"The Slum Tenant and the Common Law:

A Comparative Study"

by

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Abstract

This thesis examines the legal position of the slum tenant in the common law jurisdictions of England, the United States and the Commonwealth. Part I introduces the topic by sketching in the social and historical background. It also discusses the powers conferred upon local authorities by housing and public health legislation to aid tenants. The second Part examines the contractual rights of such a tenant and, in particular, the existence of implied terms of fitness and repair. It also looks at some recent innovations in the American law and discusses the possibility of similar developments in the English law. The third Part is concerned with statutory modifications to the common law and the fate of these in the courts. Some suggestions are made as to the meaning of certain vague terms in the legislation. The landlord's liability in tort forms the basis of Part IV which contrasts the relative immunity of the English law with liability under the American law. Part V deals with his liability in both contract and tort for parts of the premises such as those shared in common which are treated as being retained in the landlord's control. Part VI turns from rights and liabilities to a consideration of the remedies available to the tenant. It looks at traditional remedies, evaluates their merits and again looks to the American law for new remedies, in particular that of rent withholding. It also examines the legal position of tenant organisations which may be one means of improving housing conditions and at possible intervention by welfare services which may be another. Finally,

Part VII discusses the attitude of the law to efforts by landlords to either exclude the rights of tenants or to take retaliatory action against those who exercise them.

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Part I

Introductory

Chapter 1

Introduction

1) The Slum Problem

The following brief account is not designed to be exhaustive. Rather, it seeks to sketch in the main details of the social situation within which the law discussed in this thesis is to operate. It considers definitions of the slum, the persons who live there or own houses there, the extent of the slum problem and its nature and, finally, it examines some of the consequences of slum housing.

There are many definitions of the slum[1] but they can be divided into two basic types: those that stress the characteristics of the people that live in such areas and those that stress the buildings found there.[2] A slum has, for example, been described as "a bleak area of segregation of the sediments of society; an area of extreme poverty, tenements and ramshackle buildings, of evictions and evaded rents; an area of working mothers and children, of high rates of birth, infant mortality, illegitimacy, and death, an area of

1 For various definitions see,
H. Barnes, "The Slum: Its Story And Solution" (1931) p. 7
James Ford, "Slums And Housing" (1936) pp.3-14
J. Friedman, "Government And Slum Housing" (1968) p. 3
Judge F. L. Kral, 53 Chi-Bar Record 367, 369
C.R.A. Martin, "Slums And Slummers: A Sociological Treatise On The Housing Problem" (1935) p IV
H.W. Zorbaugh, "The Gold Coast And The Slum" (1924) pp 151-153

2 Barnes op cit n 1 p. 7
Friedman op cit n 1 p. 3

pawnshops and second hand stores, of gangs."[3] Though this definition does not ignore the character of the buildings, it presents the slum primarily as a sociological phenomenon. The following definition, on the other hand, emphasises the condition of the building: "the slum is a residential area in which the housing is so deteriorated, so sub-standard, or so unwholesome, as to be a menace to the health, safety, morality or welfare of the occupants."[4] This thesis adopts the second definition.

Whichever emphasis is chosen, it is obvious that there is a strong connection between the buildings and their occupants. "Common sense tells us that the slum is both a social and a physical fact. It is the home of the poor and the poor live badly."[5] There is clear evidence of the relationship of low income to sub-standard housing. Two authors have made this point forcefully by reference to relevant inquiries: "It seems only too apparent that the family which lives its life in a Milner Holland slum may well do so in Abel Smith/Townsend poverty, while its children

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3 Zorbaugh op cit n 1 p. 9

4 Ford op cit n 1 p. 13
Cf similar definition in section 4 of Housing Of The Working Classes Act 1890 and section 1 of Housing Act 1930.

5 Friedman op cit n 1 p. 3

are sent to a Plowden School".[6] The connection has been traced by American as well as English writers.[7] It is difficult to generalise but most slum houses are rented rather than owner-occupied.[8] On a national level, furnished tenancies account for only a small percentage of the housing stock but in slum areas that percentage rises rapidly and some of the worst condi-ditions are found in such lettings.[9] Though all types

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6 Coates and Silburn, "Poverty: The Forgotten Englishmen" (1970) p. 37
See also P. Townsend, "Everyone His Own Home" RI.I.B.A.J. Jan. 1973 p. 36
This connection has, of course, long been appreciated, see eg John Simon, "English Sanitary Institutions" (1890) p. 434
There are signs that in a few areas "there is no longer a consistent close relation between people's income levels and their housing conditions. A good income no longer invariably buys a good home. Since, on the whole, housing standards are higher in the public than in the private sector, it is tenure rather than income which determines housing conditions": Centre For Urban Studies, "Housing In Camden" Vol II (1968) p. 3. But such areas are exceptional.

7 Oscar Ornati, "Poverty Amid Affluence" (1966) pp. 68-69 Appendix 16, 17
Alvin L. Schorr, "Slums And Social Insecurity" (1964) pp. 77, 94

8 See Centre For Urban Studies, "Housing In Camden" (1968) Vol II pp 34-35, Tables 7, 8a
J.B. Cullingworth, "Housing In Transition" (1963) p. 66
P.G. Gray and R. Russell, "The Housing Situation in 1960" pp. 42, 48-54, 70.
John Greve, "Homelessness in London" (1971) p.29
Ministry of Housing And Local Government, "The Deeplish Study" (1966) p. 17
Town and Country Planning Assoc, "Housing In Britain" (1964) p. 64

For U.S. Statistics showing the same correlation between sub-standard housing and tenure, see Meyer, "Housing and Society" (1965) p. 144.

