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# The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development

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# THE IMPLIED WARRANTY OF HABITABILITY IN LANDLORD-TENANT RELATIONS: A PROPOSAL FOR STATUTORY DEVELOPMENT

Traditionally, the law has regarded the relationship of the landlord and tenant as one governed primarily by property law. As such, a lease of property has been considered a purchase of an estate in land. When the law of property was being formed in feudal England this notion had validity, for the tenant was concerned not with the structures on the land, but with the land itself. But with the change from a rural, agricultural society to an urban, industrial nation, many of the justifications and conditions which supported these rules ceased to exist.[1] An examination of the ghetto sections of any major city in the United States or England will show how unworkable and often injurious the rules have become.[2] One of the major characteristics of these areas is the uninhabitable conditions of many of the structures.[3] It is with these conditions in mind that this note proposes to examine the traditional rule of *caveat emptor*, the present trend toward its rejection, and the adoption of an implied warranty of habitability.

## The Common Law Rules

At early common law, the relationship of landlord and tenant grew out of the feudal system, and the purpose of the leasehold was to acquire land for farming. Therefore, the presence or condition of a dwelling or habitation on the land was of only minor importance. Even as an urban society developed in England, the old rules and concepts continued to govern this area of the law, and the courts seemed unwilling to make any meaningful changes. A common law judge once wrote: "There is no law against letting a tumbledown house." [4]

With both leasehold and freehold interests, the common law doctrine of *caveat emptor* was the rule, and under it the landlord made no im-

1. "To find a similarity between a feudal lord's fief and a cold water flat in a contemporary American city seems an anachronistic comparison." Note, *Rent Withholding—A Proposal for Legislation in Ohio*, 18 W. Res. L. Rev. 1705, 1707 (1967).

2. *See* Report of the National Advisory Commission on Civil Disorders (1969).

3. *See generally* Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. Urb. L. 695 (1969).

4. Robbins v. Jones, 143 Eng. Rep. 768, 776 (C.P. 1863).

plied warranties concerning the fitness, suitability, or condition of the premises. The view was that the tenant had equal knowledge and was therefore aware of all defects or conditions that a reasonable inspection would reveal.[5] The landlord could be held responsible only if he was guilty of purposely concealing a defect by fraud, deceit, or misrepresentation,[6] or if the defect was latent.[7]

Not only was the landlord generally not responsible for the condition of the premises at the inception of the lease, but the obligations he undertook for the term of the lease were also minimal.[8] The tenant was charged with full responsibility for the condition and repair of the property[9] so that even in the case of total destruction the obligation to pay rent continued.[10] Moreover, since the landlord made no warranty concerning fitness for the purpose of the lease,[11] the fact that changing conditions rendered the leasehold worthless was irrelevant, and the tenant was forced to continue in possession and to pay rent. Unless the tenant was able to exact express warranties in the lease, the only warranty given by the landlord was the covenant of quiet enjoyment.[12] However, relief from a breach of this covenant was extremely unsatisfactory because to establish a breach it was necessary to prove an actual eviction either by the landlord or by one claiming under a superior adverse interest.[13] Proof of mere nonhabitability of the premises was insufficient.

Even if the tenant were able to exact an express warranty, his relief under it, as under the warranty of quiet enjoyment, was troublesome and often unsatisfactory because the covenants of a lease, either express

5. *See* Sunasak v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902); Note, *Landlord and Tenant: Defects Existing at the Time of the Lease,* 35 IND. L. J. 361 (1960).

6. Shinkle, Wilson, & Kreis Co. v. Birney & Seymour, 68 Ohio St. 328, 67 N.E. 715 (1903).

7. *See* 1 AMERICAN LAW OF PROPERTY § 3.45 (A. J. CASNER ed. 1952) [hereinafter cited as CASNER].

8. Fowler v. Bott, 6 Mass. 63 (1809); 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 233 (P. Rohan ed. 1967) [hereinafter cited as POWELL].

9. CASNER § 3.78.

10. This rule was true either at law, Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1681), or in equity, Leeds v. Cheatham, 57 Eng. Rep. 533 (Ch. 1827); Fowler v. Bott, 6 Mass. 63 (1809); *see* CASNER § 3.103.

11. POWELL ¶ 225 [2].

12. CASNER § 3.47. It should be noted that the landlord gave a covenant of possession. Under that covenant, he promised to deliver possession of the premises to the lessee. However, delivery of possession was all that was needed to satisfy the covenant. POWELL ¶ 225 [1].

13. CASNER §§ 3.48-.50.

or implied, were governed by the law of property not contract. Under property rules, the covenants were viewed as independent, and the breach of one by the landlord did not give the tenant the right to cease paying rent.[14] If a violation under an express covenant to repair arose, it was necessary for the tenant to remedy the defect himself and sue the landlord for damages.[15] If he were to attempt to suspend rent payments or deduct the cost of repairs from the rent, the tenant would be found in breach of the covenant to pay rent, and the landlord would be able to evict him.[16]

In 1843 the strict doctrine of *caveat emptor* was discarded, and a warranty of habitability implied, in *Smith v. Marrable*.[17] By establishing breach of this warranty as a defense, the tenant was allowed to quit possession of a furnished house and avoid the rent for the remainder of the term. However, *Smith* was soon limited to the facts of the case, and it became an exception rather than a rule.

## Common Law Exceptions

The common law rule of *caveat emptor*, qualified only by the *Smith* exception, passed intact from England to the United States and continues to be the clear majority rule.[18] In the spirit of *Smith*, and dissatisfied with the harsh results caused by a strict application of the rule, American courts developed a number of exceptions which served to afford some measure of relief to the tenant. These exceptions are: the furnished dwelling exception, the unfinished structure rule, and the doctrine of constructive eviction.

