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Notes

IMPLIED WARRANTY OF HABITABILITY IN HOUSING LEASES

I. INTRODUCTION

Across the nation, new apartment buildings are literally springing out of the ground. The National Association of Real Estate Boards notes that construction of apartment units is proceeding at the rate of 650,000 to 700,000 per year.[1] With this yearly increase in the number of units, and the large number already in existence, an ever increasing number of individuals become lessees and in so doing become a party to a legal relationship which is as old as the ages, the landlord-tenant relationship.

Though the relationship is an ancient one, it is an ever changing one. In the days when the land was the wealth and the power, the tenant-lessee was little more than a peasant tilling the land in servitude to the landlord, the holder of the wealth and power. The relationship arose out of a lease agreement whereby the lessor agreed to give the enjoyment of the real estate to the lessee in exchange for an agreed sum of money. The lease actually conveyed an interest in the land, and it was governed more by what might be called lease law than contract law. Consequently, the relationship which developed was ordinarily a somewhat one-sided one favoring the lessor who had the longer-range interest in the land. The rule of thumb for the prospective lessee was to beware because the property that he rented would be his until the term of the lease expired even though it no longer suited his particular needs at that time. Therefore he was required to do all that he could to determine that it would best suit his needs both now and into the future. The same was true even of housing leases. If the premises were no longer habitable before the term of the lease expired, the lessee was the one to bear the loss.

In general, the landlord-tenant relationship has changed so that in many respects the parties to the lease are on equal ground legally. However, the change has been slow. The one area that has only recently evolved on a large scale is the recognition of the implied warranty of habitability in housing leases. How did the evolution take place? Why did it occur? What was the rationale of the courts effecting the changes? How do the changes affect the landlord-tenant relationship? Because of the increasing numbers of landlord-tenant relationships, these questions are of increasing relevance today more than ever before.

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[1] U.S. NEWS AND WORLD REPORT, July 26, 1971, at 78.

II. Lessor's Liability and Caveat Emptor

A. *Caveat Emptor in General*

It is well established that, in leaseholds generally as between the lessor and the lessee, the doctrine of *caveat emptor* applies,[2] and the tenant takes the leased property as he finds it with no implied warranty by the lessor that it is safe or fit for occupancy.[3] This rule is often cited in cases against defendant-lessees by third party plaintiffs injured on the premises.[4] It is likewise cited when the complainant is the lessee who has discovered upon his occupancy that the premises are not suitable for the purpose for which he intended to use them. The landmark Iowa case on this point is *Kutchera v. Graft*.[5] Plaintiff-lessee rented Graft's farm and moved there taking his livestock with him. Within three weeks his hogs contracted cholera and many died. At trial it was determined that Graft knew that the previous lessee's hogs had contracted cholera and died. However, he had believed in good faith that the previous lessee had properly disinfected the farm; therefore, the court held for the defendant. The court said that in absence of fraud or any express agreement to the contrary, the lessor is not liable to the lessee for the condition of the premises which resulted in damage to the plaintiff in spite of the fact that plaintiff was using the premises for the purpose for which they were intended, that is, the raising of hogs.[6]

The general rule sets forth three exceptions which are strictly followed in Iowa. The first is that the existence of fraud will create liability on the part of the lessor. In *Kutchera*, the entire case rested on whether plaintiff had shown fraud and deceit on the part of the defendant. Fraud, of course, had not been shown. The second exception is that any warranty must be expressly made in the contract; there is no implied warranty.[7] Even though the lease designates the use to which the premises are to be put there is no implied warranty that they will continue to be fit for that use.[8] A third exception that is also recognized borders on the fraud situation. The lessor may be liable to the lessee when there is a latent defect in the property of which defect the lessor had knowledge that he concealed from plaintiff.[9]

B. *Caveat Emptor in Dwelling Houses and Apartments*

1. *Express Warranty in Lease*

Attempts may be made to expressly warrant the premises to be habitable.

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[2] Fetters v. City of Des Moines, 260 Iowa 490, 496, 149 N.W.2d 815, 819 (1967) and cases cited therein.

[3] Roan v. Bruckner, 180 Neb. 399, 402, 143 N.W.2d 108, 111 (1966).

[4] *See* Fetters v. City of Des Moines, 260 Iowa 490, 149 N.W.2d 815 (1967); Roan v. Bruckner, 180 Neb. 399, 143 N.W.2d 108 (1966).

[5] 191 Iowa 1200, 184 N.W. 297, 26 A.L.R. 1257 (1921).

[6] *Id.* at 1209, 184 N.W. at 301, 26 A.L.R. at 1264-65.

