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Caveat Venditor: Constructive Eviction and Implied Warranties in Leasing

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Caveat Venditor: Constructive Eviction and Implied Warranties in Leasing

by Stuart R. Blatt & Nicholas Nunzio

Under common law, when land was leased to a tenant, the lease was considered equivalent to a sale of the premises for a term. There was no implied covenant of habitability or fitness for use and the rule of caveat emptor applied. In modern leasing transactions, however, "the landlord is not in the business of leasing *space, period,* but in the business of leaing *habitable space..*"[1]

Consequently, absent express covenants, courts have employed the doctrines of constructive eviction and implied warranty of habitability to avoid the rigidity of the common law.

CAVEAT EMPTOR

Rules of property law solidified before the development of mutually dependent covenants in contract law. Theoretically, there were no further unexecuted acts to be performed by the landlord, once an estate was leased. There could be no failure of consideration, with the result that there existed no implied warranty of habitability or fitness for use of the leased premises.[2] The tenant's promise to pay was exchanged only for the bare right of possession. Once the landlord delivered possession and thereafter did not interfere with that possession, use or enjoyment of the premises, the landlord's part of the agreement was completed.[3]

In the absence of fraud or active concealment on the part of the landlord, there was no covenant or implied warranty that the premises would be tenantable, fit or suitable for the use for which the lessee required them: habitation, occupation, business, or cultivation.

The rule of caveat emptor in lease transactions may have had some basis in social practice. In an agrarian, non-industrial age, a tenant, more often than not, could walk the land and determine for himself its fitness for his purpose. Both landlord and tenant possessed a generally equal knowledge of the condition of the land. Usually the land itself would yield both rents to the lessor and returns to the lessee. The buildings were incidental and constructed simply without such modern

[1] Quinn and Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines For the Future,* 38 FORDHAM L. REV. 225, 254 (1969). (hereinafter Quinn and Phillips

[2] Modern status of existence of implied warranty of habitability or fitness for use of leased premises, see 40 A.L.R.3d 646.

[3] Quinn and Phillips, 254.

conveniences as wiring or plumbing.[4]

In a more complex, industrial society, however, the vast majority of tenants do not reap the rents directly from the land, but bargain primarily for the right to enjoy the premises, especially buildings thereon. The common law conceptions of a lease and the tenant's liability for the rent are no longer viable. Tenants are often required to sign standardized leases with no means of ascertaining the true condition of the premises. "The lessor is in a better position to know of latent structural defects in a building which might go unnoticed by the inspecting lessee since the plans and specifications are not in the latter's possession."[5]

In a re-evaluation of the doctrine of caveat emptor, the New Jersey Supreme Court stated in *Reste Realty Corp. v. Cooper*:[6]

> It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. A prospective lessee, such as a small businessman, cannot be expected to know if the plumbing or wiring systems are adequate or confirm to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be readily available to the lessor who in turn can inform the prospective lessee. These factors have produced persuasive arguments for re-evaluation of the caveat emptor doctrine and for imposition of an implied warranty that the premises are suitable for the lease's purposes and conform to local codes and zoning laws.

This view, thoroughly integrated into New Jersey law,[7] represents an aspect of the modern trend away from caveat emptor.

CONSTRUCTIVE EVICTION

To avoid the rigidity of caveat emptor, some courts have employed the remedy of constructive eviction.

Earlier, courts held that the implied covenant of quiet enjoyment was violated only by actual eviction, in which the tenant was physically removed. Later, courts began to recognize that quiet enjoyment could be violated by the landlord's interference with the tenant's use and enjoyment of the property without the tenant actually being expelled. Known as constructive eviction,[8] this principle provides that any disturbance of the tenant's possession by the landlord rendering the premises unfit for the purpose for which they were leased or depriving the tenant of their beneficial enjoyment, thereby causing him to abandon them amounts to constructive eviction. The tenant must abandon the premises within a reasonable time.[9]