### *The Furnished Dwelling Exception*

This exception,[19] first announced in *Smith v. Marrable*, was the initial step in the erosion of the rule of *caveat emptor*. More fully, the facts of *Smith* were conducive to the creation of a well-defined exception, rather than a radical change in the basic rule. In an action for rent due

14. *Id.* § 3.11.

15. *See* Cook v. Soule, 56 N.Y. 420 (1874); Casner § 3.79; Comment, *Tenant's Remedies for Breach of Landlord's Covenant to Repair*, 21 Baylor L. Rev. 326 (1969).

16. Stone v. Sullivan, 330 Mass. 450, 15 N.E.2d 476 (1938); *see* Craven v. Skobba, 108 Minn. 165, 121 N.W. 625 (1909).

17. 152 Eng. Rep. 693 (Ex. 1843).

18. *See* Civale v. Meriden Housing Authority, 150 Conn. 594, 192 A.2d 548 (1963).

19. Casner § 3.45; Powell ¶ 225 [2]; Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 U. Rich. L. Rev. 322 (1969).

on a lease of a summer cottage demised for a period of one month, the defendant claimed a breach of implied warranty of habitability as a result of an infestation of bugs which rendered the house unlivable. The court held that this condition was sufficient to state a valid defense and justify the lessee's abandonment of the premises. The court stated:

> [I]f the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state . . . . A man who lets a ready-furnished house surely does so under the implied condition or obligation . . . that the house is in a fit state to be inhabited.[20]

This holding, however, was strictly limited to the facts and represented an exception to, rather than a change in, the general rule.[21]

In the United States, Massachusetts was the first to adopt the *Smith* rule[22] and was soon followed by Maine.[23] In *Pines v. Perssion*,[24] the Wisconsin Supreme Court stated its reasons for adoption of the rule:

> Legislation and administrative rules, such as the safe-place statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent "tumbledown" houses is at least a contributory cause of such problems as urban blights, juvenile delinquency and high property taxes for conscientious landowners.[25]

20. 152 Eng. Rep. at 694.

21. Sutton v. Temple, 152 Eng. Rep. 1108 (Ex. 1843); Hart v. Windsor, 152 Eng. Rep. 1114 (Ex. 1843).

22. Ingalls v. Hobbs, 156 Mass. 348 (1892).

23. Young v. Povich, 121 Me. 141, 116 A.26 (1922); *see* CASNER § 3.45 nn. 7-10.

24. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

25. *Id.* at 412-13.

The effectiveness of this exception lies in a further change these courts have made in common law rules. This warranty is viewed as dependent upon the covenant to pay rent, and a violation of the covenant by the landlord is seen as a material breach of the contract, and hence a failure of consideration.[26] The exception is justified on a number of grounds, the most common one being the intent of the parties. It is clear, particularly in the type of situation envisioned by the *Smith* rule, that the lessee has little or no interest in the land itself and only seeks a dwelling. This intent should be clear to the landlord, and if the premises are uninhabitable, this "clear intent" fails, and the consideration for the contract no longer exists. Further, a short term lease precludes the type of inspection that is the basis of *caveat emptor*. Often, the tenant will engage the premises without first having inspected at all, or only after a cursory inspection. Since the tenant contemplates immediate occupation without the necessity of alteration, he should not be held to the duty of placing the premises in a tenable condition. Some courts have applied the exception simply by saying that it is equitable and just. The rule appears to be followed in a majority of jurisdictions.

*The Unfinished Structure Rule*

Based upon either an implied warranty of fitness for a particular purpose or an implied warranty of habitability, several courts have created an exception to the general rule in cases involving a lease executed prior to the completion of the structure that is the subject of the lease.[27] Stating that because the lessee cannot inspect the building prior to completion *caveat emptor* cannot apply, some courts have granted rescission or sustained a defense to an action for rent on the basis of a subsequent non-conformity to prior representations that renders the structure uninhabitable.[28]

As a practical matter, however, this exception is rarely used. Courts normally justify the result, though achieving the same ends, in terms of breach of covenant of quiet enjoyment (in a state that uses a contract theory of leases), or under the doctrine of constructive eviction.[29] The rule finds primary application in commercial leases, and because rela-

26. *Cf.* Buckner v. Azulai, 221 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967).

27. POWELL ¶ 225 [2].

28. Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938); J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930), *noted in* 44 HARV. L. REV. 132 (1930).

29. *See* Annot., 41 A.L.R.2d 1438 (1955).

tively few tenants move into a new apartment house the availability of the remedy is limited.

*Constructive Eviction*

The doctrine most frequently used to avoid the harsh results which flow from a strict application of *caveat emptor* is constructive eviction.[30] The doctrine is grounded on a legal fiction which equates the acquiescence of the landlord in permitting the existence of an uninhabitable condition to the actual physical eviction of the tenant, and thus serves to complement the covenant of quiet enjoyment.[31] The landlord makes the defense available to the tenant either by an affirmative act which creates an untenable condition, a failure to act to correct such a situation in an area under the landlord's control, or by actual physical eviction.

In the early case of *Dyett v. Pendleton*,[32] the doctrine was used as a defense to an action for rent. The lessee claimed that the use of the adjoining parts of the premises for immoral purposes created disturbances which interfered with her peaceful occupation. Although the facts did not rise to the level of an actual eviction, the court admitted the evidence and sustained the defense.

