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Landlord and Tenant--Leases--Lease Executed in Violation of District of Columbia Housing Regulations Is an Illegal Contract--*Brown v. Southall Realty Co.*

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RECENT DEVELOPMENTS

LANDLORD AND TENANT—LEASES—Lease Executed in Violation of District of Columbia Housing Regulations Is an Illegal Contract—*Brown v. Southall Realty Co.**

Plaintiff-landlord brought an action for possession based on nonpayment of rent in the Landlord-Tenant Branch of the District of Columbia Court of General Sessions. Although the parties stipulated at trial that the rent was 230 dollars in arrears, defendant-tenant contended that the plaintiff was not entitled to possession because the lease was an illegal contract under the District of Columbia Housing Regulations. The trial court rejected this contention and gave judgment for plaintiff. By the time her appeal to the District of Columbia Court of Appeals was heard, the tenant had vacated the premises and no longer desired to contest the landlord's right to possession. In response to the landlord's claim that the tenant's abandonment had rendered the case moot, the tenant argued that her appeal should still be heard because if the judgment below were left standing, it would be res judicata on the issue of the validity of the lease in a subsequent action by the landlord for rent. The District of Columbia Court of Appeals agreed to hear the appeal and reversed: a lease executed in violation of the District of Columbia Housing Regulations is void as an illegal contract.[1]

In reaching its decision the court relied on two sections of the District of Columbia Housing Regulations:[2] one section proscribes the renting or offering for rent of housing units the condition of which is unsafe or unsanitary,[3] and the other requires that rented

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* 237 A.2d 834 (D.C. Ct. App. 1968) [hereinafter principal case].

1. The landlord's motion for rehearing was granted, and on rehearing the court adhered to its original decision. D.C. Ct. of Appeals, No. 4199, April 17, 1968. As of this writing the landlord has petitioned the U.S. Court of Appeals for the D.C. Circuit for leave to appeal to that court. Letter from Florence Wagman Roisman, attorney for defendant-appellant, May 3, 1968.

2. *See* Whetzel v. Jess Fisher Management Co., 282 F.2d 934, 948 (D.C. Cir. 1960): The Housing Regulations were established and authorized by an order of the Commissioners of the District, dated August 11, 1955. They are arranged in eight chapters. Chapter 1 contains uniform definitions. Chapter 2 is the "Housing Code of the District of Columbia." . . . The following chapters of the Housing Regulations concern the licensing of premises in which a "housing business" is conducted. . . . Chapter 3 contains general licensing regulations. It specifically incorporates Chapters 1 and 2, which are also incorporated into the following chapters prescribing additional licensing requirements for rooming and boarding houses (Chapter 4); tenements (Chapter 5); apartment houses (Chapter 6); hotels (Chapter 7); and convalescent or nursing homes (Chapter 8).

3. "No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin." WASHINGTON, D.C., HOUSING REGS. § 2304 (1955).

In the context of a tort action brought by a tenant against his landlord for injuries

premises be maintained in good repair so as to provide "decent" living conditions.[4] The trial record contained evidence that code violations sufficiently serious to render the rented premises unsafe and unsanitary existed,[5] to the knowledge of the landlord, at the time the lease was executed and that these violations had not been remedied by the time of the trial. On the strength of this evidence, the court concluded that the lease had been entered into in violation of the two relevant provisions of the Housing Regulations[6] and consequently that it was void.

In support of its holding, the court cited the decision of the Court of Appeals for the District of Columbia Circuit in *Hartman v. Lubar*[7] as establishing the general rule that "an illegal contract, made in violation of the statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer."[8] While the court in the principal case recognized that this general rule is subject to an exception when a construction of the legislation involved indicates that legislative intent would not be furthered by declaring void the product of a prohibited act,[9] it

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caused by the collapse of a ceiling, the U.S. Court of Appeals construed this section as imposing "[a]t the very least . . . an obligation upon the landlord to put the premises in safe condition prior to their rental." Whetzel v. Jess Fisher Mgt. Co., 282 F.2d 943, 949 (D.C. Cir. 1960).