Maryland law states that unless the lease provides otherwise, there shall be an implied covenant by the lessor that the lessee has a right to quiet enjoyment of the property.[10] In Maryland, the tenant is deemed constructively evicted and thus relieved of his leasehold obligations under the following circumstances:

> *Premises Rendered Unfit.* It must be shown that the landlord has committed some act or failed to perform some service owing to the tenant which has rendered the premises unfit for the use intended. Interference with the tenant's possession and enjoyment of the property must be substantial.
> *Notification.* The landlord must be notified by the tenant as to the condition of the premises.
> *Abandonment.* The tenant must abandon the premises within a reasonable time after the misconduct complained of. If the tenant fails to abandon promptly, he waives his rights.[11]

In the case of residential leases, the Maryland legislature has provided various remedies when possession is not delivered at the beginning of the term:[12]

[4] Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. Rev. 1279 (1960.

[5] Skillern, *Implied Warranties in Leases: The Need for Change*, 44 Denver L.J. 387 at pp. 397-398 (1967).

[6] 53 N.J. 444, 251 A.2d 268, 272 (1969).

[7] See, *Timber Ridge Town House v. Deitz*, 133 N.J.Super, 577, 338 A.2d 21 (1975); *Berzito v. Cambino*, 63 N.J. 46, 308 A.2d 17 (1973); *Academy Spires v. Jones*, 108 N.J. Super 395, 261 A.2d 413 (1970).

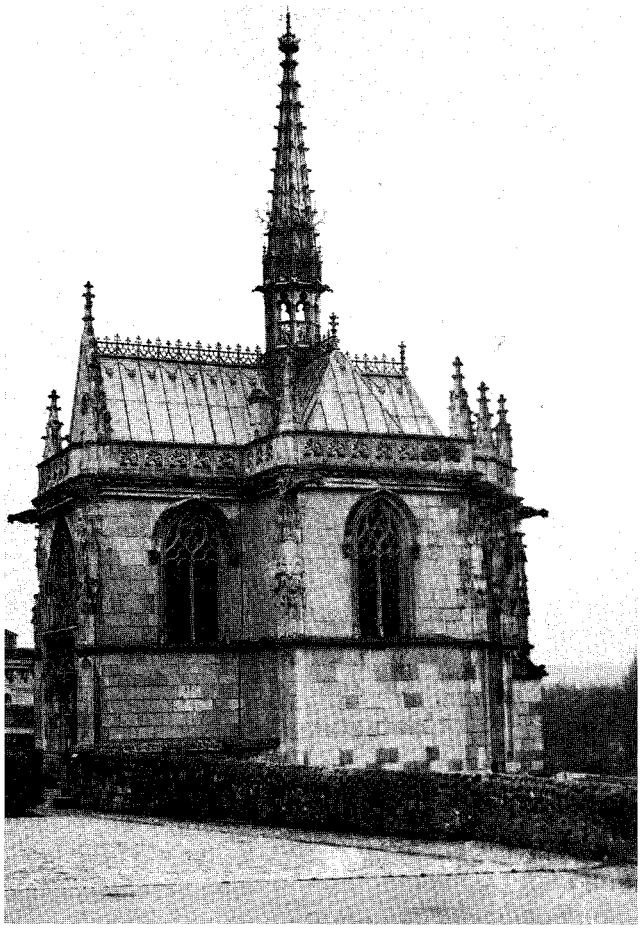
[8] Rose, *Responsibility of Landlords for Conditions of Habitability*, 1 Real Estate L.J. 53 at 55 (Summer, 1972).

[9] 49 AM. JUR. *Landlord and Tenant* §301 (1970).

[10] Md. Real Property Code Ann. §2-115 (1974).

[11] Shapiro, Graham and Bregman, *Commercial and Residential Leases, The Law and the Negotiation*, MICPEL 11 (1978).

[12] Md. Real Property Code Ann. §8-204.