The doctrine has been applied to a great variety of situations, some involving the breach of covenants to repair,[33] others the absence of any express covenant.[34] Such acts as failure to provide heat,[35] the continued existence of unsanitary conditions,[36] failure to repair a leak in a sewer system,[37] and permitting a nuisance to gather on adjoining property

30. *See* Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U. L. Q. 461; Comment, *The Failure of a Landlord to Comply with Housing Regulations as a Defense to the Non-Payment of Rent*, 21 BAYLOR L. REV. 372, 384 (1969).

31. Under early doctrine, an affirmative act was required of the landlord to constitute an eviction because of the law's reliance on the covenant of quiet enjoyment. However, later cases have held that acquiescence by the landlord is sufficient. *See* Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942), *noted in* 13 BAYLOR L. REV. 62 (1961); CASNER § 3.45; POWELL ¶ 225 [3].

32. 8 Cow. 727 (N.Y. 1826).

33. Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Dolph v. Barry, 165 Mo. App. 659, 148 S.W. 196 (1912).

34. *E.g.*, Hopkins v. Murphy, 233 Mass. 476, 124 N.E. 252 (1919).

35. Giddings v. Williams, 336 Ill. 482, 168 N.E. 514 (1929); Shindler v. Grove Hall Kosher Delicatessen & Lunch, 282 Mass. 32, 184 N.E. 673 (1933).

36. Johnson v. Snyder, 99 Cal. App. 2d 86, 221 P.2d 164 (1950); Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y.S. 1050 (1st Dept. 1913).

37. Butt v. Bertola, 110 Cal. App. 2d 128, 242 P.2d 32 (1952).

owned by the lessor[38] have all constituted bases of application of the doctrine.

Although the doctrine provides some measure of relief where a lease contains express covenants which are not held to be dependent,[39] its greatest utility is found in its application to leases which contain no express covenants. Although some courts have stated the rationale in terms of interference with the covenant of possession or of quiet enjoyment, it appears that its true operation is not really based on either theory.[40] Rather, all that is necessary is a substantial interference with the interest of the tenant and a termination of possession by him.

Thus the tenant, confronted with a condition which renders the premises uninhabitable, may be faced with a difficult decision. He can remain in possession, continue to pay rent, and bring a separate action for damages, or he can quit the premises, refuse to pay rent, and hope to defeat an action for rent by the landlord. The latter course of action may also prove dangerous, for the tenant takes two serious risks. First, if he does not abandon the premises within a reasonable time,[41] which is usually before he can find satisfactory alternative housing, he is deemed to have waived the defect.[42] Secondly, the court may find that the condition is not as serious as the tenant contends, so that the requirement of substantial interference[43] may not be met, and the tenant would, therefore, not be justified in his actions. As a result, the tenant would be left without a place to live and still be obligated to pay rent. Further, the value of such an option is open to serious questions when viewed in light of the contemporary housing crisis. Often, the alternative facing the tenant, especially in a low rent situation, is to leave one premises unfit for habitation only to find that he is forced to live in another equally bad.[44] However, almost every jurisdiction recognizes the doctrine, and in a state which does not imply a warranty of habitability it does provide some relief.

In an attempt to extend the doctrine to encompass situations where

38. Ray Realty Co. v. Holtzman, 119 S.W.2d 981 (Mo. App. 1938).

39. CASNER § 3.51; *see* Annot., 116 A.L.R. 1228 (1938) for cases under an express covenant to repair.

40. *See, e.g.*, Stifter v. Hartman, 225 Mich. 101, 195 N.W. 673 (1923).

41. CASNER § 3.51 n.14.

42. POWELL ¶ 225 [3] n.28; Note, *supra* note 30, at 471.

43. POWELL ¶ 225 [3], especially nn. 12-27. The cases discussing what is a substantial breach are legion, but it appears that the defect must be one which affects an essenial portion of the premises.

44. Note, *supra* note 30, at 472-76.

the extent of the interference would not justify abandonment, the courts of New York created the related doctrine of partial eviction.[45] In *Fifth Avenue Building Company v. Kernochan*,[46] the court held that an actual eviction of the tenant by the landlord from a portion of the premises releases the obligation to pay rent until the entire property is restored to the tenant's possession. This became known as partial actual eviction, and the requirements of an actual eviction were strictly adhered to.[47]

Related is the doctrine of partial constructive eviction, which grew up as a complement to constructive eviction. The requirements for eviction are the same, *i.e.* creation of a nonhabitable condition, short of actual eviction, by the landlord. Although one case attempted to extend this doctrine to allow a total abatement of rent,[48] the prevailing construction allows the rent obligation to be diminished only in proportion to the amount of the leasehold taken by the evicting condition.[49] Thus, the inability to use the terrace of an apartment because the central air-conditioning system leaked fluid and the incinerator deposited ash on it was held insufficient to constitute a constructive eviction. However, the court held that since the terrace was a major basis of the bargain, the fact that the tenants were prevented from using it created a partial constructive eviction, and the rent was proportionally abated.[50]

*Frustration of Purpose*

One further argument has been used to provide relief for the tenant under a lease for premises which are no longer habitable. This argument is based on the contract theory of frustration of purpose.[51] The purpose of a lease is to provide a habitable dwelling for the tenant, and when the dwelling is no longer habitable, the purpose of the contract is frus-

45. *Id.* at 471; *see* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L. J. 519, 529-32 (1966).

46. 221 N.Y. 370, 117 N.E. 579 (1917).

47. "We are dealing . . . with an eviction which is actual and not constructive." 221 N.Y. at 371, 117 N.E. at 580.

