Y. Misc. 471, 110 N.Y. Supp. 990 (S. Ct., App. Term, 1908) (a leaking roof under the control of the lessor); Everson v. Albert, 261 Mich. 182, 246 N.W. 88 (1933) (lessor failed to keep plumbing in other parts of the building in good order); Osmers v. Furey, 32 Mont. 581, 81 Pac. 345 (1905) (interference with lessee's enjoyment upon lessor's entry to repair); Leadbeater v. Roth, 25 Ill. 478 (1861) (lessor interfered with sub-tenants); Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N.W. 502 (1887) (interference with access to the premises); Purcell v. Leon, 83 N.Y. Misc. 5, 144 N.Y. Supp. 348 (S. Ct., App. Term, 1st Dep't, 1913) (janitor using insulting and threatening language); Galland v. Schubert Theater Co., 105 N.Y. Misc. 185, 172 N.Y.Supp. 775 (S. Ct., App. Term, 1st Dep't, 1918) (failure of lessor to comply with public regulations of buildings when the duty rested with him); Bass v. Rollins, 63 Minn. 226, 65 N.W. 348 (1895) (failure to supply heat in apartment). Like results have been reached as to other services such as water, steam, power, elevator service, et cetera. Purnell v. Dugue, 14 La. App. 137, 129 So. 178 (1930) (inadequate heating apparatus); Stevenson Stanoyevich Fund v. Stainacher, 125 N.J.L. 326, 15 A. 2d 772 (S. Ct., 1940) (overheating because of defective thermostats); 308 Fast 79th Street
an extreme decision, modified in New York\textsuperscript{11} and not followed in Massachusetts,\textsuperscript{12} it established a doctrine which gradually spread throughout the country and which the courts have since used frequently to ameliorate the harshness of the common law rules of landlord and tenant.

The doctrine of constructive eviction seems to have been sparingly applied for the first several decades but with the rapid development of urban centers after the Civil War and in the present century it received great impetus. Gradually the courts became more willing to take notice of the great changes and the injustices of applying the strict common-law rules of landlord and tenant amidst modern conditions.\textsuperscript{18} Modern courts gave recognition to the fact that there are reciprocal rights between landlord and tenant not known to the common law,\textsuperscript{14} and that in apartment dwelling where the lessor remains in control of a large part of the premises, elasticity in the application of the common-law principles is required.\textsuperscript{15} They saw that the common law which would not impliedly impose a duty on the landlord as to the condition of the premises is not inflexible but like many other rules of law must be construed to meet the new conditions.\textsuperscript{10}

II. JUSTIFICATION OF CONSTRUCTIVE EVICTION IN BREACH OF THE COVENANT OF QUIET ENJOYMENT

Even in the early common law there was a doctrine of eviction but it was narrow in scope. A physical eviction by the lessor of his tenant or

---

\textsuperscript{11}See Gray v. Goff, 8 Mo. App. 319, 333 (1880) (that it was modified in New York). See Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748 (1894), for references to several cases wherein the case was criticized.

\textsuperscript{12}See Dewitt v. Pierson, 112 Mass. 8 (1873).

\textsuperscript{13}See Tallman v. Murphy, 120 N.Y. 345, 24 N.E. 716 (1890), for a leading case of breaking away from the old views amidst the new conditions. But there was a strong dissent in the case urging a strict application of the common-law doctrine of caveat emptor.


\textsuperscript{16}Delameter v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931).
CONSTRUCTIVE EVICTION

by title paramount suspended the rent\textsuperscript{17} on the theory that the land could no longer earn the rent and therefore there was a failure of consideration.\textsuperscript{18} Such evictions were also regarded as a breach of the covenant of quiet enjoyment.\textsuperscript{19} It is conceivable that the courts might have justified the abandonment of the premises on account of the condition thereof upon ordinary contract principles\textsuperscript{20} but that would have involved a drastic departure from the old estate theory of leases, which was hardly to be expected. The courts preferred to find a solution in the field of property law. They perceived that a serious interference by the lessor ought to have the same legal effect as a physical eviction\textsuperscript{21} and so proceeded to dispense with the element of expulsion as a necessary prerequisite to an eviction, regarding it as a technical requirement which ought not to be applied.\textsuperscript{22}

The courts having dispensed with the need of an ouster of the tenant as a requirement for the new kind of eviction, the question arose whether constructive eviction was a breach of the covenant of quiet enjoyment as was the case in physical eviction. The first American case of \textit{Dyett v. Pendleton} strongly supported the constructive eviction as a breach of the covenant and it has been quite generally followed in that respect. Since the law generally implies a covenant of quiet en-

\textsuperscript{17} Smith v. McEnany, 170 Mass. 26, 48 N.E. 781 (1897); Edmison v. Lowry, 3 S.D. 77, 52 N.W. 583 (1892).


\textsuperscript{19} Tiffany, Real Property § 92 (3d ed., 1939).

