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Landlord-Tenant - A Contractual Basis for and Implied Warranty of Habitability in Residential Leases

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that liberty, however, and in refusing to reach the merits of the child's constitutional claim by characterizing the claim as groundless, the decision demonstrated a lack of internal consistency. While purporting to overrule the non-consensual branch of the *in loco parentis* doctrine, the court allowed the school district to *presume*, until expressly notified to the contrary, a transfer of parental privilege to use corporal punishment regardless of whether a parent desired such a transfer. Aside from the aforementioned issue of waiver, this reasoning would appear to allow the purportedly overruled doctrine "to come in through the back door." By refusing to reach the merits of the child's constitutional claim on the basis of a delegation of parental privilege that the court was subsequently to find non-existent, the court has left us with no indication of the validity of the child's constitutional assertions. It is suggested that further judicial clarification of both the rights of the objecting but unknowing parent, and of child, is needed before the full impact of the *Glaser* rationale on the use of corporal punishment by school districts can be properly assessed.

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LANDLORD-TENANT—A CONTRACTUAL BASIS FOR AN IMPLIED WARRANTY OF HABITABILITY IN RESIDENTIAL LEASES—The Supreme Judicial Court of Massachusetts has held that in the rental of any premises for residential purposes under an oral or written lease, for a specified time or at will, there is an implied warranty of habitability.

Boston Housing Authority v. Hemingway, 293 N.E.2d 813 (Mass. 1973).

Plaintiff, Boston Housing Authority (landlord) brought two actions of summary process against the defendants (tenants)[1] for failure to pay rent. The tenants began to withhold rent on March 3, 1969, after repeatedly requesting the landlord to repair claimed defects such as leaky ceilings, improper heating, wet walls, broken doors and windows, and rodent and vermin infestations. In Massachusetts tenants of premises leased for dwelling purposes are permitted by law to withhold rent if those premises are in violation of the standards of fitness for human

1. The defendant tenants were Ruth Hemingway and Ruth Briggs.

habitation established under the state Sanitary Code and, if such violations endanger or materially impair the health and safety of the occupants of those premises; provided the tenant has given written notice to the landlord of a housing inspection report certifying those violations and written notification of his intention to withhold rent until the conditions constituting those violations are remedied.[2] Although the housing inspection department had issued to the Boston Housing Authority a report of serious housing code violations, the tenants had failed to give the landlord written notification of their intent to withhold rent.[3] At the closing of the evidence, the tenants requested that the trial court rule that the obligation of the Boston Housing Authority to maintain the premises in compliance with the housing regulations and the obligation of the tenant to pay rent under a rental agreement were dependent upon each other. A further request was that any money owed by the tenants to the landlord ought to be determined by the court according to the degree of habitability of each apartment. The final request was that, even though the tenants had failed to comply with the notice requirements of the rent withholding statute, they be permitted to assert the defense of uninhabitability and avoid payment of rent if the premises were as a matter of fact found to be in violation of the state Sanitary Code.[4] The superior court judge found that the statutory defense of uninhabitability to the Boston Housing Author-

2. MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1973) [hereinafter referred to as section 8A]. Section 8A states in pertinent part:

> There shall be no recovery under this chapter, pursuant to a notice to quit for non-payment of rent . . . of any tenement rented or leased for dwelling purposes if such premises are in violation of the standards of fitness for human habitation established under the state sanitary code . . . and if such violation may endanger or materially impair the health or safety of persons occupying the premises; provided, however (1) that the person occupying the premises, while not in arrears in his rent, gave notice in writing to the person to whom he customarily paid his rent (a) that he would, because of such violation, withhold all rent thereafter becoming due until the conditions constituting such violations were remedied and (b) that a report of an inspection of such premises have been issued by the board of health . . . which report states that such violation exists and that it may endanger or materially impair the health or safety of persons occupying said premises; (2) that such violation was not caused by the person occupying the premises . . . . ; (3) that the premises are not situated in a hotel or motel; nor in a lodging house or rooming house wherein the person occupying the dwelling unit has maintained said occupancy for less than three consecutive months; and (4) that the conditions constituting the violation can be remedied without the premises being vacated . . . .

3. In 1969, the legislature amended section 8A to permit notification of Sanitary Code violations to the landlord by the local housing inspection agency to satisfy the tenant's duty of notification. Although the tenants began withholding rent after the landlord received the certified report of code violations, they could not raise the statutory defense because the amendment was enacted after they began withholding rent and it did not apply to them. *See* MASS. GEN. LAWS ANN. ch. 355, § 8A (1969), *amending* MASS. GEN. LAWS ANN. ch. 239, § 8A (1967).

4. Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 836 (Mass. 1973).

ity's action for rent was not available to the tenants due to noncompliance with the notification provision, and denied the tenants' requested findings of facts and conclusions of law.

On appeal, the supreme judicial court rejected the superior court judge's assumption that the tenants' remedies were limited to the pertinent statutory provisions. The supreme judicial court held that a warranty of habitability is to be implied into residential leases, and a breach of this warranty entitles the tenants to contract remedies of recission, reformation and damages, as well as a defense to a summary process action.[5]

In order for the *Hemingway* court to make valid use of the implied warranty of habitability theory, the court initially justified the propriety of judicial abrogation of the common law property rule of independent covenants. This centuries-old concept provides that the tenant's covenant to pay rent was independent of any covenant that the premises were suitable for dwelling purposes, provided that any latent or patent defects existing in the premises at the inception of the lease were reasonably discoverable, and that the tenant's promise to pay rent was independent of a landlord's express covenant of repair or maintenance. The court reasoned that since the common law lease was viewed as a conveyance of real property, a logical incident of that status was the rule of independent covenants. The Massachusetts legislation authorizing rent withholding had altered that status drastically, but did not annul the rule since failure to comply with statutory procedures precluded avoidance of the rental obligation even if the premises were uninhabitable as a matter of fact. Consequently, the court's duty was to appraise the common law in terms of current public policy and to erase the difference between the common law and modern conceptions of the status of a lease by announcing a new rule of mutual and interdependent covenants.

Property law principles have traditionally governed landlord-tenant relationships because a lease, at common law, was treated as a conveyance of an interest in land.[6] The lessor's primary obligation was to deliver possession[7] of the land, the quiet enjoyment of which he im-

5. *Id.* at 843.

6. 2 R. POWELL, THE LAW OF REAL PROPERTY § 221(1) (1971); 6 S. WILLISTON, CONTRACTS § 890, at 586-87 (3d ed. W. Jaeger 1964).

7. Technically, the conveyance of the leasehold estate gave the tenant the legal right to possession. Delivery of the right to possession satisfies this obligation. A split of authority exists as to the lessor's obligation to deliver actual possession by displacing trespassers or holdover tenants rather than the legal right to possession. *See, e.g.*, King v.

plicitly[8] covenanted for the term of the lease.[9] Because rent was the quid pro quo for the right to possession,[10] once the tenant was in peaceable possession of the land, his obligation to pay rent was independent of any defects in the premises, breaches of express warranties to repair[11] or total destruction of the structures which rendered the leasehold worthless.[12] Absent fraudulent concealment or misrepresentation of latent defects,[13] the lessor was under no implicit duty to reveal the condition of the premises at the inception of the lease if a reasonable inspection of the premises could reveal the existing defects. The tenant assumed the duty of repair unless the landlord expressly covenanted to maintain the demised premises once the tenant took possession.[14]

Reynolds, 67 Ala. 229 (1880); *contra*, Rice v. Biltmore Apartments Co., 141 Md. 509, 119 A. 364 (1922). New York, by statute, implied the duty to deliver actual possession into every lease. N.Y. REAL PROP. LAW § 223(a) (McKinney 1968). The technical distinction between actual possession and the legal right to possession is important when the tenant abandons the leased demise voluntarily. Absent constructive eviction, that is, the landlord's breach of the covenant of quiet enjoyment, the tenant remains liable for the rent because he retains the legal right to possession even though he has vacated the premises and even though the landlord has breached his promise to repair the premises. *See, e.g.*, Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938); 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952).

8. The lessor covenanted to refrain from disturbing the tenant's possession and use, not to protect and maintain the premises. Consequently, the lessor was not responsible when a third person, who did not have superior title to the lessor, interfered with the tenant's use. *See* Katz v. Duffy, 261 Mass. 149, 158 N.E. 264 (1927).

9. The inherent property law obligation of the lessor not to evict the tenant from possession for the term of the lease was implied by law into the lease. The cases are collected in Annot., 62 A.L.R. 1257, 1258-66 (1929) and Annot., 41 A.L.R.2d 1414, 1420-23 (1955).