48. Gombo v. Martise, 41 Misc. 2d 475, 246 N.Y.S.2d 750 (N.Y. City Civ. Ct.), *rev'd per curiam*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. 1964).

49. Majen Realty Corp. v. Glotzen, 61 N.Y.S.2d 195 (N.Y. City Civ. Ct. 1946). *But see* Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 308 N.Y.S.2d 649 (1970).

50. East Haven Associates, Inc. v. Gurpain, 39 U.S.L.W. 2153 (N.Y. City Civ. Ct. 1970).

51. CASNER § 3.104.

trated. However convincing the logic may seem, the doctrine has been more often argued than upheld.[52] The major hurdle seems to be the requirement that the frustrating event be unforseeable,[53] although courts further note that in the normal lease the tenant has the duty to repair, and so the uninhabitable condition is a result of his default. One of the few cases allowing the doctrine as a defense is *Krell v. Henry*,[54] where the lessee was relieved of his obligation under a two day lease of a flat. Since the purpose of the lease was to view the coronation of Edward VII, the cancellation of the ceremonies rendered the purpose of the lease null. However, the early rejection of this argument in cases like *Paradine v. Jane*[55] remains the general rule. The doctrine finds some application in commercial leases, but most courts refuse to apply it to a residential lease.

*Summary*

It would appear that courts confronting a problem in this area are faced with three traditional propositions which must be overcome in order to promote any serious change in the law: independence of covenants, lack of implied warranties, and tenant's duty to repair. As shall be seen, several courts have overcome these rules in different but equally effective ways.

## The Modern Rule

As of the date of publication of this note, the common law rules continue to represent the clear majority holding.[56] But a trend away from strict adherence to the rules of the past is perceivable. Following the lead of chattel and realty sales,[57] the law of landlord and tenant seems to be reaching a level of warranty response equal to the necessi-

52. *Id.* § 3.104 n.1.

53. 119 Fifth Avenue, Inc. v. Taiyo Trading Co., 190 Misc. 123, 73 N.Y.S.2d 774 (Sup. Ct. 1947).

54. [1903] 2 K.B. 740.

55. 82 Eng. Rep. 897 (K.B. 1681).

56. *See* Civale v. Meriden Housing Authority, 150 Conn. 594, 192 A.2d 548 (1963).

57. *See* Uniform Commercial Code §§ 2-314, -315; Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541 (1961); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L. J. 633 (1965); Comment, *Builder's Implied Warranty of Good Workmanship and Habitability*, 1 Texas Tech. L. Rev. 111 (1969); 45 Wash. L. Rev. 670 (1970); *cf.* Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

ties of the times. This trend has been marked by reasoned opinions and thoughtful analogies, and the old exceptions are now forming the bases of new rules.

*Wisconsin*

The first step taken in the new direction was by the Wisconsin Supreme Court. In *Pines v. Perssion*,[58] the court was faced with a fact situation that fit squarely within the furnished dwelling exception—the house was fully furnished, and the term was one year. The decision could have been based solely on the furnished dwelling exception, previously adopted in Wisconsin, but the sweeping language of the opinion indicated an intent to go beyond such a restriction.

> The evidence clearly showed that the implied warranty of habitability was breached. Respondents' covenant to pay rent and appellant's covenant to provide a habitable house were mutually dependent, and thus a breach of the latter by appellant relieved respondents of any liability under the former.[59]

From the language and holding of the case, three possible and conflicting interpretations might be drawn:

> (1) Wisconsin merely applied the well-recognized exception noted above to a case where the defects were not discoverable by reasonable inspection and the landlord knew the defects; (2) Wisconsin joined a few other states in departing from the mossbound doctrine of no implied covenants, at least as to short-term leases of furnished premises; (3) Wisconsin will now generally imply a covenant of habitability . . . .[60]

In *Earl Millikin, Inc. v. Allen*,[61] the court, citing *Pines* as authority, opted for a broad construction of the holding. In applying the warranty to the lease of a retail store building, they said: "The covenant of possession implies not only that the tenant will be able to physically occupy the premises on the date of delivery of possession, but that he will also be able to use the premises for its intended purpose." [62]

58. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

59. 111 N.W.2d at 413.

60. A. CASNER & B. LEACH, CASES AND TEXT ON PROPERTY 505 (1960). *See also* 45 MARQ. L. REV. 630 (1962).

61. 21 Wis. 2d 497, 124 N.W.2d 651 (1963).

62. 124 N.W.2d at 654.

The reasoning of the Wisconsin court was simple. In every lease of property, a covenant of fitness will be implied. This covenant takes the form of a warranty by the landlord that the premises are fit for their particular purpose, be it habitation or otherwise. Further, this covenant is dependent upon the covenant of the tenant to pay rent, and by breaching the covenant of fitness, the landlord suspends the duty of the tenant to pay rent.

In both *Pines* and *Allen*, the defects were in existence at the inception of the lease. One may only speculate as to whether the covenant will be extended to eliminate the tenant's common-law duty to repair, and shift it to the landlord.