\textsuperscript{20} Although historically covenants to pay rent and covenants of the lessor were treated as independent rather than dependent (Lewis v. Chisolm, note \textsuperscript{8} supra), there are quite a number of well reasoned American cases treating the covenants as mutually dependent excusing the tenant from paying rent upon quitting the premises for breach of covenants by the lessor. Barnes v. Strohecker, 17 Ga. 340 (1853), is an excellent early case. In University Boat Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914), the court seems to have treated a lease like an ordinary bilateral contract. In Ingram v. Fred, 210 S.W. 298 (Tex. Civ. App., 1919), we have a more recent case wherein a Texas court strongly expounded the contract theory and severely criticized the English rule of the covenants being independent. See Park Ave. M.E. Church v. Barrett, 30 N.Y.S. 2d 667, 670 (S. Ct., 1941), wherein the New York Court said that it received little assistance from the constructive eviction cases which were submitted by counsel and concluded that the question of the tenant's right to quit because of alleged poor elevator service had best be decided on the basis of what was intended by the parties under the rule of the lease about such service. Such a remark suggests the thought that the contractual theory, had courts generally seen fit to adopt it, might have been more sound than the constructive eviction theory.

\textsuperscript{21} Physical eviction and eviction by title paramount required a dispossession of the tenant. Tiffany, op. cit. supra note 19, §§ 139 & 140.

\textsuperscript{22} Delmar Investment Co. v. Blumenfeld, 118 Mo. App. 308, 94 S.W. 823 (1906). See Edmison v. Lowry, 3 S.D. 77, 52 N.W. 583 (1892) for citation of authorities.
joymnt in leases, the defense would seem to be available under most leases if the proper factual situation exists. But the view that there is a breach of the covenant by constructive eviction is not without some difficulty especially in the late cases, and differences of opinion and a conflict of authority have arisen on the point.

Theoretically the covenant of quiet enjoyment of the premises in leases means freedom from interference on the part of the lessor. So it is apparent enough how constructive eviction is a breach of the covenant when we have some acts or omissions by the lessor but it is somewhat difficult to see how, in some of the late cases, there was any breach of the covenant when the lessor did not fail in doing anything that he was obligated to do. In re Barnard Realty Company v. Bonwit is such a case. It seems that the doctrine of constructive eviction has broken out beyond the confines of the covenant of quiet enjoyment in modern times and the reasoning of the courts in terms of a breach of the covenant is sometimes confusing. Some courts are saying that the covenant is violated when an untenantable condition arises with the emphasis upon the breach of the covenant, while other courts emphasize the facts which constitute the constructive eviction merely stating casually that constructive eviction is a violation of the covenant. The latter view is the more prevalent today and it has been stated that the weight of authority and better reasoning is to the effect that any disturbance equivalent to an eviction is a breach and that such a view is just and reasonable.

III. CRITERION APPLIED BY THE COURTS IN DECIDING CASES

There are frequent statements in the cases to the effect that constructive eviction is a question of fact. Such statements may be misleading.

23 16 R.C.L. § 259.
25 Note 23 supra at § 262.
30 Bruckner v. Helfaer, 197 Wis. 582, 222 N.W. 790 (1929).
CONSTRUCTIVE EVICTION

It is submitted that it becomes a question of fact only after the tenant has found some legal theory or principle to support his case. In the early case of Bradley v. De Giocoura31 where the court found a constructive eviction by sewer gas, Larremore, J. expressed the opinion that cases of this character must be decided upon the "distinctive facts" in each case, but Beach, J. (dissenting) could see no support for the judgment in "legal principle." A court in a recent case gave warning against overlooking legal principles in the following language: "New conditions, new customs, new inventions, affect their changes in the working and application of ancient rules of guidance. But they do not dispense with certain elements vital to constructive eviction."

The standard definitions of constructive eviction usually contain two elements: (1) An intent by the lessor to evict the tenant or to deprive him of the enjoyment of the premises; (2) some act of the lessor depriving the tenant of the enjoyment which he is entitled to. A third requisite is the abandonment of the premises though this is often omitted from the definitions so abundant in the opinions. It must be warned that the definitions are not very reliable. The courts are not in agreement upon a definition and what is worse, the courts often recite several of the old definitions and citations, some of which could not be squared with the modern view of constructive eviction and sometimes not even with the decision of the court in the particular case.32

IV. THE INTENT ELEMENT

An examination of the authorities upon the requirement of an intent to evict discloses a wide diversity of judicial opinion,34 and sometimes the diversity appears even within one jurisdiction.35 In Dyett v. Pendleton there was no reference to the element of intent. The court deemed

31 12 Daly 393, 67 How. Pr. (N.Y.) 76 (C.P., 1884). See Leonard v. Armstrong, 73 Mich. 577, 41 N.W. 695 (1889), in which the court emphasized that untenantability is a question of fact without being clear on what principle of law the tenant had a right to quit. See 1 Tiffany, op. cit., supra note 5, at pp. 1238-1241, wherein he objects to decisions allowing tenants to quit because of the failure of the lessor to make covenanted repairs without a discussion of principles upon which they justify abandonment.

32 Tudor City Ninth Unit v. Perkett, note 14 supra, at 310 and 397.

33 See Mileski v. Kirby, 57 Wyo. 109, 113 P. 2d 950 (1941). The court seems to have reached the proper result but the opinion is be-fogged with many quotations from old texts and decisions which lend little to the understanding of the case.

