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Landlord-Tenant - Landlord Liability for Tenant Self-Help - To Paint or Not to Paint: Garcia's Dilemma

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CASE NOTES

LANDLORD-TENANT—LANDLORD LIABILITY FOR TENANT SELF-HELP—TO PAINT OR NOT TO PAINT: GARCIA'S DILEMMA

An action was brought by José Garcia, a tenant, against his landlord, Freeland Realty. The plaintiff lived in a tenement located in the East Harlem section of Manhattan. Plaintiff, his wife, and their two children occupied the apartment. It was established that the paint and plaster in two of the rooms had paint flaking off the walls, and that the two small children had been eating the flakes. Plaintiff had made numerous complaints to the landlord about this condition, but the landlord did nothing about the complaint; in response, plaintiff purchased supplies and repainted and replastered the walls in question. The issue was whether or not a recovery by the plaintiff for the incurred expenses was barred, as a matter of law, in view of the common law rule that the landlord, in the absence of an express covenant, was not obligated to repair or paint?

The Civil Court of the City of New York held that Mr. Garcia was entitled to recover from the landlord the reasonable cost of materials. The court added a minimum wage of $1.60 per hour for the ten hours of labor performed by Mr. Garcia in repainting and replastering the walls. *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (1970).

This decision is significant because it represents the new trend of the courts in granting judicial recognition of both the right to habitability of slum housing and the right of limited self-help on the part of the tenant, in light of the shortage of low-rent housing that exists today. The purpose of this note, by means of the common-law development and relevant case law, is critically to evaluate the extension of the landlord-tenant relationship, and to demonstrate how this extension represents an expression of the trend to ground leases in the law of contracts, thus allowing a remedy for the tenant against the landlord for breach of an implied promise to repair, an analysis and remedy unknown at the common law.

At early common law, a lease was viewed as a conveyance, giving the lessee possessory rights against the world, rather than only contractual rights against the landlord. The principle of mutual dependency of promises that was normally applicable to bilateral contracts was not applied to

leases. If the lessor covenanted in the lease to make repairs, a breach of this covenant would not relieve the tenant of his obligation to pay rent, the tenant would have merely a cause of action against the landlord for breach of contract.

The lessees in the 17th and 18th centuries were primarily engaged in agricultural activities; the leasing of living quarters on the land was only incidental to that activity. Therefore, it was *land* that was "sold" for a period of time, without any warranty of fitness: Any building on the land was of secondary importance. The concept of no warranty of fitness was, in fact, equally applicable to the building. The emphasis on the real property aspect of the lease at common law was most evident in the cases which held that the lessee's liability to pay rent continued even after the accidental destruction of the building on the leased premises.[1] With a few exceptions, the courts have generally held that a lessee, in the absence of an exculpatory clause in the lease, continued to be liable to pay the rent in spite of the destruction. The lease, therefore, was viewed as a sale for years; the rent was regarded as the purchase price.[2]

Thus, in the lease of a dwelling or other building at early common law there was no implied warranty that the building was safe, suitable for habitation, or properly adapted for the use to which it was intended to be applied, nor that it would continue to be so.[3] The law was well settled that, in the absence of a convenant or agreement by the landlord to make repairs or maintain the leased premises in a safe and suitable condition for occupancy and use by the tenant, he was not bound to do so.[4]

The rule of law that the purchaser bought at his own risk was usually expressed in the maxim caveat emptor.[5] This general rule is well stated in the New Jersey case of *Michaels v. Brookchester*.[6] There, the court stated:

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1. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY, 71 (1962). *See* Fowler v. Bott, 6 Mass. 63 (1809). This is one of the leading cases in the area. For a good discussion of this area of law, *see* Comment, *Proposed Statutory Alterations of the Landlord-Tenant Relationship for the State of Illinois*, 19 DEPAUL L. REV. 752 (1970).

2. *See, e.g.*, Fowler v. Bott, 6 Mass. 63 (1809); Moffatt v. Smith, 4 N.Y. 126 (1850); Bussman v. Ganster, 72 Pa. St. 285 (1872).

3. Libby v. Tolford, 48 Me. 316 (1861); Dutton v. Gerrish, 9 Cush. 89 (Mass. 1851); Mullen v. Rainear, 45 N.J.L. 520 (Sup. Ct. 1883); O'Brien v. Capwell, 59 Barb. 497 (N.Y. 1870).

4. Brown v. Dwight Mfg. Co., 200 Ala. 376, 76 So. 292 (1917); Flaherty v. Nieman, 125 Iowa 546, 101 N.W. 280 (1904); Samuels v. A.M. Realty Co., 165 N.Y.S. 979 (Sup. Ct. 1917); Wood v. Carson, 257 Pa. 522, 101 A. 811 (1917); Beaulac v. Robie, 92 Vt. 27, 102 A. 88 (1917).