[7] *See* Bentley v. Taylor, 81 Iowa 306, 47 N.W. 58 (1890) (express warranty found); Boyer v. Commercial Bldg. Inv. Co., 110 Iowa 491, 81 N.W. 720 (1900) (no implied warranty).

[8] Osterling v. Sturgeon, 156 N.W.2d 344 (Iowa 1968).

[9] Gamble-Robinsin Co. v. Buzzard, 65 F.2d 950 (8th Cir. 1933).

However, the success of such clauses is not unanimous. If the warranty is expressly stated in the written lease, there is no problem. But where the lease merely states that the premises are in good order, the cases are at a variance. In *Foster v. Peyser*,[10] the lease read as follows: Foster does "lease . . . unto S. M. Peyser, a certain brick dwelling-house . . . to be used as a private dwelling-house only . . . and it is understood . . . that the owner shall not be called upon or liable for any repairs whatsoever on said premises during the lease, *the house being now in perfect order*."[11] Plaintiff-lessor sued for the rents due, and in defense defendant-lessee showed evidence of a stench in the house causing sickness and discomfort to his family from the time that they moved into the house. It was caused by a faulty drain pipe which indicated to defendant that the house was not "in perfect order." The court held for the plaintiff saying that there was an implied warranty as to the repair of the building but not as to the air within it and, therefore, not to its habitability.

In *Tyler v. Disbrow*,[12] the Michigan court came to the opposite conclusion on similar facts. The lessee convenanted that she had "received said demised premises in good order and condition." The court held "that the condition of the premises was a distinct consideration . . . ."[13] Since the consideration failed, the lessee was justified in leaving the premises without paying the rent due.[14]

2. *Implied Warranty*

Questions of implied warranty have arisen in a great many circumstances. Perhaps the claim of implied warranty is made most often when the dwelling is overrun by vermin or rodents.[15] Another claim of implied warranty arises where the leased premises have become contaminated with an infectious disease. In this situation, it is generally held that where the damage results to the persons on the premises, the lessor is liable if he failed to warn the lessee.[16] This duty to warn the lessee is based on "a plain duty of humanity."[17] However, liability in this case is not usually based on implied warranty, but rather on fraudulent concealment of the fact that the premises are infected. Other circumstances where questions of implied warranty have arisen include failure to heat the premises,[18] defective plumbing, smells, damp-

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10 9 Cush. (Mass.) 242 (1852).
11 *Id.* at 243 (emphasis added).
12 40 Mich. 415 (1879).
13 *Id.* at 417.
14 *See* Curran v. Cushing, 197 Ill. App. 371 (1916) (abstract).
15 *See* Owens v. Ramsey, 213 Ky. 279, 280 S.W. 1112, 52 A.L.R. 149 (1926); Hart v. Windsor, 12 M. & W. 68, 152 Eng. Rep. 1114 (1843). *See also* Annot., 27 A.L.R.3d 924 (1969) for a comprehensive discussion of implied warranty against vermin and rodent infestation.
16 *See* Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953). *See also* Annot., 26 A.L.R. 1265 (1923).
17 Minor v. Sharon, 112 Mass. 477, 487, 17 Am. R. 122, 125 (1873).
18 Hansman v. Western Union Tel. Co., 144 Minn. 56, 174 N.W. 434 (1919) (lessor held liable); *see* Flesher v. St. Paul Apartment House Co., 151 Minn. 146, 186 N.W. 232 (1922); Annot., 13 A.L.R. 837 (1921).

ness, janitor service, and ill repute of the premises.[19]

At early common law and by a thread running through the entirety of the case law, the courts generally refused to imply a warranty of habitability, and the general rule of *caveat emptor* applied equally as well to the habitability of a dwelling or apartment. In *Hart v. Windsor*,[20] defendant-lessee claimed constructive eviction because the house that he had rented from the plaintiff was overrun with insects. He had moved out after trying to live there a few months, and plaintiff brought suit for the rent due. The court held for the plaintiff in spite of the fact that a jury had found that the house was not habitable. The court gave several reasons for upholding the long established doctrine of caveat emptor. First, "the rent issues out of the land, without reference to the condition of the buildings or structures upon it. . . ."[21] If the buildings are not habitable, the rent is still due from the lessee. Second, the infestation is not a permanent condition and is capable of being remedied.[22] Third, since *no* unfurnished house is fit for habitation at the time that the lease is made, there can be no implied warranty that it is fit.[23] Fourth, the lease which a lessee holds is "a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term . . . ." There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise."[24] Finally though there would be no particular injustice in implying a warranty of habitability in the case of a dwelling house, if it were implied, it would be necessary to also imply a warranty on land taken for other purposes. The better rule is to leave the parties to protect their own interests by stipulating in the contract.[25]

The United States Supreme Court adopted the view of *Hart* in *Doyle v. Union Pacific Railway*[26] where the safety of the dwelling was allegedly warranted. Doyle had rented a house from the railroad on the agreement that she would board crewmen for a certain amount of money which the railroad would pay her from their wages. She was completly new in the area and had never lived in a mountainous region. On the other hand, the railroad knew of the danger of snowslides to buildings on the mountainside where the house was located. Nevertheless after she was injured and her children were killed in a snowslide, the court held that there was no implied warranty that the house was safe or reasonably fit for habitability and the railroad was not under a duty to warn her of the dangerous position of the house.