34 So said the court in Hotel Marion Co. v. Waters, 77 Ore. 426, 432, 150 Pac. 865, 868 (1915).

the sole question to be whether the acts of the lessor caused the condition which induced the court to hold that it would be a constructive eviction. Since the Dyett case nearly all the opinions have remarked upon the necessity of an intent to evict but it is often very difficult to determine how much a particular court was influenced by the intent element in deciding the case. As one extreme it has been stated that "whether the eviction be called actual or constructive, at common law, there must be, in the mind of the landlord, the intention of driving the tenant off the land leased, so that he may take possession of it."

Had the courts sought a literal compliance with such a view, it would have greatly restricted the development of constructive eviction. That was not done. As another extreme we have a mere rendering of lip service to the requirement. A majority of the opinions take a position somewhere between the two extremes.

The cases seem to fall into three categories. In the first and strictest group the courts speak as though the intent had to be found subjectively. But having stated a strict rule, some of the courts within this group have tempered the rule by indicating that the intent may be presumed because the landlord must be taken to intend the consequences of his acts. At least a couple of courts have indicated that the intent may be conclusively presumed.

In a second group the courts state that it is sufficient if the acts were intentionally committed and it is not necessary that the lessor intend the result of eviction.

In the third group it is asserted that the intent with which the landlord acted is immaterial and of no importance, except in certain cases where the intent of the landlord is valuable in determining the nature of the acts, that is, whether the act is a trespass or an act of more permanent nature.

---

38 See Hughes v. Westchester Development Corp., 77 F. 2d 530 (App. D.C., 1935); Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748 (1894); Tracy v. Long, 205 Mass. 201, 3 N.E. 2d 789 (1936), that the presumption may be particularly applicable where the lessor has committed some unlawful act which causes the interference.
39 Tallman v. Murphy, note 13 supra; Powell v. Merrill, 92 Vt. 124, 103 Atl. 259 (1918).
41 Hotel Marion Co. v. Waters, note 34 supra.
CONSTRUCTIVE EVICTION

A mere trespass does not constitute a constructive eviction and the remedy at law is regarded as sufficient.42 Whether the act is a mere trespass or an eviction is said to depend upon the intent of the lessor in doing the act.43 If the character of the act is ambiguous, and the intent to evict not a necessary presumption therefrom, it is a question for the jury to decide whether the acts amount to an eviction.44 It should be warned that cases holding that the acts complained of were a trespass only are not to be trusted in what is said therein about intent for constructive eviction. The courts generally state that there was no intent to evict, which is true enough, but such statements may carry an inference that intent to evict is a necessary element for eviction. A more rational explanation would be that the acts being a mere trespass were not of a permanent character and thus there was no material deprivation of the use of the premises.

In like manner cases not involving questions of trespass may have misleading statements on the requirement of intent for eviction. The courts having concluded that the acts were not of a sufficiently permanent nature for a constructive eviction often speak about the intent to evict being absent. In the quite recent case of Mileski v. Kirby,46 for example, the trial court held that there was no constructive eviction on the ground that the interference complained of was not material enough. The higher court properly sustained the trial court but within the opinion are found many quotations from old texts and cases on the element of intent which would not be in accord with modern views. A number of Illinois cases were cited by the court all of which were decided prior to the case48 which definitely settled the intent matter in the state, but the later and controlling case was not mentioned.

The vital fact to be determined, say the courts, in this third group of cases, is the amount of interference with the tenant's beneficial enjoyment of the premises. More than half a century ago an Illinois court stated that whether the defendant was justified in quitting depends upon what the plaintiff (lessor) "did or failed to do"—quite irrespec-

42 Bartlett v. Farrington, 120 Mass. 284 (1876); Hayard v. Ramage, 33 Neb. 836, 51 N.W. 219 (1892).
43 Lester v. Griffen, 57 N.Y. Misc. 628, 108 N.Y. Supp. 580 (S. Ct., App. Term, 1908), wherein the breaking of a lock for the purpose of showing the apartment to others was a trespass but replacing the lock with another and keeping the keys was a constructive eviction within a few days even though the tenant was not occupying the apartment at the time. See also, 3 Williston, op. cit. supra note 6, at p. 2527.
44 Hayner v. Smith, 63 Ill. 430 (1872).
45 Note 33 supra.
tive of the plaintiff's intention or wilfulness. The court further stated that "acts or neglects, if arising from accident or inability would as effectively justify abandonment as if they were wilful and intentional."47 Twenty-five years later the Illinois Supreme Court accepted that view in holding that an omission of duty need not be intentional.48

The greatest divergence of views in the application of the intent requirement seems to appear in cases where the untenantable condition results from a mere omission of duty lacking in any positive acts of the lessor. Two of the leading cases, a great deal alike on facts, seem to part company on the basis of intent being viewed differently in the two jurisdictions. Each case involved the failure of the lessor to make a basement watertight as covenanted. In Stewart v. Childs Co.,49 the New Jersey Supreme Court made much of the fact that the record showed no evidence that the lessor did anything with the intention of depriving the tenant of the enjoyment of the premises, and it held that there was no constructive eviction. But in Gibbons v. Hoefeld,50 the Illinois Supreme Court held that the omission of duty need not be intentional and it allowed constructive eviction. By the decision the court turned its back upon an old view supported by dicta and settled it that intent to evict is not necessary in Illinois.51

