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COMMENT

IMPLIED WARRANTY OF HABITABILITY: AN INCIPIENT TREND IN THE LAW OF LANDLORD-TENANT?

I. INTRODUCTION

Prior to the thirteenth century, the landlord-tenant relationship was solely contractual, the lessee having no right in the land itself by virtue of the lease.¹ During the three hundred years from the thirteenth to the sixteenth century, however, the doctrine gradually evolved that the lease is primarily a conveyance of an interest in the land rather than a contract.² The strict meaning of the term "lease" refers to its character as a conveyance,³ but "lease" is frequently used to indicate both the conveyance and the collateral obligations assumed in connection with it.⁴

As a conveyance, the lease has been governed by precepts and doctrines of property rather than contract law.⁵ Basic to this property oriented approach is the view that rent is the *quid pro quo* for the right to possession.⁶ If the landlord delivers the right to possession, and thereafter does not interfere with the tenant's possession, use and enjoyment of the premises,⁷ his part of the agreement is executed. Even if the tenant subsequently discovers that the premises are completely unsuitable for his intended use, he is not relieved of the duty to

1. 2 R. Powell, *The Law of Real Property* § 221[1], at 177 (1967) [hereinafter cited by volume as R. Powell].

2. *Id.* at 178; 1 H. Tiffany, *The Law of Real Property* § 73 (3d ed. 1939) [hereinafter cited by volume as H. Tiffany]. This evolution is traced in terms of both legal doctrine and social causes in 3 W. Holdsworth, *A History of English Law* 213-17 (3d ed. rewritten 1927).

3. Blackstone, *Commentaries* * 317. The lease has been judicially recognized as a conveyance in numerous American decisions, e.g., *Carlton v. Williams*, 77 Cal. 89, 19 P. 185 (1888); *Webel v. Yale University*, 125 Conn. 515, 7 A.2d 215 (1939); *Averill v. Taylor*, 8 N.Y. 44 (1853); see 49 Am. Jur. 2d *Landlord & Tenant* §§ 1-2 (1970).

4. *Davidson v. Minnesota Loan & Trust Co.*, 158 Minn. 411, 197 N.W. 833 (1924); "A lease is both an executory contract and a present conveyance, and creates a privity of contract and a privity of estate between the lessor and the lessee." *Id.* at 415, 197 N.W. at 834; see 1 H. Tiffany § 74.

5. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); 3 G. Thompson, *Commentaries on the Modern Law of Real Property* § 1029, at 87 (1959) [hereinafter cited by volume as G. Thompson]; 6 S. Williston, *Contracts* § 890, at 587 (3d ed. W. Jaeger 1962) [hereinafter cited by volume as S. Williston].

6. *Ostrow v. Smulkin*, 249 A.2d 520 (D.C. Ct. App. 1969); *Cottrell v. Gerson*, 371 Ill. 174, 20 N.E.2d 74 (1939); 1 *American Law of Property* § 3.11 (A.J. Casner ed. 1952). See also *Connors v. Wick*, 317 Mass. 628, 59 N.E.2d 277 (1945); 52 C.J.S. *Landlord and Tenant* § 466, at 352 (1968).

7. Such interference would constitute a breach of the covenant of quiet enjoyment. *Diamond Cattle Co. v. Clark*, 52 Wyo. 265, 295-96, 74 P.2d 857, 866 (1937); 3 G. Thompson § 1130.

pay rent⁸ since he still retains everything he is entitled to under the conveyance: the right to possession.⁹

This rationale provides the theoretical basis for the doctrine of *caveat emptor*. The doctrine as applied to leases means that the prospective lessee must protect himself with regard to the condition of the premises by inspecting them prior to executing the lease.¹⁰ The same rationale supports the equally well established rule that the landlord has no duty to maintain the premises in repair during the term of the lease.¹¹

Under the theory of independence of covenants,¹² if the lessor expressly covenants regarding the condition of the premises or the making of repairs, absent some statutory provisions,¹³ the lessee's sole remedy for breach is damages.¹⁴ This theory treats the covenants of each party as unilateral obligations,¹⁵ where the duty to perform does not depend upon performance by the other party of any of his covenants.¹⁶ Thus, while the tenant may recover damages for breach of the landlord's covenant to repair, he must continue to pay rent.

The doctrine of *caveat emptor* evolved in a rural, agrarian society where the

8. *Lawler v. Capital City Life Ins. Co.*, 68 F.2d 438 (D.C. Cir. 1933); *Carney v. Bercault*, 348 Mass. 502, 509, 204 N.E.2d 448, 453 (1965); 3 G. Thompson § 1112, at 387-88. However, fraud or material misrepresentation on the part of the lessor would permit the lessee to terminate the agreement. *Eskin v. Freedman*, 53 Ill. App. 2d 144, 203 N.E.2d 24 (1964); *Cole v. Lord*, 160 Me. 223, 202 A.2d 560 (1964); *Daly v. Wise*, 132 N.Y. 306, 30 N.E. 837 (1892); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 689 (1934); see text accompanying note 83 *infra*.

9. See Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 Fordham L. Rev. 225, 235 n.18 (1970) [hereinafter cited as Quinn & Phillips].

10. *Nussbaum v. Sovereign Hotel Corp.*, 72 So. 2d 814 (Fla. 1954); *Pines v. Persson*, 14 Wis. 2d 590, 594-95, 111 N.W.2d 409, 412 (1961); 3 G. Thompson § 1129, at 468. "This maxim [caveat emptor] summarizes the rule that a purchaser must examine, judge, and test for himself." *Black's Law Dictionary* 281 (rev. 4th ed. 1968). See *Miller v. Tiffany*, 68 U.S. (1 Wall.) 298, 309 (1863); *Hargous v. Stone*, 5 N.Y. 73, 82 (1851); *Humphrey v. Baker*, 71 Okla. 272, 273, 176 P. 896, 897 (1918).

11. *Altz v. Leiberson*, 233 N.Y. 16, 17, 134 N.E. 703 (1922); 2 R. Powell § 233 and cases cited therein.

12. See *Marini v. Ireland*, 56 N.J. 130, 145, 265 A.2d 526, 534 (1970); 6 S. Williston § 890, at 589; *Restatement of Contracts* § 290 (1932).

13. E.g., Cal. Civ. Code § 1942 (West Supp. 1971); Okla. Stat. tit. 41, § 32 (1954).

14. *Stewart v. Childs Co.*, 86 N.J.L. 648, 92 A. 392 (1914); *Duncan Dev. Co. v. Duncan Hardware, Inc.*, 34 N.J. Super. 293, 298, 112 A.2d 274, 277 (App. Div.), cert. denied, 19 N.J. 328, 116 A.2d 829 (1955).