The rent shall abate until possession is delivered. The tenant, upon written notice to the landlord before possession is delivered, may terminate the lease. The landlord must return all security deposits. Regardless of whether the lease is terminated, the landlord is liable for consequential damages suffered by the tenant.[13]

In New York in the case of *Barash v. Pennsylvania Terminal Real Estate Corp.*,[14] the rule that recourse to constructive eviction was applicable to commercial leases as well as to residential leases was clearly enunciated.

In practice, however, this doctrine is not an adequate solution for the aggrieved tenant, since he must assume the risk of being held liable for the accrued rent if it is later determined that the defects in the premises were not sufficient to constitute a constructive eviction.[15] An even more serious objection to the adequacy of the remedy lies in the realities of modern urban leasing: a tenant may be unable to abandon the premises because of a critical shortage of space. Without abandonment, most courts have refused to find a constructive eviction. Furthermore, a tenant may not be able to afford such a move.[16] In view of these modern urban realities, some courts reject the doctrine of caveat emptor, and recognize the existence of an implied warranty of habitability or fitness for use of leased premises.

IMPLIED WARRANTY OF HABITABILITY

Application of such an implied warranty gives recognition to the changes in leasing transactions today, and affirms the fact that a lease is, in essence, a sale and, more importantly, a contractual relationship. The doctrine has counterparts in the law of sales and of torts. Candidly countenanced, it is compelled by the nature of the transaction and contemporary housing realities, to achieve a just and necessary result.[17]

Recognizing the limitations of outmoded legal principles and inadequate remedies, progressive jurisdictions have begun to apply warranties of fitness and habitability in urban residential leases.[18] The implied warranty of habitability may be used as a defense in both actions for possession and actions for rent if the tenant is able to show that a substantial violation of the housing code existed during the period rent was withheld. In addition, the tenant may have an affirmative cause of action against the landlord for breach of contract.[19] The tenant, however, may still remain liable for the reasonable value of the use of the premises.[20]

In *Javins v. First National Realty Corp.*,[21] suit was brought by a landlord seeking to repossess leased premises where the tenants had ceased paying rent. The tenant's refusal to pay rent was based upon the landlord's failure to maintain the premises in a habitable

[13] Shapiro, Graham and Bregman, op.cit., MICPEL 10.
[14] 26 N.Y. 2d 77, 308 N.Y.S.2d 649 (1970); and see, *Grabenhorst v. Nicodemus*, 42 Md. 236 (1875).
[15] *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470, 475 (1969).
[16] *Marini v. Ireland*, 36 N.J. 130, 265 A.2d 526, 535 (1970).
[17] *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470, 474.
[18] *Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961), *but cf.*, *Posnanski v. Hood*, 46 Wis.2d 172, 174 N.W.2d 528 (1970); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W. 791 (Iowa, 1972); *Boston Housing Authority v. Hemingway*, Mass., 293 N.E.2d 831 (1973); *King v. Moorehead*, 492 S.W.2d 65 (Mo. App., 1973); *Foisy v. Wyman*, 83 Wash.2d 22, 515 P.2d 160 (1973); *Fritz v. Warnthen*, 298 Minn. 54, 213 N.W.2d 339 (1973); *Steele v. Latimore*, 214 Kan. 329, 521 P.2d 304 (1974); *Green v. Superior Court*, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Old Town Development Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976); *Kaplan v. Coulston*, 85 Misc.2d 745, 381 N.Y.S.2d 634 (1976); *Fair v. Negley*, 390 A.2d 240 (Pa.Super. 1978).
[19] E.g., *Berzito v. Gambino*, 63 N.Y. 460, 308 A.2d 17 (1973).
[20] Damages for breach of the implied warranty of habitability are usually calculated to be the difference between the contractual rent and the fair market value of the defective premises. See, e.g., *Green v. Superior Court*, 10 Cal.3d 616, 638-39, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974). The New Jersey court in *Academy Spires, Inc. v. Brown*, 111 N.J.Super. 477, 268 A.2d 556 (1970) reduced the rent by a percentage corresponding to the dimunition in the use and enjoyment of the premises caused by the landlord's breach.
[21] 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970), at 1072 and 1082.

condition, evidenced by numerous housing code violations. The court, applying their decision solely to residential leases, reaffirmed contractual rights, stating:

> The warranty of habitability, measured by the standard set out in the housing regulations for the District of Columbia, is implied by operation of law in all leases, whether oral or written, and for all types of tenancies of urban dwelling units covered by those regulations; breach of warranty gives rise to the usual remedies for breach of contract.

