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estate. On appeal the Supreme Court of Appeals of Virginia held that the lower court erred in admitting the testator's will to probate as a will of personalty. An analysis similar to that in *Clark* was used by first looking to the traditional conflict of laws rule. Applying this rule, the testator's will was not valid as to personality since it did not satisfy the laws of his domicile. The pertinent portion of the Virginia Code, section 64-55 reads:

> *Notwithstanding* the provisions of §§ 64-51 and 64-52 ... the will of a person domiciled out of this State at the time of his death shall be valid as to personal property in this State, if it be executed according to the law of the State or country in which he was so domiciled.[35]

Because it was not faced with it, the court did not go on to the vital question presented in *Clark*. Had the argument been presented, however, that by focusing on the word *notwithstanding*, section 64-55 could be interpreted as an alternative to section 64-51 of the Virginia Code,[36] a contrary conclusion could have been reached. Section 64-51, Virginia's general statute of wills, makes no differentation between domiciliary and nondomiciliary wills. Under this approach the use of Florida law via section 64-55 could be precluded and the use of Virginia law via section 64-51 would control the determination of the will as to personal property. However, section 65-55 was treated rather summarily as a preemption of section 64-51 and as a reiteration of the traditional conflict of laws rule that wills of personal property are governed by the law of the testator's domicile at date of death.

Presented with this vital question, whether an established conflict of laws rule is changed by statute, *Clark* offers a very capable guide to the type of analysis that could be made and should receive substantial consideration by the attorneys and courts of other states when faced with a similar situation.

WILLIAM E. WINTER, JR.

HOUSING VIOLATIONS VOID LEASE— A NEW TENANT'S REMEDY

Inadequate housing is a major concern of today's cities, a problem often aggravated by the presence of slum housing and perhaps mi-

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[35]VA. CODE ANN § 64-55 (1950) (emphasis added).
[36]VA. CODE ANN. § 64-51 (1950).

nority group housing.[1] Landlords in such areas are in a position not only to demand high rents, but also to avoid making repairs. It is not surprising, therefore, that there has been pressure for governmental action or judicial reform.

The recent ruling in *Brown v. Southall Realty Company*[2] has been called "a slumfighter's dream"[3] and "the most important decision obtained in a housing case since the Office of Economic Opportunity Legal Services Program was started in 1965."[4] *Brown* arose out of a landlord's action for possession of the leasehold because of nonpayment of rent. It was alleged that rent was in arrears in the amount of $230.00, but the tenant contended that because the landlord had been aware of certain violations of the Housing Code Regulations prior to the signing of the lease, the lease should be declared void and unenforceable and that no rent should be due. *Brown* found that the lease had been entered into knowingly in violation of Sections 2304 and 2501 of the District of Columbia Housing Regulations, which require leased premises to be in repair and vermin-free.[5] To uphold the lease in light of defects which the landlord knew to be existing prior to the lease agreement would "flout the evident purposes for which Sections 2304 and 2501 were enacted."[6] The court held that the lease was void because violations of the Housing Code existed prior to the lease agreement and that no rent was due under the lease.[7]

A recent study has suggested that none of the three traditional

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[1]Fossum, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 306 (1965).

[2]237 A.2d 834 (D.C. Ct. App. 1968).

[3]Washington Post, Feb. 16, 1968, at B1, col. 1.

[4]*Id.*

[5]Section 2304 as quoted by *Brown* reads: "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." 237 A.2d at 836. Section 2501 reads, "Every premises accomodating 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." *Id.*

[6]237 A.2d at 836.

