THE DISTURBED TENANT—A PHASE OF CONSTRUCTIVE EVICTION

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"Yes," said the host as he showed his guest over the apartment, "it is comfortable and we have a fine view but I am afraid we will have to go. The people next door are terrible and the management will do nothing. You are a lawyer," he added, brightening at the prospect of some free advice, "what would you do?" The suggestion that he first examine his lease which, providentially, was not on the premises, postponed indefinitely an impromptu opinion wrung from an embarrassed guest who was not wrong in suspecting, as he said when he came to discuss the question with the writer, that an examination of the cases would show the factors necessary to be taken into consideration were more numerous than would seem probable to a casual inquirer.

One in search of evidence expressly designed to support the so-called economic interpretation of history will find in the common law pertaining to landlord and tenant abundant material in confirmation of this depressing view. All the cards, as the phrase is, are stacked against the tenant. Even the common forms of lease sold by the law stationers are little more than traps for the unwary, ingeniously drafted in the landlord's interest. Indeed, the data proves far too much; for if class-conscious self interest is at the root of all legal doctrines, then surely by this day the preponderating influence of the immense group of tenants for years, or less, now long in possession of the franchise and substantial political power would have made itself felt more effectively than has been the case up to the present time. Other strong factors are certainly present, for one thing, a traditional attitude toward land hardened by years of tacit acceptance. Most persons in an old established community have common habits of mind, customary methods of approach to their more intimate legal relations, an obscure inheritance from their ancestors which native

conservatism tempers by occasional concessions rather than downright reform.

It would be difficult to deny to the Roman landlord, social and political power equal to that of members of the same class in England or America. Yet Roman law was more favorable to the tenant than the common law. The Roman law of letting and hiring (*locatio conductio*), which applied equally to things movable and immovable, rested on the principle that it was the beneficial use and enjoyment which was conferred by the contract. Risk of accidental loss was on the lessor, not in the sense that he had still to provide the thing, but that he could claim no rent unless the tenant had the benefit of its use. If an accident occurred whereby its productive powers were seriously impaired, the rent was proportionately abated.[1] Such is still the French law: "If property let is totally destroyed during the subsistence of the lease by an act of God, the lease *ipso facto,* comes to an end. If the property is only partially destroyed, the lessee may according to the nature of the circumstances, either ask that the rent should be reduced or that the lease itself should be cancelled. In either case he is entitled to no compensation." [2] Accidental loss is not our subject and the point is introduced here only to illustrate a fundamental difference of attitude in the treatment of leasehold interests under the two great systems of jurisprudence. Roman law, as we know it, is characterized by a mature mercantile quality, no doubt impressed upon it by the powerful class of equites, who, in addition to their commercial pursuits, played in the course of time a considerable part in the administration of justice. Rome was a metropolis and city problems were familiar to their courts.[3] The apartment house (*insula*) is in fact a Roman institution.

On the other hand the English and American law relating to leaseholds, rests on principles growing out of the mediaeval

[1] D. 19, 2, 9, 3 & 4; D. 19, 2, 15, 2-8; D. 19, 2, 33; BUCKLAND, TEXT BOOK OF ROMAN LAW (1921) 498; DOMAT, CIVIL LAW (Strahan's 2d ed. 1737) § 485; 2 PLANIOL, DROIT CIVIL (9th ed. 1923) 576, § 1712.

[2] FRENCH CIVIL CODE (Wright's ed. 1908) § 1722; similar provisions are in the LA. REV. CIV. CODE (Saunders' 2d ed. 1920) § 2697. *Cf.* GERMAN CIVIL CODE §§ 537, 588.

[3] D. 19, 2, 27 & 30.

land law. By this, rent in its early forms was regarded as a thing issuing out of the land, recoverable by real actions and treated very similarly to an estate in land. The governing idea was that the land was bound to pay the rent.[4] And, although in modern law rent is regarded as a payment to which the tenant has bound himself by contract, a principle that grew in importance with the growth of rents reserved on leases for years, nevertheless the earlier conception of the nature of rent has survived in doctrines otherwise difficult to explain. Hence, by the weight of authority whatever unfortunate accident befalls the property demised during the term, rendering it unprofitable or unfit for habitation, the lessee cannot rid himself of his obligation. It is no answer to the demand for rent that the premises have been injured or destroyed by fire, flood, or the public enemy.[5] The lessee is relieved from liability only when evicted, that is actually dispossessed of the premises in whole or part by the lessor or someone claiming by title paramount to that of the lessor. In the former case the rent is suspended during the continuance of the eviction, in the latter, if the eviction is partial the rent is apportioned.[6] The doctrine of frustration of a commercial adventure does not apply to a contract which creates an estate by demise.[7] The liability of the tenant in case of accidental destruction was affirmed by Chancellor Kent on the ground that having voluntarily entered into an agreement to pay rent the tenant ought to abide by it, as he might have provided against his re-

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[4] 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 130.

[5] Hallett v. Wylie, 3 Johns 44 (N. Y. 1808); Pollard v. Schaffer, 1 Dall. 210 (Pa. 1787); Y. B. 9 Edw. III. 16 pl. 30 (1335); Taverner's Case, 1 Dyer 56a (1543); Carter v. Cummins, 4 Vin. Abr. 387 (1665); Parradine v. Jane, Aleyn 26, Style 47 (1671); Monk v. Cooper, 2 Str. 763 (1739); Barker v. Holtpzaffel, 4 Taunt. 45 (1811); Holtpzaffel v. Barker, 18 Ves. 115 (1811); London & N. E. Co. v. Schlesinger, [1916] 1 K. B. 20. *Contra:* Wattles v. Omaha I. Co., 50 Neb. 251, 69 N. W. 785 (1897); Coogan v. Parker, 2 S. C. 255 (1870).

[6] Sherman v. Williams, 113 Mass. 481 (1873); Fifth Ave. B. Co. v. Kernochan, 221 N. Y. 370, 117 N. E. 579 (1917); Emott v. Cole, Cro. Eliz. 255 (1590); Hodgkins v. Robson, 1 Vent. 185 (1675); Co. LITT. 148; PLATT, LAW OF COVENANTS (Am. ed. 1834) 197; 1 TAYLOR ON LANDLORD & TENANT (9th ed. 1904) 473, § 378; WOODFALL, LANDLORD & TENANT (20th ed. 1921) 508; 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1925) 274.