Further:

> The tenant's obligation to pay rent is dependent on the landlord's performance of his obligation, including an implied warranty to maintain the premises in a habitable condition.

Although the current trend involves the rights and remedies of residential tenants, the doctrine espoused in *Reste Realty* clearly recognizes similar grievances experienced by commercial tenants, especially small businessmen. Here the New Jersey Supreme Court first recognized the necessity for more contract oriented analysis of lease agreements and announced the implied warranty of habitability doctrine in a commercial leasehold setting.[22]

Adoption of the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness makes a more consistent and responsive set of basic contract remedies available for a tenant, including damages, reformation, and rescission, and provide a wide range of alternatives in resolving tenant grievances.[23]

In Maryland, generally, there is no implied warranty of habitability in residential leases. However, Baltimore City residents may invoke breach of implied warranty of habitability.

> In any written or oral lease or agreement for rental of a dwelling intended for human habitation, the landlord shall be deemed to covenant and warrant that the dwelling is fit for human habitation. If the dwelling is not fit for human habitation, the tenant is entitled to the followingremedies:
>
> > An action for breach of contract or warranty which may include a prayer for rescission of the contract. Rescission of the contract including the return of all deposits and money towards rent paid during the period of the breach of warranty of habitability.
>
> The warranty of habitability is a continuing warranty and the tenant may maintain an action for breach of this warranty at any time during the tenancy if the dwelling becomes unfit for human habitation.
>
> No action for breach of warranty may be maintained unless the landlord has notice or knowledge of the conditions which constitute the alleged breach of warranty of habitability.[24]

In Maryland, however, there is a limited warranty "that the premises will be made available in a condition permitting habitation, with reasonable safety. . . ." This provision may be modified or excluded by the lease and is applicable only if the landlord "offers more than four dwelling units for rent on one parcel of property at one location and . . . rents by means of written leases."[25]

The 1975 enactment of Maryland's Rent Escrow Statute[26] exemplifies far reaching reform in landlord-tenant law. The statute works as an initiative to compel the landlord to correct deficiencies in the property, or a defense against the landlord's request for back rent and eviction.

In the case of serious and dangerous defects which exist within a residential unit, i.e., lack of heat, light, electricity, or hot or cold running water; lack of adequate sewage disposal facilities; infestation of rodents in two or more dwelling units; the existence of paint containing lead pigment on surfaces within the dwelling unit; the existence of any structural defect; or the existence of any condition which represents a health or fire hazard to the dwelling unit, the tenant shall notify the landlord in writing of the defects. If the landlord fails or refuses to repair or correct the conditions, the tenant may bring an action to pay rent into the court in escrow because of the defects or conditions, thirty days after the landlord is notified.

The court may order the termination of the lease and return of the leased premises to the landlord, subject to the tenant's right of redemption; order that the rent be paid into escrow; and/or order that the amount of rent be reduced to represent the value of the premises with the conditions or defects.

After establishing rent escrow, the court has several alternatives, including: an order that the money be disbursed to the landlord after the necessary repairs have been made; an order that the escrow account be paid the tenant, or landlord, or to any appropriate person or agency for the purpose of making necessary repairs; appointment of a special administrator who shall cause the repairs to be made; or an order that the money be paid to the tenant if repairs are not made within six months. If the tenant defaults on payment into the escrow account, the account can be disbursed to the landlord.