10. Rent was the consideration given for the legal right to possession and use undisturbed by the lessor. *See* Conners v. Wick, 317 Mass. 628, 59 N.E.2d 277 (1945); 1 AMERICAN LAW OF PROPERTY § 3.45 (A. Casner ed. 1952).

11. Even if express warranties were given, property law, not contract law governed. Hence, a breach of an express warranty by the lessor gave the tenant no right to cease payment of rent. In Stone v. Sullivan, 330 Mass. 450, 15 N.E.2d 476 (1938), it was held that the landlord's express warranty to repair was "secondary" to the tenant's duty to pay rent and the tenant could not suspend his payment of rent by deducting costs of repairs. *See* Comment, *Tenant's Remedies for Breach of Landlord's Covenant to Repair*, 21 BAYLOR L. REV. 326 (1969).

12. Ware v. Hobbs, 222 Mass. 327, 110 N.E. 963 (1915). The doctrine of frustration as a defense to the enforcement of a commercial contract has been invoked by lessees claiming that unforeseen events had rendered the lease obligation unenforceable. 2 R. POWELL, THE LAW OF REAL PROPERTY § 221(1) (1971). The older cases reject this doctrine and stress the property view. In Paradine v. Jane, 84 Eng. Rep. 897 (K.B. 1646), the tenant's obligation to pay rent continued even though he was denied use of the premises by an invading army. *Accord*, Fowler v. Botts, 6 Mass. 63 (1809). However, Krell v. Henry, [1903] 2 K.B. 740, held that the lessee's liability for rent for a flat to view a coronation parade was relieved upon cancellation of ceremonies. Frustration of purpose, not property concepts, was emphasized.

13. 1 AMERICAN LAW OF PROPERTY § 3.45 (A. Casner ed. 1952).

14. *See* Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DEPAUL L. REV. 955 (1971); Comment, *Landlord-Tenant: Contractual Basis for an Implied Warranty of Habitability in Leased Premises*, 77 DICK. L. REV. 185 (1973); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123 (1972); Note, *Im-*

Furthermore, the landlord made no implied warranties concerning the suitability of the subject matter of the lease except in the lease of a furnished dwelling for a short term.[15] The sole warranty was the covenant of quiet enjoyment, a breach of which occurred when the landlord or one claiming under a superior adverse interest to the landlord interfered with the tenant's actual possession.[16] Consequently, nonhabitability of the premises was insufficient to sustain a breach of the covenant of quiet enjoyment.[17] As a result of this common law focus on the tenant's possession rather than the landlord's service,[18] the doctrine of caveat emptor had as its foundation the property rules of independent covenants, no implied warranties and the tenant's duty to maintain the leased premises.

The American judiciary adopted the doctrine of caveat emptor but carved exceptions into it. In 1892, the Massachusetts court announced the "furnished dwelling" exception in *Ingalls v. Hobbs*,[19] by holding that the lease of a furnished dwelling for a short term contained an implied warranty of fitness for immediate occupancy.[20] A second exception to caveat emptor was fashioned to accommodate a lease executed prior to the completion of the structure so that a covenant of fitness for intended use was implied into the lease.[21] Finally, the courts molded the legal fiction of constructive eviction[22] which permitted the tenant to vacate the premises within a reasonable time

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plied Warranty of Habitability in Landlord Tenant Relations, 12 WM. & MARY L. REV. 580 (1971).

15. In Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843), the court held that the breach of an implied warranty of habitability was a valid defense to an action for rent due on a three month lease of a furnished summer cottage overrun with insects. *But see* Hart v. Windsor, 152 Eng. Rep. 1114 (Ex. 1843), where the defense was not recognized when the term for the lease of a furnished house ran three years.

16. Since rent stood for possession, the deprivation of possession constituted a failure of consideration for the rent and the law abated the rent. Royce v. Gugenheim, 106 Mass. 201, 8 Am. R. 322 (1870).

17. 1 AMERICAN LAW OF PROPERTY §§ 3.48-.50 (A. Casner ed. 1952).

18. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227-39 (1970) [hereinafter cited as Quinn & Phillips].

19. 156 Mass. 348, 31 N.E. 286 (1892).

20. *Id.* The court reasoned that whereas the long-term lessee contemplated changes to adapt to his use, a short-term lessee pays more for immediate use without the expense and delay of preparation for use. *Id.* at 350, 31 N.E. at 286. *But see* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d (1947), where the court acknowledged the rule but denied relief due to a failure to show insect infestation at the beginning of the term.