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[19] *See* Annot., 34 A.L.R. 711 (1925); Annot., 29 A.L.R. 52 (1924); Annot., 26 A.L.R. 1253 (1923); Annot., 13 A.L.R. 837 (1921); Annot., 13 A.L.R. 818 (1921); Annot., 4 A.L.R. 1453 (1919).

[20] 12 M. & W. 68, 152 Eng. Rep. 1114 (1843).

[21] *Id.* at 81, 152 Eng. Rep. at 1119.

[22] *Id.*

[23] *Id.*, 152 Eng. Rep. at 1120.

[24] *Id.* at 85, 152 Eng. Rep. at 1121.

[25] *Id.* at 88, 152 Eng. Rep. at 1122.

[26] 147 U.S. 413 (1893).

a. *Furnished—Unfurnished Dwellings.* Despite the strong language of the court in *Hart*, there was already developing at that time a difference of opinion on the maxim of *caveat emptor*. In *Smith v. Marrable*,[27] the fact situation was similar to the one in *Hart* where the premises were overrun with bugs except that the rental period was a short period (5 or 6 weeks) and the house was furnished. Lord Abinger stated that an implied condition or obligation existed that the house was fit to be inhabited. "[T]he case is one which common sense alone enables us to decide."[28]

The court in *Hart* had to distinguish *Smith*. Addison stated one distinction to be that in *Smith* the house was furnished. The lessor holds out the house as being fit for immediate possession and thereby receives a much higher rent. When the lessor holds the house out as habitable, he impliedly warrants it to be habitable. Thus a distinction seemed to rest on whether the house was furnished.

In the United States, however, *Smith v. Marrable* was met with extreme opposition for many years. The New Jersey court held in 1888 that the *Smith* doctrine should be applied only where the defect was in the furniture and not in the condition of the house itslelf.[29] Consequently, *Smith* was not applicable where the tenant abandoned the dwelling because of the adverse conditions caused by a damp cellar.

New Hampshire followed this attack on *Smith* in 1893. In *Davis v. George*,[30] the court said that the distinction between a furnished and unfurnished dwelling was not apparent. Simply because the house is furnished, there is no reason that a warranty is implied against want of repair and structural defects in the house. The court concluded that the tenant must pay rent on the building though it was completely destroyed by fire resulting from such defects.

Finally, the landmark case holding *contra* to *Smith* was *Rubens v. Hill*.[31] The court said that *Smith* was bad law and, "the doctrine of Smith v. Marrable is only applied under facts precisely like those in the English case and then only as justifying the lessee in abandoning the premises and defending against the rent."[32] If the doctrine is to be used at all, it should not extend to cases where the defects relate exclusively to the building as real estate.

Though the courts were nearly unanimous, *Smith* was not received in the United States with complete hostility. The Massachusetts court was congenial to the *Smith* doctrine and in *Ingalls v. Hobbs*[33] expressed approval of the underlying theory. The court distinguished between unfurnished dwellings leased for use over a long period of time and furnished dwellings leased

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27 11 M. & W. 5, 152 Eng. Rep. 693 (1843).
28 *Id.* at 9, 152 Eng. Rep. at 694.
29 Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).
30 67 N.H. 393, 39 A. 979 (1893).
31 115 Ill. App. 565 (1904) (giving history of cases since Smith v. Marrable at pp. 571-74), *aff'd.*, 213 Ill. 523, 72 N.E. 1127.
32 *Id.* at 573.
33 156 Mass. 348, 31 N.E. 286, 16 L.R.A. 51 (1892).

for a few days' or weeks' use. In the former, the lessee determines whether it will serve his purpose and often contemplates making changes to adapt to his use. In the latter situation, the fact that the premises are rented for a particular use (habitation) and for immediate use is an important element of the contract. The lessee pays more for the opportunity to enjoy it without delay and expense of preparation for use. "It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind."[34]

b. *Short-term—Long-term Leases.* The fact that the dwelling is furnished is a dominant factor in determining whether an implied warranty exists, but the courts do not consider that fact alone. The decision in *Ingalls* was also based on the length of the term of the lease.[35] This was obviously an attempt to keep the law in line with *Smith* only under the same fact situation as *Smith* and to preclude extending the doctrine any further.[36] Of course, the short-term lease is recognized as being the one where an implied warranty exists,[37] and the long-term lease does not carry an implied warranty.[38]