15. See 11 S. Williston § 1327.

16. *In re Edgewood Park Junior College, Inc.*, 123 Conn. 74, 192 A. 561 (1937); *Banister Co. v. P.J.W. Moodie Lumber Corp.*, 286 Mass. 424, 190 N.E. 727 (1934); see *Marini v. Ireland*, 56 N.J. 130, 145, 265 A.2d 526, 534 (1970). Quinn & Phillips 233-34 characterizes the landlord-tenant relationship as existing on two levels. The first consists of the mutually dependent promises to pay rent and to turn over the right to possession. The second consists of the landlord's other promises, e.g., to supply heat, light and other services. While a breach in one level triggers remedies on that level, it has no effect on the other.

subject of a lease was the land itself, and possession alone was the primary object of the bargain.¹⁷ In contrast, the doctrine is applied today¹⁸ to leases which are the result of an agreement under which the landlord agrees to provide a liveable dwelling, supplied with such necessities as heat and water.¹⁹ A realistic analysis of this agreement can only lead to the conclusion that the tenant's promise to pay rent is made in consideration of the aggregate of the landlord's promises to supply necessary services as well as to deliver the bare right to possession.²⁰ This is clearly evident where possession alone is without value unless the necessary services are supplied.²¹ In the absence of express covenants regarding habitability, the landlord should, in leasing a dwelling, be charged with an implied warranty that the premises are indeed habitable.²² Until recently, however, strict application of traditional property law principles has prevented courts from adopting the implied warranty of habitability in leases.²³

The development of the doctrine of constructive eviction²⁴ has served to mitigate the often harsh results which strict application of *caveat emptor* would dictate.²⁵ Constructive eviction has been defined as " 'some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises ' " ²⁶ The requisite intent " 'may be inferred from the character of . . . [the landlord's] acts if their natural and probable consequence is such as to deprive the tenant of the use

17. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 427, 462 P.2d 470, 472-73 (1969); *Quinn & Phillips* 227. See also *Marini v. Ireland*, 56 N.J. 130, 141, 265 A.2d 526, 532 (1970); 3 G. Thompson § 1110.

18. *Fetters v. City of Des Moines*, 260 Iowa 490, 149 N.W.2d 815 (1967); *Coleman v. Steinberg*, 54 N.J. 58, 253 A.2d 167 (1969). See also *Smith v. M.P.W. Realty Co.*, 423 Pa. 536, 225 A.2d 227 (1967).

19. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); see Real Estate Board of New York, Inc., Standard Form of Apartment Lease, cl. 13.

20. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

21. See *Quinn & Phillips* 254. See also *Barash v. Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970).

22. *Quinn & Phillips* 254 & n.74.

23. See Bruno, *New Jersey Landlord-Tenant Law: Proposals for Reform*, 1 Rutgers-Camden L.J. 299, 301, 303 (1969) [hereinafter cited as Bruno].

24. *Id.* at 335.

25. E.g., *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959) (landlord's failure to supply light, heat, electricity and elevator service to fifth floor tenant); *Low v. Clifton Dey Props. Inc.*, 62 Misc. 2d 817, 310 N.Y.S.2d 130 (Civ. Ct. 1970) (no refrigerator, rotted kitchen floor, holes in walls, infestation by roaches); see cases cited at notes 29-32 *infra*.

26. *Westland Housing Corp. v. Scott*, 312 Mass. 375, 381, 44 N.E.2d 959, 962-63 (1942), quoting *Bartlett v. Farrington*, 120 Mass. 284 (1876); see Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 De Paul L. Rev. 69, 75-84 (1951) [hereinafter cited as Rapacz] for a discussion of the type of act and requisite intent.

and enjoyment of the premises let.'²⁷ Where the landlord's wrongful acts have rendered the premises untenable, the tenant may vacate the premises and terminate his obligation to pay rent.²⁸ A constructive eviction has been held to have occurred as a result of, *e.g.*, the landlord's failure to curb vermin infestation,²⁹ to supply heat,³⁰ to stop dampness and leakage,³¹ and to eliminate foul, offensive odors.³²

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 rent if it is later determined that the defects in the premises were not sufficient to constitute a constructive eviction.³³ An even more serious objection to the adequacy of this remedy lies in the realities of modern urban living: a tenant may be unable to abandon the premises because a critical housing shortage prevents his finding another place to live.³⁴ Without abandonment, most courts have refused to find a constructive eviction.³⁵ Moreover, the low income tenant is faced with an additional problem: even if he could find a new home, he simply may not be able to afford the move.³⁶

27. *Westland Housing Corp. v. Scott*, 312 Mass. 375, 381, 44 N.E.2d 959, 963 (1942), quoting *Tracy v. Long*, 295 Mass. 201, 205, 3 N.E.2d 789, 791 (1936); see 3 G. Thompson § 1132; 52 C.J.S. Landlord and Tenant § 445 (1968).

28. *Yaffee v. American Fixture, Inc.*, 345 S.W.2d 195 (Mo. 1961); *Leider v. 80 William Street Co.*, 22 App. Div. 2d 952, 255 N.Y.S.2d 999 (1st Dep't 1964). See generally 1 American Law of Property §§ 3.49-.51 (A.J. Casner ed. 1952).

29. *Buckner v. Azulai*, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (Super. Ct. 1967); *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931).

30. *Ira Handleman Bldg. Corp. v. Dolan*, 15 Ill. App. 2d 49, 145 N.E.2d 250 (1957); *Bass v. Rollins*, 63 Minn. 226, 65 N.W. 348 (1895).

31. *Rea v. Algren*, 104 Minn. 316, 116 N.W. 580 (1908); *Siegel v. National Bead & Stone Co.*, 37 Misc. 2d 897, 237 N.Y.S.2d 198 (Civ. Ct. 1963).

32. *Heissenbittel v. Comnas*, 14 Misc. 2d 509, 177 N.Y.S.2d 850 (Westchester County Ct. 1958).

33. *Lemle v. Breeden*, 51 Hawaii 426, 431, 462 P.2d 470, 475 (1969). Since it is the eviction which terminates the tenant's duty to pay rent (*Rapacz* 87) a court's determination that there was no eviction means that the landlord is entitled to the rent under the terms of the lease. See *e.g.*, *Katz v. Duffy*, 261 Mass. 149, 158 N.E. 264 (1927); *Trustees of Sallors' Snug Harbor v. Sugarman*, 264 App. Div. 240, 35 N.Y.S.2d 196 (1st Dep't 1942).

34. *Marini v. Ireland*, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970). But see *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E.2d 627 (1970), which held that a critical housing shortage is beyond the scope of judicial notice.

35. *Radinsky v. Weaver*, 460 P.2d 218, 220 (Colo. 1969); *City of New York v. Deland*, 63 Misc. 2d 494, 495, 311 N.Y.S.2d 675, 676-77 (Civ. Ct. 1970); *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E.2d 627 (1970). The doctrine of constructive eviction without abandonment has not been widely accepted by the courts (*Quinn & Phillips* 238) although Massachusetts seems to allow it. See *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959).

36. See 1968 Wash. U.L.Q. 461, 473. But see *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E.2d 627 (1970), where the court rejected the tenant's allegation that she could not afford to move on the grounds that she had continued to pay rent.

II. HOUSING LEGISLATION

The realization that the development of large urban centers had created social conditions requiring legislative control led to the widespread enactment of housing codes at the turn of the century.³⁷ These codes were intended to require the landlord to maintain the leased premises at a minimum level of repair. They were not effective, however, and they have continued to be ineffective to the present time, in compelling landlords to improve substandard housing.³⁸

One shortcoming of state housing legislation is that, in most instances, it does not apply to all local governmental units within the state. The New York Multiple Dwelling Law,³⁹ for example, applies only to cities with a population of 500,000 or more.⁴⁰ Prior to 1954, this meant that many areas simply had no housing legislation, since only 56 municipal housing codes had been enacted in the entire country.⁴¹ The Federal Housing Act of 1954,⁴² however, required local communities to develop workable programs to eliminate slums and urban blight in order to qualify for urban renewal assistance, public housing aid and F.H.A. mortgage insurance. As a result more than 1,000 communities have enacted housing codes.⁴³ Unfortunately, these codes have not been effectively enforced.⁴⁴

While there are many factors contributing to lack of enforcement, such as inadequate administrative resources⁴⁵ and lack of motivation on the part of

37. E.g., New York Tenement House Act of 1901, Law of April 12, 1901, ch. 334, [1901] N.Y. Laws 124th Sess. 889; Law of June 7, 1895, No. 110, [1895] Pa. Laws 178; see Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1259-62 (1966) [hereinafter cited as Gribetz & Grad]; 39 Geo. Wash. L. Rev. 152, 156. Previous legislation had been designed to protect the public from fire and building collapse, rather than to protect the tenant. Gribetz & Grad 1259. For a history of building and housing regulations in New York City from the 17th Century through 1944, see J. McGoldrick, S. Graubard & R. Horowitz, Building Regulation in New York City (1944).

