Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?
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

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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.


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 rent\textsuperscript{8} since he still retains everything he is entitled to under the conveyance: the right to possession.\textsuperscript{9}

This rationale provides the theoretical basis for the doctrine of \textit{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.\textsuperscript{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.\textsuperscript{11}

Under the theory of independence of covenants,\textsuperscript{12} if the lessor expressly covenants regarding the condition of the premises or the making of repairs, absent some statutory provisions,\textsuperscript{13} the lessee's sole remedy for breach is damages.\textsuperscript{14} This theory treats the covenants of each party as unilateral obligations,\textsuperscript{15} where the duty to perform does not depend upon performance by the other party of any of his covenants.\textsuperscript{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 \textit{caveat emptor} evolved in a rural, agrarian society where the

\textsuperscript{8} Lawler v. Capital City Life Ins. Co., 68 F.2d 438 (D.C. Cir. 1933); Carney v. Bereault, 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.


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

\textsuperscript{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).


\textsuperscript{15} See 11 S. Williston § 1327.

\textsuperscript{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. In contrast, the doctrine is applied today to leases which are the result of an agreement under which the landlord agrees to provide a liveable dwelling, supplied with such necessaries as heat and water. 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. This is clearly evident where possession alone is without value unless the necessary services are supplied. 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. Until recently, however, strict application of traditional property law principles has prevented courts from adopting the implied warranty of habitability in leases.

The development of the doctrine of constructive eviction has served to mitigate the often harsh results which strict application of caveat emptor would dictate. 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 . . . ." 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


22. Quinn & Phillips 254 & n.74.


24. Id. at 335.


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


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 Sailors' Snug Harbor v. Sugarman, 264 App. Div. 240, 35 N.Y.S.2d 196 (1st Dep't 1942).


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.
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{39} for example, applies only to cities with a population of 500,000 or more.\textsuperscript{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.\textsuperscript{38} The Federal Housing Act of 1954,\textsuperscript{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.\textsuperscript{43} Unfortunately, these codes have not been effectively enforced.\textsuperscript{44}

While there are many factors contributing to lack of enforcement, such as inadequate administrative resources\textsuperscript{46} and lack of motivation on the part of

\begin{footnotes}

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


\item[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).

\item[41] Gribetz & Grad 1260 n.19.


\item[44] Moskovitz & 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).

\item[45] Bruno 303-04 & n.25; Quinn & Phillips 241; Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304 (1965).
\end{footnotes}
politically sensitive officials,\textsuperscript{46} it has been suggested that the failure of code enforcement is primarily attributable to the reliance on criminal penalties to enforce compliance.\textsuperscript{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.\textsuperscript{48} The prolonged housing shortage, however, has caused its virtual abandonment.\textsuperscript{49} Consequently, the alternative criminal penalties have become the primary means of enforcement.\textsuperscript{50} Unfortunately, the courts have generally exacted only minimal fines,\textsuperscript{51} and have rarely sentenced a convicted landlord to jail.\textsuperscript{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,\textsuperscript{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.\textsuperscript{54} These statutes fall into one of three categories: repair and deduct,\textsuperscript{55} rent withholding or abatement,\textsuperscript{56} and receivership.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item Gribetz & Grad 1256-57.
  \item 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.
  \item 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.
  \item Quinn & Phillips 239; 39 Geo. Wash. L. Rev. 152, 156 (1970).
  \item 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.
  \item See P. Wald, Law and Poverty: 1965, at 15 (1965); Moskovitz & Honigsberg 1046; Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 824 (1965).
  \item Gribetz & Grad 1277; Quinn & Phillips 240-41.
  \item Moskovitz & Honigsberg 1048-52; Quinn & Phillips 242-49.
  \item See note 58 infra.
  \item See notes 61-65 infra.
  \item See note 73 infra.
\end{itemize}
repairs chargeable to the landlord to one month's rent,\textsuperscript{60} 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.\textsuperscript{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,\textsuperscript{61} or a designated public official.\textsuperscript{62} Under others, it can be initiated by the tenants themselves.\textsuperscript{63} Generally, they provide for suspension\textsuperscript{64} or reduction\textsuperscript{65} of rent if the premises do not meet statutory standards. But some statutes allow the landlord to collect the amount withheld after he has initiated\textsuperscript{66} or completed\textsuperscript{67} 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.\textsuperscript{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.\textsuperscript{69} While a few statutes prohibit the practice,\textsuperscript{70} and at least one court has refused to enforce it,\textsuperscript{71} retaliatory eviction continues to deter tenants from invoking rent withholding statutes in most jurisdictions.\textsuperscript{72}

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

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  \item 61. E.g., N.Y. Soc. Services Law § 143-b (McKinney 1966).
  \item 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.
  \item 69. See Bruno 304-05 & n.31; Quinn & Phillips 243.
  \item 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.
  \item 72. See Quinn & Phillips 243 & n.46.
\end{itemize}
to operate the building and make the necessary repairs. While this type of remedy has been fairly successful when it has been utilized, procedural complexities make it difficult to invoke. Furthermore, the receiver is generally a municipal officer, thus widespread use of this remedy will inevitably involve the municipality in directly administering and managing an enormous number of privately owned buildings.

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. 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 decisions 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, and cases where the tenant asserted his rights defensively in resisting the landlord.