[22] *Contra Service Oil Co., Inc. v. White,* 218 Kan. 87, 542 P.2d 652 (1975); *Coulston v. Telescope Productions, Ltd.* (S.Ct.), 85 Misc.2d 339, 378 N.Y.S.2d 553 (1975).

[23] *Lemle v. Breeden,* 51 Hawaii 426, 462 P.2d 470, 475.

[24] Baltimore City Code of Public Local Laws, Art. 4 of the Public Local Laws of Maryland, Landlord and Tenant 9-14.1 and (-14.2 (Supp. 1978).

[25] Md. Real Property Code Ann. §8-203.1 (a)(2)(i) (Supp. 1980). Furthermore, the lease must set forth "[t]he landlord's and tenant's specific obligations as to heat, gas, electricity, water and repair of the premises." Waiver is not permitted.

[26] Md. Real Property Code Ann. §8-211 (Supp. 1980).

CONCLUSION

One basic premise found in all recent decisions adopting an implied warranty of habitability is the contention that the doctrine of caveat emptor cannot stand, even on its own terms, in today's leasing transactions. The theoretical meaning of a lease has no relevancy in the modern leasing situation and should be replaced with realistic concepts. Indeed, the rights of tenants have been broadened, the courts are now viewing leases in the light of caveat venditor.

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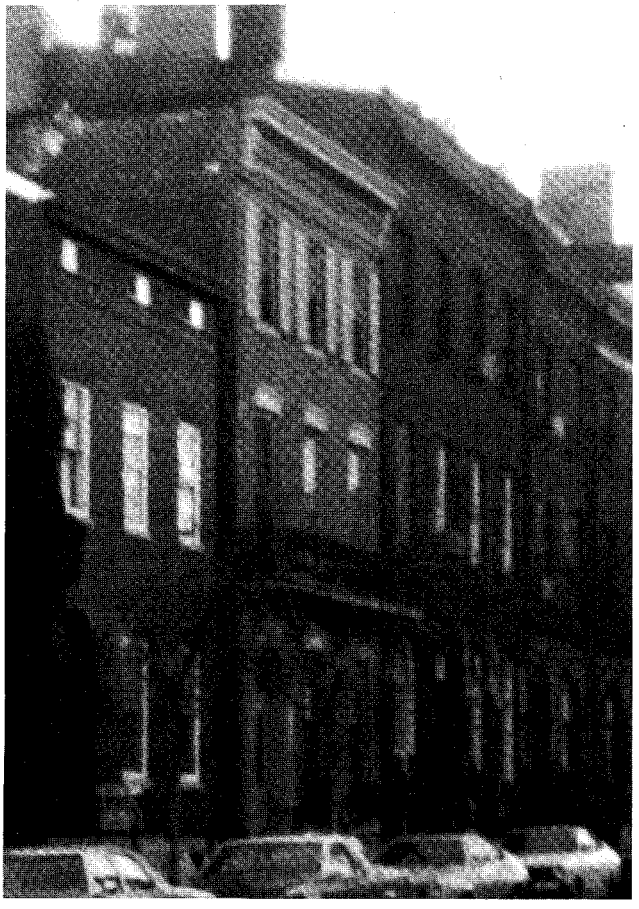

Note: On the weekend of March 15, 1981, a representative group of women employees of the United Nations in New York, dressed in black, appeared to present their complaint that about 80% of them had been harassed with demands for sexual favors in return for promotion or continued employment. Kurt Waldheim's response was that he would have preferred to have seen them dressed in pink.

CRIMINAL PROCEDURE

MARYLAND RULE 782 (c) may not be used by prosecution as a plea bargain substitute — State v. Limbo, An Imaginary Opinion by the Court of Appeals of Maryland

By Harold D. Norton

Opinion by Forthright, J.

We granted certiorari in this case to examine a long standing procedure which, while serving a legitimate role in the criminal justice system in some instances, may lack sufficient procedural safeguards to prevent its use as a tool of prosecutorial oppression. The issue, whether Maryland Rule 782(c) might allow the state to place a charge on stet[1] in return for a defendant's cooperation in an investigation, and later reinstitute the charge regardless of the defendant's subsequent conduct, has not yet been addressed by this court.