5. Wood v. Ross, 26 S.W. 147, 149 (Tex. Civ. App. 1894).

6. 26 N.J. 379, 140 A.2d 199 (1958).

> Historically a lease was viewed as a sale of an interest in land. The concept of *caveat emptor* applicable to such sales, seemed logically pertinent to leases of land. There was neither an implied covenant of fitness for the intended use nor responsibility in the landlord to maintain the leased premises.[7]

This principle, suitable for the agrarian setting in which it was conceived, lagged behind changes in dwelling habits and economic realities.[8]

Exceptions to this broad immunity inevitably developed. The initial exception to this theory of caveat emptor was the landlord's covenant of quiet enjoyment, which was implied from the landlord-tenant relationship itself. "Quiet enjoyment" means both the right to enjoy, unimpaired, the property leased from the owner, and that the lessee will be protected by the lessor from any interference with his possession, either by one claiming a paramount title, or by any acts of the lessor.[9]

Noting that the common law considered a lease a conveyance rather than a contract, it can be plainly seen that the implied covenant of quiet enjoyment likewise dealt with the use and "ownership" of the land for the "bought" period of time. However, the common law view of leases is highly impractical in today's urban society. Although the land is still necessary, there is much more concern with the building and the building's condition. As Professor Williston has stated,

> There is a clearly discernible tendency on the part of courts to cast aside technicalities in the interpretation of leases and to concentrate their attention, as in the case of other contracts, on the intention of the parties. . . .[10]

Still, the common law and the majority view today is that the landlord is under no obligation to repair the demised premises during the term,[11] even if the premises are in a dangerous condition or there are defects therein. The rule of caveat emptor applies in this respect to leases generally.[12] This rule operates, moreover, even though the premises become dangerous or untenantable during the demise.[13]

This common-law rule that a landlord, in absence of an agreement, is

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7. *Id.* at 372, 140 A.2d at 201.

8. *See* I AMERICAN LAW OF PROPERTY § 3.70 (1952).

9. W.E. Stephens Mfg. Co. v. Buntin, 27 Tenn. App. 411, 181 S.W.2d 643 (1944).

10. WILLISTON, CONTRACTS § 890A (Jaeger 3d Ed. 1962).

11. *See, e.g.*, Watkins v. Feinberg, 128 N.J.L. 79, 24 A.2d 198 (1942); Rosenberg v. Krinick, 116 N.J.L. 597, 186 A. 446 (1936); Hukill v. Myers, 36 W. Va. 639, 155 S.E. 151 (1892).

12. Holzer Displays Inc. v. 383 Lafayette Corp., 23 Misc. 2d 330, 200 N.Y.S.2d 467 (1960); Kuperschmid v. Tauszig, 124 Misc. 548, 208 N.Y.S. 464 (1925); Loucks v. Dolan, 211 N.Y. 237, 105 N.E. 411 (1914).

13. Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329 (1932); Mallard v. Duke, 131 S.C. 175, 126 S.E. 525 (1924).

not obligated to make repairs may be abrogated by statute.[14] The statutory enactments of the 19th century can be said to have their beginnings in the enactment of fire laws and building codes, which had as their primary emphasis the protection of the property and the buildings in the city. The health and safety of the buildings' inhabitants, particularly those residing in tenement houses, was not emphasized. Several jurisdictions have enacted statutory duties on the landlord to make repairs in addition to the enactment of building codes. Although these statutes have required the owner merely to keep the premises in repair, they have, nevertheless, been held to render the landlord liable to his tenant for personal injuries caused by the failure to repair required by statute.[15] California[16] allows a tenant, after notice to the landlord and his failure to repair, either to deduct the expenditures (if it is not more than one month's rent) or to vacate the premises without further payment of rent. Montana,[17] North Dakota,[18] Oklahoma,[19] and South Dakota[20] have also passed legislation which requires the lessor of a building intended for the occupation of human beings to place the premises in a condition fit for occupation, and to make all necessary repairs subsequent to occupation. Illinois also has adopted a procedure under which, if an official of any municipality determines, upon due investigation, that a building fails to conform to minimum standards of health and safety, and the owner or owners of the building fail, after due notice, to make the building conform, the muncipality may apply to any

14. Annis v. Britton, 232 Mich. 281, 205 N.W. 128 (1905).

15. Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1960).