9 Centre For Urban Studies op cit n 6 pp 4, 35.
D. Donnison, Occasional Papers On Social Administration No 9 (1962) pp. 24-25.
Greve op cit n 8 pp. 29, 63

of households may be affected. Slum houses contain a larger than average proportion of the extremes.[10] There are small households of one or two persons, often single persons or elderly couples.[11] There are also many large families with five or more persons.[12] In terms of race, coloured people have a disproportionate share of slum housing.[13]

The characteristics of landlords are just as important as the characteristics of tenants in understanding the slum problem. Unfortunately, we have insufficient evidence of landlords as a national group.[14] Surveys carried out in Northern towns reveal the average landlord to be elderly with only a few houses and with

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10 The following references relate to unfurnished tenants generally:
Cullingworth op cit n 8 pp. 75 - 77
D. Donnison, "The Government of Housing" (1967) p. 193
Donnison opcit n 9 pp. 23 - 24
Ministry of Housing and Local Government op cit n 8 p. 22

11 Ibid. For the housing conditions of America's aged, see Beyer, "Housing And Society" (1965) p.426

12 Ibid

13 Elizabeth Burney, "Housing On Trial" (1967) pp.3-4
Greve op cit n 8 pp. 118-119
For the close connection of race and poor housing in the United States, see Comment, 55 Minn. L.R. 82, 85-86, 95;
M. Lipskey, "Protest in City Politics" (1970) pp. 44-45; "National Advisory Commission Report On Civil Disorders" (1968) p. 259;
Ryan, 14 Howard L.J. 338, 343-344
Schorr, op cit n 7 pp. 64-66

14 The only published survey conducted on a national basis is John Greve, "Private Landlords In England" Occasional Papers On Social Administration No. 16 (1965) but this took a quite small sample of land-
continued...

an income not much higher than that of their tenant.[15] But other surveys carried out in London show that property companies own a considerable proportion of the housing stock.[16] Some writers have held that the greed of landlords is the cause of the slums[17] whilst others claim that they are made scapegoats for

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14 continued
lords and was weighted in favour of provincial landlords.

15 J.B. Cullingworth, " op cit n 8 pp. 105-142 (a study of private landlords in Lancaster). Ministry of Housing And Local Government, op cit n 8 Cf Greve op cit 8 pp. 35-37 (Deeplish, Rochdale).
The small and even indigent landlord has always been a part of the slum problem in both the U.K. and the U.S.A.
Edith Abbott, "The Tenements of Chicago 1908-1935" (1936) p. 378
John Greve op cit n 14 pp. 9-10
Roy Lubove, "The Progressives And The Slums" (1962) p.28
J.S. Nettleford, "Practical Housing" (1908) pp.36-37
Select Committee On The Housing Of The Working Classes Acts Amendment Bill 1906 para 27 (P.P. 1906 IX)
Cf. Royal Commission On Housing 1885 pp.21-22 (P.P.1884-5 XXX).
For legislative recognition of the plight of low income landlords, see eg Sanitary Act 1866 section 22 (local authority may do certain works in default of owner but choose not to recover expenses incurred from owner suffering from poverty.) And for recent judicial recognition, see Dickhut v Norton (1970) 173 N W 2d 297, 305 (Hansen J. dissenting).

16 Christine Cockburn, "Rented Housing In Central London" Occasional Paper on Social Administration No. 9 (1963)
Report Of The Committee on Housing in Greater London, Cmnd 2605, 1965 (The Milner Holland Report)

17 H. Barnes, op cit n 1 p. 363
H. Jephson, "The Sanitary Evolution of London" (1907)
H. Lazarus, "Landlordism an Illustration of the Rise and Spread of Slumland" (1892)
Jacob Riis, "How The Other Half Lives" (1891) p.205

the faults of others.[18] Absentee owners have been singled out for special criticism[19] but there seems to be no hard evidence that they are any worse than other landlords.[20] Again, public health authorities in some areas direct as much as 98% of their effort against immigrant landlords though this may tell us more about local authority enforcement than about landlords.[21] Given all this conflicting evidence, perhaps the only conclusion we can draw is that landlords vary considerably, we cannot afford to be dogmatic.

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18 L. Friedman, op cit n 1 p. 39 - 43
J. Rex and R. Moore, "Race, Community And Conflict: A Study Of Sparkbrook" (1967)
The Francis Committee considered that one of the things which had bedevilled the privately rented sector for a long time is the tendency -- to identify landlords as a class with the small minority of grasping landlords of the speculator type." (1971) Cmnd 4609 pp. 17 - 18.