The obvious problem arises: What is "short-term" and what is "long-term"? No term can be set and still allow the courts the flexibility that they need to adjust to each fact situation. The Maine court found a solution by treating the short-term lease as "one for a temporary purpose."[39] This is justified because the phrase's elasticity allows a variation of time depending on the purpose for which the lease was taken and on other circumstances and conditions of the transaction.

c. *Apartment Dwellings.* As early as 1913, the New York court allowed constructive eviction as a defense to an action by the lessor for rent due when the lessees moved from the apartment house because of the noisy, smelly rats.[40] The court distinguished apartments from houses because the lessees have and can have control over only their room or rooms in the apartment building. Thus, a situation existed which was different from any that existed in ancient common law and which necessitated a flexibility of the common law principle of *caveat emptor.* The tenant in an apartment can ordinarily abate nuisances such as insects, but they cannot pull down the walls and fight nuisances such as rats. Thus when the intolerable condition is one which he did not cause and cannot remedy, the tenant may apply the doctrine of constructive eviction.

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34 *Id.* at 350, 31 N.E. at 286, 16 L.R.A. at 52.
35 *See* Young v. Povich, 121 Me. 141, 116 A. 26 (1922).
36 *See* Rubens v. Hill, 115 Ill. App. 565 (1904).
37 Young v. Povich, 121 Me. 141, 144, 116 A. 26, 27 (1922); *accord,* Morgenthau v. Ehrich, 77 Misc. Rep. 139, 136 N.Y.S. 140 (1912); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286, 6 L.R.A. 51 (1892).
38 Young v. Povich, 121 Me. 141, 144, 116 A. 26, 27 (1922).
39 *Id.*
40 Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y.S. 1050 (1913).

A similar conclusion was reached where the bugs came from another apartment in the building and drove out the lessee.[41] The Supreme Court of Missouri stated the general rule as follows:

> A tenant may be constructively evicted by the conduct of the landlord in creating or permitting the existence of nuisances in or about the demised premises, provided the nuisance is of a serious character and so intolerable as to interfere with the use and beneficial enjoyment of the premises. To constitute an eviction, however, the landlord must in some way be responsible for the existence of the nuisance.[42]

d. *Modern Trend.* In 1961, the rule of implied warranty in the lease of a furnished dwelling house was recognized in Wisconsin.[43] The lease involved in this case described the premises as a house "including furniture to furnish said house suitable for student housing." When the lessees arrived, they found that the place had defective plumbing, heating and wiring and violated the building code. The court did not find an express covenant because the part of the lease quoted above referred only to the furniture. However, there was an implied covenant. The court gave judgment to the lessees in a suit by them to recover their deposit and the value of labor which they had performed.

This was one of the first times that such a warranty was recognized in the lease of a dwelling-house in the United States outside of Massachusetts and was to be a precursor of things to come. Though the Wisconsin court had never considered the exception to the general rule before, it emphasized that the implied warranty was one to be extended, not restricted. The court cited poor rental housing as a cause of urban blight, juvenile delinquency, and high property taxes for conscientious landowners.[44] To follow the old rule would be inconsistent with the current legislative policy concerning housing standards. "The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*."[45]

In 1969, the Hawaii court noted that implied warranty of habitability and fitness for the purposes intended is a just and necessary implication of the contractual relationship, since the lease is essentially a sale as well as a transfer of an estate of land.[46] Two weeks later, the Hawaii court applied the same rule to unfurnished dwellings saying that any distinction between furnished and unfurnished dwellings is "not in accord with the current realities of life in Hawaii."[47] The case was remanded to determine whether the warranty was

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41 Streep v. Simpson, 80 Misc. 666, 141 N.Y.S. 863 (App. T. 1913).

42 Ray Realty Co. v. Holtzman, 234 Mo. App. 802, 808, 119 S.W.2d. 981, 984 (1938); *see* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931).

43 Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

44 *Accord,* Buckner v. Azulai, 251 App. 2d 1013, 59 Cal. Rptr. 806 (1967).

45 14 Wis. 2d at 596, 111 N.W.2d at 413.

46 Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969), *rehearing denied,* 51 Hawaii 478 (1969).

47 Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969).

breached by the house's electrical deficiencies.