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).
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.
lord's action for rent, 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 there were only two exceptions to the rule of cædat emptor. One permitted a warranty of habitability to be implied in a short term lease of a furnished dwelling. The other applied to leases involving a building to be constructed for a particular purpose. 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, abating or suspending rent during the period of uninhabitability, and terminating the lease. Potentially, however, the entire range of contract remedies should become available, since the cases have also treated the entire rental agreement as a contract and abandoned the theory of independence of covenants.

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, yet the rationale of each case differs markedly.

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).
89. See text accompanying notes 167-87 infra.
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.
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.\textsuperscript{93}

A. \textit{Lemle} & \textit{Marini}

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

The \textit{Lemle} decision was an overt promulgation of public policy, necessitated and justified by the changed needs of modern society.\textsuperscript{99} In its decision the court reviewed the history of the rule of \textit{caveat emptor} as applied to leases,\textsuperscript{100} and concluded that the doctrine should be reexamined.\textsuperscript{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."\textsuperscript{102} Citing a number of cases where this reasoning was applied to sales of new homes,\textsuperscript{103} the court concluded that the reasoning is equally persuasive in leases of real property.\textsuperscript{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 relationship\textsuperscript{105} wherein mutuality of cove-
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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*, the court ignored traditional landlord-tenant concepts and utilized guidelines applicable to the construction of contracts in order to reach its holding.108 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.109 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.110

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.111

B. *Javins*

In *Javins v. First National Realty Corp.*,112 the United States Court of Appeals for the District of Columbia Circuit held that a warranty of habitability is imp-

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 dispossession 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.
plied in leases by the Housing Regulations of the District of Columbia, and also concluded that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition." 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. The court stated that the assumptions that "the land was more important than whatever small living structure was included in the leasehold" and that "the tenant farmer was fully capable of making repairs himself" 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. This aspect of the opinion presented the same arguments as were used by the court in Lemle, and which were discussed above.

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, certain impediments to competition in the rental housing market, and the severe shortage of adequate housing as compelling reasons for adopting the new approach.

The nexus of the holding, however, was the Housing Regulations. 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 F.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.\textsuperscript{126} Noting that the District of Columbia Court of Appeals, in \textit{Brown v. Southall Realty Co.},\textsuperscript{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,\textsuperscript{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."\textsuperscript{129} The court further held that these statutory obligations may not be waived by agreement.

\textbf{C. Garcia, Amanuensis & Jackson}

In \textit{Garcia v. Freeland Realty, Inc.},\textsuperscript{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 \textit{Marini} case\textsuperscript{131} by relying on the obligations imposed on the landlord by sections 78\textsuperscript{132} and 80\textsuperscript{133} of the New York Multiple Dwelling Law. Since these sections had previously been held to be enforceable by the city only,\textsuperscript{134} the court stated they could not be the basis of a claim for reimbursement of the cost of repair by the lessee.\textsuperscript{135} However, since the case involved


\textsuperscript{127} 237 A.2d 834 (D.C. App. 1968).

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


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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 . . . ."

\textsuperscript{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."


\textsuperscript{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, 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. 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.

The holding in *Amanuensis, Ltd. v. Brown,* 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* and *Emigrant Industrial Savings Bank v. One Hundred Eight West Forty Ninth Street Corp.*, 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. The court stated that those cases "[left] . . . ample discretion to achieve decent and fair results in accordance with present day realities . . . ."

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. 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.

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.


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.


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


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, the second, that a tenant could readily move to a suitable dwelling. The court then referred to modern legal scholarship and recent decisions in other jurisdictions 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*.

The court then held that violations of the Multiple Dwelling Law 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.

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.

In *Jackson v. Rivera*, 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 *Amanu*.

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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.


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


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 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.

The court found that the landlord had violated his statutory duty to repair under the Multiple Dwelling Law, 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.” 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.

In contrast to Garcia, which provided relief for the tenant while remaining within the bounds of traditional landlord-tenant law as set forth in Davar and Emigrant, 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. Until the appellate courts reconsider the law in this area, these decisions indicate that New York may well follow the trend established by Lemle, Marinis’ and Javins.

IV. Remedies Made Available

Under prior law, the tenant whose leased dwelling became uninhabitable could either repair the defects at his own expense or abandon the premises and invoke the doctrine of constructive eviction. 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-

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.
162. 255 App. Div. 570, 8 N.Y.S.2d 354 (1st Dep’t 1938); see text accompanying notes 141-45 supra.
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.
tractual relationship,\textsuperscript{169} and construed the implied warranty of habitability and the tenant's promise to pay rent as mutually dependent.\textsuperscript{170} Thus, breach of the landlord's warranty gives the tenant his choice among the basic contract remedies,\textsuperscript{171} the most helpful of which are damages\textsuperscript{172} and rescission.\textsuperscript{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.\textsuperscript{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 \textit{Javins} court adopted,\textsuperscript{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.\textsuperscript{176} The \textit{Amantensis} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{179} Rescission was

\begin{footnotes}

\footnotetext{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.


\footnotetext{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.

\footnotetext{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.

\footnotetext{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).

\footnotetext{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.

\footnotetext{176} 428 F.2d at 1082-83.

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

\footnotetext{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).

\end{footnotes}
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.

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180. 51 Hawaii at 428, 462 P.2d at 472.
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.
187. Id. at 8-9.
188. Quinn & Phillips 321-42.