38. Gribetz & Grad 1255; Quinn & Phillips 249; Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965); see Note, Rent Withholding for Minnesota: A Proposal, 55 Minn. L. Rev. 82 (1970).

39. N.Y. Mult. Dwell. Law §§ 1-367 (McKinney 1946), as amended, (McKinney Supp. 1970).

40. Id. § 3 (McKinney Supp. 1970). Another example is Minn. Stat. §§ 460.01-86 (1963), which applies only to first class cities without a home rule charter. There are no such cities in the state. Note, Rent Withholding for Minnesota: A Proposal, 55 Minn. L. Rev. 82, 91 n.60 (1970).

41. Gribetz & Grad 1260 n.19.

42. Act of Aug. 2, 1954, ch. 649, § 101, 68 Stat. 590, codified as amended, 42 U.S.C. § 1451(c) (Supp. V, 1970).

43. Gribetz & Grad 1260 n.19; Moskowitz & Honigsberg, The Tenant Union-Landlord Relations Act: A Proposal, 58 Geo. L.J. 1013, 1014 (1970) [hereinafter cited as Moskowitz & Honigsberg].

44. Moskowitz & Honigsberg 1014; Quinn & Phillips 239-40; authorities cited note 38 supra. The inadequate enforcement of housing codes was noted as early as 1927. See Ford, The Enforcement of Housing Legislation, 42 Pol. Sci. Q. 549, 551-60 (1927).

45. Bruno 303-04 & n.25; Quinn & Phillips 241; Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304 (1965).

politically sensitive officials,⁴⁶ it has been suggested that the failure of code enforcement is primarily attributable to the reliance on criminal penalties to enforce compliance.⁴⁷ In the early 1900's the primary sanction was the order to vacate which, by requiring tenants to vacate substandard buildings, deprived the landlord of his rent.⁴⁸ The prolonged housing shortage, however, has caused its virtual abandonment.⁴⁹ Consequently, the alternative criminal penalties have become the primary means of enforcement.⁵⁰ Unfortunately, the courts have generally exacted only minimal fines,⁵¹ and have rarely sentenced a convicted landlord to jail.⁵² If the landlord bases his decision to repair on business considerations, he will usually find it much more economical to simply pay the fine,⁵³ and since he runs little risk of going to jail, there is no effective pressure to coerce his compliance with the applicable code.

More recent legislation has emphasized rent impairing remedies.⁵⁴ These statutes fall into one of three categories: repair and deduct,⁵⁵ rent withholding or abatement,⁵⁶ and receivership.⁵⁷ While this type of legislation is potentially more effective, being directed toward the landlord's pecuniary interest, those statutes which have thus far been enacted have failed to effectively fulfill their promise.

Repair and deduct statutes have been enacted in six states.⁵⁸ Permitting a tenant to repair serious deficiencies after the landlord has failed or refused to do so and then to deduct the cost of such repairs from his rent could be an efficient and effective remedy, yet this procedure has been all but emasculated by other statutory provisions. Two states, for instance, limit the total cost of

46. Gribetz & Grad 1256-57.

47. *Id.* at 1256. N.Y. Mult. Dwell. Law § 304(1) (McKinney Supp. 1970), e.g., provides that punishment for violations shall be "by a fine . . . by imprisonment . . . or by both. . . ." for a first violation.

48. 39 Geo. Wash. L. Rev. 152, 156 (1970); see Gribetz & Grad 1275. Ordering the tenant to vacate premises maintained in violation of housing regulations deprives the landlord of his right to rent, but is hardly an ideal remedy from the tenant's point of view. *Id.*

49. See 1966 N.Y.C. Dep't of Bldgs. Ann. Rep. 242-43; 39 Geo. Wash. L. Rev. 152, 156 (1970).

50. Quinn & Phillips 239; 39 Geo. Wash. L. Rev. 152, 156 (1970).

51. See 1966 N.Y.C. Dep't of Bldgs. Ann. Rep. 244. In 1966 the average fine per case was \$14.58. *Id.* See also Quinn & Phillips 240.

52. See P. Wald, *Law and Poverty*: 1965, at 15 (1965); Moskowitz & Honigsberg 1046; Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801, 824 (1965).

53. Gribetz & Grad 1277; Quinn & Phillips 240-41.

54. Moskowitz & Honigsberg 1048-52; Quinn & Phillips 242-49.

55. See note 58 *infra*.

56. See notes 61-65 *infra*.

57. See note 73 *infra*.

58. Cal. Civ. Code §§ 1941-42 (West 1954); La. Civ. Code Ann. arts. 2692-94 (West 1952); Mont. Rev. Codes Ann. §§ 42-201 to -202 (1961); N.D. Cent. Code §§ 47-16-12 to -13 (1954); Okla. Stat. Ann. tit. 41, §§ 31-32 (1954); S.D. Compiled Laws Ann. §§ 43-32-8 to -9 (1967).

repairs chargeable to the landlord to one month's rent,⁵⁹ hardly adequate to rehabilitate an uninhabitable dwelling. Furthermore, all of the states permit the landlord to nullify the operation of the statute by a provision in the lease.⁶⁰

Rent abatement or withholding statutes vary greatly in their respective procedural requisites. Under some, the withholding action may be initiated by a public agency such as a welfare department,⁶¹ or a designated public official.⁶² Under others, it can be initiated by the tenants themselves.⁶³ Generally, they provide for suspension⁶⁴ or reduction⁶⁵ of rent if the premises do not meet statutory standards. But some statutes allow the landlord to collect the amount withheld after he has initiated⁶⁶ or completed⁶⁷ repairs, and thus do not effectively deter the landlord from allowing his buildings to deteriorate initially. Even if there is no such provision, the landlord will often find it less costly to accept reduced rent than to make the necessary repairs.⁶⁸ In such a case, the remedy amounts to little more than damages for living in squalor.

The foregoing objections are based on the inadequacies of the statute once invoked, but a basic problem with this remedy is that many tenants, especially those in the urban ghetto, have found themselves evicted by their landlord in retaliation for invoking the law.⁶⁹ While a few statutes prohibit the practice,⁷⁰ and at least one court has refused to enforce it,⁷¹ retaliatory eviction continues to deter tenants from invoking rent withholding statutes in most jurisdictions.⁷²

The third category, receivership, is a variation of the rent withholding statute which provides additional procedural machinery for having a receiver appointed

59. Cal. Civ. Code § 1942 (West 1954); Mont. Rev. Codes Ann. § 42-202 (1961).

60. E.g. Cal. Civ. Code § 1941 (West 1954); Mont. Rev. Codes Ann. § 42-201 (1961); N.D. Cent. Code § 47-16-12 (1960); Okla. Stat. Ann. tit. 41, § 31 (1954); S.D. Compiled Laws Ann. § 43-32-8 (1967). In Louisiana this result has been permitted by the courts. See *Pecararo v. Grover*, 5 La. App. 676 (1927). The California Civil Code has been amended by § 1942.1 (West Supp. 1970), which declares such a waiver void where the premises are uninhabitable.