[7] Whitehall Court Ltd. v. Ettinger, [1920] 1 K. B. 680.

sponsibility;[8] and while this briefly represents the general view, it assumes what is not generally true in fact, that the possibility of destruction entered into the contemplation of the parties. If it is actually brought to mind the point will be covered by a clause in the lease, but usually it is an unthought of contingency which may result in hardship to either or both parties. In days before insurance the rule may have promoted care on the part of tenants, but its soundest justification was given many years ago by the Supreme Court of Massachusetts: "a lease for years is a sale of the demised premises for the term; and unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accident or any other deterioration." [9] But it is unnecessary to go into particulars as the subject is touched on here merely to illustrate the fundamental difference in approach between the civil and common law in considering leasehold interests so as to better understand the nature of the difficulties that beset the lessee in protecting himself against disturbances of his enjoyment of the premises demised.

It will be conceded generally that the landlord is not to be held accountable for the wrongful acts of other parties over whom he has no control and for whom he is not responsible.[10] Such is the ancient law—a covenant for quiet enjoyment is against the acts of those claiming title, not the wrongful acts of

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[8] 3 KENT COMM. 467. *Cf.* Brewer, J., in Whitaker v. Hawley, 25 Kan. 674 (1881). According to some authorities there is an exception to the rule where a room only is leased and destroyed. Leiferman v. Olsen, 167 Ill. 93, 47 N. E. 203 (1897); Shawmut N. Bk. v. Boston, 118 Mass. 125 (1875); Liberthal v. Montgomery, 121 Mich. 369, 80 N. W. 115 (1899); Graves v. Berdan, 26 N. Y. 498 (1863). *Contra:* Izon v. Gorton, 5 Bing. N. C. 501 (1839); Helburn v. Mofford, 70 Ky. 169 (1870).

[9] Fowler v. Bott, 6 Mass. 63 (1809).

[10] Conrad Seip B. Co. v. Hart, 62 Ill. App. 212 (1895); Kistler v. Wilson, 77 Ill. App. 149 (1898); Tagney v. Tabor, 204 Ill. App. 440 (1917); Stead v. Crane, 256 Ill. App. 445 (1930); O'Neil v. Pearse, 87 N. J. L. 382, 94 Atl. 312 (1915), *aff'd*, 88 N. J. L. 733, 96 Atl. 1102 (1916); Leonard v. Gunther, 47 App. Div. 194, 62 N. Y. Supp. 99 (1900); Oakford v. Nixon, 177 Pa. 76, 35 Atl. 588 (1896); Blauvelt v. Powell, 59 Hun. 179, 13 N. Y. Supp. 439 (1891); Shapiro v. Malarkey, 278 Pa. 78, 122 Atl. 341 (1923); Girard Trust Co. v. Raiguel, 93 Pa. Super. 123 (1928); Angelo v. Deutser, 30 S. W. (2d) 707 (Tex. 1930). In Barns v. Wilson, 116 Pa. 303, 9 Atl. 437 (1887) the removal of a party wall by an adjoining owner did not constitute an eviction that would relieve the tenant from rent. *Contra:* Bentley v. Sill, 35 Ill. 415 (1864).

strangers.[11] Thus, in an action for rent it was held no defense that patrons of the landlord's adjoining shop loitered in front of defendant's show window obstructing the view and indulged in loud talk. The space in front of the window was not under the control of the plaintiff and he could not be held responsible for the presence of persons collecting there.[12] The tenant is not supposed to be altogether spineless. An injury to an occupant of land in the reasonable enjoyment of the property of which he is in possession, by noise or other means of disturbance, is a nuisance and remediable as such at law or in equity without regard to the quality of the tenure.[13] The lessee may have an injunction to restrain a nuisance which is injurious to his health and comfort,[14] or an action for the damages sustained during his tenancy resulting from the maintenance of the nuisance.[15] So much may be conceded. But is this all? Experienced individuals regard litigation as a calamity. Aside from its expense, it means, in the inferior courts of this great democracy, personal humiliation and waste of time. A quarrel with a neighbor usually develops into a feud that lasts until the expiration of the tenancy. With a reasonable excuse to move, prudent persons would rather leave the neighborhood than remain in perpetual controversy with those whose tastes differ and interests conflict. But the lessor also is concerned with the good reputation of the premises under lease,

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[11] Y. B. 22 Hen. VI, 52, pl. 26 (1443); 26 Hen. VIII, 3, pl. 11 (1534); Wotton v. Hele, 2 Saund. (Wms. 2d Am. ed. 1816) 175 *e* (1669); Dudley v. Folliott, 3 T. R. 584 (1790); PLATT, *op. cit. supra* note 6, 313.

[12] Eagle v. Matthews, 98 Kan. 715, 160 Pac. 211 (1916); Volkmar v. Vladi, 20 BERKS Co. L. J. 218 (Pa. 1928).

[13] Off v. Exposition Coaster, Inc., 336 Ill. 100, 167 N. E. 782 (1929); Dulaney v. Fitzgerald, 227 Ky. 566, 13 S. W. (2d) 767 (1929); People v. Hess, 110 Misc. 76, 179 N. Y. Supp. 734 (1920); Prendergast v. Wells, 257 Pa. 547, 101 Atl. 826 (1917); Soltau v. DeHeld. 2 Sim. (N. S.) 133 (1851); Inchbald v. Barrington, L. R. 4 Ch. App. 388 (1869). *Cf.* Pig'n Whistle S. Shop v. Keith, 167 Ga. 735, 146 S. E. 455 (1928); Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768 (1888); Tarr v. Hopewell Country Club, 153 Wash. 214, 279 Pac. 594 (1929).

[14] State v. King, 46 La. Ann. 78, 14 So. 423 (1894); Ingraham v. Dunnell, 5 Metc. 118 (Mass. 1842); DeLaney v. Blizzard, 5 Hun 7 (N. Y. 1876); Grantham v. Gibson, 41 Wash. 125, 83 Pac. 14 (1905); Jones v. Chappell, L. R. 20 Eq. 539 (1875).

[15] Ackerman v. Ellis, 81 N. J. L. 1, 79 Atl. 883 (1911); Bly v. Edison Electric Co., 172 N. Y. 1, 64 N. E. 745 (1902); Pritchard v. Haynes, 92 App. Div. 178, 87 N. Y. Supp. 225 (1904); Smith v. Phillips, 8 Phila. 10 (Pa. 1871); Jenkins v. Jackson, 40 Ch. D. 71 (1888).

and in the case of a subdivided building or an apartment house where he has been responsible for bringing incongruous elements into juxtaposition, is there no formula by which his interest in maintaining peace and good will throughout his domain may be transmuted into a duty to see that the manners or occupations of some of his lessees shall not cause unreasonable discomfort to the others?