[7]The *Brown* court stated: "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.' Neither does there exist any reason to treat a lease agreement differently from any other contract in this regard." 237 A.2d at 837.

sanctions against landlord misconduct—fines, forced vacancy of the building thus depriving the landlord of his rent, and statutory liens against the property for improvements made by city officials—has been successful in solving the problem of the slum or indigent tenant.[8] The principal sanction in the District of Columbia Housing Regulations is a maximum penalty of $300.00 fine or ten days' imprisonment.[9]

The *Brown* court declared that the original lease was void and unenforceable because of its nonadherence to the housing regulations. By so holding, the court has extended a basic contract principle[10] concerning illegal leases to the area of known housing code violations prior to leasing. It has been suggested that courts have begun to look more and more toward well established contract principles in solving difficult landlord-tenant problems,[11] and *Brown* clearly treated the lease agreement as it would any other contract.[12] A well established contract principle is that a contract which violates a provision of a municipal ordinance[13] or of a state or federal statute[14] is illegal and void. Public police regulations have been read to void private leases for unlawfully maintaining a gambling establishment,[15] illegally selling liquors,[16] and maintaining an illegal house of prostitu-

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[8]Fines or small jail sentences are provided for in nearly all housing codes, but these are often treated as a cost of doing business. Requirements that defective buildings be vacated until repaired have often resulted in depriving people of the only homes available as well as causing neighborhoods to decline because of vacated buildings. A third technique, that of allowing the city to make needed repairs and to recover the expense either through rent collection or statutory liens, has been thought to infringe upon the owner's due process protection. 69 HARV. L. REV. 1115, 1123-4 (1956).

[9]WASHINGTON, D.C., HOUSING REGULATION § 2104 (1955). For a statement of this regulation see Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 523 (1966). In 1960 the Circuit Court of Appeals for the District of Columbia indicated in a personal injuries suit that the public policy purpose for which the code was passed (Section 2101) also imposed upon the landlord the duty to maintain the leasehold in a safe condtion and to "put the premises in safe condition prior to their rental." Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 949 (D.C. Cir. 1960).

[10]*See, e.g.*, Ewert v. Bluejacket, 259 U.S. 129 (1922); Hartman v. Lubar, 133 F.2d 44 (D.C. Cir. 1942).

[11]C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 73 (1962).

[12]The *Brown* court concluded: "Neither does there exist any reason to treat a lease agreement differently from any other contract in this regard." 237 A.2d at 837.

[13]*See, e.g.*, Wolk v. Benefit Ass'n, 172 F. Supp. 62 (W.D. Pa. 1959); Keith Furnace Co. v. MacVicar, 225 Iowa 246, 280 N.W. 496 (1938); Baker v. Latse, 60 Utah 39, 206 P. 553 (1922).

[14]*See, e.g.*, Ewert v. Bluejacket, 259 U.S. 129 (1922); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

[15]Zotalis v. Connellos, 138 Minn. 179, 164 N.W. 807 (1917).

[16]Musco v. Torello, 102 Conn. 346, 128 A. 645 (1925).

tion.[17] Section 2301 of the District of Columbia Housing Code prohibits the occupation of any building which violates the housing regulations,[18] and the *Brown* court not only emphasized this illegality, but also relied on an earlier decision that "an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer."[19] This is true even where the other party entered into the contract knowing it to violate the statute.[20] In addition, it has been held that a party to an illegal contract cannot ratify it,[21] and mere occupancy of premises will not amount to a ratification of a void lease, absent some new promise by the lessee.[22]

It should be noted, however, that private contracts which violate public police regulations need not always be made void. Although one state court has held that any agreement which violates a police regulation is void unless the statute contains language from which the contrary can be inferred,[23] the United State Supreme Court has encouraged courts to use their discretion in determining to what extent statutory police regulations should affect private contractual rights conferred upon a wrongdoer.[24] This decision would seem to be an exception to the general rule and would suggest that if the legislative intent is not served, the courts need not allow every minor infraction of regulations by a landlord to void the landlord's right to rent from the tenant. The courts might in their discretion modify the contract so as to make it conform to the statute in question. Another state court has suggested that legislative intent coupled with the requirements of public policy should guide the court in deciding whether an otherwise legal agreement is void.[25] This approach would seem to prevent an unscrupulous tenant from taking advantage of an honest landlord while at the same time forcing an unscrupulous landlord to heed the housing regulations. It is not clear in *Brown* whether a minor departure from a housing code would permit the tenant to declare the lease void or whether only substantial departures can have such an effect.