21. J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. 1933). The tenant's opportunity to inspect for defects is the basis of caveat emptor. If he has had no opportunity to inspect the structure prior to its completion, the subsequent nonconformity with prior covenants constitutes a failure of consideration. 2 R. POWELL, THE LAW OF REAL PROPERTY § 225(2) (1971).

22. Dyett v. Pendleton, 8 Cow. 727 (N.Y. Ct. Err. & App. 1826).

and to avoid the obligation to pay rent after notifying the landlord of untenantable conditions caused by the lessor's affirmative acts, failure to act or actual eviction.[23]

Because private common law had failed to provide the tenant with adequate remedies to enforce the landlord's service covenants of repair and maintenance, legislatures have imposed upon the landlord statutory obligations to the community.[24] Initially, criminal law sanctions in the form of fines or imprisonment were designed to compel the landlord to maintain decent health, building and sanitation standards.[25] However, because of the ineffectiveness of a fine as a deterrent,[26] the unlikelihood of imprisonment,[27] and the inefficiencies of the bureaucratic system,[28] legislatures created a private remedy for these public violations by empowering the tenant to enforce the state and local codes.[29]

The Massachusetts legislature provided the tenant with offensive and defensive weapons which are designed to aid enforcement of the Sanitary Code,[30] without fear of eviction for nonpayment of rent.[31] The statutory options are actions against the derelict landlord in the

23. The breach of the covenant of possession and quiet enjoyment occurred when the lessee proved a substantial unprivileged interference with his use of the premises which was caused by the lessor, one with paramount title to the lessor or someone who derived authority for his acts from the lessor, and resulted in the tenant's subsequent abandonment of the premises. *See* Nesson v. Adams, 212 Mass. 429, 99 N.E. 93 (1912). The landlord was not liable for unauthorized acts of third parties. *See* Katz v. Duffy, 261 Mass. 149, 158 N.E. 264 (1927) (prior tenant wrongfully refused to vacate); DeWitt v. Pierson, 112 Mass. 8 (1903) (acts of other tenants); *contra*, Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959) (failure to abandon the premises did not bar equitable relief).

The theory of partial eviction, used in New York, that the tenant's possession of the 'incomplete' premises results in his actual partial eviction, allows him to suspend rent until the landlord remedies his breach. *See* Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917); Boreel v. Lawton, 90 N.Y. 293 (1882) (constructive partial eviction absent abandonment). *See generally* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 529-31 (1966).

24. Quinn & Phillips, *supra* note 18, at 239.

25. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1262-63 (1966).

26. *Id.* at 1276.

27. *Id.* at 1279-81.

28. Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 839 (Mass. 1973).

29. *Id.*

30. Pursuant to the authority granted by MASS. GEN. LAWS ANN. ch. 111, § 5 (1967), *as amended* MASS. GEN. LAWS ANN. ch. 111, § 127A (Supp. 1973), the Department of Health adopted article II of the Sanitary Code in 1960. *See* Appelstein v. Quinn, 281 N.E.2d 228 (Mass. 1972), where the court held that section 8A was designed to promote repairs, permitting the tenant to withhold rents during the period of correction, but entitling the landlord to recover the increased rents accrued during the period of withholding.

31. Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 839 (Mass. 1973).

district court or the superior court,[32] or rent withholding according to a statutory procedure.[33] Unless the statutory conditions are met, however, the landlord retains his common law right to evict a tenant for nonpayment of rent despite the substandard conditions of the demised premises.[34] Consequently, the remedial legislation does not displace the common law rule of independent covenants.[35]

A minority of courts[36] have heralded the denouement of the independent covenants rule by implying a warranty of habitability into a lease. Courts have found requisite support for the implied warranties in the common law "furnished house" exception, the concept of constructive eviction and principles of contract law. Thus, the tenant's remedies for the landlord's breach of this warranty are dependent upon the legal theory sustaining its implication.

If the defect existed at the inception of the lease, the "furnished house" exception permits the courts to imply a warranty that the premises are fit for their intended use.[37] However, the covenant may not extend to oblige the landlord to assume the tenant's duty to maintain the premises.[38] When the relief is phrased in terms of constructive

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32. MASS. GEN. LAWS ANN. ch. 111, §§ 127C-F, H (Supp. 1973), allow the tenant to petition either the district court, *id.* § 127C, or the superior court, *id.* § 127H, for a finding that Sanitary Code violations exist and may endanger the health of the tenant. If the court makes this finding, it can order rent withholding or that the tenant channel the rent to the clerk of court. *Id.* § 127F. The lessor is entitled to the balance remaining after the costs of repairs have been deducted. *Id.*

33. The landlord's violation of a state sanitation code standard of fitness for human habitation is a defense, if properly raised, to a summary proceeding. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1973). *See generally* Angevene & Taube, *Enforcement of Public Health Laws—Some New Techniques*, 52 MASS. L.Q. 205 (1967).