Judge Wright of the District of Columbia Circuit Court of Appeals came to the same conclusion in *Javins v. First National Realty Corporation.*[48] The lessees refused to pay rent to the lessor and cited 1500 violations of the Housing Regulations of the District of Columbia in the building of the apartment as their equitable defense to an action for possession for nonpayment of rent. The court held that there was a common law implied warranty in the lease and a statutory one implied by the Housing Regulations.

The court first attacked the common law basis for no implied warranty and noted that all common law on the subject of leases was based on real property law. However, the tenant in 1970 seldom has an interest in the land as did the tenant of 1893. The value of the lease is no longer the land, but rather it is that the lease gives the lessee a place to live. When people "seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."[49] Furthermore, the average city-dwelling lessee is not a jack-of-all-trades who, like the farmer of old, was skilled in making necessary repairs. Also in today's mobile society, the lessee is seldom in one apartment long enough to justify the great expense of repairs. Finally, many could not afford the repairs even if they were planning to live there for a long period of time.

The court also attacked the no-warranty rule by relying on the principles involved in the consumer protection cases. The tenant must be able to depend upon the word and skill of his landlord just as a car buyer is able to depend upon the car manufacturer. As long as the rent remained the same, the lessees were entitled to expect that the premises would be maintained as they were at the beginning of the lease.[50]

The court also relied on the nature of the lessor-lessee relationship. Usually the lessee has no bargaining power to enforce better housing standards. The shortage of good housing, the racial and class discrimination, and the standardized form lease leave the lessee in a take it or leave it situation and necessitate the need for maintaining the existing dwellings. The poor housing consequential to the inability of the lessee to have any bargaining power results in detrimental effects to the entire society.[51] All of these points are reasons for construing the lease in terms of common law contract law which contains implied warranties that the goods and services which are the subject of the contract are fit for the purposes for which they are ordinarily used. In fact, the old common law rule requiring the lessee to repair the premises was never meant to apply to residential urban leaseholds.[52]

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48 428 F.2d 1071 (D.C. Cir. 1970).
49 *Id.* at 1074.
50 *Id.* at 1079.
51 *Id.*
52 *Id.* at 1080.

The court then went one step further and stated that the District of Columbia housing code requires that a warranty of habitability be implied in all leases of the housing that it covers.[53] Failure to comply with the housing standards renders the lease void. The court's rationale rested on the fact that the parties to the lease actually intended to include the provisions of the code within the lease but did not do so because they supposed that it was not necessary to include it because the law provided for it. Thus in implying a warranty, the court does nothing more than uphold the contract as the parties intended and expected it to be.[54] Judge Wright cited *Pines* and concluded that "the Housing Regulations imply a warranty of habitability . . . into leases of all housing that they cover."[55]

In *Marini v. Ireland*,[56] the Supreme Court of New Jersey went still another step further than the District of Columbia Court of Appeals had gone in holding for the existence of an implied covenant to repair as well as one of general habitability. The fact situation was similar with the distinction being that when the lessor did not repair the cracked toilet, the lessee had it repaired instead. When the rent came due ($95), the lessee sent the bill for $85.72 along with $9.28 to the lessor instead of sending full amount of the $95. The lessor brought suit for the rent due (the $85.72). The court said that the distinction between a warranty of habitability and a covenant to repair was a mere matter of semantics.

> Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease.[57]

The general remedy for breach by the lessor was constructive eviction which released the lessee from his obligation to live there and pay rent. However that is little comfort to the lessee, particularly in a housing shortage. In the alternative, he should be given the opportunity to terminate the cause of the constructive eviction where it involves failure to make reasonable repairs. With this opportunity goes the right to offset the cost of those repairs against the rent. The court footnoted this proclamation with a comment emphasizing the necessity of reasonably attempting to give the lessor timely and adequate notice so that he will have the chance to make the repairs.

The Supreme Court of New York in *Garcia v. Freeland Realty, Inc.*[58] agreed with the New Jersey court in that the landlord and tenant law estab-

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[53] *See* Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922).

[54] The provision of the Regulations in point requires that the property must "be maintained and kept in repair so as to provide decent living accommodations for the occupants." 428 F.2d at 1081.

[55] *Id.* at 1082.

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

[57] *Id.* at 144, 265 A.2d at 534.