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[17]Kessler v. Pearson, 126 Ga. 725, 55 S.E. 963 (1906).

[18]WASHINGTON, D.C., HOUSING REGULATION § 2301 (1955). For a statement of this regulation see Schoshlinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 530 (1966).

[19]Hartman v. Lubar, 133 F.2d 44, 45 (D.C. Cir. 1942).

[20]Kirschner v. Klavik, 186 A.2d 227 (D.C. Mun. Ct. 1962).

[21]City Lincoln-Mercury Co. v. Lindsey, 52 Cal. 2d 267, 339 P.2d 851 (1959).

[22]McIntosh v. Lee, 57 Iowa 356, 10 N.W. 895 (1881).

[23]Hartford Fire Ins. Co. v. Knight, 146 Miss. 862, 111 So. 748 (1927).

[24]Miller v. Ammon, 145 U.S. 421 (1892).

[25]*In re* Peterson's Estate, 230 Minn. 478, 42 N.W.2d 59 (1950).

Brown cannot necessarily be interpreted as a total victory for tenants in slum areas. To declare the lease void does not, for example, automatically determine whether rent has to be paid by the tenant. While mere occupancy of premises does not by itself necessarily imply a promise by the occupant to pay rent,[26] the general rule still remains that occupancy of another's premises with the consent of the owner ordinarily implies some agreement to pay.[27] Thus, although the general rule is that an illegal and void agreement in itself confers no rights upon either party,[28] recovery by the landlord might still be available under a quantum meruit, unjust enrichment, theory.[29] In such an action by the landlord against the tenant, the recovery would be limited in some jurisdictions to the reasonable value of the leasehold for the time the tenant occupied it, regardless of any agreement in the void lease.[30] In other jurisdictions, the landlord under an obviously illegal lease will not only be precluded from enforcing the contract, but also be denied any quasi-contractual recovery for the value of the benefits conferred.[31] It would seem harsh in many cases for the courts to allow a tenant to escape liability because of some minor defect which made the lease invalid. In recognition of such harsh results, several courts have held that the terms of a void or defectively executed lease may nevertheless be used to determine the amount of rent which is owed to the landlord.[32] One earlier court has reached the same result in a unique manner, stating that continued occupancy alone is the basis for the creation of a new kind of tenancy,[33] the terms of which are evidenced perhaps by the terms of the void lease and by the conduct of the parties.[34]

While *Brown* goes far in helping the wronged tenant, it nevertheless leaves several unanswered questions. First, the tenant's defense

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[26]Herron v. Temple, 198 Iowa 1259, 200 N.W. 917 (1924); Rochelle v. Russ, 54 So. 2d 856 (La. Ct. App. 1951).

[27]Ross v. City of Longbeach, 24 Cal. 2d 258, 148 P.2d 649 (1944); Goff v. MacDonald, 333 Mass. 146, 129 N.E.2d 115 (1955); Southern Pac. Co. v. Swanson, 73 Cal. App. 321, 238 P. 736 (1925).

[28]*See, e.g.*, Baccus v. Louisiana, 232 U.S. 334 (1914); Vock v. Vock, 365 Ill. 432, 6 N.E.2d 843 (1937); Smith v. Southern Bell Tel. Co., 349 P.2d 646 (Okla. 1960).

[29]For a discussion of this proposition see 36 U.S.L.W. 1121 (1968).

[30]*See* Smith v. Bliss, 44 Cal. App. 2d 171, 112 P.2d 30 (1941).

[31]*See generally* Lunsford v. First Nat'l Bank, 224 Ala. 679, 141 So. 673 (1932); Canning v. Bennett, 206 Okla. 675, 245 P.2d 1149 (1952); RESTATEMENT OF CONTRACTS, § 598, comment *c* at 1111 (1932).

[32]*See generally* RKO Distrib. Corp. v. Film Center Realty Co., 53 Ohio App. 438, 5 N.E.2d 927 (1936); Cole v. Bunch, 85 Okla. 38, 204 P. 119 (1921); Snyder v. Harding, 38 Wash. 666, 80 P. 789 (1905).