61. E.g., N.Y. Soc. Services Law § 143-b (McKinney 1966).

62. E.g., N.J. Stat. Ann. § 2A:42-77(a) (Supp. 1970).

63. E.g., Mass. Ann. Laws ch. 239, § 8A (1970); Pa. Stat. Ann. tit. 35, § 1700-1 (Supp. 1971).

64. E.g., Pa. Stat. Ann. tit. 35, § 1700-1 (Supp. 1971); R.I. Gen. Laws Ann. § 45-24.2-11 (Supp. 1968).

65. E.g., N.J. Stat. Ann. § 2A:42-77 (Supp. 1970).

66. E.g., Mich. Comp. Laws § 125.530-531 (Supp. 1971).

67. E.g., Mo. Rev. Stat. § 441.570 (Supp. 1970); N.Y. Real Prop. Actions Law § 755 (McKinney Supp. 1970).

68. See, e.g., *People v. Rowen*, 9 N.Y.2d 732, 174 N.E.2d 331, 214 N.Y.S.2d 347 (1961), where correction of the violations would have cost \$42,500.

69. See Bruno 304-05 & n.31; Quinn & Phillips 243.

70. E.g., Cal. Civ. Code § 1942.5 (West Supp. 1970); Ill. Rev. Stat. ch. 80, § 71 (1966); N.J. Rev. Stat. § 2A:170-92.1 (Supp. 1970).

71. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). While the District of Columbia does not have such a statute, the court refused to enforce a retaliatory eviction on public policy grounds.

72. See Quinn & Phillips 243 & n.46.

to operate the building and make the necessary repairs.⁷³ Expenditures are recouped out of the rent, which is deposited in court.⁷⁴ While this type of remedy has been fairly successful⁷⁵ when it has been utilized, procedural complexities make it difficult to invoke.⁷⁶ Furthermore, the receiver is generally a municipal officer,⁷⁷ thus widespread use of this remedy will inevitably involve the municipality in directly administering and managing an enormous number of privately owned buildings.⁷⁸

The various shortcomings of each type of housing legislation have in many instances prevented the utilization of potentially effective remedies by aggrieved tenants. An additional problem, however, lies in the fact that relatively few jurisdictions have adopted rent impairing legislation at all.⁷⁹ Absent the adoption of more effective housing legislation on a much wider scale, or, alternatively, of legislation which abrogates property law concepts with respect to these leases and declares them to be contracts, the protection of a tenant's right to a liveable dwelling in return for his rent can only be insured by the development of the common law of landlord-tenant.

III. ANALYSIS OF RECENT DECISIONS

Recent decisions⁸⁰ in several jurisdictions have recognized the existence of an implied warranty of habitability in the lease of a dwelling. These decisions included both cases where the tenant brought an action against the landlord,⁸¹ and cases where the tenant asserted his rights defensively in resisting the land-

73. E.g., Mass. Ann. Laws ch. 111, § 127H(d) (1967); N.Y. Mult. Dwell. Law § 309(5) (McKinney Supp. 1970).

74. See N.Y. Mult. Dwell. Law § 309(5) (McKinney Supp. 1970). Massachusetts does not have such a provision. See Mass. Ann. Laws ch. 111, § 127H(d) (1967).

75. From the time of its enactment in 1962 to early in 1966, the New York statute resulted in 120 buildings being placed in receivership. Gribetz & Grad 1273. It has been maintained that the statute has effectively coerced landlords to make substantial improvements on their own. Gribetz, *New York City's Receivership Law*, 21 *J. Housing* 215, 297 (1964).

76. Quinn & Phillips 249; see N. LeBlanc, *A Handbook of Landlord-Tenant Procedures and Law*, With Forms 30-31 (2d ed. 1969).

77. E.g., N.Y. Mult. Dwell. Law § 309(5)(c)(1) (McKinney Supp. 1970) (Commissioner of Real Estate); see Mich. Comp. Laws § 125.535(2) (Supp. 1971).

78. See Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 *Calif. L. Rev.* 304, 335-36 (1965), where it is maintained that this is the necessary result of an effective urban rehabilitation program.

79. Eighteen states have adopted this type of legislation.

80. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 *Hawaii* 426, 462 P.2d 470 (1969); *Lund v. MacArthur*, 51 *Hawaii* 473, 462 P.2d 482 (1969); *Marini v. Ireland*, 56 *N.J.* 130, 265 A.2d 526 (1970). *Garcia v. Freeland Realty, Inc.*, 63 *Misc. 2d* 937, 314 *N.Y.S.2d* 215 (Civ. Ct. 1970), did not find an implied warranty of habitability, but utilized another principle to reach the same result as *Marini v. Ireland*, supra. See text accompanying notes 130-38 *infra*. *Amanuensis, Ltd. v. Brown*, 65 *Misc. 2d* 15, 318 *N.Y.S.2d* 11 (Civ. Ct. 1971) and *Jackson v. Rivera*, 318 *N.Y.S.2d* 7 (Civ. Ct. 1971) permitted tenants to defend summary proceedings for non-payment of rent on the basis of the landlord's failure to comply with statutory standards.

81. *Lemle v. Breeden*, 51 *Hawaii* 426, 462 P.2d 470 (1969); *Garcia v. Freeland Realty, Inc.*, 63 *Misc. 2d* 937, 314 *N.Y.S.2d* 215 (Civ. Ct. 1970).

lord's action for rent,⁸² but the holdings were broadly stated, and none attempted to restrict their effect to the particular facts in issue. Prior to these decisions, in the absence of fraud or material misrepresentation,⁸³ there were only two exceptions to the rule of *caveat emptor*. One permitted a warranty of habitability to be implied in a short term lease of a furnished dwelling.⁸⁴ The other applied to leases involving a building to be constructed for a particular purpose.⁸⁵ These recent decisions, then, represent a drastic modification of prior law. Their primary effect is to greatly expand the number of non-statutory remedies available to the tenant. The remedies in these cases included permitting the tenant to make the necessary repairs and recover the expenses from the landlord,⁸⁶ abating or suspending rent during the period of uninhabitability,⁸⁷ and terminating the lease.⁸⁸ Potentially, however, the entire range of contract remedies⁸⁹ should become available,⁹⁰ since the cases have also treated the entire rental agreement as a contract and abandoned the theory of independence of covenants.⁹¹

Underlying these decisions is the realization that public policy must impose upon the landlord the obligation to insure the habitability of premises leased for dwelling purposes,⁹² yet the rationale of each case differs markedly. The

82. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Lund v. MacArthur*, 51 Hawaii 473, 462 P.2d 482 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

83. See note 8 *supra* and cases cited therein.

84. This exception was originally enunciated in the English case of *Smith v. Marrable*, 152 Eng. Rep. 693 (Ex. 1843), and has generally been followed in the United States. See, e.g., *Young v. Povich*, 121 Me. 141, 116 A. 26 (1922); *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942); 1 American Law of Property § 3.45 (A.J. Casner ed. 1952).

85. *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 (Civ. App. 1930), rev'd on other grounds, 66 S.W.2d 676 (Tex. Comm'n App. 1933); *Hardman v. McNair*, 61 Wash. 74, 111 P. 1059 (1910).

86. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Jackson v. Rivera*, 318 N.Y.S.2d 7 (Civ. Ct. 1971); *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. 1970).

87. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971).

88. *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969).

89. See text accompanying notes 167-87 *infra*.

90. *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082; *Lemle v. Breeden*, 51 Hawaii at 434-36, 462 P.2d at 475. *Accord*, *Morbeth Realty Corp. v. Rosenshine*, 323 N.Y.S.2d 363 (Civ. Ct. 1971).

91. While a number of cases have introduced contract principles, including mutual dependence of covenants, none have found mutuality between the two levels of the landlord-tenant relationship posited by Quinn and Phillips. Note 16 *supra*. See Note, *Contract Principles and Leases of Realty*, 50 B.U.L. Rev. 24 (1970). See also *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); 6 S. Williston § 890A, at 632.