16. CALIF. CIV. CODE §§ 1941, 1942 (1957). Section 1941 reads, in part, "The lessor of a building intended for the occupation of human beings must . . . put it into a condition fit for such occupation. . . ." Section 1942 reads, in part, "If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself . . . and deduct the expenses of such repairs from the rent . . . ."

17. MONT. REV. CODES ANN. §§ 42.201, 42.202 (1946). Section 42.201 states "The lessor of a building intended for the occupation of human beings must . . . put it into a condition fit for such occupation and repair all subsequent dilapidations. . . ." Section 202 states that, ". . . the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent. . . ."

18. N.D. REV. CODES ANN. §§ 47.16-12, 47.16-13 (1943). "The lessor of a building intended for the occupation of human beings must put it into a condition fit for such occupation and repair all subsequent dilapidations. . . ."

19. OKLA. STAT. ch. 41, §§ 31, 32 (1961). "The lessor of a building intended for the occupation of human beings must . . . put it into a condition fit for such occupation. . . ."

20. S.D. COMP. LAWS § 43-32-8 (1967). "The lessor of a building intended for the occupation of human beings must . . . put it into a condition fit for such occupation. . . ."

court of competent jurisdiction for an injuction requiring compliance with the ordinance or other appropriate relief. This section further provides that should a receiver be appointed to cause such a dwelling to conform, he may use the rents of the property to pay for repairs.[21] Since all of the previously mentioned statutes represent a radical departure from the common law, most courts have construed them narrowly.[22]

Another type of legislation present in this area is found in New York. This legislation imposes a duty, however, only upon the owners of multiple dwellings.[23]

The examples of state legislation previously discussed are but a few of the many statutes present in this area. Provisions of other state statutes dealing with the duty to repair have been limited in some cases to tenement houses,[24] but have been extended in others to include all dwellings.[25] Georgia has expressly rejected the common law position in favor of an affirmative duty imposed by law.[26] Thus, where the landlord has failed to repair, the tenant has been allowed to make the repairs himself and claim set off expenses against the rent.[27]

Although there are a few decisions to the contrary,[28] the general rule is that, in the absence of a statute similar to those previously discussed, there is no warranty, covenant, or condition implied in the letting of a tenement that it is reasonably fit for habitation. Such uninhabitability, moreover, does not warrant abandonment or constitute a constructive eviction[29] un-

21. ILL. REV. STAT. ANN. ch. 24, § 11-31-2 (Smith-Hurd 1967).

22. *See, e.g., In re* Buck's Estate, 32 Cal. 2d 372, 186 P.2d 708 (1947); Wall Estate Co. v. Standard Box Co., 20 Cal. App. 311, 128 P. 1020 (1912).

23. N.Y. MULT. DWELL. LAW § 78.1 (35-A McKinney 1946). "Every multiple dwelling . . . shall be kept in good repair."

24. CONN. REV. GEN. STAT. §§ 4050, 4054 (1949); MASS. GEN. LAWS ch. 144, § 66.89 (1932); WIS. STAT. §§ 101.06, 101.28 (1947).

25. IOWA CODE §§ 413.66, 413.108 (1946); MICH. STAT. ANN. §§ 5.2843, 5.2873 (1936).

26. GA. CODE ANN. § 61-111 (1966).

27. Black v. State, 54 Ga. App. 326, 187 S.E. 884 (1936); Rhoddenberry v. State, 50 Ga. App. 378, 178 S.E. 170 (1935); Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S.E. 928 (1909).

28. Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967) (infestation of the premises by vermin); Lenoard v. Armstrong, 73 Mich. 577, 41 N.W. 695 (1889); Collins v. Hopkins, 2 K.B. 617 (1923) (house in which person has recently suffered from tuberculosis).

29. Buckner v. Azulai, *supra* note 28; Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); 52 C.J.S. *Landlord-Tenant* § 455 (1968): "An intentional act or omission of the landlord or by those acting under his authority or with his permission, that permanently deprives the tenant without his consent of the use and beneficial enjoyment of the demised premises or any substantial part thereof, in

less there are some special terms in the lease which will raise an implied covenant or condition that the premises shall be fit for occupancy as a dwelling.[30]

The earlier cases placed the tenant in the same position as a buyer, and applied the rule of caveat emptor. The Pennsylvania court in *Moore v. Weber*[31] stated the rule this way: "The lessee's eyes are his bargain; he is bound to examine the premises he rents, and secure himself by covenants, to repair and rebuild."[32] Also, there was no implied warranty that the premises which were habitable at the time of demise would continue to be habitable during the demised period.[33] Based upon the premise stated in *Moore*, a District of Columbia court, in *Saunders v. First National Realty Co.*,[34] held that a tenant has no recourse by way of withholding rent, even though the lease was made void because of the landlord's failure to make repairs of housing code violations, where such violations occurred after the tenancy was created. The court emphasized that these regulations were penal in nature. This rationale, however, was later rejected in *Brown v. Southall Realty Co.*,[35] where the court declared the original lease was void and unenforceable because of its non-adherence to the housing regulations. In so holding, the court extended a basic contract principle concerning illegal leases to the area of known housing code violations prior to leasing, and incorporated housing codes in the interpretation of housing leases.