To such a query the common law would give a short answer. The tenant has the possession, and possession is single and exclusive.[16] The landlord's right is confined to the redress of injuries to the reversionary interest, since he has no present possession.[17] In almost all cases it is the person in occupation who is *prima facie* entitled to maintain an action for an injury done the property, and when an injury is caused to third persons by the state of the premises, he it is who is usually held liable.[18] If intolerable conditions compel the tenant to remove from the premises can he find grounds for avoiding his lease? By the early cases an eviction of the tenant by the landlord from the whole or a part of the premises suspended the rent, but the plea had to state an expulsion of the lessee by the lessor and a keeping him out of possession until after the rent became due, otherwise it was bad. A trespass by the lessor did not suspend the rent.[19] Physical dispossession was contemplated and so Chancellor Kent understood when he wrote: "No offensive or outrageous conduct on the part of the landlord, as by erecting a nuisance in the neighborhood of the demised premises will be sufficient." [20] Such indeed was the decision of the supreme court of New York in the case of *Dyett v. Pendleton*,[21] but on appeal to the court of errors judgment was

[16] POLLOCK & WRIGHT ESSAY ON POSSESSION (1888) 21, 47.

[17] Mumford v. Oxford W. & W. R. Co., 1 H. & N. 34 (1856); Shelfer v. Electric Co., [1895] 1 Ch. 287; White v. London General Omnibus Co. (1914) 58 SOL. J. 339.

[18] WOODFALL, LANDLORD & TENANT (20th ed. 1921) 888; 1 TIFFANY, LANDLORD & TENANT (1910) 789, § 120.

[19] Vatel v. Herner, 1 Hilton 149 (N. Y. 1856); Bennet v. Bittle, 4 Rawle 339 (Pa. 1834); Cibel & Hill's Case, Leon. 110 (1587); Asconglis' Case, 9 Co. 133 (1611); Timbrell v. Bullock, Style 446 (1655); Salmon v. Smith, 1 Saund. (Wms. 2d Am. ed. 1816) 202 at 204 (1668); Roper v. Lloyd, 1 T. Jones 148 (1678); Hunt v. Cope, 1 Cowp. 242 (1775).

[20] 3 KENT COMM. 464.

[21] 8 Cow. 727 (N. Y. 1826), *rev'g* 4 Cow. 581 (N. Y. 1825).

reversed, and *Dyett v. Pendleton* became a leading case, marking a departure from ancient precedent and establishing a basis for the development of new principles.

The action was covenant on a lease of two rooms in a house in New York City. The lessee pleaded that he had been ejected and expelled by the lessor and on the trial offered to prove that the lessor had introduced prostitutes into other parts of the house who by their noisy and riotous proceedings had disturbed the sleep of other occupants and brought the house into ill repute in the neighborhood so that defendant was compelled to leave. The trial judge excluded this evidence and, after a verdict for plaintiff, the ruling was sustained on motion for a new trial. There was no actual physical eviction, said the court, not even a trespass, as the acts complained of were committed in a different part of the house. The disturbance suffered by the lessee was in the nature of a nuisance and his remedy was to call in the police who would have taken the plaintiff and his associates into custody and punished them by fine and imprisonment. The case was then taken to the court of Errors, which at that time was composed of the State Senate, the Chancellor and the Justices of the Supreme Court, and there the vote was sixteen to six for reversal. Senator Colden, speaking for affirmance, said in effect, that if the lessee, finding himself temporarily disturbed by the lessor's conduct and abandoning the premises, is to be exonerated from the payment of rent, a new and extensive chapter will be introduced in the law of landlord and tenant. If the landlord's encouragement or practice of lewdness under the same roof would warrant an abdication by the tenant and release him from his covenant to pay rent, there is no reason why, if the landlord should by any other means render the occupation inconvenient or uncomfortable the same consequences should not ensue. "If the landlord should happen to have the plague of a scolding wife under the same roof with his tenant, the tenant might feel himself authorized to leave the premises and claim an exoneration from the payment of rent." A decision of this nature, he felt, would afford grounds for perpetual contentions. If litigation is objectionable *per se,* the number of cases that trace their ancestry to the view of the majority in this decision

would seem to justify the senator's forebodings. It is a curious and common judicial paradox that a judge whose principal function is to decide cases in the interest of justice should shrink from the thought of increasing the instances in which justice is to be administered. The new chapter was, in fact, introduced into the law and Senator Spencer gave it a name which appears in his opinion for reversal: the evidence, he thought, should have been received because it tended to establish a "constructive eviction." Now "constructive eviction" is a phrase that is open to the objection that it is self-contradictory and lacking in that scientific precision which is an aid to clear thinking. But Anglo-American law has never been interested in clarity of thought—if it could see its way to a practical result. In the earnest if somewhat tenuous arguments of the court it is noticeable that in the end moral considerations were decisive. Perhaps it was time. The decisions of the New York Court of Errors when the senators sat on appeals have at times been referred to contemptuously; but in this instance at least, the social value of their judgment has been confirmed by the passage of the years.[22] Indeed Senator Spencer in his opinion uses these frank and significant words: "When this court of last resort, was declared to consist of senators, with the chancellor and judges, it must have occurred, that the largest proportion of its members would be citizens not belonging to the legal profession. And it must, therefore, have been intended to collect here, a body of sound practical common sense, which would not overthrow law, but which would apply the principles and reasons of the law according to the justice of each case, without regard to the technical refinements and arbitrary and fictitious rules, which will always grow upon professional men."

Dyett v. Pendleton [23] has been discussed at some length not only because it is the leading American case but because its

[22] Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748 (1894); Billamy v. Smith, 4 Houst. 113 (Del. 1870); Rowbotham v. Pearce, 5 Houst. 135 (Del. 1876); Hartenbauer v. Brumbaugh, 220 Ill. App. 326 (1920); Lancashire v. Garford M. Co., 199 Mo. App. 418, 203 S. W. 668 (1918); Weiler v. Pancoast, 71 N. J. L. 414, 58 Atl. 1084 (1904); Stewart v. Forst, 15 Misc. 621, 37 N. Y. Supp. 215 (1876); Cushman v. Thompson, 58 Misc. 539, 109 N. Y. Supp. 757 (1908); Phyfe v. Dale, 72 Misc. 383, 130 N. Y. Supp. 231 (1911); Herbert R. Co. v. Petchett, 8 Pa. D. & C. 418 (1926).

[23] *Supra* note 21.

boundaries were not at first clearly understood. It was described as an extreme case; one that "carried the doctrine of eviction to its utmost verge." [24] In Massachusetts it was said that it had been modified if not overruled by later decisions.[25] But upon that point the learned court was mistaken. *Dyett v. Pendleton* [26] has met with distinct approval within its true limits.[27] One of these limits, about which there is that comparative unanimity which marks a well settled principle is that there must be an abandonment of possession by the lessee, who cannot remain in possession and shield himself from the payment of rent by reason of the wrongful acts of the landlord.[28] Another of the limits, and one far more difficult in application, is that the lessor must have caused or connived at the nuisance of which the lessee complains.[29]

The English cases are few in number and treat problems of this general nature with much reserve. While it is not necessary that there should be an actual physical expulsion of the tenant, an act to constitute an eviction must be, in the words of Jervis, C. J., in *Upton v. Townsend*,[30] "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the en-

[24] Etheridge v. Osborn, 12 Wend. 529 (N. Y. 1834); Royce v. Guggenheim, 106 Mass. 201 (1870); Gilhooley v. Washington, 4 N. Y. 217 (1850).