*New Jersey*

New Jersey soon followed the lead of Wisconsin, although their courts had recognized the exceptions to the rule and had granted relief based on constructive eviction. In *Reste Realty Corp. v. Cooper*,[63] the court, though phrasing the decision in terms of constructive eviction, indicated that this was not the only means of giving effect to the implied warranty: "[I]t is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects." [64]

Subsequently, *Marani v. Ireland*[65] afforded the opportunity to fully adopt the doctrine. The lessee of a residential dwelling under a one year lease repaired a broken toilet, and deducted the cost of repairs from his rent. In an action for possession by the landlord the court sustained the defense of the tenant:

> Patently, "the effect which the parties, as fair and reasonable men, presumably would have agreed on," was that the premises were habitable and fit for living. The very object of the letting was to furnish the defendant with quarters suitable for living purposes. This is what the landlord at least impliedly (if not expressly) represented he had available and what the tenant was seeking. In a modern setting, the landlord should, in residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness. It

63. 53 N.J. 444, 251 A.2d 268 (1969).
64. 251 A.2d at 277.
65. 56 N.J. 130, 265 A.2d 526 (1970).

> is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness." Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in a usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.[66]

Even though the lease contained a covenant of quiet enjoyment, the court declined to find a constructive eviction for its violation, and expressly decided on the basis of the implied warranty, thereby adopting a dependent covenant theory.[67] Since the defect arose after commencement of the lease, it seems clear that the break with the old notion of latent defects is now complete in New Jersey.

*Hawaii*

The Supreme Court of Hawaii has provided one of the most comprehensive statements to date on this area of the law. In *Lemle v. Breeden*,[68] the court clearly and expressly adopted the warranty of habitability as a covenant implied in every lease. The tenant rented a furnished house on Diamond Head for one year at a substantial rent.[69] After three days, during which the landlord's agent attempted to remedy the situation, he was forced to abandon the house because of rat infestation. The lessee sued to recover his deposit and the initial rent payment, alleging both constructive eviction and breach of implied warranty of habitability. The supreme court dismissed the complaint based on constructive eviction, and then went on to discuss their reasons for granting relief based upon implied warranty:

> At common law when land was leased to a tenant, the law of property regarded the lease as equivalent to a sale of the premises for a term . . . . Yet in an urban society where the vast majority of tenants do not reap the rent directly from the land, but bargain

66. 265 A.2d at 533-34.
67. 265 A.2d at 535.
68. — Hawaii —, 462 P.2d 470 (1969).
69. It is interesting to note that the rent was $800 a month. This indicates that significant changes in property law have not been restricted to indigent tenant situations.

> primarily for the right to enjoy the premises for living purposes, often signing standardized leases as in this case, common law conceptions of a lease and the tenant's liability for rent are no longer viable....
>
> The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship .... Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended.[70]

The court said that the doctrine of constructive eviction was only a substitute for dependency of covenants and, although it often achieved a satisfactory result, was a fiction. As have other courts, Hawaii has adopted a contract theory governing leases, and hence the covenants of habitability and rent are mutually dependent. Upon breach by the landlord, three remedies are available to the tenant: damages, reformation, or rescission. In accord with normal contract rules, the breach must be material, and the factors of length of existence and seriousness of the defect are relevant. The tenor of this opinion would indicate that these factors are to be liberally construed in determining materiality.[71]

As with *Pines*, *Lemle* on its facts was subject to ambiguous interpretation, despite its strong language, because the dwelling in question was furnished. In *Lund v. MacArthur*,[72] decided shortly after *Lemle*, the supreme court applied the doctrine to an unfurnished dwelling and indicated that in Hawaii there is no longer any question that a residential lease contains an implied warranty of habitability which operates to include defects which come into existence during the term, as well as those which are latent at the inception of the lease.

*District of Columbia*

Perhaps the greatest amount of landlord-tenant litigation has occurred in the District of Columbia.[73] It is therefore not surprising that

70. 462 P.2d at 472-74.

71. *Id.* at 475-76.

72. *Id.* at 482.

73. In this respect it is interesting to note that the court of original jurisdiction, the D.C. Court of General Sessions, has a separate division exclusively devoted to landlord-tenant litigation.

the number of different theories advanced in litigation is almost as great as the number of cases.[74] Though the problem of habitability is a recurring theme in the courts of the District, only recently has the law in this area significantly changed. It is interesting to note, however, that the approach taken is different from other jurisdictions. The courts of the District of Columbia have viewed the problem in two stages: defects existing at the commencement of the lease, and defects occurring during the term.

The rule on defects in existence at the commencement of the term was first stated in *Brown v. Southall Realty*.[75] In that case, the landlord sued for possession of the premises for failure to pay rent, and the tenant defended by citing the existence of defects in violation of the Housing Code. The theory of defense was constructive eviction and implied warranty, but the court found another theory on which to deny recovery to the landlord, that of illegal contract. The court noted that the defects were in existence at the commencement of the term, and that the landlord had received notice from the Housing Bureau that the violations had to be corrected. The court reasoned that because the act of renting premises in violation of the Code is prohibited by statute, and because the landlord had received notice that the violation existed, the lease which demised the premises in the proscribed condition was illegal and hence void.[76]

Soon thereafter, in *Diamond Housing Corp. v. Robinson*,[77] the court sought to clarify the holding in *Brown*. In an action for possession of an unfurnished house, the tenant defaulted on his rent, relying on *Brown* as a defense. In *Robinson*, however, the landlord had received no official notice of the violations from the Housing Bureau. The court affirmed a judgment for the defendant on the basis of a finding by the jury that the violation existed, stating that awareness of the defect by the landlord was sufficient to establish illegality. The court then discussed the problem of what follows after a finding of an illegal contract:

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74. *Cf.* Schoshinski, *supra* note 45, at 528-41.

75. 237 A.2d 834 (D.C. App. 1968).

76. *See* Schoshinski, *supra* note 45, at 537; Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L. J. 920 (1968); *cf.* Judge Bazelon's dissent in Bowles v. Mahoney, 202 F.2d 320 (D. C. Cir. 1952); Comment, *The Failure of a Landlord to Comply with the Housing Regulations as Defense to the Non-Payment of Rent*, 21 BAYLOR L. REV. 372, 372-81 (1969).