In conclusion of this matter of intention the writer submits the statement of a trial judge which caught the fancy of the Supreme Court of Virginia52 and which, to the writer, seemed to be an excellent analysis and summary of the thinking on the subject. The Court quoted the trial judge as follows:

It is certainly difficult for the modern jurist to apply the stringent common-law principles concerning eviction, as between landlord and tenant, to the con-

48 Gibbons v. Hoefeld, note 46 supra. The court pointed out that up to the time of the Gibbons case there had been expressions of the Supreme Court and the Appellate Courts, but no decisions to the effect that the intent of the lessor to evict was a necessary requisite for constructive eviction. The case is regarded as clearing up the matter for Illinois. See Allman v. Davis, 248 Ill. App. 350 (1928). But see Laffey v. Woodhull, 256 Ill. App. 325 (1930), wherein counsel still argued two years later, that the acts must be done with the intent to deprive the tenant of enjoyment of the premises.
50 Note 46 supra.
51 See McDougall and Haber, Property Wealth and Land 369 (1948), to the effect that another state (Mass.) has recently corralled the intent element.
52 See Buchanan v. Orange, note 36 supra, at 517, and at 54.
CONSTRUCTIVE EVICTION 79

ditions of the present day. By eviction at common law originally was manifestly
meant an actual dispossession of the tenant by the landlord, in order that the
landlord might take possession of the premises, and with an intention on his
part so to do, or the eviction may occur under the paramount title of a stranger.
Whether the eviction be called actual or constructive, at common law, there
must be, in the mind of the landlord, the intention of driving the tenant off
the land leased, so that he may take possession of it. To apply this idea to the
modern custom of leasing a floor in a building, for business or living purposes,
under a contract with varying stipulations as to the duties of the landlord
towards the tenant, incompatible with the common-law lease, is a task im-
possible of exact accomplishment. It is manifest in the cases referred to above
by me and in the cases cited by counsel at bar, that while the courts seem to
hold to the technical doctrine of intention, yet the facts of no case in which
the tenant was held to be justifiable evinced an intention on the part of the
landlord to put the tenant out. On the contrary, the tenant abandoned for
reasons claimed by him to justify abandonment, and the landlord was trying
to hold him. It seems to me that the law would be stultifying itself to lay down,
as a maxim in these cases, that there can be no abandonment unless it be shown
that the landlord intended to dispossess the tenant. I am satisfied that under
the more modern doctrine in cases of this character, the intention of the
landlord should be held to be a matter of law or of fact, to be inferred from
the acts, so that if the acts of the landlord as a matter of fact resulted in dis-
possessing the tenant by giving him justifiable cause to vacate the premises,
then the law imputes the intention to the landlord on the general principle that
every man must be held to intend the proximate consequences of this act. 53

Subject to the exception of a few cases in which it has been asserted
that the intent of the lessor is immaterial and of no consequence, 54 the
quotation can be said to be a fair summary of the matter as exemplified
by the more recent cases. It seems that we have reached the state in the
law where intent to evict is merely a technical requirement which
might well be abandoned.

V. THE ACT OF CONSTRUCTIVE EVICTION

The courts report the same wide diversity of opinion and confusion
as to the nature of the acts which will constitute constructive eviction
as was found in the cases dealing with the intention to evict. 55 In theory,
eviction ought to involve some act of the lessor. It has often been as-
serted that it is properly an affirmative act on the lessor's part; an act of
commission rather than just an act of omission. 56 There is, however,
a growing tendency to recognize acts of omission as sufficient when-

53 Ibid.
54 See Harmony v. Rauch, note 47 supra.
55 See Ben Har Holding Corp. v. Fox, 147 N.Y. Misc. 300, 263 N.Y. Supp. 695
(N.Y. Munic. Ct., 1939); Hotel Marion Co. v. Waters, note 34 supra.
56 Tudor City Ninth Unit Inc. v. Perkett, note 14 supra at 211 and at 398; 1 Tiffany,
op. cit. supra note 5 at p. 1221; 1 Tiffany, op. cit. supra note 19 at 238.
ever the court can find a duty on the landlord to act. But this doctrine of constructive eviction based on mere omission of duty, as distinguished from positive acts of the lessor, has been criticized as pushing constructive eviction too far, especially when extended to cases of failure to make repairs or to perform other covenants, the breach of which renders the premises only less desirable.

It is generally conceded that constructive eviction involves at least some breach of duty on the part of the landlord, and that without some breach of duty there cannot be a constructive eviction. There are, nevertheless, some modern cases finding a constructive eviction wherein it is difficult to see any violation of a legal duty by the lessor, as in Bruckner v. Helfaer where a Wisconsin court held it to be a constructive eviction when the lessor failed to put a stop to the noises made by other tenants though the law generally is that acts of other tenants are not attributable to the lessor. In another case, In re Barnard Realty Company v. Bonwit, a New York court found a constructive eviction because of the noises made by rats in the ceiling and walls of a new apartment building on the theory of an “intolerable condition” which the tenant did not cause and which he could not remedy. The eviction seems to have been allowed irrespective of the landlord’s causation of the condition or his liability in damages for it. In such a case the court is confronted with the impossibility of enjoyment by the tenant and it may be that the court is desperately seeking a way out for the tenant. The result seems to make good sense because the landlord, who controls the whole building, is in a much better position to remedy the situation than the tenant is and consequently he need not