4. *See* WASHINGTON, D.C., HOUSING REGS. § 2501:

> Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.

5. The specific violations were an obstructed toilet, a broken second-floor railing, and an insufficient ceiling height in the basement of the house. The ceiling height, according to the testimony of an inspector for the Housing Division of the Department of Licenses and Inspections, precluded the use of the basement for dwelling purposes under the Housing Regulations. Principal case at 836. The tenant testified, and the landlord admitted on cross-examination, that during the tenant's inspection of the house the landlord had shown her how to reconnect a disconnected stove located in the basement and that one room in the basement had contained bedroom furniture. The landlord further admitted having told the tenant that the basement could be used for dwelling purposes after the housing inspector had advised her to the contrary. Brief for Appellant at 2.

6. Principal case at 836, citing the provisions quoted at notes 3 and 4 *supra*.

7. 133 F.2d 44 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 767 (1943). That decision refused enforcement of a loan contract executed in violation of the District of Columbia Loan Shark Law, D.C. CODE § 26-601 (1957).

8. 133 F.2d at 45. As authority for this proposition, the *Hartman* opinion cited Ewert v. Bluejacket, 259 U.S. 129 (1922), which voided a deed of Indian land to an attorney employed by the U.S. Attorney General to handle certain Indian affairs, such employees being subject to a statute prohibiting them from trading with the Indians except on behalf of the United States. *See also* RESTATEMENT OF CONTRACTS §§ 580, 598 (1932); 6 F. WILLISTON, CONTRACTS §§ 1763, 1764, 1787 (rev. ed. 1932); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 537-38 (1966).

9. Lloyd v. Johnson, 45 App. D.C. 322, 327 (1916). *See also* Waskey v. Hammer, 223 U.S. 85, 94 (1912) [cited in Ewart v. Bluejacket, 259 U.S. 129, 138 (1922)]; RESTATEMENT OF CONTRACTS §§ 599, 601; F. WILLISTON, *supra* note 8, § 1764.

found that the public policy considerations recited in the District of Columbia Housing Regulations[10] could be served only by a holding that a lease executed in violation of the Regulations was unenforceable. Significantly, the court bypassed an issue that has been a perennial obstacle to the development of tenants' remedies at common law: the traditional proposition that a lease, although containing contractual elements, is primarily a conveyance of an estate.[11] The only reference to this problem is the last sentence of the court's opinion which asserts that there is no reason to "treat a lease agreement differently from any other contract in this regard."[12]

In sidestepping the conveyance doctrine, the court was echoing a position taken by the District of Columbia Court of General Sessions a few months earlier in the case of *Adams v. Lancaster*.[13] That case was a suit by a tenant to recover eighty dollars paid to the landlord at the time of entering into an oral lease. Also invoking the rule of *Hartman v. Lubar*, the *Adams* court granted recovery to the tenant on the ground that the lease was void because of violations of the Housing Regulations.[14] The court also went on to deny the landlord's claim for an offset to cover the expenses of preparing the apartment for the tenant's occupancy.

The theory of these two cases, while somewhat limited in its potential application,[15] can be viewed as an encouraging develop-

10. WASHINGTON, D.C., HOUSING REGS. § 2101 (1955), entitled "Purpose of Regulations," contains a lengthy statement of findings by the District's Commissioners to the effect that slums and potential slums exist in the District and that such "unfortunate conditions" are due to a number of "insanitary [sic] or unsafe" housing conditions. The section concludes with the statement, "The Commissioners, accordingly, promulgate these regulations for the purpose of preserving and promoting the public health, safety, welfare, and morals."

11. *See* 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952) ("The lease is primarily a conveyance, executed as to the lessor at the time the lease is made, to which the covenants are merely incidental.").