It has been suggested that the courts have begun to look into and toward well-established contract principles in solving difficult landlord-tenant problems.[36] A recital in a lease that the premises are in good condition, in some cases, has been held to have the effect of a warranty of habitability,[37] in other cases such recital has been completely rejected as implying such a warranty.[38] Most of the implied warranties in leases today have

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consequence of which he abandons the premises, constitutes a constructive eviction."

30. Wolfee v. Arott, 109 Pa. 493, 1 A. 333 (1885).

31. 71 Pa. 429, 10 Am. Rep. 708 (1872).

32. *Id.*, at 432, 10 Am. Rep. at 711.

33. Blake v. Dick, 15 Mont. 236, 38 P. 1072 (1895).

34. 428 F.2d 1071 (D.C. Cir. 1970). The duties imposed by housing regulations may not be waived nor shifted by agreement; the regulations specifically place the duty upon the lessor. "Criminal penalties are provided if these duties are ignored." *Id.* at 1082.

35. 237 A.2d 834 (D.C. App. 1968).

36. Moynihan, *supra* note 1.

37. Curran v. Cushing, 197 Ill. App. 371 (1916).

38. Foster v. Peyser, 9 Cush. 42 (Mass. 1852). A clause in a lease that the owner shall not be liable for any repair on the premises during the term—the house

been derived from legislation, generally of a type imposing a duty to repair on the landlord.[39]

The question of habitability of a leased dwelling has arisen in cases involving plumbing and drains,[40] lack of heat,[41] infestation with vermin and rodents,[42] and ill repute of the premises.[43] In the landmark case of *Altz v. Liberson*,[44] a tenant was injured by a falling ceiling. Judge Cardozo, then on the bench of the New York Court of Appeals, stated that the New York Tenement House Law, which provides that "every tenement house and all the parts thereof shall be kept in good repair,"[45] imposed a duty on the landlords that "extends to all whom there was a purpose to protect."[46] That statute did not specify who had the duty to repair, nor did it speak of tort liability: It only authorized penalties in criminal enforcement proceedings.[47] Nevertheless, this court held that

> [t]he legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.[48]

The District of Columbia in the case of *Ross v. Hartman*[49] has held that the violation of an ordinance intended to promote safety is negligence. The court found that a defendant who had left his automobile unlocked in violation of a traffic regulation was negligent as a matter of law, and was liable for injuries sustained by the third person at the hands of one who stole the car. The fictionalization of negligence contrived by earlier courts was

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now is in perfect order—had reference only to the condition of the house as an edifice on present repair and not to the future.

39. *See* CALIF. CIV. CODE §§ 1941, 1942 (1957); ILL. REV. STAT. ANN. ch. 24, § 11-31-2 (Smith-Hurd 1967); MONT. REV. CODES ANN. §§ 42.201, 42.202 (1946); N.D. REV. CODES ANN. §§ 47.16-12, 47.16-13 (1943); OKLA. STAT. ch. 41, §§ 31, 32 (1961); S.D. COMP. LAWS § 43-32-8 (1967).

40. *Supra* note 35. *See also* Kern v. Myell, 80 Mich. 525, 45 N.W. 587 (1890).

41. Keiper v. Anderson, 138 Minn. 392, 165 N.W. 237 (1917). An action against the landlord for negligently causing personal injuries to a tenant by violation of his covenant to keep leased premises heated has been held to be an action for breach of contract.

42. Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931).

43. Stapes v. Anderson, 26 N.Y.S. 327 (N.Y. Super. 1865).

44. 233 N.Y. 16, 134 N.E. 703 (1922).

45. N.Y. TENEMENT HOUSE ACT ch. 61, § 102 (McKinney 1909).

46. *Supra* note 44, at 19, 134 N.E. at 704.

47. N.Y. TENEMENT HOUSE ACT ch. 61, § 102 (McKinney 1909).

48. *Supra* note 44, at 19, 134 N.E. at 704.