92. *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1074-80; *Lemle v. Breeden*, 51 Hawaii at 433, 462 P.2d at 474; *Marini v. Ireland*, 56 N.J. at 141-43, 265 A.2d at 532-33; *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d at 939, 314 N.Y.S.2d at 219. Legal scholarship has also addressed itself to this issue. See note 170 *infra* and authorities cited therein.

various approaches taken by the courts are important because the cases evidence a growing trend toward establishing the implied warranty of habitability in the leasing of dwellings as an accepted rule of law in American jurisdictions.⁹³

A. *Lemle & Marini*

The Supreme Court of Hawaii, in *Lemle v. Breeden*,⁹⁴ held that there is an implied warranty of habitability in the lease of a dwelling for residential purposes.⁹⁵ While the *Lemle* holding was not expressly restricted to furnished dwellings, the case involved a furnished house, and thus technically fell within the furnished dwelling exception.⁹⁶ Consequently, in *Lund v. MacArthur*,⁹⁷ the court expressly extended the principle to unfurnished dwellings as well.⁹⁸

The *Lemle* decision was an overt promulgation of public policy, necessitated and justified by the changed needs of modern society.⁹⁹ In its decision the court reviewed the history of the rule of *caveat emptor* as applied to leases,¹⁰⁰ and concluded that the doctrine should be reexamined.¹⁰¹ The court noted a parallel with the implied warranty of fitness and merchantability in the law of sales, and summarized the policy reasons for implied warranties in that field: "The reasoning has been (1) that the public interest in safety and consumer protection requires it, and (2) that the burden ought to be shifted to the manufacturer who, by placing the goods on the market, represents their suitability and fitness."¹⁰² Citing a number of cases where this reasoning was applied to sales of new homes,¹⁰³ the court concluded that the reasoning is equally persuasive in leases of real property.¹⁰⁴ Having decided that there is an implied warranty of habitability in the lease of a dwelling house, the court proceeded to characterize the lease as primarily a contractual relationship¹⁰⁵ wherein mutuality of cove-

93. See *Schweiger v. Superior Ct. of Alameda County*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970), where it was said in dicta that public policy requires leased premises to be maintained in habitable condition.

94. 51 Hawaii 426, 462 P.2d 470 (1969), noted in 38 Fordham L. Rev. 818 (1970). The plaintiff, after a brief inspection, leased defendant's furnished house for two short term periods. Rat infestation required abandonment three days after he went into possession. Thereafter, plaintiff brought an action to recover his deposit and rent payment.

95. *Id.* at 433, 462 P.2d at 474.

96. See note 84 *supra* and accompanying text.

97. 51 Hawaii 473, 462 P.2d 482 (1969). This was an action by the landlord for rent. The defendant had abandoned the premises after learning of serious violations of the local building code.

98. *Id.* at 475, 462 P.2d at 483.

99. *Id.* at 429-34, 462 P.2d at 472-74.

100. *Id.* at 429-33, 462 P.2d at 472-73; see text accompanying notes 10-32 *supra*.

101. 51 Hawaii at 432, 462 P.2d at 473. For an earlier critical analysis of this doctrine, see *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), where the Wisconsin Supreme Court adopted the furnished dwelling exception. See note 84 *supra* and accompanying text.

102. 51 Hawaii at 432, 462 P.2d at 473, citing W. Prosser, *Torts* § 97 (3d ed. 1964).

103. *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Humber v. Morton*, 426 S.W.2d 554 (Sup. Ct. 1968), *aff'd mem.*, 448 S.W.2d 494 (Tex. Civ. App. 1969).

104. 51 Hawaii at 432, 462 P.2d at 474.

105. *Id.* at 432, 462 P.2d at 474. The court cited no authority for this conclusion. It is, therefore, probably a policy decision based upon the changed needs of society.

nants would apply. This aspect of the decision is extremely important, since the availability of contract remedies provides the means by which the policy determination is implemented.¹⁰⁶

The Supreme Court of New Jersey, in *Marini v. Ireland*,¹⁰⁷ discussed the basic elements—society's changed needs and the lease as a contract—but the emphasis was reversed. After discussing the doctrine of *caveat emptor*,¹⁰⁸ the court ignored traditional landlord-tenant concepts and utilized guidelines applicable to the construction of contracts in order to reach its holding.¹⁰⁹ Starting with the premise that a covenant can arise either from the specific language of the lease, or by implication where it is indispensable to the purpose of the lease, the court stated that the intention of the parties, as evidenced by the circumstances of the letting, is determinative of what covenants may be implied.¹¹⁰ Since the lease itself restricted the use of the premises to "dwelling," the very object of the letting was found to be providing the lessee with suitable living quarters, and the landlord was therefore held to have impliedly warranted that this was what he had available.¹¹¹

Implying the warranty, however, would have been a futile gesture under the traditional independence of covenants doctrine, so the court followed the contract construction principle through to its logical conclusion and held the landlord's implied covenant of habitability and the tenant's covenant to pay rent to be mutually dependent.¹¹²

B. *Javins*

In *Javins v. First National Realty Corp.*,¹¹³ the United States Court of Appeals for the District of Columbia Circuit held that a warranty of habitability is im-

106. See text accompanying notes 167-87 *infra*.

107. 56 N.J. 130, 265 A.2d 526 (1970). After repeatedly attempting to inform the plaintiff-landlord that the toilet in the demised premises was cracked and leaking water onto the floor, defendant hired a plumber to make the necessary repairs. Defendant then deducted the cost of these repairs from the following month's rent. Plaintiff brought an action for summary dispossess and recovery of the rent balance. The trial court found for the landlord, and the Supreme Court of New Jersey reversed and remanded for a new trial in conformity with its holding.

108. *Id.* at 141-43, 265 A.2d at 532-33. The New Jersey Supreme Court had previously criticized this doctrine in *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

109. 56 N.J. at 141-44, 265 A.2d at 533-34, citing 3 G. Thompson § 377; see 4 S. Williston §§ 602-03.

110. 56 N.J. at 143, 265 A.2d at 533, citing, *inter alia*, *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 161 A.2d 717 (1960); *Washington Constr. Co. v. Spinella*, 8 N.J. 212, 84 A.2d 617 (1951). See *Indemnity Ins. Co. v. Sloan*, 68 F.2d 222, 228 (4th Cir. 1934); *Arizona Land Title & Trust Co. v. Safeway Stores, Inc.*, 6 Ariz. App. 52, 57, 429 P.2d 686, 691 (1967); *Maw v. Noble*, 10 Utah 2d 440, 443, 354 P.2d 121, 123 (1960); 4 S. Williston § 618, at 716-17.

111. 56 N.J. at 144, 265 A.2d at 533-34, citing *Hyland v. Parkside Inv. Co.*, 10 N.J. Misc. 1148, 162 A. 251 (Sup. Ct. 1932).

112. 56 N.J. at 145-46, 265 A.2d at 534-35. *Contra*, cases cited at note 16 *supra*.

113. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), noted in 39 Geo. Wash. L. Rev. 152 (1970) and 84 Harv. L. Rev. 729 (1971). The landlord, First National Realty Corp., brought actions against Javins and two other tenants seeking to recover possession of its apartments for the tenants' failure to pay rent. By way of a defense, the tenants alleged approximately 1,500 violations of the District of Columbia Housing Regulations.

plied in leases by the Housing Regulations of the District of Columbia,¹¹⁴ and also concluded that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition."¹¹⁵ While this conclusion was expressed in dictum, it was supported by a well-reasoned analysis which lends authoritative support to the development of the doctrine of implied warranty of habitability in leases.