[25] DeWitt v. Pierson, 112 Mass. 8 (1873); see Gray v. Graff, 8 Mo. App. 329 (1880).

[26] *Supra* note 21.

[27] Kinney v. Libbey, 54 Misc. 595, 104 N. Y. Supp. 863 (1907); Bergman v. Papia, 103 Misc. 863, 109 N. Y. Supp. 856 (1908); and cases in note 22.

[28] Endicott v. Thorne, 111 Conn. 697, 151 Atl. 187 (1930); Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N. E. 35 (1930); Ogilvie v. Hull, 5 Hill 52 (N. Y. 1843); Edgerton v. Page, 20 N. Y. 281 (1859); Harper v. Jackson, 240 Pa. 312, 87 Atl. 430 (1913); Weinstein v. Barrasso, 139 Tenn. 593, 202 S. W. 920 (1918), 1918D L. R. A. 1174 and note; Angelo v. Deutser, 30 S. W. (2d) 707 (Tex. 1930). But the lessee may recoup or counterclaim for damages. Parrish v. Studebaker, 50 Cal. App. 719, 195 Pac. 721 (1920); Seltz v. Stafford, 284 Ill. 610, 120 N. E. 462 (1918); City of New York v. Pike Realty Co., 247 N. Y. 245, 160 N. E. 359 (1928); Depuy v. Silver, 1 PA. L. J. REP. 385 (Clark, 1843).

[29] Paterson v. Bridges, 16 Ala. App. 54 (1917); Cougle v. Deasmore, 57 Ill. App. 591 (1894); Wolf v. Epstein, 71 Ore. 1, 140 Pac. 751 (1914); DeWitt v. Pierson, 112 Mass. 8 (1873); Katz v. Duffy, 261 Mass. 149, 158 N. E. 264 (1927); Gilhooley v. Washington, 4 N. Y. 217 (1850); Townsend v. Gilsey, 1 Sweeny 155 (N. Y. 1869).

[30] 17 C. B. 30 (1855).

joyment of the demised premises." In that case the landlord rebuilt after a fire, with the tenant's consent, in an altered form and it was held an eviction as to sub-tenants. So railing off a portion of the garden demised with the house was held an eviction.[31] On the other hand the pulling down of a summer house by the landlord was held a mere trespass.[32] The case that is nearest in point of fact is *Jaeger v. Mansions Consolidated*,[33] in which the plaintiff was tenant of a residential flat in a building under a form of lease, used in the case of all the tenancies, that the lessee would not permit the premises to be used for any unlawful or immoral purpose. The action was brought alleging that some of the flats were being used for immoral purposes and praying for an injunction to prevent the owners from permitting the flats to be so used as to cause a nuisance to the plaintiff. To a counterclaim for rent the defendant replied that further occupation had been rendered impossible and he had left the premises. It was urged on a preliminary point of law that no cause of action was disclosed but it was held in the Court of Appeal that the case ought to go to trial to determine whether in fact the landlord permitted the offending tenants to do the acts complained of. If so, then since it was part of the general scheme that these flats should be respectably occupied, the occupation of parts of the building with the knowledge and assent of the landlord for improper purposes would be a violation of such scheme and render him as clearly liable to an injunction as if he had entered into an express agreement to that effect. In the court below the further point was made that the conduct of the lessor might constitute a breach of the covenant of quiet enjoyment. Buckley, J., ob-

[31] Smith v. Raleigh, 3 Campb. 513 (1814). Where the landlord gave notice to sub-tenants to quit and one did quit it was held an eviction of the principal tenant. Burn v. Phelps, 1 Stark (N. P.) 75 (1815). So also the service of a declaration in ejectment. Jones v. Carter, 15 M. & W. 718 (1846).

[32] Hunt v. Cope, Cowp. 242 (1775). So also where landlord removed explosives, Newly v. Sharpe, 8 Ch. D. 39 (1878). So where the landlord put off the premises an agent of the tenant on personal grounds. Henderson v. Mears (1859) 5 Jur. (N. S.) 709, (1858-9) 7 W. R. 554. So putting a custodian in charge of abandoned premises. Wheeler v. Stevenson, 6 H. & N. 155 (1860); Griffths v. Hodges, 1 C. & P. 419 (1824). In Hart v. Windsor, 12 M. & W. (1843), an action for rent, a plea that because the house was infested with bugs defendant quitted possession was held bad, distinguishing Smith v. Marrable, 11 M. & W. 5 (1843), a lease of a furnished house.

[33] (1903) 87 LAW TIMES 690.

served that such a covenant had reference to disturbances of a physical and not of a metaphysical nature. However, an interference with the tenant's use of the halls, stairs and lights would be within the rule. This phase of the case is not discussed by the Court of Appeal. The decision is an ingenious and significant extension of the principle developed in equity of enforcing restrictive agreements as to the use of land.[34] In *Malzy v. Eichholz*,[35] part of the ground floor of a building was leased as a restaurant by the defendant with a covenant for quiet enjoyment. Another room in the front of the building was leased to another tenant who covenanted not to permit any disturbance of the landlord or his tenants. This tenant permitted mock auctions on his premises which led to great disorder and finally to police interference. The restaurant keeper sued the other tenant and the landlord and was awarded a verdict for damages. The landlord alone appealed. There was no general scheme for the use of the building and the Court of Appeal held that the landlord was not liable because he knew that there was a nuisance and did not take any active steps to prevent what was being done by using all the powers that he might have under any agreements with other persons for the benefit of the plaintiff. Authorization or participation in the act done was essential to render him liable. It seemed to be agreed that to constitute a breach of the covenant for quiet enjoyment there must be some physical disturbance of or interference with the lessee.[36]

The American courts have made such generous use of the convenient if nebulous phrase "constructive eviction" that it would be impossible in a brief paper to review all the various groups of decisions where the acts of the landlord or his omission to act have been held such as to justify the tenant in relinquishing pos-

[34] See Hudson v. Cripps, [1896] 1 Ch. 265, where an injunction was granted restraining the change of part of residential flat building into a club and Gedge v. Bartlett, 17 T. L. R. 43 (1900); Alexander v. Mansions Proprietary, Ltd., 16 T. L. R. 1431 (1900). *Cf.* Postal Tel. C. Co. v. Western Union T. Co., 155 Ill. 335, 40 N. E. 587 (1895); Beebe v. Tyra, 49 Wash. 157, 94 Pac. 940 (1908); Davis v. Town Properties Investment Corporation, Ltd., [1903] 1 Ch. 797.