12. Principal case at 837, citing Jess Fisher & Co. v. Hicks, 86 A.2d 177 (D.C. Mun. App. 1952), an action for possession based on nonpayment of rent under a lease that had been executed on the mistaken assumption that the premises were exempt from the District of Columbia Rent Act by virtue of a 1950 amendment, the lease providing for a rental amount higher than the ceiling under rent control. The court found that "[a]ny lease entered into under the mistaken assumption that decontrol had taken place is, therefore, ineffective." 86 A.2d at 178.

13. Small Claims No. C-12912-67 (D.C. Ct. Gen. Sess. Oct. 30, 1967). The opinion is reprinted in full in 2 LAW IN ACTION 14 (1967). The tenants in both *Adams* and *Brown* were represented by attorneys on the staff of the Neighborhood Legal Services Project of the United Planning Organization, a Washington antipoverty agency.

14. Another ground of illegality in *Adams* was the fact that the apartment's Certificate of Occupancy prohibited occupancy by a family as large as the tenant's. Although both grounds are cited by the court, there is no indication in the opinion that the result would have been different had the code violations been the only element of illegality in the case. The opinion, for example, contains the statement: "No persuasive reasons suggest themselves to the court as to why any distinction should be made between contracts entered into in violation of the Housing Regulations as opposed to contracts rendered illegal for any other numerous reasons."

15. *See* text accompanying notes 22-36 *infra*. *See generally* Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920 (1968).

ment to the extent that it reflects a shift away from the reluctance of the courts to draw upon contract principles to provide relief to residential tenants suffering injury attributable to their inherently unequal bargaining position. The traditional characterization of a lease as a conveyance rather than a contract[16] has led the courts to conclude that the covenants in leases are independent and thus that a substantial breach of a material covenant by a landlord does not excuse a tenant from performance of his covenant to pay rent.[17] While commercial tenants have had some success in winning judicial application of contract principles to their leases,[18] the residential tenant has for the most part been left to whatever statutory defenses or causes of action his state's legislature has been persuaded to enact.[19]

16. *See* note 11 *supra* and accompanying text.

17. 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952); 3A A. CORBIN, CONTRACTS § 686, at 238 (1960); 6 F. WILLISTON, CONTRACTS § 890, at 585 (3d ed. 1962); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 312-13 (1965); Schoshinski, *supra* note 8, at 534-35; Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 (1966). Application of the principal of dependency of covenants might be of little assistance to a tenant unless principles of unconscionability or contracts of adhesion were also employed, for, as Professor Levi points out, a typical form lease has been "characterized by lawyers as one which grants to the tenant the right to pay rent and precious little else." *Id.* at 275. Under the standard lease form used in Chicago, for example, "[t]he landlord disclaims any intention to alter, repair, or decorate the premises; does not obligate himself as to common passageways and stairways; and requires the tenant to waive any tort claims that may arise from the landlord's negligence." *Id.* at 275 n.2. One of the arguments advanced by the tenant in the principal case, which the court did not have to rule on, was that rule 4(c) of the Rules of the Landlord and Tenant Branch of the District of Columbia Court of General Sessions, which permits a tenant to set up an equitable defense by way of setoff in an action for possession based on nonpayment of rent, had the effect of creating dependency of covenants. Brief for Appellant at 27. The same argument is advanced by Schoshinski, *supra* note 8, at 536. Another stumbling block to the development of tenants' remedies at common law has been the traditional holding that there is no implied warranty in a lease that the premises leased are habitable. AMERICAN LAW OF PROPERTY, *supra*, § 3.45; Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1285-86 (1960); Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 675-78 (1966). *But see* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), rejecting the common-law rule and finding a warranty of habitability in a lease of a furnished house (to a number of Wisconsin students) based on legislative policy contained in a number of statutes. Schoshinski, *supra* note 8, at 523-27, argues for a comparable theory based on expressions of public policy in the District of Columbia Housing Regulations.