19 Elizabeth Burney, op cit n 13 p. 164
James Ford op cit n 1 p. 450
Audrey Harvey, "Tenants In Danger" (1964) p.13
Jacob Riis op cit n 17 pp. 276 - 277
Select Committee op cit n 15 para 26

20 Abbott op cit n 15 p. 388

21 Burney op cit n 19 pp. 25-26. See generally on immigrant landlords. Ibid pp. 10 - 13, 92-93.
Milner Holland Report op cit n 16 pp. 188 - 195.
Francis Report op cit n 18 pp. 17-18

There is a similar lack of clarity when it comes to the management policies adopted by landlords. Local authorities invariably have a well defined policy of seeing to repairs though the administrative network involved may confuse the uninitiated.[22] A special fund is set aside for this purpose[23] and there is usually a maintenance department which not only sees to day to day repairs but also carries out periodic inspection and external painting.[24] By contrast, private landlords seem largely to act without any clear management policy at all.[25] Many landlords appear to undertake only those repairs that cannot be avoided. A study of Lancaster in 1963 revealed that only about 20% of landlords did "necessary" repairs whilst another 34% only did repairs when they were not only "necessary" but also "absolutely essential". Eight per cent did repairs only when legal action was taken or "seriously

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22 See, Central Housing Advisory Committee, "The Management Of Municipal Housing Estates" (1938); Ibid, "Management Of Municipal Housing Estate" (1945); Ibid, "Councils And Their Houses" (1959) J.B. Cullingworth op cit n 8 p. 183 J.B. Cullingworth, "Housing And Local Government" (1966) pp. 80-82, 91-104 R.J. Rowles, "Housing Management" (1959) Chapter 5. A.N. Schofield and J.F. Garner, "Housing Law And Practice" (1950) pp. 330-337.

23 Cullingworth op cit n 22 pp. 165-167

24 Ibid pp. 91-104

25 See generally, Cullingworth op cit n 8 pp.124-128 Greves op cit n 14 pp. 32-41 Ministry of Housing and Local Government op cit n 8 pp.37-42

threatened" by tenants.[26] A survey carried out in London in 1963 showed that more than half of tenants requesting repairs had to wait over six months.[27] It is difficult to know how representative these figures are: a study carried out in 1958 showed that in the country as a whole 11% of private tenants reported that landlords organised regular inspection of the property" specially to see if any repairs or decorations should be done" but only 1% of tenants reported such inspections in the county of London.[28] Apart from national variations, there is also evidence that size of holdings is an important factor in management and that large landlords repair more often than the small landlords.[29]

There is abundant evidence that there is a substantial slum problem in the sense that many thousands of people are living in dwellings which are unfit, lack essential amenities or are overcrowded. The latest evidence is provided by the House Condition Survey carried out in 1971 which confirms national,[30] regional[31]

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26 Cullingworth op cit n 8 p. 125

27 Milner-Holland Report op cit n 16 p. 115

28 Ibid. See also Ministry of Housing and Local Government op cit n 8 p. 39.

29 Cullingworth op cit n 8 p. 135.

30 Gray and Russell op cit n 8
Government Social Survey, "The Housing Survey in England and Wales, 1964" (1967)
H.M.S.O. "House Condition Survey, England and Wales, 1967" "Economic Trends" No 175. May 1968.

31 Ministry of Housing and Local Government, "Housing

continued....

and local surveys[32] carried out in recent years. This showed that three and a half million homes, or a fifth of the entire housing stock of England and Wales, were unfit, lacked basic amenities or needed more than £ 00 to be spent on repairs.[32a]

Statistics can inform us of the size of the slum problem but only those affected can tell us of the nature of that problem. There are some vivid accounts compiled in Shelter Reports.[33] The following illustrates the discomfort caused by vermin,

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31 continued ......
Survey Reports" (Series from 1969)
For Greater London, see Milner Holland Report op cit n 16 and Greater London Council, "Greater London Development Plan - Report of Studies" (1969)

32 Centre For Urban Studies op cit n 6 (Camden)
Cullingworth op cit n 8 (Lancaster)
Cockburn op cit n 16 (St. Marleybone, London)
Ministry of Housing and Local Government op cit n 8 (Deeplish, Rochdale)
Notting Hill Housing Service, "Notting Hill Housing Survey: Interim Report" (1967)
Rex and Moore op cit n 18
Shelter Paper, "Better Than No Place" (1971) (Islington, London)
Shelter Report, "Reprieve For Slums" (1972)
Gilburn and Coates op cit n 6 (St. Annes, Nottingham)

32a Department Of The Environment, "Housing Survey Reports No. 9: House Condition Survey 1971, England and Wales" (1973)

33 Shelter Reports, "Who Are The Homeless? Face The Facts" (1969)
"No Place Like Home" (1969) "Reprieve For Slums" (1972)
See also Frank Allaun, "No Place Like Home" (1972)

> "Mr. and Mrs. M. and their seven children live in a four roomed house in Manchester which is infested with rats, mice and cockroaches. The mice eat everything they can find, including the bedding in the baby's pram. Mrs. M. has begun to suffer with nerves, from her constant terror of having to face the rats when filling the baby's bottle in the middle of the night, and from her fright when she frequently finds rats in the beds when making them." 34

Disrepair and decay are frequent cause for complaint,

> "My toilet is coming down. The overflow from the floor above is coming into our toilet. I have to put newspapers down to soak it up." 35