49. 139 F.2d 114 (D.C. Cir. 1943).

abandoned by California in *McNally v. Ward.*[50] This case logically examined the applicable housing ordinances and arrived at the conclusion that, since the ordinances were designed to protect the occupants, the occupants should be the ones who should enforce them. "The purpose of the ordinance is the establishment of a general duty, not a coterie of specialized ones, and we should effectuate the legislative objective."[51]

The courts ultimately have implied a warranty of habitability within a lease. One of the most impressive judicial landmarks in this area is the case of *Pines v. Perssion.*[52] This was an action by a lessee to recover a sum of money deposited with the lessor for the fulfillment of a lease, plus the cost of labor performed by the lessee on the demised premises. The Supreme Court of Wisconsin held that, since the lease provided that the house was suitable for student housing, there was an implied warranty of habitability. Such implied warranty was broken when an inspection disclosed that the plumbing, heating, and wiring systems were defective and violated the building code. This breach relieved the lessee from any liability to pay the rent, and allowed vacation of the premises.

The next step for the judicial system would be to allow a tenant to remain in possession and have the premises repaired to a state suitable for habitation. This would be much more beneficial in today's society because of the low-income housing shortage.

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal clichè, *caveat emptor.*[53]

The rules of "old" law must now bend in the path of the new and rapidly changing milieu in which the law now operates.

In 1967, a lower appellate court in California noted the above language from *Pines* and accepted the implied warranty theory for the first time in California. The case was *Buckner v. Azulai.*[54] In 1969, several more jurisdictions began to follow the principle of *Pines.* In *Reste Realty Corp. v. Cooper,*[55] New Jersey cited *Pines* and *Buckner,* and decided to impose "an implied warranty that the premises are suitable for the leased purposes

50. 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1969).
51. *Id.* at 887, 14 Cal. Rptr. at 264.
52. Pines v. Perssion, *supra* note 29.
53. Pines v. Perssion, *supra* note 29, at 596, 111 N.W.2d at 412-13.
54. *Supra* note 28.
55. 53 N.J. 444, 251 A.2d 268 (1969).

and conform to local codes and zoning laws."[56] The court stressed the landlord's superior bargaining power and superior access to knowledge about defects in the building.[57]

The Supreme Court of Hawaii followed suit in *Lemle v. Breeden.*[58] Although this case involved a furnished apartment, the court did not fall back on the traditional exception to the no-warranty rule. It instead chose to follow *Reste Realty,* and found an implied warranty of habitability, recognizing that a lease is essentially a contractual relationship.

Any possible doubt that *Lemle* applied to unfurnished as well as furnished apartments was dispelled by the court two weeks later in *Lund v. MacArthur.*[59] Though the tenants in *Lund* had inspected the premises prior to renting, serious defects became apparent to them only after they had occupied the apartment, and it was then that they sought to vacate the premises. The court, in applying the *Lemle* concept, also interjected the consideration of the seriousness of the defect in the rented dwelling and the length of time during which the defect persisted as relevant factors to be considered in determining the materiality of a breach of an implied warranty of habitability.

A lower New York[60] court and a Colorado court[61] also soon adopted the implied warranty theory. In the decisions, the courts referred to a frustration of state legislative policy if use was made of the common law rule and also referred to the desirability of enforcement of a duty to repair on the landlord.

On May 7, 1970, the United States Court of Appeals for the District of Columbia rendered the most far-reaching decision. In *Javins v. First National Realty Corp.,*[62] a unanimous court held:

> In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia the standards of the warranty are set out in the Housing Regulations.[63]

The courts are now slowly adopting this new trend of applying the doctrine

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56. *Id.* at 452, 251 A.2d at 272.

57. *Supra* note 55.

58. 51 Hawaii 426, 462 P.2d 470 (1969). *See* Note, *Landlord and Tenant—Implied Warranty of Habitability—How "Constructive" is "Eviction"?,* 19 DEPAUL L. REV. 619 (1970).

59. 51 Hawaii 473, 462 P.2d 482 (1969).

60. Sayko v. Bishop, 2 CCH Pov. L. REP. ¶ 10,789 (N.Y. Dist. Ct. 1969).

61. Bonner v. Beechan, 2 CCH Pov. L. REP. ¶ 11,098 (Colo. County Ct. 1970).

62. 428 F.2d 1071 (D.C. Cir. 1970).

63. *Id.* at 1076-77.

of an implied warranty of inhabitability in the area of housing; in doing so, the archaic "black-letter" law of yesteryear must fall to the wayside.

In the interpretation of leases there has generally been a split with respect to the theory upon which to base a recovery. It was always a question of whether a lease was a specie of property law or contract law. In many instances, these two areas conflicted in their interpretations of a given act.