58 See 1 Tiffany, op. cit. supra note 19 5 145.
59 Tudor City Ninth Unit Inc. v. Perkett, note 14 supra 212 and at 399; 3 Williston, op. cit. supra note 6 at p. 2532.
60 In re Hopkins v. Murphy, 233 Mass. 476, 124 N.E. 232 (1919) (an apartment became infected with cockroaches two years after leasing). The court held that there could not be a constructive eviction because it could not find any violation of a duty to the tenant. See also, Beach, J., dissenting in the early case of Bradley v. De Giocoura, 17 Daly 393, 67 How. Pr. (N.Y.) 76 (1884).
61 197 Wis. 582, 222 N.W. 790 (1929), noted in 29 Col. L. Rev. 530 (1929).
63 See 3 Williston, op. cit. supra note 6, at p. 2532.
64 See 1 Tiffany, op. cit. supra note 19, at p. 238 as indicating that the courts indulge in that type of thinking in many other situations.
take his losses very long. The result, however, is difficult to justify on theories of constructive eviction.

Returning to the more orthodox views that there must be some act of commission or omission, or a breach of duty as some courts put it, it is not every breach of duty which will justify a constructive eviction. The act which will justify abandonment of the premises must be of a "grave and serious" nature or "substantial and material" as some courts state it, and it must be "permanent" in character. Whether the deprivation is material is a question for the jury. If the acts are of slight interference or if the condition could have been easily corrected by the tenant at small cost, there cannot be a constructive eviction. As to what constitutes an act of permanent character, there is more difficulty and a wider diversity of opinion. Permanent does not mean that the act must be of long duration but only that it must be more than a mere trespass or just a passing act like one act of misconduct by an employee of the lessor, or temporary defects in services. Whether the act was a trespass or of a permanent character is not judged in terms of time alone. The intent of the lessor may be important in determining the matter. The point is well illustrated in the case of *Lester v. Griffin* where a lessor entered the lessee's apartment in his absence to show it to prospective tenants. The lessor had removed the lock to make the entry and then installed a different lock retaining the key. The court stated that the first act would be just a trespass but the second act was a constructive eviction even though the whole

---

65 Fleming v. King, 100 Ga. 449, 28 S.E. 239 (1897).
69 Mileski v. Kirby, note 33 supra.
71 See Marion Hotel Co. v. Waters, note 34 supra.
elapsed time was only a matter of days. One court has gone so far as to say that the acts need not be of a permanent character, and that any act which has the effect of depriving a tenant of the free enjoyment of the premises, or any appurtenances pertaining to these premises, must be treated as an eviction.\textsuperscript{76} A New York court more than fifty years ago summarized the requirements of permanency and seriousness of the act very well. A tenant abandoned his apartment because of some annoyance from the janitor and poor services which the lessor had a duty to render. The court said: "If there was generally a substantial performance, and no evidence of an intent not to perform, or of a continuous failure to perform, then omissions which are not in their nature both serious and persistent will not prevent a recovery."\textsuperscript{77}

Constructive eviction being generally based upon some breach of duty by the lessor it follows that a lessee cannot claim an eviction through the wrongful acts of third parties not authorized expressly or impliedly by the lessor to do the acts complained of.\textsuperscript{78} Acts of public authorities which affect the premises are regarded as acts of third parties;\textsuperscript{79} and acts of other tenants unless authorized by the lessor, are generally regarded as acts of strangers.\textsuperscript{80} It has been said that the landlord controls his buildings not his tenants,\textsuperscript{81} and the remedy of the complaining tenant is against the offending tenant.\textsuperscript{82}

In the application of the above general principles one must take heed of some modern decisions tending more and more to hold the lessor responsible for the conduct of his tenants, especially where groups of people live together in apartment buildings or congregate for business reasons on the premises of the same lessor. In \textit{Bruckner v. Helfaer}\textsuperscript{83} a Wisconsin court held it to be a constructive eviction when the lessor, after due notice, did not abate noises, drinking and obscene language of other tenants in a high-class apartment building. The court did not even discuss whether the act was attributable to the lessor. After stating

\textsuperscript{76} Wusthoff v. Schwartz, 32 Wash. 337, 341, 73 Pac. 407, 408 (1903).
\textsuperscript{77} Humes v. Gardner, 22 N.Y. Misc. 333, 335, 49 N.Y. Supp. 147, 148 (S. Ct., App. Term, 1898).
\textsuperscript{78} Meeks v. Bowerman, 1 Daly (N.Y.) 99 (C.P., 1860); Holden v. Tidwell, 37 Okla. 553, 133 Pac. 54 (1913); Shapiro v. Malarkey 278 Pa., 78, 122 Atl. 341 (1923).
\textsuperscript{80} Eley v. L. & L. Mfg. Co., 30 Ga. App. 453, 118 S.E. 583 (1923); Wolf v. Eppenstein, 71 Ore. 1, 140 Pac. 751 (1914).
\textsuperscript{81} Tudor City Ninth Unit v. Perkett, note 14 supra at 210 and at 397.
\textsuperscript{83} Note 30 supra.
that the authorities are not uniform on the subject elsewhere, the court said that it is "just and reasonable" to hold it a nuisance which excuses the tenant from liability for rent after quitting. In *Kesner v. Consumers Company* an Illinois court held it to be a constructive eviction when the lessor did not abate a nuisance caused by another tenant when it endangered the lives of a large number of employees of the first tenant. It was contended strongly in behalf of the lessor that he was not responsible for the conduct of all his tenants. The court could not find a decided case like it, but it held nevertheless that a duty rested upon the landlord, as a landowner, to keep the premises safe under city ordinances regulating the storage of films, regardless of the technical relations of landlord and tenant.