The court's conclusion was based on three separate considerations. The first was that the old rule is based on factual assumptions which were appropriate to the agrarian economy of the Middle Ages, but which are no longer valid today.¹¹⁶ The court stated that the assumptions that "the land was more important than whatever small living structure was included in the leasehold"¹¹⁷ and that "the tenant farmer was fully capable of making repairs himself"¹¹⁸ are no longer true with regard to the modern urban tenant, and that, therefore, the old rule can no longer be justified in these terms.

Next, the court stated that landlord-tenant law should be brought into harmony with the principles supporting consumer protection cases based on implied warranties of quality.¹¹⁹ This aspect of the opinion presented the same arguments as were used by the court in *Lemle*,¹²⁰ and which were discussed above.¹²¹

The third and final consideration was to be found in the present urban housing situation. The court noted the inequality in bargaining power between landlord and tenant,¹²² certain impediments to competition in the rental housing market,¹²³ and the severe shortage of adequate housing¹²⁴ as compelling reasons for adopting the new approach.

The nexus of the holding, however, was the Housing Regulations.¹²⁵ While

114. D.C. Housing Regs. (1967). The argument that these regulations could be the basis of an implied warranty of habitability was made in Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 *Geo. L.J.* 519, 524 (1966) [hereinafter cited as Schoshinski].

115. 428 F.2d at 1077.

116. *Id.*; see Quinn & Phillips 231.

117. 428 F.2d at 1077 (footnote omitted).

118. *Id.* (footnote omitted).

119. *Id.* at 1075. This part of the decision is very well documented. See *id.* at 1075-76 & nn.14-25.

120. 428 F.2d at 1075-76. The court cites *Lemle v. Breeden*, 51 *Hawaii* 426, 462 P.2d 470 (1969), in support of its conclusion. *Id.* at 1076.

121. See text accompanying notes 94-106 *supra*.

122. 428 F.2d at 1079. The court cited *Edwards v. Habib*, 397 F.2d 687, 701 (1968); 2 *R. Powell*, *supra* note 1, § 221[1], at 183; *President's Committee on Urban Housing, A Decent Home* 96 (1968) & nn.44-46 [hereinafter cited as *A Decent Home*].

123. 428 F.2d at 1079. The impediments noted were class and racial discrimination, and standard form leases.

124. *Id.* at 1079, citing *A Decent Home*.

125. *Id.* at 1081. The court specifically relied on D.C. Housing Regs. § 2501 (1967) which stated: "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this 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." The Housing Regulations have since been amended to expressly provide for an implied warranty that the landlord will comply with the regula-

the Regulations do not specifically provide for private remedies, the court cited two decisions which had held that they do create rights enforceable by the tenant in tort.¹²⁶ Noting that the District of Columbia Court of Appeals, in *Brown v. Southall Realty Co.*,¹²⁷ had viewed the lease as a contract and held it illegal and void because the condition of the premises before the lease term began seriously violated the Housing Regulations,¹²⁸ the court said: "We think it untenable to find that this section has no effect on the contract after it has been signed. To the contrary, by signing the lease, the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accord with all applicable law."¹²⁹ The court further held that these statutory obligations may not be waived by agreement.

C. *Garcia, Amanuensis & Jackson*

In *Garcia v. Freeland Realty, Inc.*,¹³⁰ the Civil Court of the City of New York did not find an implied warranty of habitability, but reached the same result as the *Marini* case¹³¹ by relying on the obligations imposed on the landlord by sections 78¹³² and 80¹³³ of the New York Multiple Dwelling Law. Since these sections had previously been held to be enforceable by the city only,¹³⁴ the court stated they could not be the basis of a claim for reimbursement of the cost of repair by the lessee.¹³⁵ However, since the case involved

tions. D.C. Housing Regs. § 2902.2 (1971). Cf. *Morbeth Realty Corp. v. Rosenshine*, 323 N.Y.S.2d 363 (Civ. Ct. 1971).

126. *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943 (D.C. Cir. 1960); *Kanelos v. Kettler*, 406 F.2d 951 (D.C. Cir. 1968); see *Halliday v. Greene*, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (Dist. Ct. App. 1966); *Rietze v. Williams*, 458 S.W.2d 613 (Ky. 1970); *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922). Compare these holdings with the Massachusetts rule that a landlord's violation of a safety statute does not create a cause of action in favor of the tenant, but is merely evidence of negligence. *Dolan v. Suffolk Franklyn Sav. Bank*, 355 Mass. 655, 246 N.E.2d 798 (1968).

127. 237 A.2d 834 (D.C. App. 1968).

128. D.C. Housing Regs. § 2501 (1956). For text of regulation, see note 125 supra.

129. 428 F.2d at 1081. In support of its position, the court cited *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960); Annot., 110 A.L.R. 1048 & nn.55-56 (1937).

130. 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. 1970). Tenant's children were eating plaster and paint flaking off apartment walls. After complaining to landlord who took no action, tenant replastered and painted the walls himself and brought this action to recover for materials furnished and labor performed.

131. In *Garcia*, as in *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970), the tenant was awarded recovery of the cost of putting the premises into habitable condition himself, after the landlord had refused or neglected to do so. 63 Misc. 2d at 943, 314 N.Y.S.2d at 222.

132. N.Y. Mult. Dwell. Law § 78(1) (McKinney 1946) provides in part: "Every multiple dwelling . . . shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section. . . ."

133. *Id.* § 80(1) provides in part: "The owner shall keep all and every part of a multiple dwelling . . . clean and free from vermin, dirt, filth, garbage or other thing or matter dangerous to life or health."

134. 63 Misc. 2d at 938, 314 N.Y.S.2d at 217-18. The court cited *Davar Holdings, Inc. v. Cohen*, 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), *aff'd mem.*, 280 N.Y. 828, 21 N.E.2d 882 (1939) and *Emigrant Indus. Sav. Bank v. One Hundred Eight West Forty Ninth Street Corp.*, 255 App. Div. 570, 8 N.Y.S.2d 354 (1st Dep't 1938).

135. 63 Misc. 2d at 938, 314 N.Y.S.2d at 218; see note 134 supra and cases cited therein.

the ingestion by the tenant's children of flaking plaster and paint,¹³⁶ the court reached its decision by relying on the landlord's tort liability for injuries suffered by the tenant or members of his family as a result of the landlord's failure to make repairs as required by sections 78 and 80.¹³⁷ Arguing that the tenant's repairs constituted prevention of an actionable tort, the court held that it was reasonable to reimburse him for the expenses incurred.¹³⁸

The holding in *Amanuensis, Ltd. v. Brown*,¹³⁹ also decided by the Civil Court of the City of New York, went much further than *Garcia*, and sustained the tenants' defense based on breach of warranty of habitability against the landlord's claim for rent. The court found that the appellate division cases which had been identified as controlling in *Garcia*, *Davar Holdings, Inc. v. Cohen*¹⁴⁰ and *Emigrant Industrial Savings Bank v. One Hundred Eight West Forty Ninth Street Corp.*,¹⁴¹ did not compel a holding which sustained a landlord's right to rent where a residential building is operated in systematic violation of the law.¹⁴² The court stated that those cases "[left] . . . ample discretion to achieve decent and fair results in accordance with present day realities . . ." ¹⁴³

The court identified three factors which distinguished *Davar* and *Emigrant* from the present case: in those cases (1) the landlord had acted in good faith; (2) the violation did not significantly impair habitability; and (3) routine housing code enforcement was expected to be effective.¹⁴⁴ Holding that the appellate division did not intend to lay down a rule of universal application in *Davar*, the court construed that holding as applying only to the type of case then before the court.¹⁴⁵

136. 63 Misc. 2d at 940, 314 N.Y.S.2d at 219. *Contra*, *Kolojeski v. John Deisher, Inc.*, 429 Pa. 191, 239 A.2d 329 (1968), where defendant landlord's use of lead base paint which resulted in death of tenant's two year old child was held not to constitute actionable negligence.