Freedom to contract is a particularly sacred concept in our judicial system. The only time the courts have invaded this area is when a very adhesive bargain has been formed. A transaction in which a tenant, who lacks bargaining power because of a housing shortage, is forced to rent a dwelling in a rundown condition seems to meet the basic requirements of such an adhesive contract.

Freedom to contract has been limited in other areas where public policy demands it because of the abuses found in certain types of contracts. For instance, a borrower cannot contract away the defense of usury,[64] nor can an employee waive the minimum wage requirement.[65] Because of the unequal bargaining position of the two parties in the previous situations, public policy considerations imply covenants into those contracts. A landlord-tenant relationship often is formed under the stress of such unequal bargaining positions; public policy should also demand that a tenant not be allowed to waive an implied warranty or any breach thereof. Parties should not be able privately to release, by contract (that is, lease), a landlord from an obligation required by law.[66]

It should be clearly noted that not every minor infraction of a housing or health code would be treated as a breach of the implied warranty. While no clear standards have been formed, it is apparent from the cases that the courts have followed some type of "substantiality" test. The District of Columbia in *Javins* alluded to a "substantial compliance" test.[67] "The jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* . . . ."[68] This was supported by prior decisions of the District of Columbia courts following the rule that a lease, made when there were substantial code violations, was illegal. In *Brown*, for example, the tenant withheld the rent because of unsafe and unsanitary conditions in the premises, which were of such a na-

64. CORBIN, CONTRACTS § 1515 (1962).
65. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).
66. 3175 Holding Corp. v. Schmidt, 150 Misc. 853 (N.Y. Mun. Ct. 1934).
67. *Supra* note 62, at 1082.
68. *Supra* note 62, at 1082 n. 63.

ture as to make the dwelling unsafe. The landlord knew, or should have known, that at the time of the demise the premises were, in fact, in violation of the housing code.[69] Thus, the lease was void, *ab initio*, and no rent was due thereunder to the landlord.

In the *Pines* case, the Wisconsin court did not specify any clear test, but it did point out that the house was "filthy" and the plumbing, heating and wiring were defective. "[T]he house was not in a condition reasonably and decently fit for occupation when the lease term commenced."[70] Hawaii specified no test of substantiality in *Lemle*, but it did hold that facts showing rat infestation "demonstrates the uninhabitability, and unfitness of the premises for residential purpose."[71] The court stated that it was a decided advantage of the doctrine of implied warranty that the tenant could then avail himself of a number of remedies under this "contract" doctrine.

The doctrine of constructive eviction, on the one hand, requires that the tenant abandon the premises within a reasonable time after giving notice that the premises are uninhabitable or unfit.[72] This is based on the absurd proposition, contrary to modern urban realities, that "[A] tenant cannot claim uninhabitability, and at the same time continue to inhabit."[73] Some courts have creatively allowed for alternatives to abandonment requirement by allowing for a declaration of constructive eviction without forcing actual quitting of the premises.[74] Other courts have found *partial* constructive evictions where alternative housing was scarce, thus allowing the tenant to remain in at least part of the premises.[75] The court in *Lemle* expresses this idea when it states:

> In spite of such imaginative remedies, it appears to us that to search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist. . . . By adopting the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness, a more consistent and responsive set of remedies are available for a tenant. They are the basic contract remedies of damages, reformation and rescission. These remedies would give the tenant a wide range of alternatives in seeking to resolve his alleged grievance.[76]

69. District of Columbia Housing Reg. §§ 2304, 2305 (1961).

70. Pines v. Perssion, *supra* note 29, at 596, 111 N.W.2d at 413.

71. Lemle v. Breeden, *supra* note 58, at 433, 462 P.2d at 474.

72. POWELL, THE LAW OF REAL PROPERTY § 225(3) (Rohan ed. 1969). *See* Aguglia v. Cavicchia, 229 Mass. 263, 118 N.E. 283 (1918).

73. Two Rector Street Corp. v. Bein, 226 App. Div. 73, 76, 234 N.Y.S. 409, 412 (1929).

74. Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959).

75. *See* Bruck v. Credit Corp., 3 N.J. 401, 70 A.2d 496 (1950).

76. Lemle v. Breeden, *supra* note 58, at 435-36, 452 P.2d at 475.

It has seemed fairly clear that the breach of warranty will permit the tenant to give notice of a rescission of any lease or rental agreement and vacate the premises. Under contract principles, since there has been a "failure of consideration,"[77] he will not be liable for future rent. This was the holding in *Reste Realty*[78] where the court appeared to equate breach of warranty with constructive eviction and the doctrine of quiet enjoyment. The court granted the tenant relief where an improper grading of a driveway resulted in the premises being flooded with water during the rainy season.