In MD.R.P. 782(c) Disposition by stet is explained. "Upon motion by the State's Attorney, the court may postpone trial indefinitely upon a charging document by marking the case 'stet' on the docket."

When a case is stetted, all further action is held in abeyance. Outstanding warrants which would lead to arrest or detention of the defendant are recalled or revoked. MD.R.P. (d). At the request of either party a stetted case may be rescheduled for trial within one year of the stet and thereafter only by court order for good cause shown. MD.R.P. 782(c).

The state candidly admits the facts as stated by petitioner, Limbo. Limbo was indicted for receiving stolen goods[2] on July 2, 1978. The prosecuting attorney proposed, through defense counsel, that Limbo cooperate with the police by "identifying certain members" of a fencing operation. In return for this cooperation, the prosecutor promised to place the theft indictment on stet docket. The stet was entered in open court on October 3, 1978. The defendant was not advised that he had waived his right to a speedy trial (in the event the charges were rescheduled) by accepting the stet. *See Fowler v. State,* 18 Md. App. 37, 350 A.2d 20 (1973). Judicial inquiry into the reason a case is being placed on stet docket is not required by MD.R.P. 782(c) and none was made.

The defendant was not present at the hearing. Nor was he required to be by Rule 782(c). The rule requires only that notice be sent to the defendant and his counsel of record.

Within the next nine months, the police had successfully infiltrated the fencing operation. The state maintained that their success was due to independent investigation although Limbo had given the police "a few

names". On October 2, 1979, the stetted charge against Limbo was rescheduled. Limbo was subsequently found guilty and sentenced to ten years imprisonment pursuant to MD. ANN. CODE art. 27 §466.

At trial the state explained that the charge was stetted on the docket because information was to be supplied by Limbo and the prosecution needed the threat of reinstitution of the charge as an incentive. Had the state *nolle prosequied* the charge instead, the indictment would have been cancelled. *Brady v. State,* 26 Md. App. 283, 374 A.2d 613 (1977). In MD.R.P. 782(a) a State's Attorney may terminate a prosecution on a charging document and dismiss the charge at his discretion, by entering a *nolle prosequi* on the record in open court, with a statement of the reasons. The defendant need not be present. Notice will be sent to defendant and his counsel.

When *nolle prosequi* has been entered all pretrial release conditions are terminated and bail posted by the defendant on those charges shall be released. MD.R.P. 782(b).

The state contended that Limbo could not complain because he voluntarily accepted the risk that the state might reschedule the charge at its discretion within one year. While we realize that Rule 782(c), in its present form, allows the state to reschedule a stetted charge within one year, we are convinced that this procedure violates the requirement of fundamental fairness assured by the Maryland Constitution, Article XXIII, and The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A plea bargain was not used under Rule 733 because the state wished "to keep [its] options open."

Traditionally a "plea bargain" requires a plea of guilty or *nolo contendre* to one or more charges upon the condition that the state make some concession in regard to those or other pending charges. *Gray v. State,* 38 Md. App. 343, 380 A.2d 1071 (1974). When a prosecutor makes a promise that serves as consideration or inducement for a plea, that promise must be fulfilled and may be specifically enforced by the defendant. *Kisamore v. State,* 286 Md. 654, 409 A.2d 719 (1980). The standard to be applied is one of fair play and equity under the facts and circumstances of the case, and where an agreement has been reached, it would be a grave error to permit the prosecution to repudiate its promises where the defendant is willing to perform, but because of some action taken by the prosecution, is unable. *State v. Brockman,* 277 Md. 687, 698-99, 357 A.2d 376, 383-84 (1976); *see generally* 9 U. Balt. L. Rev. 295 (1980), on plea bargain. We see no constitutional significance between a traditional plea bargain and the case at hand.