So are inadequate amenitites,

> "Mrs. G. and her five children -- share the lavatory and bathroom with 10 others. There is no hot water supply." 36

Dampness may cause the plaster to crumble and fall, the woodwork to rot and warp[37] and fungus to appear.[38] The degree of overcrowding is often staggering,

> "One researcher found it impossible to walk in a straight line across the room of the house occupied by Mrs G. and her five children in Birmingham. Four of the children sleep in one bed, two facing the top and two facing the bottom, and every time one wakes up, the four wake up." 39

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34 Shelter Report, "Who Are The Homeless? Face The Facts" (1969) p. 29

35 Allaun op cit n 33 p. 118

36 Shelter Report op cit n 34 p. 22

37 Ibid 25

38 Allaun op cit n 33 pp. 79-80

39 Shelter Report op cit n 34 p. 22

These illustrations are by no means exceptional and can be multiplied by any slum area.[40] It is not surprising that tenants in stress areas tend to place lack of maintenance at the top of their list of housing complaints.[41]

Though the exact relationship is often a matter of controversy, there are numerous studies showing that slum housing is at least a contributory cause of other social problems.[42] The association between bad housing and health has been noted ever since the pioneers of public health legislation stressed it in the 1840s.[43] Overcrowding, in particular, causes infectious diseases to spread more rapidly. Dampness may aggravate bronchitis. The risk of accidents in the home is also greater in such conditions. A Shelter

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40 For American illustrations, see eg Joost, 6 New England L.R.1, 4 - 5 (1970); Schorr, op cit n 7 pp. 123-124. The facts of some cases provide glaring examples eg 176 East 123rd St. Corp v Flores (1970) 317 NYS 2d 150, 152 n 3, 153 n 5.

41 The Francis Report op cit n 18 pp. 261-264,293. showed that some 20% of unregistered unfurnished tenants were not content with the maintenance of the building and that this went up to 41% for registered tenants.

42 See generally,
Castle and Gettus, "The Distribution Of Social Defects In Liverpool", 1957 Sociological Review p.43.
James Ford, op cit n 1, pp. 350-437
Gunnar Myrdal, "An American Dilemma" (1964)p.376
A.T. Nevitt, "Some Economic And Social Aspects Of Twilight Area Housing" Sociological Review Monograph No. 14 (Sept. 1969)
Alvin Schorr, op cit n 7 pp. 1 - 21

43 A.E. Martin, "Environment, Housing and Health" 4 Urban Studies 1 (1967)

continued....

Report contains this tragic story: "I had another little girl -- but the ceiling fell on her and she died".[44] The risk of fire in multi-occupied houses is ever present; with so many people in the building both the potential sources of fire and the number of victims are multiplied.[45] The stresses inherent in congested and inadequate housing can lead to mental and emotional disturbance resulting in some cases in mental illness[46] or family break-up.[47] These frus-

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43 continued .....

See also, Ford op cit n 1 pp. 375-397
J.W.L. Klevins, "Housing And Health In A Tropical City"(1972)
J.M. Mackintosh, "Topics In Public Health" (1965) pp.124-127
John Robertson, "Housing And The Public Health" (1919) pp.9-50
Shelter Reports, op cit n 33
Daniel M. Wilner, "The Housing Environment and Family Life" (1962)

For an interesting legislative recognition of the connection between housing and health, see The National Insurance Act 1911 s.63.

44 Shelter Report, "Reprieve" (1972) p. 27

45 Shelter Report, "Who Are The Homeless? Face The Facts" (1969) pp. 13-14

Elizabeth Burney, op cit n 13, p. 20.

46 Greve, op cit n 8, p. 20
Shelter Report op cit n 44, pp. 12, 31, 47

47 F. Engels, "The Condition Of The Working Class In England" (1845) (ed: Henderson and Chaloner, 1958) p.145
Greve op cit n 8 pp. 20-21
Shelter Report op cit n 45 p. 17
See generally, J.M. Mackintosh, "Housing And Family Life" (1952)

trations may be taken out of the house and onto the street. The National Advisory Commission investigating the American Civil Disorders of the mid 1960s concluded, "In nearly every disorder city surveyed, grievances related to housing were important factors in the structure of Negro discontent."[48] Less dramatically, slums may be the breeding ground for crime and other anti-social behavior.[49] The education of children may suffer because of the absence of study facilities or the presence of stresses caused by poor housing.[50]

An appreciation of the nature and consequences of slum housing provides the basis for the two philosophies that have long been used to justify legal action to deal with the slums: humanitarianism and utilítarianism.[50a] It can be argued that sympathy for the plight of slum dwellers is sufficient justification.[50b]

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48 National Advisory Commission Report On Civil Disorders" (1968) p. 259. Historically, riots and the fear of riots have been a cause of housing reform in both the U.S.A. and the U.K.; Lipskey op cit n 13 pp. 22-24, 34-35; Hansard 3rd series 1848, Vol 98 col 769-770 (Mr. R.A. Slaney). For a modern example, see Beattie, 2 Prospectus 239 (1968) (Detroit riots).