137. 63 Misc. 2d at 941, 314 N.Y.S.2d at 220, citing *Weiner v. Leroco Realty Corp.*, 279 N.Y. 127, 17 N.E.2d 796 (1938); *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922); *Benjamin v. Woodner Co.*, 22 App. Div. 2d 68, 253 N.Y.S.2d 649 (1st Dep't 1964); *Moore v. Bryant*, 27 Misc. 2d 22, 83 N.Y.S.2d 365 (Sup. Ct. 1948); see cases cited note 81 supra.

138. 63 Misc. 2d at 943, 314 N.Y.S.2d at 222. The plaintiff was awarded the cost of materials he had purchased, but his claim of \$70 for labor was not granted. Instead, he was awarded an amount based on \$1.60 an hour, the minimum wage for unskilled labor. *Id.*, 314 N.Y.S.2d at 222-23.

139. 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971). The landlord brought a summary proceeding against tenants who counterclaimed for damages for violation of the warranty of quiet enjoyment and fitness for use. The landlord had acquired the building on April 4, 1969. At that time, and for several years before, there had been numerous housing code violations recorded against the property which the landlord had done little or nothing to correct.

140. 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), *aff'd mem.*, 280 N.Y. 828, 21 N.E.2d 882 (1939).

141. 255 App. Div. 570, 8 N.Y.S.2d 354 (1st Dep't 1938).

142. 65 Misc. 2d at 18, 318 N.Y.S.2d at 15; cf. *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d at 937-38, 314 N.Y.S.2d at 217-18.

143. 65 Misc. 2d at 18, 318 N.Y.S.2d at 15.

144. *Id.* at 19-20, 318 N.Y.S.2d at 16.

145. *Id.* at 20, 318 N.Y.S.2d at 17.

Having thus disposed of the limitations of *Davar* and *Emigrant*, the court identified two factual assumptions which influenced those decisions, but which it felt were no longer valid. The first was that code enforcement would be effective,¹⁴⁶ the second, that a tenant could readily move to a suitable dwelling.¹⁴⁷ The court then referred to modern legal scholarship¹⁴⁸ and recent decisions in other jurisdictions¹⁴⁹ in support of its conclusion that the older doctrine which permitted a landlord to recover rent while in violation of statutory requirements should be limited to situations such as were before the court in *Davar*.¹⁵⁰

The court then held that violations of the Multiple Dwelling Law¹⁵¹ and the housing code would permit residential tenants to raise a defense in eviction proceedings for nonpayment of rent in three situations:

First, where the landlord has not made a good faith effort to comply with the law, and there have been substantial violations seriously affecting the habitability of the premises.

Second, where there are substantial violations and code enforcement remedies have been pursued and have been ineffective.

Third, where substantial violations exist and their continuance is part of a purposeful and illegal effort to force tenants to abandon their apartments.¹⁵²

The court also stated that a violation of the warranties of quiet enjoyment and fitness for use may result in a landlord's being liable to the tenant for damages, but further held that the defendants had not proved damages in excess of the rent withheld.¹⁵³

In *Jackson v. Rivera*,¹⁵⁴ the issue was the tenant's right to make emergency repairs and set off the reasonable cost against the rent claimed. The court characterized this as being substantially the same question as posed by *Amamu-*

146. As authority for the conclusion that code enforcement has been inadequate the court cited Gribetz & Grad, *supra* note 37, and Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965). 65 Misc. 2d at 19, 318 N.Y.S.2d at 17; see text accompanying notes 37-39 *supra*.

147. 65 Misc. 2d at 19-20, 318 N.Y.S.2d at 17. The court cited no authority in support of its conclusion that this is no longer true, but discussed the fact that a severe housing shortage has existed since World War II. *Id.*

148. *Id.* at 20, 318 N.Y.S.2d at 17, citing Quinn & Phillips and Sax & Hiestand, *Slumlordism as a Tort*, 65 Mich. L. Rev. 869 (1967); Schoshinski, *supra* note 114.

149. 65 Misc. 2d at 20, 318 N.Y.S.2d at 18, citing, *inter alia*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 395 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

150. 65 Misc. 2d at 20, 318 N.Y.S.2d at 17.

151. N.Y. Mult. Dwell. Law §§ 1-367 (McKinney 1946), as amended, (McKinney Supp. 1970).

152. 65 Misc. 2d at 21, 318 N.Y.S.2d at 19.

153. *Id.* at 24, 318 N.Y.S.2d at 22.

154. 318 N.Y.S.2d 7 (Civ. Ct. 1971). The landlord brought a summary proceeding for nonpayment of rent. The tenant asserted a right to deduct the cost of having her toilet repaired, which she had done after the landlord refused to repair it. The court permitted her to deduct \$22.00, the actual cost, which was found to be a reasonable amount.

ensis. *Davar*¹⁵⁵ was distinguished as it had been in *Amanuensis*, and the court then briefly restated its discussion of the ineffectiveness of housing code enforcement, scholarly criticism of the independence of the landlord's right to rent, and recent decisions in other jurisdictions.¹⁵⁶

The court found that the landlord had violated his statutory duty to repair under the Multiple Dwelling Law,¹⁵⁷ and that the nature of the situation—a defective toilet—created an emergency which could not await the outcome of court proceedings. Under the circumstances, “[t]he tenant was entitled to have her toilet put in working condition promptly.”¹⁵⁸ The court held that a tenant may make repairs and deduct their reasonable cost from the rent where (1) the situation creates an emergency affecting habitability, (2) the landlord has refused to make repairs, and (3) the condition cannot reasonably continue until code enforcement proceedings have run their course.¹⁵⁹

In contrast to *Garcia*,¹⁶⁰ which provided relief for the tenant while remaining within the bounds of traditional landlord-tenant law as set forth in *Davar*¹⁶¹ and *Emigrant*,¹⁶² *Amanuensis* and *Jackson* limited the applicability of those cases and applied the modern concept of mutuality between the landlord's right to rent and the tenant's right to a habitable dwelling.¹⁶³ Until the appellate courts reconsider the law in this area, these decisions indicate that New York may well follow the trend established by *Lemle*,¹⁶⁴ *Marini*¹⁶⁵ and *Javins*.¹⁶⁶

IV. REMEDIES MADE AVAILABLE

Under prior law, the tenant whose leased dwelling became uninhabitable could either repair the defects at his own expense¹⁶⁷ or abandon the premises and invoke the doctrine of constructive eviction.¹⁶⁸ The implied warranty of habitability would greatly expand his choice of remedies, because the courts which recognize that doctrine have at the same time treated the lease as a con-

155. 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), aff'd mem., 280 N.Y. 828, 21 N.E.2d 882 (1939).

156. 318 N.Y.S.2d at 9. The court cited the same authorities as had been cited for these conclusions in *Amanuensis*. See notes 144, 146-47 supra.

157. N.Y. Mult. Dwell. Law § 78 (McKinney 1946); see note 132 supra for text of this section.

158. 318 N.Y.S.2d at 10.

159. Id.

160. See text accompanying notes 130-38 supra.

161. 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), aff'd mem., 280 N.Y. 828, 21 N.E.2d 882 (1939); see text accompanying notes 140-45 supra.

162. 255 App. Div. 570, 8 N.Y.S.2d 354 (1st Dep't 1938); see text accompanying notes 141-45 supra.

163. *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d at 19-21, 318 N.Y.S.2d at 17-18. *Jackson v. Rivera*, 318 N.Y.S.2d at 8-9.