The stet procedure may be used as an inducement for investigatory cooperation. A prosecutor may promise not to reschedule a stetted case so long as the defendant cooperates with the authorities. The defendant's fear that a charge may be rescheduled acts to insure his cooperation. In light of the standards imposed by other existing procedures and the need for the state to appear open and fair in its dealings with defendants, we believe that Rule 782 (c) cannot stand in its present form.

We first note that Rule 733 provides a detailed procedure that must accompany a plea agreement involving a plea of guilty or *nolo contendre.* The judge must be advised of the terms of the agreement, which he may accept or reject, and, most importantly, all proceedings pursuant to the agreement must be stated on the record. MD.R.P. 733(c). Therefore, when a question arises concerning the obligations of either party, MD.R.P. 733(d) acts as a plea bargain "Statute of Frauds", with the agreement reduced to a writing.

No similar safeguards exist under MD.R.P. 782(c). Entry of stet requires a *pro forma* motion by the state; the trial judge need not be made aware of any underlying agreement; the state may unilaterally reschedule the charge for trial at any time within one year without explanation; only after a year is "good cause" required to reschedule. Rule 782(c) seems to provide a presumption that neither party is prejudiced by rescheduling a stetted charge within one year. We see in this case, however, that circumstances other than passage of time may prejudice a criminal defendant to the extent that it would be unfair to reinstitute the charge, *e.g.,* production of self-incriminating evidence or witnesses. In addition, the in-

tegrity of the judiciary is injured whenever the state is seen as promising that which it need not deliver.

Because of these shortcomings, MD.R.P. 782 would be amended by this court to provide the following safeguards when a charge is placed on stet docket with defendant's consent: first, that the defendant be present; second, that the trial judge be fully advised of the reasons for the entry of the stet; third, that the trial judge consent; fourth, that the defendant be told that by accepting the stet, he waives his right to a speedy trial; fifth, that the proceeding fully appear on the record to the same extent as MD.R.P. 733; and last, that the state be required to show "good cause" whenever a stetted charge is sought to be rescheduled.

CONVICTION VACATED: CASE REMANDED FOR HEARING IN ACCORDANCE WITH THIS OPINION

Concurring opinion by Dictum, J.

I can foresee no situation which would require the use of a stet, instead of other existing procedures. In my opinion, the stet procedure is too unpredictable and indefinite to be used in criminal prosecutions where less suspect means are available to achieve similar ends.

For example, where a busy prosecutor has a defendant before a court and is unable, for one reason or another, to proceed, he may ask that the case be stetted. At first this seems perfectly reasonable since the defendant may still request that the case be tried. Where the defendant is present, stet may not be entered, under Rule 782(c), without his consent. As a practical matter, the state would then be forced to either *nolle prosequi* the charge or ask for postponement. Where postponement is proper, the state would be forced to prepare its case. Where postponement would not be allowed, a *nolle prosequi* would provide a final determination of the charge. In both instances, the merits of the charge are more strictly scrutinized, and a final determination assured. If a charge cannot be proven, society's interests are vindicated through the *nolle prosequi.* If a charge can be proven, but at a later time, society's interested are vindicated by a trial on the merits. Remove the option of stetting the case and something more is precluded: the possibility that a guilty person may never be tried or that an innocent person be subject to "the cloud of an unliquilated criminal charge" for one year's time. *Klopfer v. North Carolina,* 386 U.S 213, 226-227 (1966) (concurring opinion). The solution to a large number of valid charges being entered *nolle prosequi* is not to allow the prosecutor to act as a judge and set the case on the back burner, but to put a greater emphasis on being ready with the case the first time. For these reasons, I have no reservation in striking down Rule 782, in its present form, as an anachronism which has outlived its usefulness.

[1] *See* MD.R.P. 782 (1980).

[2] MD. ANN. CODE art. 27 §466 (1976 Repl. Vol. & Supp. 1978), recodified as MD. ANN. CODE art. 27 §342 (1976 Repl. Vol. & Supp. 1980).