34. In Rubin v. Prescott, 284 N.E.2d 902, (Mass. 1972), the court held that section 8A did not abrogate the landlord's common law right to recover possession of the premises from a tenant at sufferance even though the minimum standards of fitness for human habitation as defined by the Housing Code were violated.

35. Boston Housing Authority v. Hemingway, 293 N.E.2d 813, 840 n.9 (Mass. 1973).

36. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *See also* Todd v. May, Civil No. 1-7211-36 (Conn. Cir. Ct., July 5, 1973).

37. In Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), the court's implication of the warranty of habitability into a one year lease for a furnished home relieved the tenant of the obligation to pay rent. The court in Earl Millikin, Inc. v. Allen, 21 Wis. 2d 497, 124 N.W.2d 651 (1963), gave a broad construction to the *Pines* rationale in its statement that the covenant of possession included the covenant of delivery of possession as well as a warranty of fitness for intended purpose. *See* Note, *Implied Warranty of Habitability in Landlord Tenant Relations*, 12 WM. & MARY L. REV. 580, 590 (1971).

38. Reste Realty Corp., v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). Although the court's

eviction, and the violation of the covenant of quiet enjoyment does not amount to a constructive eviction, the tenant may repair and deduct his costs from the rent even though the landlord is not required to maintain the premises.[39] When the implied warranty of habitability finds its support in contract theory,[40] the covenants of habitability and rent are mutual and interdependent. As to defects in existence at the inception of the lease, a breach of the implied warranty of habitability may constitute a failure of consideration rendering the transaction void as against public policy.[41] However, the illegal contract theory can only be invoked when material violations of the housing codes exist prior to the execution of the lease, and, since the remedy is termination of the lease, the tenant who desires to remain after the defects are repaired has no relief.

When the defects arise subsequent to the commencement of the lease, the implication of the warranty of habitability is supported by contract theory. Three separate public policy considerations, first articulated in *Javins* v. *First National Realty Corp.*,[42] and ratified by other courts such as Massachusetts, have compelled judicial implication of the warranty. First, the underlying factual assumptions of the doctrine of caveat emptor are no longer valid, for the modern tenant's primary

relief for the landlord's failure to remove the cause of flooding of a basement apartment was phrased in terms of a breach of the covenant of quiet enjoyment (constructive eviction), the court characterized the tenant's right in terms of a breach of a covenant of quiet enjoyment, material failure of consideration or breach of an implied warranty against latent defects. *Id.* at 465, 251 A.2d at 277.

39. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). The repair costs for a leaky toilet could be offset against the rent owed to a landlord who ignored the tenant's requests to repair it, for ancillary to the implied warranty against latent defects was an implied covenant to repair vital facilities. However, *Marini* did not base its remedies in contract law for "the tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive notice." *Id.* at 147, 265 A.2d at 535. *But see* Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973), where the court held that the tenant's covenant to pay rent and the landlord's duty to maintain the demised premises in habitable condition were mutually interdependent. *See also* Note, *Landlord and Tenant—New Remedies for Old Problems*, 76 DICK L. REV. 580 (1972).

40. The first jurisdiction to expressly imply a warranty of habitability into every lease was the Hawaiian supreme court in Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969), where it was held that the tenant could recover his deposit and initial rent payment on a furnished house infested with rats. Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969), extended *Lemle* to unfurnished dwellings and to defects occurring during the term of the lease.

41. Implicit in the illegal contract theory is the canon of construction that the law existing at the time and place of the making of the contract is incorporated into the terms of the agreement. 1 S. WILLISTON, CONTRACTS §§ 1-16 (3d ed. W. Jaeger 1957).

In Brown v. Southhall Realty, 237 A.2d 834 (D.C. App. 1968), the act of renting the premises in violation of the housing regulations was prohibited by statute, and the landlord had been notified by the Housing Bureau of the existence of the violations; thus, the lease was illegal and void. *See* Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920 (1968).