**Cases wherein the lessor had the power to stop the act.**—Modern leases often contain a number of provisions giving the lessor the power to stop certain enumerated acts of tenants such as loud playing of radios, dancing, et cetera, with the right to terminate the lease for violations thereof. The interpretation of such provisions in reference to constructive eviction has come before the courts in a number of cases. It has generally been held on one ground or another that such provisions place no duty upon the lessor to enforce them in behalf of his tenants. Some courts hold that such provisions merely give the lessor an option to act but they are not covenants that he will exercise his right whenever there is a violation thereof, and therefore no constructive eviction results from a refusal to act. Other courts have taken the view that such provisions are put into the lease solely for the lessor's benefit and not for the benefit of the tenants. Still other courts simply hold that the acts of other tenants are the acts of third parties in spite of the provisions.

It has been strongly argued that since the lessor has the power, he likewise has the duty to exercise it in behalf of his tenants. Though

---

84 255 Ill. App. 216 (1929).
85 Sefton v. Juilliard, 46 N.Y. Misc. 68, 91 N.Y. Supp. 348 (S. Ct., App. Term, 1904). (The tenant had quit the premises because of the loud playing of a piano by another tenant.)
89 See Sefton v. Juilliard, note 85 supra; cf. Hartenbauer v. Brumbaugh, 220 Ill. App. 326 (1920), wherein the court held a lessor's failure to abate a house of ill-fame,
the courts generally would not concede the validity of the argument, a Texas court, in *Maple Terrace Apartment Company v. Simpson*, allowed constructive eviction when the lessor failed to abate the nuisance of a barking dog owned by one of his tenants. The result was reached in spite of a further provision in the lease that the lessor shall not be responsible for the acts of other tenants and his strong argument that such provisions in his leases were clearly intended for the lessor's benefit only. The court held that the provisions were for the benefit of all the tenants. It said that the provisions were in aid of the implied covenant of quiet enjoyment and imposed a legal duty to act. Failure to act was regarded as a sanction by the lessor of the tenants' acts.

The decisions in this field are too recent and too few in number to warrant any statement as to what the law is even as to one jurisdiction. In New York, for example, in the early case of *Sefton v. Juilliard*, it was held that such provisions are an option or privilege of the lessor, but thirty years later a trial court in the same state raised some doubts as to the propriety of the construction in the earlier case with at least an inference that failure of the lessor to exercise the privilege might support a constructive eviction. Six years thereafter we find the Supreme Court, Appellate Term, holding that a tenant sustained the defense of constructive eviction when a lessor took no effective steps, as he had a right to under the terms of the lease, against an overhead tenant who caused continuous noises and disturbances which deprived the defendant of the beneficial enjoyment of the premises.

It is submitted that the Texas and New York courts have rendered a common sense construction. The trend ought to be to place more responsibility upon the lessor for the conduct of his tenants when so many of our people live and do business in multiple-unit buildings. The lessor is usually in a more advantageous position to deal with an obstreperous tenant than is one of the tenants.

---

90 22 S.W. 2d 698 (Tex. Civ. App., 1929).
91 Note 85 supra.
92 See Tudor City Ninth Unit Inc. v. Perkett, note 14 supra at 212 and at 398.
VI. NOTICE OF THE CONDITION TO THE LESSOR AND ABANDONMENT BY THE TENANT ARE NECESSARY

Notice.—A tenant to justify his quitting because of the untenantable condition of the premises must generally give the lessor notice of the condition and an opportunity to remedy the defect. It is regarded as a matter of fairness to give the lessor an opportunity to ascertain the cause and a reasonable opportunity to remedy it. Notice, however, is unnecessary under circumstances where a jury would be justified in finding that the lessor had full knowledge of the condition. If the lessor does not respond within a reasonable time after notice, the tenant may quit even after the lessor has entered to correct the defective condition, if the tenant has, in the meantime, hired other premises because of the lessor's delay. The notice must be given to the proper person. The janitor is usually not the lessor's agent to receive notices of breaches of a lease. The notice should be directed to the leasing agent or to the lessor the same as the payment of rent.

Abandonment.—As to abandonment of the premises, it is generally held that there cannot be a constructive eviction without a surrender of the premises. To claim an eviction while in possession would be a contradiction and unjust in that the tenant had the use of the premises. But there has been some relaxation of the rule when there has been a claim of partial eviction and the tenant has continued in occupation of the remainder.