77. 257 A.2d 492 (D. C. App. 1969).

> When it is established that a lease is void and unenforceable under the *Brown v. Southall* ruling, the tenant becomes a tenant at sufferance and the tenancy, like any other tenancy at sufferance, may be terminated on thirty days' notice. The Housing Regulations do not compel an owner of housing property to rent his property. Where, as here, it has been determined that the property when rented was not habitable, that is, not safe and sanitary, and should not have been rented, and if the landlord is unwilling or unable to put the property in a habitable condition, he may and should promptly terminate the tenancy and withdraw the property from the rental market, because the Regulations forbid both the rental and the occupancy of such premises.[78]

It should be noted that under the holding of the court, a tenancy at sufferance is created, and the landlord is able to terminate the tenancy after the statutory thirty day notice. The problem of retaliatory eviction would seem to exist, but in light of *Edwards v. Habib*,[79] it would appear that the ability of the landlord to punish the tenant in this manner is limited.[80]

The problem of defects occurring subsequent to the commencement of the lease was resolved in *Javins v. First National Realty Co.*[81] The holding in *Brown* appeared to be only a slightly different approach to the traditional rule that the landlord warrants against latent defects in existence at the commencement of the term. But *Javins* went far beyond this and, if its dicta is taken to be an indication of future holdings, beyond any other court that has acted in this area.

In *Javins* the landlord sought possession for the failure of the tenant to pay rent, and the tenant claimed that defects which came into existence after the commencement of the term created a violation of the Housing Code, and a breach of the implied warranty of habitability. The United States Court of Appeals for the District of Columbia Circuit accepted this theory:

> In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing

78. *Id.* at 495. Note the serious questions raised about the ability of the tenant to find alternate housing if the landlord chooses to withdraw the property from the market.

79. 397 F.2d 687 (D. C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

80. *See* Schoshinski, *supra* note 45, at 541-42; Note, *Retaliatory Evictions: A Study of Existing Law and Proposed Model Code*, 11 WM. & MARY L. REV. 537 (1969).

81. 428 F.2d 1071 (D. C. Cir.), *cert. denied*, 91 S. Ct. 186 (1970).

> code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.[82]

The opinion discussed analogies from the law of realty and chattel sales and, in making clear that *caveat emptor* can no longer continue to govern such leases, stated the policy behind the decision:

> In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.[83]

Thus, *Brown* and *Javins* indicate a pattern to be followed by the District's courts. The court has incorporated the Housing Code into all leases by implication[84] and construed it as creating an affirmative duty in the landlord to maintain the premises. If the defect is so substantial as to violate the Code, then the tenant may avail himself of it as a basis for recovery of damages, as a basis for specific enforcement of the warranty, or as a defense in an action for rent, the liability for rent being reduced in proportion to the extent of the defects.[85] The theory used will depend upon the time of occurrence of the defect.[86]

*Standards and Disclaimers*

Upon initial examination, the reasoning of the courts in these cases appears sound, and the underlying social policy just. Upon closer in-

82. 428 F.2d at 1076-77.

83. *Id.* at 1077.

84. *See* Schoshinski, *supra* note 45, at 523-28.

85. 428 F.2d at 1082. The amount of rent which the tenant must pay will vary from the entire amount to none at all. The determining factor is the proportion of the leasehold "taken" by the uninhabitable condition. The tenant must pay the reasonable value of the portion of the premises which remains in his possession and use. *See, e.g.*, Davis, Inc. v. Slade, No. 5329 (D. C. App., Dec. 3, 1970).

86. 428 F.2d at 1081.

spection, however, problems become apparent. These problems do not necessarily call into question the desirability of the decisions, for more protection for the tenant seems not only necessary but overdue. There are some troublesome problems, however, which the courts must necessarily resolve.

One of the initial questions concerns the scope of the warranty. Although most courts call it a warranty of habitability, the question arises as to the extent of its operation. Though most of the cases in which the warranty has been found to exist have involved residential leases, is the doctrine to be restricted in its application only to such situations, or will it be extended to cover commercial leases under a type of warranty of fitness for a particular purpose? That it may be extended is indicated in the language of some New Jersey decisions[87] and has by no means been foreclosed by the language of other opinions. If this were to be the case, it would represent a substantial change in the law of commercial leasing. Yet, it is clear that the compelling reasons for the implication of a warranty in a residential lease are lacking in most, if not all, commercial situations.

Another problem concerns the standard to be applied in determining the materiality of the defect. The courts of the District of Columbia have attempted to solve this problem by stating that the measure of the substantiality of the defect will be the Housing Code—if a defect violates the Code, it constitutes a breach of warranty.[88] However, by dispensing with the necessity of notice from the Housing Bureau,[89] an element of uncertainty is introduced into the situation. Clearly an objective standard is necessary to enable the parties to recognize a breach. It would seem only fair that the tenant be required to notify the landlord of the existence of the defect, and to give him a reasonable time in which to repair it.