18. Schier, *supra* note 17, at 679. This contrast between the development of the law of commercial, as opposed to residential leases, while it may be attributable in part to the greater complexity of the former, is undoubtedly equally a reflection of the paucity of appellate-level litigation on behalf of residential tenants prior to the activity of neighborhood legal services projects under the antipoverty program.

19. *E.g.*, N.Y. REAL PROP. ACTIONS § 755 (McKinney 1963 and Supp. 1967) (The court can order rent paid into court if violations of record that are tantamount to a constructive eviction have been found by a "code enforcement agency" in the tenant's apartment or building; accrued rent is paid over to landlord after violations are dismissed); N.Y. REAL PROP. ACTIONS art. 7-A (McKinney Supp. 1967) (if conditions are dangerous to life, health, or safety, an affirmative action can be brought by at least one third of a building's tenants for which the remedy is the appointment of an administrator to collect rents and make repairs); N.Y. SOCIAL WELFARE LAW § 143-b (McKinney 1966) (the "Spiegel Act," abating rent paid by the Welfare Department if the conditions in an apartment are dangerous to life, health, or safety); CONN. GEN.

Assuming that these two cases do reflect a new trend in judicial thinking about the residential landlord-tenant relationship, it is necessary to isolate the factors that must exist in a given case in order to invoke the illegal contract theory. It is clear that the conditions complained of must constitute a violation of some provision of the local housing code,[20] but at the same time, given the language of the relevant provisions of the District of Columbia Housing Regulations,[21] a relatively trivial code violation that does not create an unsafe or unsanitary condition would probably not be sufficient to void the lease. Because of the generally dilapidated condition of most slum housing, this limitation should rarely create problems for a rent-withholding slumdweller. Moreover, it has the advantage of insulating the theory from attack on the ground that it could be misused by a tenant to escape liability for rent because of a technical code violation of an insubstantial nature. At this point, a caveat must be offered. On rehearing, the District of Columbia Court of Appeals stated: "In our former decision we did not rule, and we do not now rule, upon . . . any obligation of the tenant to pay for the reasonable value of the use of the property during his occupancy."[22] Thus, it would be possible for a landlord who was properly counseled to recover part of the rent withheld by the tenants. However, the issue of "reasonable value" of the use of the property during the tenant's occupancy is difficult to resolve in the context of a slum housing market. If a court looked to "market value" of the premises, it might get a distorted picture of reasonable value because of market-disrupting influences such as racial discrimination. It would still be possible for a tenant to argue that, if housing code violations serious enough to render the premises "unsafe or unsanitary" existed, the premises had little or no value in housing market where prospective tenants could exercise an unfettered choice of housing accommodations.[23]

A more difficult limitation—required at least for the application

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STAT. REV. § 79-371 (1960) (rent not recoverable by landlord if he has not obtained a certificate of compliance with the housing code); MASS. GEN. LAWS ANN. ch. 238, § 8A (Cum. Supp. 1966) (rent not recoverable by landlord if violations of record endangering health or safety exist; court may order rent paid into court).

20. Principal case at 836.

21. *See* notes 3 and 4 *supra* and accompanying text.

22. Brown v. Southall Realty Co., No. 4199 (D.C. Ct. App. April 17, 1968) (order on rehearing).

23. If the judiciary chose to utilize the market-value concept in this manner, it would presumably have significant effect upon landlords renting substandard housing. There is even authority for denying such a landlord any recovery:

> One who has given illegal consideration . . . cannot recover reasonable compensation for what he has done. In other words, it is entirely immaterial that the defendant in fact has been benefited if the bargain is of a seriously illegal nature or is prohibited by statutes.