95 Green v. Redding, 92 Cal. 548, 28 Pac. 599 (1891).
98 North Western Realty Co. v. Hardy, 160 Wis. 324, 151 N.W. 791 (1915).
100 Chelton Ave. Bldg. Corp. v. Mayer, 316 Pa. 228, 172 Atl. 675 (1934) (held not to be a constructive eviction when the tenant quit the premises because of the lack of services but did not remove her furniture).
101 See Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N.W. 502 (1887); Brown v. Holyoke Water Co., 152 Mass. 463, 25 N.E. 966 (1890). In a recent case a New York court found a partial constructive eviction when part of an apartment became untenantable because of a fire and the lessor did not make it habitable within a reasonable time as required by statute, and the tenant continued in possession of the remainder. The court said it would be against the reason of the rule to insist upon the tenant quitting in this critical housing shortage. The rent was apportioned by the court.
In general, upon the premises becoming untenantable or unfit for occupancy, the tenant must make his election whether he will retain or abandon the leased premises. If he retains the premises for an unreasonable length of time, after they have become unfit for occupancy, he waives his right to terminate the lease on that ground.\textsuperscript{102} What is a reasonable time is generally a question for the jury,\textsuperscript{103} but it may become a question of law as when reasonable minds would reach the conclusion that the time was reasonable,\textsuperscript{104} or when the facts are undisputed.\textsuperscript{105}

The tenant is not bound to make his election upon the first neglect of a lessor to furnish some covenanted service.\textsuperscript{106} The courts recognize that services are not necessarily the same from day to day being often dependent upon servants to render them. Payment of rent after the acts complained of commenced will not be a waiver when it was not apparent at the time that the acts would be a serious interference with the tenant's enjoyment.\textsuperscript{107} Likewise, a tenant is relieved from the necessity of removing from the premises forthwith by promises of the lessor to ameliorate the condition.\textsuperscript{108} It is said that the lessor, under such circumstances, waives his right to have the tenant vacate within a reasonable time because of the promises.\textsuperscript{109} If a tenant takes possession before the promised repairs are completed, under circumstances where

\textsuperscript{102} Giddings v. Williams, 336 Ill. 481, 168 N.E. 514 (1929); Merritt v. Tague, 94 Mont. 595, 23 P. 2d 340 (1933).
\textsuperscript{103} Viehman v. Boelter, 105 Minn. 60, 116 N.W. 1023 (1908).
\textsuperscript{104} Giddings v. Williams, 336 Ill. 481, 168 N.E. 514 (1929).
\textsuperscript{105} Merritt v. Tague, 94 Mont. 595, 23 P. 2d 340 (1933).
\textsuperscript{106} Amsterdam Realty Co. v. Johnson, 115 Conn. 243, 161 Atl. 339 (1932); Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N.W. 986 (1892).
\textsuperscript{107} Wusthoff v. Schwartz, note 76 supra, where a tenant gave notice in March that he was quitting because of the lack of heat as soon as he could find a suitable place. It was held that he had not waived his right by occupying the premises until May. Accord: General Industrial & Mfg. Co. v. American Garment Co., 76 Ind. App. 629, 128 N.E. 454 (1920). But a tenant who paid rent for the summer months following a lack of heat in the prior winter waived his right of constructive eviction and could not set it up as a defense when he quit in October. Orcutt v. Isham, 70 Ill. App. 102 (1897).
the lessor had the right to make them at once or within a reasonable time after the commencement of the lease, there is no waiver of the right to constructive eviction through taking possession. A like result is reached when a tenant takes possession at the beginning of a term while a building is under construction but not ready for occupancy as covenanted. Where the breach is of a continuing nature, a waiver of a past breach does not preclude a tenant from taking advantage of subsequent defaults. A provision in a lease to the effect that a lessee waives constructive eviction because of any condition of the premises has been held void in New York as contrary to their tenantability statutes and as against public policy.

VII. THE EFFECTS OF EVICTION

Eviction suspends or terminates the duty to pay rent.—The most important effect of any eviction is upon the liability of the tenant to pay future rents. The typical statement in respect thereto is that it suspends the liability. Occasionally, it is stated that the eviction does not terminate the liability, as it does not terminate the tenancy. On the other hand, there are assertions in a number of cases that an eviction does terminate the liability.

It is submitted that speaking in terms of the obligation to pay rent being terminated is more in accord with actuality than saying that the rent is merely suspended. There seems to be no case indicating or holding that a tenant has a duty to return after an eviction, but we do have the contrary assertions that he is not obliged to return after the cause of the eviction has been removed. So it seems that the only meaning which the typical statement can have is that the tenant would be

112 Laffey v. Woodhull, 256 Ill. App. 325 (1930).
115 See Leadbeater v. Roth, 25 Ill. 478 (1861), to the effect that the tenancy terminated when the lessor’s act of eviction occurred. Accord: Rea v. Algren, 104 Minn. 316, 116 N.W. 580 (1908). In Alger v. Kennedy, 49 Vt. 109 (1876), the court held that the tenant was discharged from his obligation to pay rent. The Vermont Court regarded the right to collect rent as concurrent with the lessee’s right and duty to occupy the premises.
obliged to pay rent upon his voluntary return which practically never happens.

Lessee's right to damages.-A secondary effect of a constructive eviction is the right to sue the lessor for damages. A Texas court, in a quite recent case, stated that much has been written on the question of damages in eviction cases and that there is some conflict of opinion as to what elements can be properly considered in the measure of damages. The form of action to be brought by the tenant may deserve consideration. The usual form of action seems to be one upon the covenant of quiet enjoyment, but it may be that there would sometimes be an advantage in suing in tort because of interference with the tenants possession and enjoyment of the land. There are indications in some of the opinions that one might obtain consideration of some elements of damage in a tort action which would not receive consideration in an action for breach of the covenant of quiet enjoyment.