49 Ford op cit n 1 pp. 398 - 432
L. Friedman, op cit n 1
Shelter Report op cit n 44 pp. 11, 23

50 Shelter Report, "Back To School -- From A Holiday In The Slums" (1967)
Frank Allaun, op cit n 33 pp. 42-43, 113

50a J. Vere-Hole, "The Housing Of The Working Classes In Britain 1850-1914" (1965)(Unpublished U of London Ph. Thesis) pp.499-501.Cf Friedman op cit n 1 p.4.

50b See eg Viscount Morpeth in introducing the Public Health Bill of 1848 (infra 57): Hansard 3rd
continued......

Alternately, a cold calculation of the cost to society of the demands made on health, police and social services and of the waste of opportunities also leads to the conclusion that slums must be abolished.[50c]

2) The Role Of The Law And The Scope Of This Thesis

To understand the role the law can play in preventing and remedying slum conditions, it is necessary to consider first the causes of the slum.

The causes of the slum are many and varied.[51] Some may be the result of original defects in construction:[52] jerry-built houses,[53] the back to back houses in the English industrial slums[54] or the

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50b continued..........
Series Vol 96 Col 386-387 and Lord Ashley in supporting it: Ibid Vol 98 col 779-780. Religious beliefs were often a source of humanitarian interest in the slums: Friedman op cit n 1 p. 11.

50c See eg Mr. Slaney's reasons for supporting the Public Health Bill of 1848: Hansard 3rd Series Vol 96 col 413 and Dr. Southwood Smith, Fifth Annual Report Of The Poor Law Commission, 1839, Appendix C 2 p. 106. See generally Vere-Hole opcit nsca pp.84-85. The utilitarian approach was a more powerful force behind American housing reform: Friedman op cit n 1 p.12, Roy Lubove, "The Progressive And The Slums" (1962) pp.34-35.

51 See generally Ford op cit n 1 pp.443-454 L.Needleman, "The Economics of Housing" (1965) pp.191-193

52 Schorr op cit n 7 pp.119-120

53 Asa Briggs, "Victorian Cities" (2nd ed 1968)p.19

54 Briggs op cit n 53 p.156
M.W. Beresford, "The Back To Back House in Leeds 1787-1937" in S.D. Chapman (ed), "The History Of Working Class Housing" (1971)

dumbell tenement in New York City built before 1901.[55] Houses sound in construction may become slums by being used in a way in which they were not designed to be used: a house built for a single family may soon become a slum if used in multi-occupation.[56] Also, no matter how good the original construction, no dwelling is immune from the natural decay resulting from time and the elements.[57] Eventually time conquers all construction. But this inevitable process may be slowed down by proper maintenance by the owner or occupants. Failure to maintain is thus another cause of the slum.[58] Finally, in contrast to lessening the natural progression to decay, ill-treatment of the dwelling will speed up the process. In particular, neglactful and destructive tenants may be causes of the slum.[59]

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55 See Marshall B. Clinnard, "Slums And Community Development" (196?) pp. 33-34
Lipsky op cit n 13 p. 25.

56 See for problems of multi-occupation; Burney op cit n 13 pp. 15-19, Shelter Report op cit n 45 pp 11 - 12.

57 Barnes op cit n 1. pp. 302-303
For a graphic description of urban decay in operation, see Comment, 29 Indiana L.J.109,111-113.

58 "National Advisory Commission Report On Civil Disorders" (1968) p. 259.
Needleman op cit n 51 pp. 192-193
Shelter Report op cit n 44 p. 6

59 The view that tenants contribute to slum formation is by no means new, see
F. Engels, "The Condition Of The Working Class In England" (1845) (ed: Henderson and Chaloner 1958) pp. 69-70
Octavia Hill, "Homes Of The London Poor" (2nd ed 1883 p. 10);
H. Jephson, "The Sanitary Evolution Of London" (1907) p.328

continued........

The law must use different techniques to deal with these various causes. Building laws regulating initial construction should ensure that houses are not built as slums and planning laws should ensure that their locality does not make them such. Wrongful use of a dwelling is again a matter for planning law and for housing and public health legislation. These last two legislative codes are also weapons designed to deal with neglect of maintenance and intentional damage. They grant extensive powers to local authorities to require both owners and occupiers to put and keep the premises in a safe and sanitary condition.[60] But the time may come when none of the above laws are sufficient, then it will be the time for the drastic tool of slum clearance to be employed and new houses to take the place ofthe old. It will be seen that all these types of law are statutory.

The common law has traditionally been given an insignificant part to play in the battle against the slums. Two areas of the law are relevant: restrictive covenants which can be used to regulate construction[61]

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59 continued .....
J.S. Nettleford, "A Housing Policy" (1906) pp.25, 35-37
B.S. Townroe, "The Slum Problem" (1930) pp.12,20, 100, 105-111 (He quotes a medical practioner who argued that "the true slum making slum is a valid sub-species of Homo Sapiens.")
Edith Elmer Wood, "Housing Of The Unskilled Wage Earner" (1919) p. 34

60 Infra 52

61 See, J. .W.B. McAuslan and Neal A. Roberts,"Land Use Planning And Development Law" (1973) (unpublished materials compiled for course on Planning Law at the University Of Warwick Chap. 5.

and duties of repair, express or implied, to be found in the landlord-tenant relationship. It is the second area that forms the basis of this thesis. The first is certainly a suitable area for study but it is submitted that the size of the slum problem today demands more urgent consideration of the duties of repairs in the landlord-tenant relationship and, in particular, of those duties in the context of the slum. There are excellent studies of the duty to repair generally,[62] but these do not take into account the special position of slum tenants. As we have seen, such tenants are likely to be those with low incomes and, by definition, they have severe housing problems. A consideration of the position of business tenant or of tenants with high incomes and relatively minor housing problems is not sufficient; the law must reflect these factual differences. This thesis, therefore, attempts to do no more than consider the law relevant to slum tenants.