42. 428 F.2d 1071, 1077 (D.C. Cir. 1970).

objective in the leasing transaction is a dwelling fit for habitation as opposed to the acquisition of a property interest.[43] Second, the residential landlord-tenant law should be consistent with the warranties afforded by the law of chattel[44] and realty sales,[45] where public policy dictates that the party who puts a product on the market should assume the risk for the defects therein.[46] Consequently, the landlord, as a seller of a product, implicitly warrants the fitness for human habitation in a lease of his premises. The third consideration is the current urban housing market. Not only is there a shortage of available housing, but the inequality of bargaining power between the landlord and tenant often forces tenants into leasing substandard housing.[47] Public policy considerations have compelled the implied warranty of habitability in leases in order to reallocate the risks and responsibilities of the landlord and to attain a proper balance of landlord-tenant rights.[48]

Once the courts have implied the warranty, the definition, limitations and remedies for its breach are developed. Some courts narrowly measured the warranty by the legislative expression of habitability found in the housing codes.[49] Other courts weighed the materiality of the alleged breach in light of the seriousness of the defect and the length of the time it persists.[50] The New Hampshire court had outlined objective variables that would indicate the parties' expectations as well as the equities of shifting the burden of inspection and repair.[51] Iowa's supreme court focused upon the bargaining position as well as the ex-

43. The modern tenant possesses neither the skill nor the will to investigate and make repairs. Consequently, the burden of investigation is shifted to the landlord who is best able to know the premises and spread the risk over a long term. *See* Mease v. Fox, 200 N.W.2d 791, 794-96 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 91, 276 A.2d 248, 251 (1971).

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

45. *See* 12 DUQ. L. REV. 109 (1973).

46. The underlying policy reason is that the party's inducement of reliance upon the landlord's superior skill and knowledge is in a better position to know, control and assume the risk of defects in his products. *See* Note, *Landlord Tenant—Housing Code Violations*, 16 VILL. L. REV. 383, 391 (1970).

47. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

48. Note, *Landlord Tenant—Housing Code Violations*, 16 VILL. L. REV. 383, 393 (1970).

49. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (D.C. Cir. 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 200, 217 (1972); Kline v. Burns, 111 N.H. 87, 91, 276 A.2d 248, 251 (1971).

50. Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972). *Accord*, Lemle v. Breeden, 51 Hawaii 426, 436, 462 P.2d 470, 476 (1969).

51. The nature of the deficiency, the time of its persistence, the age of the structure, the effect on habitability, the amount of rent, the tenant's waiver of the defects, and whether the defect resulted from abnormal use by the tenant are some factors considered in deciding if there has been a breach. *See* Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971).

pectations of the parties by construing its warranty to include a warranty against latent defects as well as against material violations of the housing code,[52] even if the tenant was aware of the defect at the commencement of the lease.[53] The warranty has been limited to the type of dwelling that is leased,[54] to the existence of latent, not patent, defects,[55] and to the situation where the tenant has afforded the landlord a reasonable opportunity to repair after adequate notice of a defect that was not caused by the tenant's wrongdoing.[56] The means of enforcing the implied warranty of habitability encompass the contract remedies of damages, reformation, recission,[57] and specific performance,[58] the self-help remedy of repair and recovery,[59] and a defense to an action for rent. Thus, depending upon the court's interpretation of the warranty and its remedies, the rights and duties of the landlord and tenant are relatively equalized.

The "new common law rule"[60] announced by the *Hemingway* court afforded the tenant contractual rights and remedies for the landlord's breach of the implied warranty. This new rule requires the tenant to demonstrate a material breach by the landlord in addition to the tenant's notice to the landlord of the breach and the landlord's failure to correct it within a reasonable time. A certified housing inspection report of a substantial Sanitary Code violation is evidence of a material breach and gives the landlord notice of the breach.[61] When the defect is either a technical violation or no violation of the Sanitary Code, yet the defect substantially impairs the value of the premises to the tenant, the court weighs the seriousness of the defect, the length of time the breach continues and the tenant's oral or written notice to the landlord of the condition, the possibility of repair within a reasonable time and

52. Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972).

53. *Comment, Tenant Protection in Iowa—Mease v. Fox and the Implied Warranty of Habitability*, 58 IOWA L. REV. 656, 667-70 (1973).

54. The court in Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), limited the warranty to the multiple unit dwelling.

55. Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971), shifted the tenant's common law duty to inspect for latent defects to the landlord who was better able to bear the cost of repairs.

56. Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972).

57. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

58. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

59. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

60. 293 N.E.2d at 843 n.14.