[58] 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y. City Court 1970).

lished in a rural society must be modified to deal with the realities of modern urban living. The *Garcia* case involved a tenant who replastered his apartment and withheld the cost from the rent. The court cited *Marini*, found an implied warranty, and further held that since the lessor would have been liable in tort for damage caused to Garcia's children from eating the old paint and plaster, it is reasonable to charge him with the expense of averting the tort after he has had reasonable notice and time to repair.[59]

The Supreme Court of New Jersey did not stop with only the one alternative to constructive eviction as set forth in *Marini*. Two months later in July of 1970, the court set forth a second alternative in the case of *Academy Spires, Inc. v. Brown*.[60] The tenant withheld a certain amount of rent because of the lessor's failure to supply necessary services (heat, hot water, garbage disposal service, and elevator service) in violation of the implied warranty of habitability. The lessor brought dispossess proceedings for nonpayment of rent. The court cited *Marini* and *Javins* in great length in support of the doctrine of implied warranty but distinguished the present case from *Marini* because here they were involved with a multi-family dwelling rather than a 2-family dwelling, and there was no written lease. Nevertheless the same principles were held to apply. Defendant-lessor argued that the alternative that *Marini* offered the lessee was to repair or move. The court said however that to so restrict *Marini*'s principles would "place an emphasis on form, technicality and fiction"[61] when "[t]he thrust of law in this State is in the direction of consumer protection."[62] To uphold the principles expressed only in the exact fact situation of *Marini* would be meaningless to lessees in a 400-unit dwelling, none of whom could ever afford to repair it. The amount that the tenant could withhold was the difference between the contracted amount and the actual rental worth of the premises.[63]

This modern trend, which the New Jersey courts now propound, is long overdue in other states around the nation wherever people are renting dwelling units. However, only New Hampshire has recently joined the course set by New Jersey. In the latest case, *Kline v. Burns*,[64] the court summarized the four factors considered in applying legal principles to the modern day relationship of lessor and lessee. The first is the recognition by the legislature that the public welfare requires rental property for dwelling purposes to be in a safe condition and fit for human habitation. Second, the lessor has a better knowledge of the conditions of the premises than does the lessee so that the lessor then is in a better position to discover and know of latent defects. Third, since the lessor retains the enjoyment of the premises long after the tenant does, it is

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[59] *See* Jackson v. Rivera, 65 Misc. 468, 318 N.Y.S.2d 7 (N.Y. City Court 1971).
[60] 111 N.J. Super. 477, 268 A.2d 556 (1970).
[61] *Id.* at 483, 268 A.2d at 560.
[62] *Id.* at 484, 268 A.2d at 560.
[63] *See* Berzito v. Gambino, 114 N.J. Super. 124, 274 A.2d 865 (1971); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. City Court 1971).
[64] 276 A.2d 248 (N.H. 1971).

appropriate that he bear the cost of repairs necessary to make the premises safe and fit for habitation. Fourth, because of the lessor's better bargaining position poor housing is often rented in violation of public policy.[65] The court concluded that in the rental of an apartment as a dwelling unit, there must be an implied warranty of habitability by the lessor.

III. Remedies for Violation of Implied Warranty of Habitability

Although express warranties were never mentioned in the cases, the modern trend has set about to enforce the implied warranty as if it was an express covenant. The first implied warranty cases gave the lessee a remedy by allowing him to claim constructive eviction as a defense to the action for rent. In other words, the lessee could recind the lease and move and not be liable for the rest of the rent because he had been constructively evicted.[66] *Pines v. Perssion*[67] not only allowed recission of the lease, but allowed the lessees to recover what they had invested in the property, the deposit and a reasonable amount for labor performed. In *Lemle v. Breeden*,[68] the court chided other courts for always attemping to give the lessee a remedy shaped around the doctrine of constructive eviction. Viewing the lease as "a contractual relatonship 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."[69] The lessee was justified in rescinding the lease and vacating the premises and should have been returned the rent paid in the amount of $1110.00.[70] Thus until 1970, the courts agreed that regular contract remedies are available to enforce the implied warranty but they had only actually used rescission.

The most recent cases have finally opened the way to the use of all the contract remedies which have always been available where there has been an express warranty. In *Marini*,[71] the court allowed the lessee to exercise the self-help remedy of making the necessary repairs and deducting their cost from the rent as it came due (provided, of course, that reasonable notice of the need for the repair had been given).[72] A third remedy was allowed in *Kline v. Burns*[73] where the lessee was allowed to sue for damages for breach of the implied warranty. The court held that the proper measure of damages was the difference between the contract amount and the actual worth of the premises. The other remedy ordinarily available where an express covenant is violated

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65 *Id.* at 251.
66 *See* Smith v. Marrable, 11 M. & W. 5, 152 Eng. Rep. 693 (1843).
67 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
68 51 Hawaii 426, 462 P.2d 470 (1969).
69 *Id.* at 436, 462 P.2d at 475.
70 The court did not comment specifically on the rent refund. However, the facts show that the amount had been paid in advance and plaintiff-lessee only lived in the house three days and nights. There were so many rats in the bedrooms that his family had to sleep in the living room. Even then the court allowed the lessor to keep $80.
71 *See* note 56 *supra*.
72 *See* Garcia v. Freeland Realty, Inc., note 58 *supra*.
73 *See* note 64 *supra*.