Adoption of an objective standard such as a housing code as a substitute for the jury's determination of materiality appears necessary to avoid the element of uncertainty on the part of both parties. And since most residential areas in which commercial housing is available have housing codes, the problem appears to be solved. But what is to be done when the defect, though not in violation of a housing code, impairs the value of the premises to the tenant, while not rendering them objectively uninhabitable? For example, suppose an air conditioner or a

87. *See, e.g.*, Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).
88. 428 F.2d at 1080. *See also* Schoshinski, *supra* note 45, at 523.
89. Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D. C. App. 1969).

dishwasher in an apartment fails to operate and the landlord will not repair it. Does this constitute a breach of warranty? Clearly it is not a housing code violation, but it is a defect in the premises. Further, suppose the defect, though a technical violation of the code, is not so serious as to render the premises uninhabitable. If a housing code is the standard, would not every landlord be in violation for one of a number of inconsequential defects? These hypotheses emphasize the necessity of a clear and workable objective standard by which the performance of the landlord may be measured.[90]

Another problem arises in determining whether or not this warranty can be disclaimed in the lease. Courts have drawn heavily on the Uniform Commercial Code for analogy in these cases, likening the warranty of habitability to a warranty of merchantability or of fitness for a particular purpose.[91] However, the Code, in addition to creating these implied warranties, provides the parties with the means by which they may be disclaimed.[92] If the courts are to imply a warranty of habitability by saying it is of the same nature as the warranties of chattel sales, should not the parties also have the right to disclaim them? In the law of real estate sales, another source of support, warranties as to the habitability of the house have been implied. However, the parties have again been given the freedom to contract away the covenant.[93]

The court in *Javins*, by way of dicta, advanced the opinion that because the warranty went to the essence of the lease, it was not to be excluded even by express language.[94] If this view is adopted, much of

90. This possibility is discussed in 428 F.2d at 1082 nn. 62-63. It is necessary that the defect go to the livability of the premises, and a technical violation is considered *de minimis*. The rent obligation is suspended only in proportion to the extent of the defect.

It should be noted that several jurisdictions have accomplished this result by statute. *See* MICH. COMP. LAWS ANN. § 554.139 (Supp. 1970): "In every lease or license of residential premises, the lessor or licensor covenants: . . . That the premises and all common areas are fit for the use intended by the parties." MICH. COMP. LAWS ANN. § 125.130 (4) provides that where the premises are in violation of section 554.139, and a certificate of compliance has been denied or revoked the tenant may pay the rent into escrow. The landlord can then receive the rent only by obtaining a certificate after repairing the structure to comply with the Code. *Id.* § 554.131-138. *See also* N.Y. MULTIPLE DWELLING LAW §§ 301, 302 (McKinney Supp. 1970); materials collected in II KRIPKE, THE PRIVATE LAW PROBLEMS OF THE POOR 394-423 (1968).

91. UNIFORM COMMERCIAL CODE §§ 2-314, -315.

92. *Id.* § 2-316.

93. *See* Haskell, *supra* note 57.

94. 428 F.2d at 1081-82. The court indicated that any such provision "would be illegal and unenforceable." *Id.* at 1082 n.58.

the landlord's ability to bargain will be stripped away. Since the facts of *Javins* involved an indigent tenant, it may be that the court meant that only in that type of situation could the warranty not be excluded. A possible approach is to make the warranty subject to disclaimer, but to open the disclaimer to attack as unconscionable.[95] As a practical matter, any allowable disclaimer will be incorporated into the lease, either because the tenant will have inferior bargaining power or will not know the effect of the disclaimer when he signs the lease.

Another problem that has been created is related to the question of the common-law duty to repair. The effect of these decisions is to shift that burden from the tenant to the landlord. To the extent a defect exists at the commencement of the term, the decisions are somewhat consistent with the common law.[96] However, under common law rules the duty to repair, even to the point of replacing destroyed premises, was on the tenant. Under the warranty, repair becomes an affirmative duty of the landlord if he is to avoid a breach. In one respect this is fair, for the vast majority of apartment dwellers have little or no interest in the property, and are unwilling to put much money into its maintenance and repair.[97] But viewed from the landlord's position, the burdens imposed are far greater than they might appear. Worries are few for the landlord who owns property in a high income, high rent area, for the tenants will help keep the property in repair, and his virtual assurance of receiving the rent every month makes it a profitable venture. The problems arise for the owner of a multiple dwelling in a large city. His return from the property is usually marginal because of the low rents which he is forced to charge. This is further complicated by the fact that the collection of the already low rent is by no means guaranteed. As a consequence, the cost of necessary repairs is a great burden, and the cooperation in normal maintenance that he receives from the tenants is often unsatisfactory. And, when facing a jury in an action for rent, his burden of establishing that the defects occurred not by his default, but because of a negligent or destructive act by the tenant or another will frequently be difficult.

In response to this, it is easy to say that the slumlord has brought this upon himself because of many years of neglect of the condition of the dwellings. But it must be recognized that the stereotype of the

95. *See* UNIFORM COMMERCIAL CODE § 2-302; Schoshinski, *supra* note 45, at 552-57.

96. *See* note 5 *supra*.

97. 428 F.2d at 1078.

rent-seeking, building-neglecting slumlord is not always accurate. Furthermore, professional landlords will not suffer greatly from the imposition of this duty, for they have outside interests sufficient to absorb losses caused by loss of rent. It is the small businessman who owns a single building and who, though trying to provide decent housing cannot do so because of high material costs, taxes, and rent defaults, may be forced to abandon his building. This phenomenon has already occurred in New York City. The duty to keep in repair a building whose return in rent is already a marginal proposition will cause many well-meaning landlords to leave the business, and possibly place the tenant in a worse situation—a building for which he does not have to pay rent, but to which no repairs of any kind are being made.