[35] [1916] 2 K. B. 308.

[36] Jenkins v. Jackson, 40 Ch. D. 71 (1888); Browne v. Flower, [1911] 1 Ch. 219. *Cf.* Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836.

session. Logically an eviction by the landlord is an affirmative act and the use of the term should be confined to acts of commission involving an intentional and wrongful interruption of the possession or a permanent and substantial interference with the beneficial use,[37] remembering that where the wrongful acts of the lessor are such as will naturally and probably exclude the lessee from possession or enjoyment of the premises the law will presume an intent to do so, and if the natural consequence follows, the acts will be regarded as an eviction.[38] Nevertheless there are other decisions where the courts have, in fact, extended the doctrine to include acts of omission. Familiar instances occur where a failure to furnish heat or other services according to the terms of the contract renders the premises unfit for the purpose for which they were leased.[39] And, although this extension of the application of the word has been criticized as calculated to obscure the true nature of an eviction,[40] it has, nevertheless, been applied in cases where there was no specific agreement to supply what was regarded as an essential service.[41] In New York, in the case of an apartment house, the presence of vermin has been

[37] Warren v. Wagner, 75 Ala. 188 (1883); Lewis v. Hughes, 12 Colo. 208, 20 Pac. 621 (1888); Central B. College v. Rutherford, 47 Colo. 277, 107 Pac. 279 (1910); Longwood T. Co. v. Doyle, 267 Mass. 368, 166 N. E. 634 (1929); Blaustein v. Pincus, 47 Mont. 202, 131 Pac. 1064 (1913); Vanderbilt v. Persse, 3 E. D. Smith, 428 (N. Y. 1854); Edgerton v. Page, 1 Hilton, 320 (N. Y. 1857); Humes v. Gardner, 22 Misc. 333, 49 N. Y. Supp. 147 (1898); Huber v. Ryan, 26 Misc. 428, 56 N. Y. Supp. 135 (1899); Two Rector St. Corp. v. Blein, 226 App. Div. 73, 234 N. Y. Supp. 409 (1929); Hoeveler v. Fleming, 91 Pa. 322 (1879); McCandless v. Findley, 86 Pa. Super. 288 (1926).

[38] Scally v. Shute, 132 Mass. 367 (1882); Buchanan v. Orange, 118 Va. 511, 88 S. E. 52 (1916). See further Levitzky v. Canning, 33 Cal. 299 (1867); Boyer v. Commercial B. I. Co., 110 Iowa 491, 81 N. W. 720 (1900); Royce v. Guggenheim, 106 Mass. 201 (1870); Case v. Minot, 158 Mass. 577, 33 N. E. 700 (1893); Boston Veterinary Hospital v. Kiley, 219 Mass. 533, 107 N. E. 426 (1914); Jackson v. Eddy, 12 Mo. 210 (1848); Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716 (1890).

[39] Laffey v. Woodhull, 256 Ill. App. 325 (1930); Nesson v. Adams, 212 Mass. 429, 99 N. E. 93 (1912); Conroy v. Toomay, 234 Mass. 384, 125 N. E. 568 (1920); Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986 (1892); Siebold v. Heyman, 120 N. Y. Supp. 105 (1909); Russell v. Olson, 22 N. D. 410, 133 N. W. 1030 (1911); McSorley v. Allen, 36 Pa. Super. 271 (1908); Wasserman v. Levy, 29 Pa. D. R. 55 (1919); Buchanan v. Orange, *supra* note 38. *Cf.* Automobile Supply Co. v. Scene-in-Action Corp., *supra* note 28; Jones v. Silverman, 95 Pa. Super. 336 (1928).

[40] 2 TIFFANY, LANDLORD & TENANT (1910) 1271.

[41] Berlinger v. Macdonald, 149 App. Div. 5, 133 N. Y. Supp. 522 (1912); Flechner v. Douglass, 136 Misc. 57, 239 N. Y. Supp. 121 (1929).

regarded as an act of omission essentially interfering with the tenants' enjoyment and justifying an abandonment of possession.[42] But the rule is stated otherwise in Massachusetts where the presence of large numbers of cockroaches which the lessor unsuccessfully attempted to exterminate, was held not to amount to a constructive eviction,[43] applying the ordinary rule that the lease of a building for a dwelling implies no covenant that it is fit for occupation.[44]

The nature and extent of the disturbances coming from other rooms or adjacent property owned or controlled by the landlord which will justify a tenant in quitting the premises and refusing to be bound further by the lease is necessarily, in most cases, a difficult question of fact. On the one hand it is agreed that the use of part of a building by one tenant which is unpleasant and inconvenient to another tenant but with which the landlord has nothing to do is not an eviction.[45] On the other hand it has been held that where a portion of a building has been expressly leased for a particular use by the tenant, the landlord is not permitted to lease a portion of the premises for a use which, although not a nuisance in itself, will totally deprive the first tenant of the benefit

[42] Batterman v. Levenson, 102 Misc. 92, 168 N. Y. Supp. 197 (1917); Madden v. Bullock, 115 N. Y. Supp. 723 (1909); Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N. Y. Supp. 1050 (1913); Streep v. Simpson, 80 Misc. 666, 141 N. Y. Supp. 863 (1913). *Contra:* Pomeroy v. Tyler, 9 N. Y. St. Rep. 514 (1887); Jacobs v. Morand, 59 Misc. 200, 110 N. Y. Supp. 208 (1908); and *cf.* Westlake v. DeGraw, 25 Wend. 669 (N. Y. 1841); Cushman v. Bohl, 153 N. Y. Supp. 94 (1915); Wainwright v. Helmer, 193 N. Y. Supp. 653 (1922).

[43] Hopkins v. Murphy, 233 Mass. 476, 124 N. E. 252 (1919); Luch v. Husbands, 152 Atl. 729 (Del. 1930); Gunther v. Oliver, 98 N. J. L. 563, 117 Atl. 402 (1922).

[44] Fisher v. Lighthall, 4 Mackey 82 (D. C. 1885); Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622 (1885); McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389 (1892); Griffin v. Freeborn, 181 Mo. App. 203, 168 S. W. 219 (1914); Daly v. Wise, 132 N. Y. 306, 30 N. E. 837 (1892); Reeves v. McComeskey, 168 Pa. 57, 27 Atl. 884 (1895); Lane v. Cox, [1897] 1 Q. B. 415. Otherwise where the lease is of a furnished house, Young v. Povich, 121 Me. 141, 116 Atl. 26 (1922); Ingalls v. Hobbs, 156 Mass. 348, 31 N. E. 286 (1892); Smith v. Marrable, *supra* note 32; Campbell v. Lord Wenlock, 4 F. & F. 716 (1866).