The case for duties to repair at common law as well as under housing and public health legislation is very strong. There is sufficient evidence to suggest that such legislation is inadequate by itself: it takes too long to enforce and its sanctions do not always ensure compliance. Moreover it is paternal in nature: powers are given to local authorities not right to

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62 M.F. Cahill, "The Householder's Duties Respecting Repairs" (2nd ed 1930)
W.A. West, "The Law Of Dilapidations" (6th ed 1963)
Sir T, Cato Worsfold, "The Law Of Repairs And Dilapidations" (2nd ed 1934)

tenants. There is indeed a case for paternalism in this area where tenants might not know how to enforce their rights. But to accept that there is a case for paternalism is not to accept that it is wrong for the law to confer rights on tenants. The slum problem is so great that there should be both public and private actions existing side by side, the one to re-enforce the other.

The scope of this thesis is thus to examine the duty of repair in the context of the slum tenancy. The "slum tenant" is defined as one who lives in a physically sub-standard dwelling. His legal position is viewed primarily in relationship to the condition of that dwelling. Naturally, the "slum tenant" may have problems in relation to the amount of rent payable, security of tenure and other aspects of the landlord-tenant relationship but these have only indirect relevance to this thesis. The main problem for our tenant is to get the premises improved though measures designed to deal with this problem may have an effect on the rent payable or his security of tenure so these are of relevance though only indirectly.

The slum tenant's position is considered with reference to "the common law". In the first place, this term is used to distinguish that body of law which is entirely statutory in origin and, in particular, the housing and public health legislation already mentioned. Once again, that body of law is of indirect

relevance. A study of the slum tenant's position which ignored the powers conferred upon local authorities by this legislation would be quite misleading. The origin and development of common law doctrines in this field can only be truly appreciated in the light of legislative developments. In contrast to that body of law which is entirely statutory in origin and form, there is legislation which papers over gaps in the common law, which modifies that law or which encloses it in statutory provisions. Such legislation is here considered to come within that elusive concept, "the common law", and is given as much attention as purely judge-made law. Secondly, "common law" is used to refer to those legal systems which trace their doctrines back to English law asopposed to Roman or religious law.[1]

This ia a convenient place to consider the approach taken to sub-standard rented housing by the Roman Law and followed by the Civil law systems..

Roman law did not recognise the division of ownership by time. The lessor retained the ownership of land even while the lessee was in possession and the arrangement was treated as a simple contract for hire. Naturally, the lessor was expected to be primarily responsible for the upkeep of the property. The lessor warranted the habitability of the house at the commence-

1 For an example of the attitude taken by Jewish law, see Comment, 22 Vanderbilt L.R. 419
" 6 Columbia J. of Law and Social Policy 49

ment of the lease and for some time thereafter. If the property w s not fit for the use for which it was intended according to the agreement, the tenant could claim to be discharged.[1a]

The Civilian systems of the Continent impose a duty of fitness for occupation.[2] The German Civil Code provides for example, that, "the lessor shall deliver to the lessee the leased thing in a condition fit for the stipulated use, and shall keep it in such condition during the term of the lease."[3] Breach of this obligation releases the tenant from the payment of rent[4] and entitles him to bring an action for damages. He may also terminate the tenancy.[5]

The semi-civilian laws of Scotland and South Africa have adopted similar rules. Through Roman-Dutch law, the South African law has adopted the Civil law and requires the landlord "to see that the subject of the lease is free from such defects as will prevent its being properly and beneficially used for the purpose for which it was leased."[6] He must "place the house in a proper and habitable state of repair."[7] Scottish

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1a Buckland, "Roman Law" (2nd ed. 1950) pp.498-503 Cohn, 11 Modern L.R. 377, 380 (1948)

2 See generally Cohn op cit n 1.

3 Section 536. See generally Lipsky and Neumann, 44 Tulane L.R. 36 for a comparison of German and American law.

4 Section 537

5 Section 544

6 Le , "Introduction to Roman-Dutch Law" (4th ed 1946) p. 302

7 Bensley v Cle r (1878) Buch 89, 90 per De Villiers

law makes a distinction between agricultural and urban leases. In the former, there is an implied warranty of fitness at the commencement of the term but, during the term, the obligation to keep up the buildings and fences on a farm lies on the tenant.[8] The position as regards urban leases was summarised by the Lord President in <u>Wolfson</u> v <u>Forrester</u>,[9]

> "By the law of Scotland the lease of every urban tenement is, in default of any specific stipulation, deemed to include an obligation on the part of the landlord to hand over the premises in a wind and water tight condition and if he does not do so, there is a breach of contract and he may be liable in damages. He is also bound to put them in a wind and water tight condition if by accident they become not so. But this is not a warranty and accordingly, he is under no breach as to this part of his bargain till the defect is brought to his notice and he fails to remedy it." 10