The court in *Javins* held that a breach of this warranty gives rise to the usual remedies for breach of contract and "that leases of urban dwelling units should be interpreted like any other contract."[79] The *Lemle* court indicated that the basic contract remedies for damages, reformation, and rescission would be available.[80] Since the implied warranty theory is essentially a contractual one, traditional affirmative actions for breach of contract should be allowed, including damages. Once a lease is based in the law of contracts, we may go into the intentions of the parties. The law will imply an obligation—and enforce it if it is a necessary implication of the instrument.

Rent withholding has, in the past, been the most effective method of forcing landlords to improve the dwellings. Where substantial code violations exist at the time of the demise, total rent withholding might be permitted. In *Brown,*[81] the District of Columbia held that a lease made in such circumstances was an illegal contract and, being void, no rent may be collected on it. The court in *Javins* cited *Brown* with apparent approval.[82] Where, however, one is able to prove that substantial code violations occurred only after the agreement was made, breach of an implied warranty is the best feasible attack. With this situation, the cases tend to indicate that a partial reduction in the rent would be allowed, and that the tenant would be able to avoid eviction if he pays the amount found to be due by the court.

The *Pines*[83] court reasoned that, since the landlord had breached the

77. RESTATEMENT OF CONTRACTS §§ 80, 314 (1932). Failure, without justification, to perform part of a contract constitutes a breach.

78. *Supra* note 55, 460-61, 251 A.2d at 276-77.

79. *Supra* note 62, at 1075.

80. Lemle v. Breeden, *supra* note 58, at 435-36, 462 P.2d at 475.

81. *Supra* note 35.

82. *Supra* note 62.

83. Pines v. Perssion, *supra* note 29.

warranty, there was a failure of consideration which absolved the tenant from the liability to pay *any* future rent. The tenant had entered into the lease of the house relying upon the representation of the landlord that the premises would be made habitable. When this was not done, the tenant moved in, and attempted to make the repairs himself. He failed, and vacation of the premises followed. The tenant, the court found, would be liable only for the "reasonable rental" of the premises during the time of actual occupancy.[84] In *Reste Realty* the court suggested in dicta that "equitable principles" would permit the tenant to remain in possession; the court would fix the reasonable rental value during the period of occupancy.[85] The court of appeals in *Javins* also appeared to join the "reasonable rental" school. That court stated—under contract principles—that the tenant's obligation to pay rent was dependent on the landlord's performance of his warranty of habitability. From this premise, it follows that the court would then reason that, if the landlord breaks this warranty at the beginning of the tenancy, no rent is owed. The court, however, refused to find their premise as a question of law. Instead, the court held that the *jury* must find "what portion, if any at all, of the tenant's obligation to pay rent was suspended by the landlord's breach."[86] The Illinois Supreme Court recently went one step farther in enunciating the rights of a tenant when he withholds rent. In *Spring v. Little*,[87] the court held that a tenant could not withhold his rent and still remain in possession of the dwelling under any theory of law. The court stated:

> It would seem most anomalous for a lessee being sued for eviction to set up as a defense the invalidity . . . on the basis of illegality for any reason, and claim the right to stay in possession under the illegal lease and withhold rent because entry into the lease was prohibited by law.[88]

Violation of a housing code does not give the lessee the right to remain in possession and withhold rent until the prohibited defects are corrected.

Reste Realty suggested an alternative to the "reasonable rent rule." The tenant, it was said, may "have the defective condition repaired or remedied himself and offset the cost against the rent fixed in the lease provided the expenditures involved wouldn't be unreasonable in light of the value of the leasehold."[89] The court converted this dictum into a holding in

84. Pines v. Perssion, *supra* note 29, at 594, 111 N.W.2d at 413.
85. *Supra* note 55, at 462 n.1, 251 A.2d at 277 n.1.
86. *Supra* note 62, at 1082.
87. Spring v. Little — Ill. 2d —, 266 N.E.2d 338 (1970).
88. *Id.* at —, 266 N.E.2d at —.
89. *Supra* note 55, at 462 n.1, 251 A.2d at 277 n.1.

Marini v. Ireland.[90] There, the tenant alleged that after repeated attempts to get the landlord to fix the leaking toilet she hired a plumber to repair it. The bill was $85.72, which she paid. The tenant then mailed a check for $9.28 together with the receipt for the plumber's fee in payment of the July rent. The landlord challenged the offsetting of the cost of repairs and demanded the outstanding balance.