6 F. WILLISTON, CONTRACTS § 1787 (rev. ed. 1938). *See also* Schoshinski, *supra* note 8, at 537; RESTATEMENT OF CONTRACTS § 598 (1932).

of the theory evolved from the specific facts of *Brown*—is the requirement of a local housing code provision prohibiting the leasing of premises unless certain minimal conditions of habitability are met.[24] It should be noted that the court in *Brown* did not rest its finding of illegality on the existence of conditions violating the housing code per se but rather on the conjunction of those violations with the Housing Regulations' prohibition of the act of renting premises that are not in decent condition.[25] Arguably, the embodiment of minimum standards of habitability in a housing code implies a prohibition against renting premises that do not fulfill those standards, but such a theory is based on a logical jump that the court in *Brown* was not required to make. However, the court may have made that logical jump in its order on rehearing. Significantly, on rehearing the court omitted any reference to the two provisions of the Housing Regulations mentioned above; rather, it stated that a lease is void if executed when housing code violations exist which render the property unsafe or unsanitary.[26]

Another problem raised by *Adams* and *Brown* is the question of whether finding the lease void requires that the landlord know of the existence of the offending conditions at the time of execution of the lease.[27] In *Brown*, the court's summary of the evidence and of the tenant's position[28] both refer in passing to the landlord's knowl-

24. The existence of a housing code should present no problem. The Housing and Home Finance Agency estimated in 1963 that since passage of the 1954 Housing Act, 42 U.S.C. §1451(c), which requires cities applying for federal urban renewal funds to have a code-enforcement plan as part of their "workable program," more than 650 cities had adopted housing codes. HHFA, New Release HHFA-OA-No. 63-325, Dec. 30, 1963. "The Department of Housing and Urban Development, in an unofficial survey, estimated that there were approximately 1,080 housing codes in existence as of September 30, 1965." Statement of Hon. Clifford Case, *Hearings on S. 2331, S. 3549, and S. 3558 Before the Subcomm. on Business and Commerce of the Senate Comm. on the District of Columbia*, 89th Cong., 2d Sess., at 38 n.3 (1966). Chicago's housing code contains a provision comparable to § 2304 of the Washington Code at the beginning of each chapter, the prohibition being worded in terms of compliance with the requirements of the chapter. CHICAGO, ILL., MUN. CODE §§ 78-13, 78-14, 78-15, 78-16 (1963). The N.Y. ST. MODEL HOUSING CODE (Division of Housing and Community Renewal 1960), on the other hand, has no provision resembling § 2304. (The code is presented as "a guide to New York municipalities in meeting the housing regulation requirements under the Federal and State urban renewal programs." *Id.* at 1.)

25. *See* note 3, *supra*, quoting § 2304 of the Housing Regulations. The court also cited § 2501, set out in note 4, *supra*, a citation that appears to be essentially a makeweight. Inasmuch as the critical point in time for a finding that the lease is an illegal contract is the date of execution, premises that were in compliance with the code at the time of execution but which deteriorated thereafter (thus violation § 2501 but not § 2304) might not qualify for invocation of the theory.

26. Opinion No. 4199 (D.C. Ct. App. April 17, 1968).

27. The separate question of knowledge that the conditions constituted code violations poses no problem in view of the ancient maxim that ignorance of the law is no excuse. That maxim was invoked in *Adams*, for example, in connection with the court's rejection of the landlord's claim for offset for expenses involved in preparing the apartment for occupancy.

28. Principal case at 836.

edge of the violations at the time of execution. The original statement of the holding in *Brown* was silent on the matter;[29] however, on rehearing the court stated that its holding applied when a landlord leased "knowing" that significant code violations existed.[30] On the other hand, it is possible to argue that such a knowledge requirement is illogical in view of the well-established doctrine that a property owner is criminally liable for housing code violations even absent either criminal intent or knowledge of the existence of the violations.[31] In addition, in a jurisdiction which has a statutory provision prohibiting renting or offering for rent housing which is unsafe or unsanitary,[32] a decision imposing a knowledge requirement arguably contravenes the legislative intent in enacting a seemingly clear and unambiguous provision.