The Civil law has penetrated North America in its appearance in the jurisdictions of Quebec and Louisiana. Under the law of Quebec, the landlord owes a continuing obligation to the tenant with respect to both defects and the maintenance of the demised premises in a fit condition for the purpose for which it has been leased.[11] Article 1613 of the Civil Code provides, "The thing must be delivered in a good state of repair in all respects, and by Article 1615 the lessor is obliged

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8 Gloag and Henderson, "Introduction To The Law Of Scotland" (6th ed 1956) pp. 368-370

9 (1910) S.C. 675

10 Ibid 680. Cf Cameron v Young (1908) A.C. 176, 180 per Lord Robertson

11 See generally Durford, 44 Can. B.R. 477,477-482

"during the lease to make all necessary repairs, except those which the tenant is bound to make."

Louisiana has similar code provision.[12] By Article 2692 of the Civil Code, the lessor is required to make the premises fit for the purpose for which it is leased.[13] A recent case affirmed that even where the lessee accepts the demised premises in the condition in which they were in, he is still entitled to the warranty protection afforded by the Civil Code.[14] Under the Georgia Code, it is the duty of a landlord renting an apartment for a term to begin in the future, to have it on the day when the term is to begin in a condition reasonably suitable for the purpose for which it was to be rented.[15]

This thesis is also a comparative study. In particular, it compares the laws of the United Kingdom and of the United States of America. Though these are both primarily common law systems, a comparative study is most rewarding. In recent years there have been tremendous developments in the American law of landlord and tenant: new doctrines have been formulated to give

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12 See generally, Viterbo v Friedlander (1887) 120 U.S. 707
Christien, 30 Tulane L.R. 474
Comment, 20 Louisiana L.R. 76
" 23 Louisiana L.R. 458
De V. Claverie, 39 Tulane L.R. 789
For the history of the Louisiana code provisions, see Comment, 10 Tulane L.R. 473
" 15 Tulane L.R. 141

13 See eg Siracusa v Leloup (1946) 28 So 2d 406

14 Reed v Classified Parking System (1970) 232 So2d 103
Cf Tewis v Zurich Insurance Co. (1970) 233 So 2d 357

15 See De Yere v Withers (1914) 15 Ga.App 688, 82S.E. 163

the slum tenants both rights and remedies in his fight for better housing conditions.[16] To a large extent, the aim of this thesis is to demonstrate the possibilities of similar developments taking place in the law of the United Kingdom. Reference is also make to the law of other common law systems where that is relevant. The thesis is also comparative on another level. It compares the legal position of the tenant with that of the consumer and seeks to draw lessons therefrom. Upon which of the two parties, landlords or tenants, should the law place the liability for maintaining the premises? There are arguments both ways but, on balance, it is submitted that there are greater justifications for placing this burden on landlords than on tenants where slum premises are involved and this thesis proceeds on that basis. In favour of requiring tenants to repair the premises, it can be argued that they are in a better position to take note of what repairs need to be done and to do them at an early stage. Another powerful argument is that imposing this burden of landlords will have the effect of discouraging investment in rented property and that this will intensify the housing problem.[63]

Though there is much force in the above arguments,

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16 See A.B.A. Committee on Leases, 6 Real Property, Probate & Trust J. 550 (1971) and Indritz, 1 New Mexico L.R. 1(1971) for general summaries of these developments.

63 Comment, 84 Harv. L.R. 729, 733-734
" 56 Iowa L.R. 460, 470
Eldredge, 84 U. of Pa. L.R. 467, 490
This is an old problem, see Herbert Spencer, "Social Statics" (1851) p. 384

there are stronger arguments in favour of requiring the landlord to be the responsible person. The first argument can be satisfied by requiring him to carry out regular inspections of the premises as part of an efficient policy of property management.[64] The second is more substantial but the answer to inadequate private investment in housing is not to lower standards but to encourage such investment by government loans and grants[65] or by changes in tax laws which may at present hinder investment.[66] There are three main arguments for holding the landlord responsible: (1) as the owner of the reversion, he will get the benefit of improvements carried out during the term of the lease,[67] (2) it is normally the expectation of the parties to the tenancy agreement that the landlord will

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64 Glanville Williams (ed), "Law Reform Now" (1951) p.124

65 See generally Housing Act 1969 Part 1 (U.K.)

66 Cullingworth op cit n 22 p. 216
Milner Holland op cit n 16 p. 38
A.A. Nevitt, "Housing, Taxation And Subsidies" (1966) p. 44
For U.S. Law, see e.g.

Crimmons, 45 Notre Dame Lawyer 107
Guido 25 Vand. L.R. 289
Nemann, 41 U. of Cincinnati L.R. 151
Schiering, 38 U. of Cincinnati L.R. 539
Sporn, 59 Colum L.R. 1026

For an interesting historical precedent, see Customs and Inland Revenue Act 1890 which enabled landlords of certain types of dwellings to recover remission of the inhabited house tax if the premises were certified as fit: Jephson op cit n 17 pp.344-345.