Though the district court rejected the rent-withholding defense, the supreme court reversed, holding that "equitable as well as legal defenses asserting payment or absolution from payment in whole or part are available to a tenant in a dispossession action and must be considered by the court."[91] This court has however held that a tenant's recourse to self-help and consequent withholding of rent must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make necessary replacement or repair.[92]

The distinguishing feature of *Garcia v. Freeland Realty, Inc.*[93] is the ingestion by children of flaking plaster and paint from the walls of the tenement house. The court in this instance took judicial notice of the many incidents of death among children from lead poisoning, particularly among children in tenements in New York City. In fact, the court cited numerous recent New York Post and New York Times[94] articles portraying the "epidemic" proportions of this problem. The court used this health hazard to indicate that the painting is not for the sake of comfort but to protect the children of the poor from a menace to life and health.[95] The court followed the trend of other courts, which ground a lease, not in property law, but in contract and tort law, giving the tenant some of the remedies which would be available to him if he had signed an "ordinary contract."

In *Altz v. Leiberson*,[96] a case involving a statutory provision similar to the one involved in *Garcia*—Section 78 of the Multiple Dwelling Law[97]—

90. 56 N.J. 130, 265 A.2d 526 (1970).

91. *Id.* at 140, 265 A.2d at 531.

92. *Id.* at 146, 265 A.2d at 535.

93. 63 Misc. 2d 937, 314 N.Y.S.2d 215 (1970).

94. N.Y. Post, May 15, 1970, at 6, col. 2; N.Y. Times, June 12, 1970, at 20, col. 7; N.Y. Times, June 14, 1970, at 55, col. 1.

95. N.Y. UNCONSOL. LAWS ch. 338 (McKinney 1970) enumerates the major hazards to children from the ingestion of paint and provides a method of repair by the landlord where he can deduct up to three-fourths of the cost of repair from his taxes. This law is used by the court as a basis for the rationale that painting is necessary for the safety of the occupant and not merely for the sake of beautifying the premises.

96. *Supra* note 44.

97. N.Y. MULTIPLE DWELLING LAW § 78.1 (McKinney 1946) "(1) Every

the landlord was held liable to the tenant for injuries sustained as a result of a falling ceiling in the tenant's apartment. The purpose of Section 78 of the Multiple Dwelling Law was to impose a liability upon the landlord for the benefit of tenants and their families for injuries resulting from the landlord's failure to repair any part of a multiple dwelling.[98] A tort action resulted in *Altz*. So too, would a tort action be the probable result from the continued ingestion of peeling paint by children. Mr. Garcia acted to prevent the tort and irreparable damage. In his discussion of "prevention," Prosser has said "while the idea of prevention is seldom controlling, it very often has weight as a reason for holding the defendant responsible."[99]

The courts have suggested the remedy of set off against the rent by a tenant who repaired the apartment as the most feasible alternative open to the tenant. The *Garcia* decision represents an adoption by the courts of the implied warranty theory of inhabitability. The courts now consider the bargaining position of the tenant within a large city in considering his ability to alter a "form" lease.[100] The availability of housing and the conditions of such housing has made the courts assist the tenant in developing a better "bargaining position" in his "contract" to lease an apartment.[101]

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multiple dwelling . . . shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused by his own wilful act. . . . Any such persons who shall wilfully violate or assist in violating any provisions of this section shall also jointly and severally be subject to the civil penalties provided in Section 304. (2) Whenever, the light, ventilation, or any matter or thing in or about a multiple dwelling or part thereof, or in or about the lot on which it is situated, is in the opinion of the department in a condition or in its effect dangerous to life or health, the department may order or cause any such light, ventilation, matter or thing to be repaired or improved or as provided in Section 309 take such action as it may deem necessary to remove such danger to life or health."

98. Woolflok v. Eisenberg, 215 N.Y.S.2d 941 (1961); Moore v. Bryant, 83 N.Y.S.2d 365, 366 (1948).

99. PROSSER, TORTS § 4 (3rd ed. 1964).

100. Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 394 (1967): "The nature of the implied warranty in the lease would be that the leased premises are suitable for the purpose of the tenant and that they are built in conformity to the applicable local codes."

101. The MODEL RESIDENTIAL LANDLORD-TENANT CODE, Tentative Draft (1969), prepared by the American Bar Association, has provided guidelines as to the condition of an apartment supplied by the landlord. Section 2-203 stipulates that: "(1) The landlord at all times shall comply with local codes; and (2) He shall make all repairs and arrangements necessary to put and keep the dwelling units in as good condition as they were at the beginning of the term." Section 2-206 of this code provides the tenant with a remedy of repair and ability to deduct from the rent the cost of repair (up to $50.00).