is the right of set-off or recoupment of damages. The court recognized this principle in *Academy Spires, Inc. v. Brown* where, in an action for rent due, the court allowed a diminution in the rent of 25% because of plaintiff's violation of the implied warranty. Thus through the modern trend of decisions the courts have concluded that where the lessor violates the implied warranty of habitability, the lessee has the same remedies as are available where the covenant violated by the lessor is expressed in the lease.[74]

The Circuit Court of Appeals for the District of Columbia seems to have regarded the implied warranty of habitability in even greater esteem than previous courts have regarded the express warranty in written leases. It has generally been agreed that the covenant of the lessor to repair is independent of the lessee's covenant to pay the rent.[75] Consequently the breach of the former is no defense to the action by the lessor based on lessee's failure to pay the rent. Ordinarily this would be a matter of form and pleading because the lessee still has the option of recoupment or counterclaiming for damages. However, *Javins* was an action by the lessor for possession for failure of the lessee to pay the rent. Judge Wright, in a statement contrary to almost all law involving breach of express warranties to repair and maintain the rental property stated:

> Under contract principles, however, the tenant's obligation to pay rent is *dependent* upon the landlord's performance of his obligation, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.[76]

Thus, if the lessor's implied covenant is held to be dependent, its breach is a defense (and if the breach is severe enough, a complete defense) to the lessor's action for possession of the rental property. The court remanded the case to the jury to determine what part, if any, of the rent was suspended by the lessor's breach of warranty.

IV. Contracting to Avoid the Implied Covenant of Habitability

A major question, as yet not completely answered, as to implied covenants of habitability is whether the lessor can by agreement with the lessee contract against liability. The common law rule in lease law is that the lessor may by express contract exempt himself from liability to the lessee.[77] Often the type of exculpatory clause that is used states that the obligation of the tenant is not affected by the failure to maintain the premises in good repair. This may be simply stated as follows: "It is expressly understood and agreed that whenever re-

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[74] Annot., 28 A.L.R.2d 446 (1953); Annot., 28 A.L.R. 1448 (1924).

[75] Annot., 28 A.L.R.2d at 452; Annot., 28 A.L.R. at 1453.

[76] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (1970) (emphasis added). In a footnote to the first sentence here, the court notes that in extending all contract remedies to the parties of a lease they included an action for specific performance of the implied warranty of habitability.

[77] *See* 52 C.J.S. *Landlord-Tenant* § 423(2) (1968).

pairs to be made by the Landlord shall be delayed because of factors beyond its control, the obligation of the Tenant hereunder shall not be affected whatsoever thereby, nor shall any claim accrue to the Tenant against the Landlord, or its assigns, by reason thereof." Or the clause may appear to be slightly more lenient by first listing the various items that the lessor will keep in repair and then stating, "The failure to keep any of the foregoing in repair shall not affect the obligation of TENANT to pay rent, and TENANT'S sole remedy therefor shall be recovery of damages from OWNER." This phrase is often followed in a later part of the lease by a statement similar to the following: "Except only as otherwise specifically provided by statute, neither OWNER nor OWNER'S agents shall be liable for damages to TENANT or to any persons claiming through TENANT (nor shall rent be abated) for damage to or loss of property wherever located from any cause whatever." In either case, the thrust of the covenant goes to create a defense in an action brought by the lessee for damages caused to him as a result of the lessor's action (or inaction as the case may be). The basis for support of such provisions is the right of either party to contract and the reluctance of courts to infringe upon that right.

There are certain cases where exculpatory clauses have not been upheld. For instance, where its enforcement would allow the lessor to violate the housing code, the clause would be held to be invalid as against public policy. The obvious reason is that enforcement allows nullification of the object of the statute. *Javins* relied on this type of reasoning and stated that where the Housing Regulations placed the duty on the lessor, it could not be shifted or waived by agreement.[78] Thus, to the extent that *Javins* is applicable and that the local housing code is thus a part of the lease in the form of an implied warranty, exculpatory clauses would be illegal and unenforceable as a violation of public policy.

Though *Javins* is the leading case of the modern trend discussed above, the whole line of cases indicate by their reasoning that the courts will not continue to allow the lessor to avoid his duty to maintain the premises once the duty is imposed. *Pines* stated that the implied warranty was one to be extended not restricted.[79] The basic argument that runs through the whole line of cases is the public policy argument that does not so much rely upon the statutes and housing codes as it depends upon the court's duty to protect the general welfare. If *caveat emptor* is contrary to public policy in that it allows poor rental housing which in turn causes urban blight, juvenile delinquency, and high property taxes as the *Pines* court said,[80] then the Wisconsin court will be likely to regard the covenant against liability as having the same effect.