This assessment may be overly pessimistic, although it is not without support.[98] It is not intended as a condemnation of the actions of the courts, but rather as a search for answers to the perplexing questions which will inevitably occur.[99]

## A Solution

Present day warranty protection is rapidly developing, to include even landlord-tenant law. However, as with most periods of rapid development, changes are made immediately, and only later are the consequences fully realized. At this point in time it is difficult to evaluate the present trend, and conclusions drawn must of necessity be speculative. However, it appears safe to say that landlord-tenant law has taken a giant step forward. The increase in the rights and protection of the tenant offered by the warranty of habitability is a judicial enforcement of legislative intent as expressed in the housing codes, for it provides a means of private enforcement of those standards. In this way, it relieves the housing bureaus of the entire burden of discovering and enforcing correction of all defects; and it makes protection immediately available to those who most need it.

98. *See* Commission, *supra* note 2; G. Steinlieb, The Tenement Landlord (1966); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 Colum. L. Rev. 275 (1966); Sax & Hiestand, *Slumlordism as a Tort*, 65 Mich. L. Rev. 869 (1967).

99. *See also* Durnford, *The Landlord's Warranty Against Defects and the Recourses of the Tenant*, 15 McGill L. J. 361 (1969); Garrity, *supra* note 3; Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. Rev. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 Ford. L. Rev. 225 (1969); Comment, *A National Landlord-Tenant Relations Act: A Legislative Proposal for the 1970's*, 3 Akron L. Rev. 69 (1969). *But see* Note, *Implied Warranty of Habitability in Leases*, 20 Clev. St. L. Rev. 169 (1971).

There are, however, serious shortcomings when a complex field of law is developed on a case by case basis as discussed above. It is the opinion of the author that these areas serve to illustrate the need for rapid and comprehensive legislative action in this field. The new Michigan Housing Code, the culmination of years of effort by a revision committee, furnishes a fine example of the direction legislation in this area could take.[100] As a minimum, certain specific procedures must be designed clearly to afford protection to both parties to the lease.

Initially, a housing code should specifically indicate the defects which will be deemed material, and the defects the existence of which will allow action on the part of the tenant only if the landlord fails to correct them. The tenant should be under an obligation to report the defects not only directly to the housing bureau, but also to the landlord. After the housing bureau is notified of the defect, an inspection should be conducted, and notice of the defect served on the landlord. The landlord should be afforded the opportunity to show that the defect arose not as a result of his failure to maintain the premises, but because of the tenant's improper use or care of the property. If this were the case in the opinion of the inspector, the statutory remedies should not be immediately available to the tenant. The landlord should then have a specified period in which to repair the defect, perhaps fifteen days for a serious defect such as broken floors and stairs, faulty electric wiring, inoperative plumbing, or unsanitary conditions. For less dangerous or offensive defects, such as broken windows or lightbulbs in common passageways, the landlord should be given a longer period, perhaps thirty days.

It should be provided that the tenant is not allowed to take any action except that specified by the statute. Under the category of remedies, the code should first provide that if the premises are unsafe for human life the tenant may immediately vacate and abate his rent. As far as less serious defects are concerned, the compliance or non-compliance of the structure with the housing code should be evidenced by a certificate of occupancy issued by the housing bureau. The landlord would be required to have this certificate at all times as a prerequisite to the collection of rent. This certificate would not only be a condition precedent

100. This Code, adopted in 1968, is the most integrated and comprehensive in the country. The final draft was a culmination of the work of the Community Legal Action Program, Legal Services Program at the University of Detroit Law School, and is discussed in 3 LAW IN ACTION 5 (1968).

to the initial payment of rent, but would have to be retained throughout the term of the lease.

If it is certified by the housing bureau that a defect exists, then the landlord would have the specified period in which to repair. A failure to repair would mean automatic loss of the certificate of occupancy, and would allow the tenant three options:

(1) If the defect falls into a certain class of very serious defects, the tenant should be allowed to vacate the premises and not remain liable for rent. This would of necessity be a carefully limited and defined class of defects, though not as serious as those under the unsafe to human life standard;

(2) If the defect is not within the first category, the tenant should be required to pay the abated portion of the rent into escrow with the housing bureau, or

(3) certify to the bureau that it is being used to repair the defect.

The necessity of providing clear standards which allow the tenant to take certain actions is required for the protection of the landlord. The statute should further provide for proportional abatement of the rent, the amount allowed to be withheld being commensurate with the seriousness of the defect. In this way the tenant is unable to avoid the entire rent obligation for a minor defect, and the landlord is not allowed to collect his rent when the condition of the structure does not comply with the code requirements.

As mentioned earlier, failure to meet the standards imposed by the statute would automatically revoke the certificate of occupancy and prevent its renewal until the building again complied with the requirements of the code. If the repairs are performed or paid for by the tenant out of his own funds, the certificate should not be issued until the landlord has reimbursed the tenant for the expenditures.

Clearly, this set of regulations should be incorporated into the lease agreement by operation of law, and should not be subject to disclaimer in the contract. Because the regulations would be supported by a strong public policy and would go to the very essence of the bargain, they must be deemed essential and not susceptable of waiver, at least in a residential lease.

In summary, it is the opinion of the author that a comprehensive legislative code is the only complete solution to provide results just and meaningful to both parties. By placing the authority in an administra-

tive body, much of the burden presently resting on the courts of large metropolitan areas would be relieved. The code would have the effect of providing a clear standard by which both landlord and tenant could measure their conduct, and a clearly defined set of remedies. This is not to say that a code of this sort would end all the problems and litigation inherent in this area of the law. But it is clear that it would have the effect of improving the position of the tenant, affording the landlord the necessary degree of protection, and relieving the burden of litigation for redress of present inhuman conditions.

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