[45] Bilicke v. Janss, 14 Cal. App. 342, 112 Pac. 201 (1910); Wood's Theatre v. North Amer. Union, 246 Ill. App. 521 (1927); Voss v. Silvester, 203 Mass. 233, 89 N. E. 241 (1909); French v. Pettingill, 128 Mo. App. 156, 106 S. W. 575 (1907); Mortimer v. Bruner, 6 Bosw. 653 (N. Y. 1860); Leonard v. Gunther, *supra* note 10; Martens v. Sloane, 132 App. Div. 114, 116 N. Y. Supp. 512 (1909); Wilkes-Barre R. Co. v. Levy, 114 N. Y. Supp. 713 (1909); Weinstein v. Barrasso, *supra* note 28; Toy v. Olinger, 173 Wis. 277, 181 N. W. 295 (1921).

of his lease.[46] Thus, in one case where the owners of a building in which they conducted a furniture store leased space in the store for the sale of music and musical instruments and thereafter discontinued the furniture business and leased the space for a meat market and grocery store the first lessee was held entitled to an injunction to restrain such use. Said the court:

> "Plaintiff deals in musical instruments, inclusive of Victrolas and records, and it is well known that purchasers desire a demonstration. A selection from Chopin, on a Victrola played to the accompaniment of a cleaver cracking bones on a butcher's block, might not detract from the sale of meat but would seriously interfere with the music business. No music dealer with sense, would expect to be able to carry on his business in a butcher's shop. The carcass of a hog, hung by the heels, with opened body and bloody snout, may not look out of place in a butcher's shop, but wholly out of place and repulsive in the same room with a music store." [47]

With this may be contrasted the view taken in a Pennsylvania case where a dentist leased rooms for a term of years on the second floor of a building known and used exclusively as an office building although there was no express agreement to rent for offices exclusively. A lease of this building as a hotel making it undesirable and unfit as a location for the tenant's business was held not to be a breach of the covenant of quiet enjoyment which, the court said, did not extend to the act of the landlord in making a different use of that part of his property not demised, there being no disturbance of the tenant's possession.[48] A nuisance maintained by the lessor injurious to the lessee and destructive

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[46] Halligan v. Wade, 21 Ill. 470 (1859); Kesner v. Consumers Co., 255 Ill. App. 216 (1929); Phoenix L. & I. Co. v. Seidel, 135 Mo. App. 185, 115 S. W. 1070 (1908); Duff v. Hart, 16 N. Y. Supp. 163 (1891); Wade v. Herndl, 127 Wis. 544, 107 N. W. 4 (1906). The closing of a hotel or market house in which tenant has rented a stand or stall will amount to an eviction, Coulter v. Norton, 100 Mich. 389, 59 N. W. 163 (1894); Denison v. Ford, 7 Daly 384 (N. Y. 1878). *Cf.* Kelly v. United States, 69 Ct. Cl. 220 (1930).

[47] Grinnell v. Asinliewicz, 241 Mich. 186, 216 N. W. 388 (1927).

[48] Tucker v. DuPuy, 210 Pa. 461, 60 Atl. 4 (1904); Gray v. Gaff, 8 Mo. App. 329 (1880).

of his comfort is another matter.[49] Thus, where a few weeks after the tenant had moved into a flat the landlord opened a public bowling alley directly under the rooms occupied by him which was used all day and late into the night, the evidence was held sufficient to justify the tenant in quitting the premises.[50] But to constitute an eviction such injuries must of course be substantial.[51]

In the case of residential apartments the proprietor is in a very different position from that of the innkeeper who is bound to give reasonable attention and care to the convenience and comfort of his guests.[52] A room in an inn occupied by a guest is not in a legal sense his dwelling house for notwithstanding his occupancy it is the house of the innkeeper; there is not the conventional relation of landlord and tenant for there is no contract as to the realty.[53] The fact that there is nothing unusual or inconsistent in a building having a double character being simultaneously a hotel and an apartment house has probably contributed to some popular misconceptions as to the extent of the lessor's duties, but where specific rooms are leased for a precise time at a definite rate so separated from the other rooms in the house as to give the occupant full possession and control they become in fact and law the separate tenement of the lessee.[54] In the Michigan

[49] Wyse v. Russell, 16 Misc. 53, 37 N. Y. Supp. 683 (1896); Cohen v. Dupont, 1 Sandf. 260 (N. Y. 1848); Fox v. Murdock, 58 Misc. 20, 109 N. Y. Supp. 108 (1908); Onward Construction Co. v. Harris, 144 N. Y. Supp. 318 (1913).

[50] Donovan v. Koehler, 119 App. Div. 51, 103 N. Y. Supp. 935 (1907).

[51] Molineux v. Hurburt, 79 Conn. 243, 64 Atl. 350 (1906); McLaughlin v. Bohn, 20 Misc. 338, 45 N. Y. Supp. 745 (1897); Finck v. Rogers, 30 Misc. 23, 62 N. Y. Supp. 996 (1899); Haas v. Ketcham, 87 N. Y. Supp. 411 (1904); Greenwald v. Shustek, 169 N. Y. Supp. 98 (1918); Ewing v. Cattman, 9 Pa. Super. 444 (1899); Cline v. Altose, 290 Pac. 809 (Wash., 1930).

[52] Lehnen v. Hines & Co., 88 Kan. 58, 127 Pac. 612 (1912); Raider v. Dixie Inn, 198 Ky. 152, 248 S. W. 229 (1923); Holden v. Carraher, 195 Mass. 392, 81 N. E. 261 (1907); Dalzell v. Dean Hotel Co., 193 Mo. App. 379, 186 S. W. 41 (1916); Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779 (1887).

[53] Foster v. State, 84 Ala. 451, 4 So. 833 (1887); Davis v. Gray, 141 Mass. 531, 6 N. E. 549 (1886); Dixon v. Robbins, 246 N. Y. 169, 158 N. E. 63 (1927); Alsberg v. Lucerne Hotel Co., 46 Misc. 617, 92 N. Y. Supp. 851 (1905); Crapo v. Rockwell, 48 Misc. 1, 94 N. Y. Supp. 1122 (1905); DeWolf v. Ford, 193 N. Y. 397, 86 N. E. 527 (1908); Hackett v. Bell O. Co., 181 App. Div. 535, 169 N. Y. Supp. 114 (1918).