It could be argued that the lessee has a right to contract in any way he chooses. Nevertheless, the *Javins* court has said that he is purchasing a package of goods and services including "adequate heat, light and ventilation, serv-

78 428 F.2d at 1082.
79 *See* text at note 44 *supra*.
80 *Id.*

iceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance."[81] The lessor would have a difficult time convincing the court that the lessee really intended to purchase a less than adequate package of goods and services. This would be especially difficult in a law suit where the lessee contends to the contrary. *Javins* perhaps indicates that the lessor would have to show that the lessee was a "jack-of-all-trades, that he planned to stay a long time, and that he could afford to make necessary repairs."[82] The lessor would have to show that the rent has been reduced indicating that the lessee's expectations should be at a lower level than when the relationship commenced.[83] The evidence would have to show that the lessee actually had some bargaining power in the transaction. Any of the following will show *lack* of bargaining power: shortage of good housing, racial or class discrimination, or the standardized form lease.[84] All in all, the lessor will have a difficult time proving that the lessee intended and expected to shift and accept the burden of maintaining the premises.

V. Conclusion

In light of the recent increase in the number of apartment units and the consequent increase in the number of lessor-lessee relationships, it is important that the parties be aware of the recent decisions which seem to be the forerunners of the route for other states to follow. The trend's primary thrust is toward viewing the lease as a contract which is subject to contract law of implied warranty and the principles of the Uniform Commercial Code. Enforcement of the implied warranty has now been allowed by every means available for the enforcement of the express covenants of the lease, and other remedies such as specific performance may be available. Though that is as far as the courts have gone thus far, it is likely that they will also enforce the implied warranty in spite of any attempts by owners to contract to avoid the duty imposed by that warranty.

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81 *See* note 49 *supra.*
82 *See* text at note 49 *supra.*
83 *See* text at note 50 *supra.*
84 *See* text at note 51 *supra.* In obtaining the leases quoted *supra,* the author received the second lease which was quoted (a standardized form lease) from a black tenant. Further investigatons revealed that other, white tenants had a completely different lease. Did the black tenant have bargaining power? Javins says, "No!"

THE STATUS OF IOWA'S OBSCENITY LAWS

Iowa's laws regulating obscenity[1] were passed 75 to 85 years ago.[2] They are similar to other obscenity statutes passed during that period, and they were based on the law as it existed then.[3] In the last 15 years, however, the United States Supreme Court has defined the constitutional concepts surrounding obscenity. These decisions have declared many state obscenity statutes to be unconstitutional in violation of the First and Fourteenth Amendments, either on their face or as applied. The purpose of this Note is to examine Iowa's obscenity statutes in light of the constitutional mandates imposed by the Supreme Court, and to explain the present law governing the regulation of obscenity.

I. The Permissible Scope of Obscenity Regulation

The area of obscenity takes on a constitutional aspect because the right of free speech is protected by the First Amendment,[4] which is applied to the states through the Fourteenth Amendment.[5] The First Amendment is not absolute, however, and obscenity is one of several classes of speech which may be regulated.[6] Because of this distinction, it is necessary to define obscenity in order to determine what material may be regulated and what material may not be regulated.

A. *The Roth Definition*

The leading case establishing a comprehensive definition of obscenity is *Roth v. United States*.[7] In that decision, the United States Supreme Court overturned some earlier ideas and attempted to clarify the free speech issues surrounding obscenity. First of all, the Court specifically held that obscenity is not within the area of constitutionally protected speech.[8] This holding was based on the concept that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of . . . the First Amendment . . . ."[9] The Court apparently felt that obscenity, as it was subsequently defined, has no

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1 Iowa Code §§ 725.3-.6, .8-.9, .11 (1971).

2 55 Iowa Code Ann. §§ 725.3-.6, .8-.9, .11 (1950) (History and Source of Law).

3 Report of the Commission on Obscenity and Pornography 353 (Bantam ed. 1970) [hereinafter cited as Commission Report].

4 "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

5 Gitlow v. New York, 268 U.S. 652 (1925).

6 "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the *lewd and obscene*, the profane, the libelous, and the insulting or 'fighting' words . . . ." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (Emphasis added).

7 354 U.S. 476 (1957). The companion case of Alberts v. California applied the Roth opinion to the states.

8 *Id.* at 485.

9 *Id.* at 484.