61. *Id.* at n.15

the evidence of the defect being caused by the tenant's abnormal use of the premises in determining the materiality of the breach.[62]

The dissent argued that the definition of habitability should be the minimum standards of fitness outlined in the state Sanitary Code.[63] The dissent further reasoned that this statute implicitly changed the common law rule of caveat emptor because it imposed legal obligations on the landlord for the benefit of his tenants.[64] According to normal contract principles, the law existing at the time and place of the execution of the lease is deemed a part of it; therefore, the landlord implicitly covenants that he intends to comply with those laws defining minimum standards of habitability.[65] The dissent cautioned that a judicial "roadblock"[66] which the majority did not consider was the rule of *Palmigiani v. D'Argenio*.[67] That rule provides that, unless the statute expressly modifies landlord-tenant contractual relations as they existed at common law, the courts refuse to imply the existing statute in its construction of the lease, if such an implication would materially alter the parties' contractual rights and duties. Consequently, when the court's refusal to imply those statutory duties is fused with the common law independent covenants rule, the tenant is denied the benefits of the statute designed to protect him. Therefore, the dissent argued that the majority should have reached its result by overruling the *Palmigiani* rule and reading into the lease the relevant statutes existing at the time and place of the execution of the lease. The majority could then substitute the new rule of mutually interdependent obligations for the common law rule of independent covenants, and the tenant would be relieved of his rental obligations for the uninhabitable premises even though his lease contained no express covenant of repair and maintenance.[68]

The dissent's view is conceptually deficient in its definition and implication of the covenant of habitability. By refusing to limit habitability to the minimum standards of the applicable Sanitary Code, the majority's approach preserves the landlord's and tenant's freedom to contract for habitability (which would be determined on a case by case

62. *Id.* at 843-44.
63. *Id.* at 848 (dissenting opinion).
64. *Id.* at 849, where the dissent notes that criminal sanctions exist for the landlord's failure to comply with the Sanitary Code, although the tenant has no private right to enforce these statutes.
65. *Id.*
66. *Id.*
67. 234 Mass. 434, 125 N.E. 592 (1920).
68. 293 N.E.2d at 853 n.3.

basis by weighing the parties' bargain, the existence of a material defect in the premises and the violations of the applicable codes).[69] The only limitations on this freedom to contract is that the minimum standards of the Sanitary Code and local health regulations cannot be waived.[70]

Another conceptual inadequacy of the dissent's approach is found in its view that the applicable law defining habitability is restricted to that existing at the inception of the lease. If, subsequent to the inception of the lease, the landlord is required to perform additional statutory duties, then, upon the landlord's noncompliance, the tenant has no way of obtaining the benefits of those statutes. His remedies are confined to theories such as constructive eviction. The majority, however, avoids this hiatus by imposing a continuing obligation upon the landlord to comply with existing law, an obligation which changes with current legislative determinations of minimum standards of habitability.[71] Furthermore, the dissent overvalues the precedental worth of *Palmigiani*. *Palmigiani* applies to a statute that implicitly modifies the landlord-tenant relationship, which was defined by the common law property principles. However, the majority avoids a rule applicable to property law concepts because contract law, not property law, supports the implied warranty of habitability. The majority's more flexible definition of habitability coupled with the landlord's continuous duty to maintain the premises in livable conditions and its abrogation of the independent covenants rule not only affords the tenant the benefits of the statutes designed for him, but also permits him to suspend his rent upon a material breach of the landlord's express and implied contractual warranties.

Once the majority had implied the warranty of habitability, it discussed remedies for the breach of this warranty. Upon adequate showing of materiality of the breach, the tenant can rescind the contract from the time the implied warranty of habitability was first breached and he can recover the security deposits.[72] If the tenant elects to stay

69. *Id.* at 843-44.
70. *Id.* at 843.
71. The majority held that the implied warranty means "that the inception of the rental there are no latent (or patent) defects in facilities vital to the use of the premises for residential purposes and that these essential facilities will remain *during the entire term in a condition which makes the property livable.*" *Id.* at 843 (emphasis added). *See also id.* at 844 n.16.
72. *Id.* at 843-44. A question left unanswered by the court was whether the court would require restitution by the landlord of rent paid during the occupancy of the uninhabitable dwelling less the actual rental value of the premises. The court was not faced with that issue and did not answer it.