As a rule the courts have a regard for three principal elements of damage: (1) loss of the contractual bargain; (2) costs and expenses of eviction; (3) loss of profits from the business, profession or trade. Under (1) the courts have said that the lessor should respond in ordinary damages, or that the tenant is entitled to be put in such position pecuniarily as he would have been if the contract had been kept. The lessee is entitled to recover rents paid in advance on the theory of failure of consideration. He is also entitled to recover at least the value of the term over and above the stipulated rent still to accrue. Under (2) the tenant may recover the costs and expenses of eviction including the cost of moving to other premises; the cost of improvements made on the leased premises under certain circumstances; for loss of fur-

120 See Chapman v. Kirby, 49 Ill. 211, 217 (1868); Gildersleeve v. Overstolz, 90 Mo. App. 518, 528 (1901).
nishings rendered worthless because of the eviction;\textsuperscript{127} possibly, the costs in the suit for damages;\textsuperscript{128} and perhaps for loss of time from a profession or trade while moving to another location.\textsuperscript{129} As to losses from business, profession or trade, recovery may be had for injury to any established business,\textsuperscript{130} and for loss of future profits providing they are not purely speculative.\textsuperscript{131} All that is required in such cases is that the amount of damage be shown with reasonable certainty.\textsuperscript{132} Ordinarily, it is said that the injury to business consists mainly in the loss of profits\textsuperscript{133} but it has been pointed out that there may be other elements of injury where a man has spent time and effort building up the business.\textsuperscript{134}

Wilfulness or malice in causing the eviction has received some consideration in determining the amount of damage, but it is not apparent of how much significance such elements were.\textsuperscript{135} Lastly, we have the cases wherein courts have found a constructive eviction irrespective of the landlords causation,\textsuperscript{136} in regard to which it has been suggested that no recovery of damages could be had.\textsuperscript{137}

VIII. CONCLUSIONS

The doctrine of constructive eviction at first operated within narrow bounds. The courts in the early cases gave careful consideration to the common law doctrines governing the liability of the landlord for the condition of the premises. The landlord was the favored party. But

\textsuperscript{127}Blaustein v. Pincus, 47 Mont. 202, 131 Pac. 1064 (1913).
\textsuperscript{128}See Klein v. Lewis, 41 Cal. App. 463, 182 Pac. 789 (1919).
\textsuperscript{129}See Jennings v. Bond, 14 Ind. App. 282, 42 N.E. 957 (1895); Wade v. Herndl, 127 Wis. 544, 107 N.W. 4 (1900).
\textsuperscript{130}Clark v. Koeshevan, 26 Cal. App. 305, 146 Pac. 904 (1915); Ludvigsen v. Larsen, 227 Mich. 528, 198 N.W. 900 (1924). See Gildersleeve v. Overstolz, 90 Mo. App. 518 (1901) for an excellent discussion of what elements may be considered as an injury to an established business.
\textsuperscript{131}Everson v. Albert, 261 Mich. 182, 246 N.W. 88 (1933); Blaustein v. Pincus, note 127 supra; Belcher v. Bullion, note 118 supra. In each of these cases there was some recovery on the basis of future profits. Contra: Denison v. Ford, 10 Daly (N.Y.) 412 (C.P., 1882).
\textsuperscript{132}See Belcher v. Bullion, note 118 supra, for a case wherein the court found a sufficient basis for making a fair calculation of future profits in a small business.
\textsuperscript{133}Gildersleeve v. Overstolz, 90 Mo. App. 518, 531 (1901).
\textsuperscript{134}See Chapman v. Kirby, 49 Ill. 211 (1868).
\textsuperscript{135}See Dobbins v. Duquid, 65 Ill. 464 (1872); Denison v. Ford, 7 Daly (N.Y.) 384 (C.P., 1878); Gildersleeve v. Overstolz, 90 Mo. App. 518 (1901).
\textsuperscript{136}In re Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y. Supp. 1050 (1st Dep't, 1913).
\textsuperscript{137}See 3 Williston, op. cit. supra. note 6, at p. 2532.
with the rapid growth of urban centers the courts perceived the need of moulding the doctrines to fit modern conditions of life if it was to operate justly. It was but natural that the social attitude of the courts would play a part in restricting or expanding the doctrine. There will, therefore, continue to be differences of opinion as to the proper limits of the doctrine. It may be certain however, that the doctrine will continue to expand as new conditions arise in the future.

The theory of constructive eviction and the criteria to be applied were pretty well crystallized prior to the last fifty years. Any further discussions of the intent of the landlord as a test of constructive eviction would seem superfluous and might well be abandoned as being no more than a technical requirement of little value. The emphasis in modern cases is upon the facts which may constitute a constructive eviction. It is not unusual for a court to report a decision simply stating that it was a question of fact. Such statements can be misleading. They should not be construed to mean that theory and criterion have been entirely dispensed with. There still exist the obligations of observing the terms of the lease and of applying landlord and tenant law. It seems that courts sometimes come pretty close to creating the duties, which they speak of, out of whole cloth and then enforcing them through a holding of constructive eviction.