[54] Porter v. Merrill, 124 Mass. 534 (1878); Cromwell v. Stephens, 2 Daly 15 (N. Y. 1867); Shearman v. Iroquois Hotel Co., 42 Misc. 217, 85 N. Y. Supp. 365 (1903); Alsberg v. Lucerne Hotel Co., 46 Misc. 617, 92 N. Y. Supp. 851 (1905).

case of *Stewart v. Lawson*[55] the action was to recover the rent of a flat from the tenant who had removed therefrom before the expiration of his term. The defendant claimed that the conduct and language of some of the other tenants were so offensive that he could not remain. It was held that there was no eviction which would bar a recovery of the rent, there being no evidence that the plaintiff encouraged the disturbance; at most she suffered it to continue. Under the covenant for quiet enjoyment the lessor incurred no liability for disturbance through the wrongful conduct of third persons. There was a clause in the lease requiring the family and visitors of the lessee to conduct themselves peaceably and not become a nuisance to other tenants and it was urged that the lessor might have ejected the objectionable parties as their leases contained the same clause, but the court held that the presence of this clause did not alter the rule. In *Sefton v. Juilliard*[56] the trial court held that there was sufficient proof to show that the apartment leased and occupied by the defendant was rendered untenantable by reason of constant piano playing by another tenant occupying the apartment directly underneath that of defendant. The rules at the end of the lease provided against conduct annoying or disturbing to occupants of the building and forbade practicing on musical instruments. In reversing judgment for defendant the New York Supreme Court said that the lease merely gave the landlord an option to terminate the lease for a violation of the rules regulating the use of the premises, but that was not a covenant that such option would be exercised whenever a violation occurred. The landlord was not bound to expel one tenant for the benefit of another. So it has been said in Illinois: "These rules are simply restrictions by the lessor. . . . If the lessee desired an express stipulation or covenant on the part of the landlord touching the conduct of other tenants it should have been incorporated in the lease."[57] A contrary view was taken in a Texas case where the lease of an apartment contained a rule prohibiting the keeping of animals in the

[55] 199 Mich. 497, 165 N. W. 716 (1917), L. R. A. 1918D 394 and note.
[56] 46 Misc. 68, 91 N. Y. Supp. 348 (1904).
[57] A. H. Woods Theatre v. North American Union, 246 Ill. App. 521 (1927); Eley v. L. & L. Mfg. Co., 30 Ga. App. 595, 118 S. E. 583 (1923).

building. There the lessor's failure to require a co-tenant to remove a dog from the building after notice, was held to entitle the lessee to move before the expiration of his lease and claim an eviction.[58] Naturally a much stronger case for the tenant arises when the landlord expressly agrees in the lease to make and enforce reasonable rules for the welfare of the tenants and conduct the building in a first class manner, and among the rules is one that no tenant shall disturb or annoy other tenants by unseemly or untimely noises. Having assumed this obligation it is the landlord's duty to secure to the lessee the quiet enjoyment to which he is entitled by enforcing the rules and a failure to act on a well grounded complaint works an eviction.[59]

There may be no provision in the lease as to the use of the premises. Such a case was recently considered in Wisconsin on an appeal from an order denying an injunction to restrain the owners of a two-family apartment house from using any portion of the premises for any other purpose than as a private residence.[60] The plaintiff was the lessee of the lower floor apartment for a term of years and occupied the premises with his family. Before the lease expired the defendants made a contract to sell the property to a college fraternity which moved its furniture into the upper apartment. It was alleged that the use of the premises as a club house by exuberant and irresponsible young men given to boisterous habits and "addicted to the use of vibrant and sonorous musical instruments" would deprive the plaintiff of the beneficial enjoyment of his lease. There was no provision in the lease that the building should be used for residence purposes only but it was urged that such a covenant would be implied from the fact that the building was constructed for residential purposes. The Supreme Court, however, found that in *Hudson v. Cripps,*[61] and other English cases cited, all the leases provided that the premises should not be used except as dwellings, and

[58] Maple Terrace Apartment Co. v. Simpson, 22 S. W. (2d) 698 (Texas Civ. App. 1929); Keenan v. Flanigan, 157 La. 750, 103 So. 30 (1925).

[59] Herbert Realty Co. v. Petschett, 8 Pa. D. & C. 418 (1926).

[60] Hannan v. Harper, 189 Wis. 588, 208 N. W. 255 (1926). Followed and approved, Bruckner v. Helfaer, 197 Wis. 582, 222 N. W. 790 (1929).

[61] *Supra* note 34.

that there was no authority for the proposition that such a covenant could be implied from the purpose to which alone the premises had been previously applied. Nevertheless the order of the court below was reversed and the cause remanded with instructions to grant a temporary injunction. If, said the court, the occupancy of the upper flat by the college fraternity as a club and headquarters rendered the lower flat unsuitable for residential purposes the result would amount to a breach of the covenant for quiet enjoyment. It was unnecessary, as the lower court thought, to hold that college students as a class were not law abiding for it was enough if the purposes, objects and activities of the fraternity were incompatible with the recognized incidents of home life such as privacy, quiet and repose. Activities conforming in every respect to proper conduct when confined to fraternity headquarters give rise to noises and disturbances incompatible with family life in such close proximity to a club. It will be noted that in this case no actual disturbance of the lessee was alleged or proved, and, ordinarily, injunctions are not granted merely to allay the fears and apprehensions of the parties; it should be made to appear that real and substantial injury to rights of property are imminent and probable.[62] The conclusion reached is put, naïvely, on "the intuitive judgment of every member of a household of ordinary susceptibilities."

Where part of the premises are used by their occupants for unlawful purposes which constitute a nuisance, the cases are not in agreement as to how far the tenant must trace a connection of the landlord with such proceedings in order to justify an abandonment of the lease. If the lewd conduct that makes living conditions intolerable for a respectable family is that of the landlord himself there is, as was decided in *Dyett v. Pendleton,*[63] a constructive eviction. But when the unlawful conduct is that of co-tenants there are decisions conflicting in result although professing ad-

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[62] *In re* Penn Development Co., 220 Fed. 222 (S. D. Cal. 1915), and the many cases cited in 32 C. J. 43.

[63] *Supra* note 21; Allot v. Bowers, 168 Ill. App. 573 (1912); *Cf.* Meeks v. Bowerman, 1 Daly 109 (N. Y. 1861) where the premises had formerly been occupied for immoral purposes. Molineux v. Hurlburt, 79 Conn. 243, 64 Atl. 350 (1906), evidence not sufficiently explicit.

herence to the same general principles. In one group it is held that the injured lessee must show that the landlord created the nuisance by knowingly making a lease for immoral purposes or, knowing of the disorderly conduct, tolerated it under circumstances that would clearly justify an inference of connivance or consent to such use.[64] But another group holds that where tenants of other apartments are guilty of prostitution or lewd and disorderly conduct and the landlord having knowledge of the facts takes no steps to restore order and remove the tenants guilty of the conduct complained of, his failure to act is a constructive eviction and justifies the injured lessee in vacating the premises and refusing to pay the remainder of the rent.[65] No doubt the strict accountability to which lessors are held in such cases is due partly to the obnoxious character of the nuisance and the ease with which the landlord in many jurisdictions may rid himself, by summary statutory proceedings, of proved violators of the law.