[33]Vinz v. Beatty, 61 Wis. 645, 21 N.W. 787 (1884).

[34]Saul v. McIntyre, 190 Md. 31, 57 A.2d 272 (1948).

of a void lease could be, in effect, self-defeating in attempting to force the landlord to meet code requirements.[35] If the tenant used such a defense to the landlord's suit for rent, the landlord could simply amend his complaint to ask for removal of the tenant. Thus, it would seem that retaliation by the landlord and perhaps by even potential landlords could be a major deterrent to the lone tenant who seeks to invoke the *Brown* defense.[36] Of course, a collective effort by many tenants in the same building might provide better bargaining power in negotiations for repairs and improvements. In addition, the threat of retaliation by a landlord could perhaps be cured by simply reading into housing regulations an implied provision protecting the tenant who complains.[37] Such an implied provision would in effect protect the tenant by giving him a judicially created lease for as long as the code violation exists.[38]

Brown does not speak to the problem faced by the tenant when the leasehold falls into disrepair and into violation of the code *after* the lease agreement and during occupancy. The courts have already interpreted the District of Columbia Housing Regulations to impose upon the landlord the duty of general maintenance and repair.[39] However, one Pennsylvania case has held that housing code violations are not as such incorporated into the lease and that the tenant could not complain of breach of these conditions occurring after signing of the lease and during occupancy.[40] The owner who fails to keep the leasehold in the condition required by the housing regulations was once thought to be precluded from bringing any action for rent,[41] but there is authority that the tenant will be held liable for the reasonable rental value of the premises during his actual time of occupancy.[42] It remains to be seen whether *Brown* will successfully be used by the tenant whose leasehold falls into disrepair after the lease agreement, but it would seem that by further reliance on contract

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[35]Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 538 (1966).

[36]It could be suggested that retaliatory eviction proceedings by the landlord are a violation of a tenant's constitutional rights to petition for redress of grievances.

[37]Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541 (1966).

[38]Fossum, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 311 (1965).

[39]National Bank v. Dixon, 301 F.2d 507 (D.C. Cir. 1961); Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960).

[40]Kearse v. Spaulding, 406 Pa. 140, 176 A.2d 450 (1962).

[41]Leuthold v. Stickney, 116 Minn. 299, 133 N.W. 856 (1911).

[42]Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

principles, such an argument might prevail. The general rule is that where a contract is legal when made but thereafter is deemed void by statute, further performance is illegal and neither party may recover for breach of contract.[43] Police power statutes may be enacted which forbid further performance of previously legal agreements and have the practical effect of terminating existing contracts.[44] When the leasehold falls into such disrepair as to make occupancy illegal under the housing codes, the tenant seemingly could seek an extension of *Brown* to relieve him from further duties under the lease.

Although the court made no distinction between written and oral leases, a third possible problem is the great likelihood that in poor neighborhoods the decision might put an end to written lease agreements.[45] When housing is scarce, landlords may refuse to commit themselves through formal leases, and complaining tenants will simply not be allowed to begin another term in the dwelling. The tenant who has no written lease as security against landlord retaliation for complaints would certainly find himself in a frustrating position.

The holding in *Brown* can nevertheless have great influence in the area of urban housing problems. This decision can serve to protect the indigent tenant who previously could ill afford to pursue conventional modes of redress against the landlord. It might also insure enforcement of housing codes, which in many instances may be necessary to provide adequate housing for the poor. In addition, in times of social crisis and turmoil, giving the tenant a legal remedy where one previously was realistically unavailable can serve to divert potentially explosive situations into easily managed legal channels.

HUBERT H. YOUNG, JR.

[43]*See, e.g.*, Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965). Massillon Sav. & Loan Co. v. Imperial Fin. Co., 114 Ohio St. 523, 151 N.E. 645 (1926).

[44]Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S.W. 364 (1908).

[45]Washington Post, Feb. 16, 1968, at B1, col. 1.