Even if all of the requisite elements of the illegal-contract theory are present, there is an additional practical limitation on its applicability. Possession under an illegal lease is generally regarded as being in the nature of a common-law tenancy at sufferance; thus, it is terminable at the pleasure of the landlord.[33] In other words, had Mrs. Brown still been in possession of the premises at the time the court voided the lease as an illegal contract, her landlord undoubtedly would have served her with notice that he intended to terminate her tenancy.[34] If she refused to vacate the premises at the expiration of the statutory notice period,[35] her landlord could have brought a successful action for possession based not on nonpayment of rent

29. *See* principal case at 837:

> The more reasonable view is, therefore, that where such conditions exist on a leasehold prior to an agreement to lease, the letting of such premises constitutes a violation of Sections 2304 and 2501 of the Housing Regulations, and that these Sections do indeed "imply a prohibition" so as "to render the prohibited act void."

The opinion in *Adams* gives no clue as to whether the landlord there was aware of the existence of violations of the Housing Regulations; it is difficult, however, to draw any firm conclusions from this omission in view of the greater authority of *Brown* and also in view of the extreme brevity of the *Adams* decision.

30. No. 4199 (D.C. Ct. App. April 17, 1968) (order on rehearing).

31. *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1279 (1966), and authorities cited therein.

32. WASHINGTON, D.C., HOUSING REGULATIONS § 2304, quoted in note 3 *supra*.

33. *See* Schoshinski, *supra* note 8, at 538.

34. Mrs. Brown's counsel argued that her landlord had been obligated to terminate the tenancy unless he chose to make the necessary repairs:

> [T]he only lawful means by which appellee [landlord] could continue to rent out the premises involved would be to either make the repairs necessitated by the duties imposed upon him by the Housing Regulations as a landlord, or to terminate the tenancy by an appropriate thirty-day notice to quit. However, when it is the duty of the landlord to correct the violations on the premises, it is illegal for appellee to continue the tenancy, and to fail to exercise either of these options. Since appellee did neither, the continuation of the tenancy, under a lease, runs afoul of the rule voiding contracts made in violation of a statutory prohibition designed for regulatory purposes.

Brief for Appellant at 15.

35. Thirty days written notice is required in the District of Columbia for termination of a tenancy at sufferance. *See* Schoshinski, *supra* note 8, at 541-42.

but on the expiration of the tenancy at sufferance and her consequent status as a holdover.[36]

Despite the obvious problems presented by extending the illegal-contract theory to its logical conclusion of a tenancy at sufferance, there are three situations in which the theory can be usefully applied. The simplest application is illustrated by the *Adams* and *Brown* cases, where a tenant (1) decides—either before moving in[37] or afterwards[38]—that he no longer desires the particular housing and (2) is able to find more satisfactory living quarters. Under the illegal-contract theory, such a tenant would be free, in effect, to "break" his lease and could either escape liability for rent[39] or, by an affirmative action, recover whatever rent he has already paid.[40]

The second possible application of the theory, which might be called the consecutive application, is directed toward a landlord who evicts a rent-withholding tenant as a tenant at sufferance and rents the premises again without correcting the code violations. Such a landlord expects that the subsequent tenant will be ignorant of the availability of the illegal-contract theory. The landlord's purpose can be frustrated, and his incentive to evict and relet the premises removed, if successor tenants can be informed of their right to withhold at least some of the rent under *Brown* and *Adams*. A series of such uncooperative tenants should communicate to the landlord that he may never collect significant amounts of rent unless and until he makes the repairs necessary to bring the premises up to code standards.[41]

The third possible application, which might be called the collective application, requires both an aggressive organizing force—such as a neighborhood legal services project—and an apartment building in which all or most of the apartments are in sufficiently bad condition in and of themselves to qualify for the defense or are

36. Although the court's original opinion was somewhat unclear in that it gave the impression that the tenant might be allowed to remain in possession after the lease was held unenforceable, the order or rehearing stated that "[i]n our former decision we did not rule, and we do not now rule, upon any right of the tenant under such a [void] lease to remain in the property . . . ." Opinion No. 4199 (D.C. Ct. App. April 17, 1968).