on for the term, he is to initiate procedures to institute suit or withhold rent. Failure to comply with these statutory procedures affords the tenant no statutory defense to eviction, yet the landlord's breach of the warranty is a defense to an action for rent and a basis for a counterclaim for damages equal to the difference between the value of the premises as warranted and the actual value of what was in fact received.[73]

The dissent's final criticism was that the majority's discussion of constructive eviction, in its outline of remedial relief, resolved related questions not in issue. The importance of this discussion lies in the majority's definition of a necessary corollary to the newly announced rule. Whereas the dissent's proposal merely modified the traditional landlord-tenant relations,[74] *i.e.*, that the lease is to be construed in light of property law which is to be qualified by statute, the majority abolished the common law rule of caveat emptor and created new law. Consequently, the decision rests on the terms of habitability rather than Sanitary Code regulations. In order to abrogate the common law rule, the majority had to explicitly outline the remedial differences afforded by a contractual approach in contrast to a property view of a lease in order to preserve a logical consistency in the opinion. The common law defense of constructive eviction has to be woven into the new contractual theory to provide for those situations where, even though the premises were uninhabitable, they do not violate the Sanitary Code.[75] Thus, no remnants of the common law remain to qualify the rule the majority has promulgated.

The significance of this decision is not in what was done, but in how it was done. The court justified its adoption of the contractual theory to support the implied warranty of habitability by means of an analysis of the current status of the lease, the realities of urban leasing, and statutory inadequacies. Furthermore, the court's preclusion of disclaimer of the minimum standards of habitability found in the Sanitary Code insures that the subject matter of the parties' bargain (habitable living conditions) is preserved, despite the inequalities of bargaining positions.[76] Thus, the court's contractual approach provided it with

73. *Id.* at 845. The damages are limited to the period the apartment remained uninhabitable after notice of the breach was given. *Id.*

74. *Id.* at 851.

75. *Id.* at 844 n.16.

76. If the court had likened the warranty to the Uniform Commercial Code's implied warranties, as the *Javins* court did, then logical consistency would have compelled the court's adoption of the Uniform Commercial Code's disclaimer provision in section 2-316.

a new frame of reference within which to resolve and remedy landlord-tenant problems.

Maureen Ellen Lally

TAXATION LAW—FEDERAL INCOME TAXATION—REDEMPTIONS AND REORGANIZATIONS—The Courts of Appeals for the Sixth and Ninth Circuits are in conflict on the question of whether section 351 or section 304 of the Internal Revenue Code of 1954 governs a transfer of the stock of a brother corporation to a sister corporation by the common controlling shareholder in return for stock of the sister corporation and cash.

Coates Trust v. Commissioner of Internal Revenue, 480 F.2d 468 (9th Cir.), *cert. denied*, 94 S. Ct. 551 (1973).

Commissioner of Internal Revenue v. Stickney, 399 F.2d 838 (6th Cir. 1968).

Section 304(a)(1)[1] of the Internal Revenue Code (Code) provides

However, by viewing the covenant of habitability as the essence of the lease, the court avoided this conceptual inconsistency of the Uniform Commercial Code approach and established a legal foundation in contract law for its mandate against disclaimer.

1. INT. REV. CODE OF 1954, § 304 states:
Redemption through use of related corporations
(a) Treatment of certain stock purchases.—
(1) Acquisition by related corporation (other than subsidiary).—For purposes of sections 302 and 303, if—
(A) one or more persons are in control of each of two corporations, and
(B) in return for property, one of the corporations acquires stock in the other corporation from the person (or persons) so in control,
then (unless paragraph (2) applies) such property shall be treated as a distribution in redemption of the stock of the corporation acquiring such stock. In any such case, the stock so acquired shall be treated as having been transferred by the person from whom acquired, and as having been received by the corporation acquiring it, as a contribution to the capital of such corporation.
(2) Acquisition by subsidiary.—For purposes of sections 302 and 303, if—
(A) in return for property, one corporation acquires from a shareholder of another corporation stock in such other corporation, and
(B) the issuing corporation controls the acquiring corporation,
then such property shall be treated as a distribution in redemption of the stock of the issuing corporation.
(b) Special rules for application of subsection (a).—
(1) Rule for determinations under section 302 (b).—In the case of any acquisition of stock to which subsection (a) of this section applies, determinations as to whether the acquisition is, by reason of section 302(b), to be treated as a distribution in part or full payment in exchange for the stock shall be made by reference to the stock of the issuing corporation. In applying section 318(a) (relating to