It is quite another matter, in the absence of an express covenant in the lease, to attempt to impose upon the landlord responsibility for the suppression of the many forms of petty annoyance more or less inevitable under urban living conditions. Short of the millenium there will always be detestable neighbors and the landlord cannot be expected to guarantee congenial companionship in the tenement or apartment house. For acts done in the halls and other parts of the building under his control he is responsible,[66] but in the absence of a clause in the lease he has no general power to regulate the private affairs of his tenants who are responsible for their own acts should they amount to a nuisance to others. The principle has been applied in various instances

[64] Paterson v. Bridges, 16 Ala. App. 54, 75 So. 260 (1917); Congle v. Densmore, 57 Ill. App. 591 (1894); DeWitt v. Pierson, 112 Mass. 8 (1873); Katz v. Duffy, 261 Mass. 149, 158 N. E. 264 (1927); Gilhooley v. Washington, 4 N. Y. 217 (1850); Townsend v. Gilsey, 1 Sweeney 155 (N. Y. 1869); Wolf v. Epstein, 71 Ore. 1, 140 Pac. 751 (1914).

[65] Milheim v. Baxter, 46 Colo. 155, 103 Pac. 376 (1909); Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748 (1894); Hartenbauer v. Brumbaugh, 220 Ill. App. 326 (1920); Lancashire v. Garford Mfg. Co., 199 Mo. App. 418, 203 S. W. 668 (1918); Weiler v. Pancoast, 71 N. J. L. 414, 58 Atl. 1084 (1904); Cushman v. Thompson, 58 Misc. 539, 109 N. Y. Supp. 757 (1908); Phyfe v. Dale, 72 Misc. 383, 130 N. Y. Supp. 231 (1911).

[66] Stewart v. Forst, 15 Misc. 621, 37 N. Y. Supp. 215 (1896); Phyfe v. Dale, *supra* note 65.

such as the noisy playing of children;[67] a barking dog;[68] singing lessons;[69] and other disturbances not of a grave and permanent nature.[70] The lessee has in any case his remedy directly against the author of the nuisance. So also, for acts of his landlord not amounting to a constructive eviction but interfering with the comfortable enjoyment of the premises he may sue at law or bring a bill for equitable relief.[71]

A reading of the cases shows that it is far from easy to adjust the conflicting interests of those unfortunate creatures whose desire to live in the heart of a metropolis, whose craving for sanitary comforts, or whose plain economic necessity compels them to herd in the expensive cells of the apartment house or the flimsy compartments of the reconstructed flat. The manner in which so many thousands live peaceably side by side within these narrow limits speaks volumes for the good nature and pacific disposition of the average man and woman. But there are always rude and selfish persons who impose upon their milder neighbors and, again, there are nervous and sensitive souls incapable of adjusting their irritable organisms to the common life of the community. The trend of modern law is against the view that an owner can collect the rent in complete Olympian aloofness from the conditions of living on the premises demised; whatever logical objection there may be to the term "constructive" as applied to eviction the doctrine has accomplished this practical result. Although the cases do not all go so far, there is sufficient warrant to say that the landlord will be ill advised if he knowingly permits a serious nuisance to exist on the premises, substantially interfering with the beneficial enjoyment, expecting at the same time to hold the tenant to his part of the contract. Where noise and disorder are the grounds for complaint, the tenant has

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[67] Seaboard Realty Co. v. Fuller, 33 Misc. 109, 67 N. Y. Supp. 146 (1900).

[68] McKinney v. Browning, 126 App. Div. 370, 110 N. Y. Supp. 562 (1908).

[69] Chisolm v. Kilbreth, 88 N. Y. Supp. 364 (1904). But see Sefton v. Juilliard, *supra* note 56.

[70] Tagney v. Taylor, 204 Ill. App. 440 (1917); Keenan v. Legardeur, 5 La. App. 266 (1926); O'Neil v. Pearse, 87 N. J. L. 382, 94 Atl. 312 (1915); Ellis v. McDermott, 147 Atl. 236 (N. J. L. 1929).

[71] Rowbotham v. Pearce, 5 Houst. 135 (Del. 1876); Winchester v. O'Brien, 266 Mass. 33, 164 N. E. 807 (1929).

usually been successful where he has shown that the lessor actively participated in, or has been clearly remiss in the suppression of conduct on the premises contrary to good morals and public order. Further than that courts proceed with great caution. The landlord is not obliged to act as social censor for his little community; to put one tenant out to please another. He may and in fact usually does adopt a social code for his building in the form of rules and regulations made a part of the contract and obligatory upon each tenant under penalty of cancellation of the lease. It is sound policy to do so. But, as leases are commonly drawn, the rules and regulations are enforceable at the option of the lessor only, and not by the tenants who can complain of an infraction of the rules and the lessor will then have to decide whether the matter should be ignored or is serious enough to require extreme measures to preserve the character and reputation of the building in the class to which it belongs, or perhaps, merely aspires.

Of course leases can be drawn making it obligatory on the owner to enforce the rules and giving the tenant the option to terminate the lease on failure of the lessor to perform this part of his contract. They are occasionally so drawn and, as competition for the better class of tenants increases, such covenants may be introduced with greater frequency by enterprising real estate agents as convincing evidence of the high standards of conduct maintained on the property in their charge. If so the rules will have to be drawn with great skill to maintain reasonable standards without inviting the meddlesome domination of the crank. But conveyancers are notoriously timid and he would be a bold stationer that dared introduce such a clause in a common form. When the public becomes more conversant with the hygienic importance attached by modern medicine to rest and quiet, stronger ground may be expected to be taken in enforcing the refinements and amenities of civilized living upon those whose boisterous spirits and crude manners have hitherto been indulgently regarded as symbols of the national vitality. Nevertheless our mechanical contrivances continue to develop on the side of noisy disturbance. The most trying form of nuisance to the present day apartment house dweller is the discordant and incessant din of many radios.

But such is the power of these raucous instruments in dispensing unsolicited information and mediocre music that laws or ordinances will ultimately be required for the regulation of their use. The many and varied forms taken today by rented buildings subdivided into dwellings and offices and the wide difference in the social habits of their inmates makes it unwise to be too specific in laying down rules of law for their control. What will be reasonable and fair in one instance will be harsh and impractical under other circumstances. But the management of rented property is today a vast business that cannot be conducted on feudal principles, and this the parties themselves in their mutual relations usually take into account, establishing conventions for which the law will in the course of time supply plausible theories.