37. *E.g.*, Adams v. Lancaster, Small Claims No. C-12912-67 (D.C. Ct. Gen. Sess. Oct. 30, 1967).

38. *E.g.*, principal case.

39. *E.g.*, principal case.

40. *See* note 13 *supra* and accompanying text.

41. The possibilities for success of such a tactic will be improved by the existence of a neighborhood legal services project such as the District of Columbia project that represented the tenants in *Adams* and the principal case. Such an organization is in a position to know of the theory and to communicate it to successive tenants; the fact that a series of tenants living in the same apartment are represented in court by the same organization may also serve to communicate most efficiently to the landlord the fact that ultimately he is playing a losing game. There may, however, be lay community groups in a given neighborhood that will be in a position to perform the communications function.

significantly affected by unsafe or unsanitary conditions in common areas such as halls and stairways.[42] This application of the theory contemplates organization of the tenants and collective rent-withholding, followed by negotiations with the landlord by the organization or its attorney. In negotiations the tenants could offer the landlord two alternatives: (1) suing all the tenants and facing invocation of the *Brown* defense and consequent loss of a substantial amount of rent; or (2) promising to make repairs in exchange for payment by the tenants of the rent then due. If the latter alternative is chosen, payment should be accompanied by a warning that payment in the following month would be contingent on repairs having been initiated in good faith by that time.[43] The chances for success of such a tactic would depend both on the nature of the building and the financial position of the landlord. The collective application is best suited for a building in which the amount of rent legally withheld under *Brown* is enough to constitute a potent bargaining weapon and one in which conditions are not so dilapidated that the prospective cost of repairs would lead to the landlord's abandonment. The landlord would ideally be one whose ownership is a profitable undertaking rather than a marginal enterprise[44] and who thus would be unlikely to abandon.

Given the inherent limitations of the illegal-contract theory and the tactical complexities involved in applying it on more than a limited scale, the *Brown* opinion itself can hardly be cheered as a great step forward in the development of tenants' rights.[45] Its ultimate importance will probably lie in its willingness to apply contract principles to a residential lease.[46] In this respect, one can hope

42. Application of the theory to common areas would be an extension of *Adams* and the principal case; however, a forceful argument could be made, for example, that a third-floor apartment is rendered unsafe by a defective stairway below the third floor.

43. This tactic, in somewhat sketchier form, is suggested by Schoshinski, *supra* note 8, at 538. A variant on the tactic would involve the tenants taking the position that payment of rent would be contingent, not on an initial promise to repair, but on at least substantial completion of the repairs. The adoption of one tactic or the other will depend on such considerations as the tenants' estimate of the reliability of the landlord's promise and the possible strategic advantage of a showing of good faith on their part by a relinquishment of the rentals.

44. For a discussion of the character and typical economic position of the slumlord, *see* Sax & Hiestand, *Slumlordism As a Tort*, 65 MICH. L. REV. 869, 892 (1967).

45. The Office of Economic Opportunity, in a press release hailing the decision, engaged in a bit of legal sophistry by characterizing it as meaning "that when housing is in violation of the code the landlord cannot go to the courts to compel the tenant to pay rent or to evict the tenant for nonpayment of rent"—ignoring the landlord's ability to evict the tenant as a holdover. (*See* text accompanying note 36 *supra*.) OEO, News Release 68-17, Feb. 11, 1968. A Washington columnist found the decision to be "a slum-fighter's dream" and in effect a legalization of rent strikes. Raspberry, *Court Decision Arms the District's Slum Fighters*, Washington Post, Feb. 16, 1968, at B1, col. 2.

46. *See* text accompanying notes 11, 15-19 *supra*.

that *Brown* indicates that contract principles will be increasingly applied to permit courts to find that the covenants in residential leases are dependent.[47]

47. For an argument for such application and a discussion of the advantages and remedy that would follow, *see* Schoshinski, *supra* note 8, at 534-37.