164. See text accompanying notes 94-106 supra.

165. See text accompanying notes 107-12 supra.

166. See text accompanying notes 113-29 supra; see *Morbeth Realty Corp. v. Rosenshine*, 323 N.Y.S.2d 363 (Civ. Ct. 1971).

167. See 3 G. Thompson § 1140, at 532.

168. See text accompanying notes 24-36 supra. See also *Kay v. Cain*, 154 F.2d 305 (D.C. Cir. 1946); *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. 2d 436, 155 N.E.2d 545 (1959) (dissenting opinion); *Kuzniak v. Broolchester*, 33 N.J. Super. 575, 111 A.2d 425 (1955).

tractual relationship,¹⁶⁹ and construed the implied warranty of habitability and the tenant's promise to pay rent as mutually dependent.¹⁷⁰ Thus, breach of the landlord's warranty gives the tenant his choice among the basic contract remedies,¹⁷¹ the most helpful of which are damages¹⁷² and rescission.¹⁷³

General damages for breach of warranty in sales contracts are measured by the difference between the value of the goods received and the value of the goods as warranted.¹⁷⁴ By analogy, the aggrieved tenant would be awarded the difference between the value of the defective premises and the value of the premises in a habitable state of repair. In landlord-tenant terminology, this would amount to an abatement of the rent, or possibly even a suspension of it if the premises are found to be totally without value. This was the remedy which the *Javins* court adopted,¹⁷⁵ remanding the case for the determination of whether substantial violations existed, and if so, what portion of the tenant's obligation to pay rent was suspended by the landlord's breach.¹⁷⁶ The *Amanuensis* court also applied this remedy and set off repair costs against the tenant's rent obligation and permitted the tenant to deposit rent in escrow until conditions were remedied by the landlord.¹⁷⁷

Rescission is an alternative to the remedy of damages. In sales law it terminates the contract and allows the aggrieved party to recover whatever he has given or its value.¹⁷⁸ Applying this to the lease situation, the tenant would be permitted to terminate the lease and recover payments made, although he might be charged with liability for the reasonable value, if any, of his use and occupation of the premises for the time he was in possession.¹⁷⁹ Rescission was

169. *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082; *Lemle v. Breeden*, 51 Hawaii at 433, 462 P.2d at 474; *Marini v. Ireland*, 56 N.J. at 141, 265 A.2d at 532.

170. *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082; *Lemle v. Breeden*, 51 Hawaii at 436, 462 P.2d at 475-76; *Lund v. MacArthur*, 51 Hawaii at 475-76, 462 P.2d at 483-84; *Marini v. Ireland*, 56 N.J. at 145-46, 265 A.2d at 534-35. *Contra*, *Hutcherson v. Lehtin*, 313 F. Supp. 1324 (N.D. Cal. 1970).

171. *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082; *Lemle v. Breeden*, 51 Hawaii at 434-36, 462 P.2d at 475; *accord*, *Morbeth Realty Corp. v. Rosenshine*, 323 N.Y.S.2d 323 (Civ. Ct. 1971).

172. Damages, of course, were always available if the landlord breached his express covenant to repair. Absent such a covenant, however, the tenant had no cause of action. See notes 1-16 *supra* and accompanying text.

173. "Rescission, as an alternative to a damage action for breach of warranty, terminates the contract and allows the aggrieved party to recover what he has given or its value." 38 *Fordham L. Rev.* 818, 823 n.56 (1970), citing 12 S. Williston, §§ 1454, 1454A, 1455, 1462; see text accompanying notes 178-80 *infra*.

174. Uniform Commercial Code, § 2-714(2); 3 S. Williston, *Sales* § 613 (rev. ed. 1948). In addition, incidental and consequential damages may be recovered. Uniform Commercial Code § 2-715; 3 S. Williston, *Sales* § 614 (rev. ed. 1948).

175. 428 F.2d at 1082-83. *Contra*, *In re Estate of Smith*, 123 Misc. 69, 204 N.Y.S. 475 (Sur. Ct. 1924); 3 G. Thompson § 1065, at 254.

176. 428 F.2d at 1082-83.

177. 65 Misc. 2d at 24, 318 N.Y.S.2d at 21-22.

178. 12 S. Williston § 1455. Williston specifically provides that rescission is permitted for breach of warranty. *Id.* § 1462. See Uniform Commercial Code, § 2-711(1).

179. See *William J. Davis, Inc. v. Slade*, 271 A.2d 412 (D.C. Ct. App. 1970); 3 G. Thompson § 1030, at 90-91, § 1132, at 499-500, § 1137, at 528-29.

permitted in *Lemle*, allowing the tenant to recover rents and deposits he had paid in advance.¹⁸⁰

An additional remedy, and one not based upon contract principles, provided the basis for recovery in *Marini*.¹⁸¹ reimbursement of the tenant by the landlord for the cost of repairs made to put the premises in habitable conditions.¹⁸² This self-help approach is logically concomitant with the implied warranty of habitability, in view of the acute housing shortage which exists in most urban areas across the country today.¹⁸³ Practically speaking, it is the most effective remedy available to the aggrieved urban tenant. The housing shortage makes rescission as impractical for the urban tenant as abandonment under the theory of constructive eviction.¹⁸⁴ Furthermore, damages and abatement do not solve the basic problem, for when the landlord elects to accept reduced rent rather than make the necessary repairs, the tenant is left in substandard and unhealthy housing. Aside from the urban ghetto tenant, however, these contract remedies do provide flexible alternatives for enforcing a tenant's rights against his breaching landlord.

The self-help remedy was also permitted in *Garcia*.¹⁸⁵ Although based upon a tort-prevention principle rather than on an implied warranty of habitability, it provided effective relief within the limits of traditional law. The *Jackson*¹⁸⁶ court also applied this remedy, and its holding is of potentially broader application than *Garcia* since it distinguished the cases which were felt to control in *Garcia*, limiting them strictly to their own facts.¹⁸⁷

V. CONCLUSION

The inadequacy of traditional landlord-tenant law in dealing with the modern leasing situation is well documented.¹⁸⁸ The implied warranty of habitability, if adopted by the courts, can displace many of these shortcomings. Legal scholarship has supported this doctrine,¹⁸⁹ as have a few previous cases.¹⁹⁰ The cases discussed in this comment have adopted it and held it to be consonant with sound policy. It is to be hoped that these cases have opened the way for acceptance of the implied warranty of habitability on a wide scale and that the present trend evidences a willingness on the part of our courts to make the common law of landlord-tenant responsive to the realities of modern life.

180. 51 Hawaii at 428, 462 P.2d at 472.

181. 56 N.J. 130, 265 A.2d 526 (1970).

182. Compare 3 G. Thompson § 1140, at 532, and 3A id. § 123, at 142, and § 1302, at 470, with *Marini v. Ireland* 56 N.J. at 145, 265 A.2d at 534.

183. See N.Y. Times, June 5, 1969 at 1, col. 5.

184. See text accompanying notes 24-36 supra.

185. 63 Misc. 2d 937, 314 N.Y.S.2d 213 (Civ. Ct. 1970); see notes 130-38 supra and accompanying text.

186. 318 N.Y.S.2d 7, 10 (Civ. Ct. 1971).

187. Id. at 8-9.

188. Quinn & Phillips 321-42.

189. E.g., Lesar, Landlord and Tenant Reform, 35 N.Y.U. L. Rev. 1279 (1960); Quinn & Phillips; Schoshinski, supra note 114; Skillern, Implied Warranties in Leases: The Need for Change, 44 Denver L.J. 387 (1967). See also Note, 1968 Wash. U.L.Q. 461.

190. E.g., *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969); *Pines v. Persson*, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409 (1961).