67 Bartlett, 18 Stanford L.R. 1397

be responsible,[68] (3) most importantly, the landlord is normally in a better economic position to bear the burden.[69] Of course, there are cases where the tenant is better off than his landlord and there is evidence that many landlords are retired persons with a small income.[70] But, in general, it seems reasonable to conclude that, as a group, landlords are economically stronger: by definition, they have at least one substantial asset in their property. Moreover, landlords with more than one tenant can get the benefit of economies of scale.

A related point is what to do in the case of those tenants whose incomes are not sufficient to pay the rents necessary to ensure that premises are kept in reasonable condition.[70a] According to the Social

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68 For empirical research on how the parties distribute repair obligations in practice, see

Greve op cit n 14 pp. 33-34, 47 table 6 (d)
Ministry of Housing and Local Government op cit n 8 p. 39, table 20.
Francis Report op citn 18 p. 148 (Dr. D.C.M. Yardley)

69 Comment, 55 Minn. L.R. 82, 94
" 26 Ohio State L.J. 512

70 Supra 11-12

70a This is again a very old problem: in 1842, the Marquess of Salisbury opposed an early attempt at public health legislation because it would lead to higher rents and consequent homelessness for tenants who could not afford to pay them, Hansard 3rd Series 1842 Vol 60 Col. 239. It is also a problem in the United States: Nancy Leblanc, "Cals Handbook" Part II (Circa 1965)pp IV-V

Survey Report of 1960, rather less than half of private tenants were willing to pay increased rent if missing amenities were provided.[71] The most likely reason for this was that they simply could not afford to pay any more rent.[72] More recently, many low income families have been forced out of traditional working class areas by housing improvements that have increased rents out of their reach. One study estimated that as much as 40% of all privately rented houses in two wards of North Kensington have changed from low-rent to high rent accommodation in five years and that average rents rose from £4.80p per week to £14.50p.[73] Once again, the answer is not to lower housing standards but to ensure that such tenants benefit from housing allowances.[74]

Likewise, if landlords are genuinely unable to afford the cost of repairs, the answer is not to condemn their tenants to slum conditions. But nor will anything be gained by punishing the landlord.[75]

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71 P.G. Gray and R. Russell, op cit n 8, p.58, table 52
Cf. Cullingworrh op cit n 8 pp. 150-151 (Lancaster Survey)
Shelter Paper op cit n 32 p. 36 (Islington)

72 Town & Country Planning Assoc. op cit n 8, p.67
Cf. Ministry of Housing and Local Government op cit n 8 p.70 (Deeplish, Rochdale Survey)

73 Notting Hill Peoples Assoc. Housing Group, "Losing Out: A Study Of Colville and Tavistock" (1972). See also Shelter Paper, "Home Improvement - People or Profit?" (1972)

74 See Housing Finance Act 1972 Part II
Furnished Lettings Act 1973

75 Friedman op cit n 1 pp. 194-199

In such circumstances, society must step in to help him discharge his duty. Though this thesis places primary responsibility upon the landlord, it is not contended that he must always bear this burden unaided. If our society sincerely wishes to remove the slums, then it must be prepared to pay the costs of grants and loans to low income landlords as well as low income tenants. The rest of society cannot salve its conscience by heaping impossible burdens on those unable to bear the strain.

The Social Setting: The Slums

The vital decisions in this area of the law date from the 1840s though these decisions placed reliance on earlier cases. The second part of this thesis traces the origins and development of the law on a case to case basis. This part provides an essential introduction to that analysis, it describes the social setting to those cases.

The period from 1780 to 1840 saw the very structure of English society change from one dependent upon an agrarian economy to one based upon industry. The face of the country was completely changed as a result of the Industrial Revolution.[1] The consequences of this social revolution were far-reaching and profound; one of the most important was the rate of growth of the urban population.[2] In 1801 the population of London was 864,845 but within forty years it had reached 1,873,676 - more than double the earlier figure. Similarly Birmingham, Leeds and Bristol also doubled their population in this period 1801 to 1841 whilst Manchester and Liverpool trebled in size: Manchester from 90,399 rose to 296,183 and Liverpool grew from 79,722 to 286,487.[3] Contemporary opinion expressed concern about these fundamental changes. Lord Ellemborough observed in the House of Lords[4] that members could not shut their eyes to the fact that a great

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1. For one contemporary account, see
   F. Engels, "The Condition of the Working Class in England" 1845 [Henderson & Chaloner ed. 1958] pp. 9-26.
2. Asa Briggs, "Victorian Cities" 59, 86, 89.
   Royston Lambert, "Sir John Simon 1816-1904" (1963) 57-58.
3. W. Vere-Hole, "The Housing of the Working Classes in Britain 1850-1914: a study of the Development of Standards and Methods of Provision". Unpublished U. of London Ph.D. Thesis (1965) p.80.
4. Debate on Drainage of Towns Bill 1841; Hansard 3rd series 1841, Vol. 56, col. 537.

practical revolution had taken place in the state of society in the half century prior to 1841. "The proportion between the manufacturing and agricultural population had been altogether reversed, and with this change was altogether changed the structure of society."[5] Writing in 1845, Engels said, "Eighty, even sixty years ago England was no different from any other country, with its little townships, only a few simple domestic manufacturers and a relatively large but widely-scattered agricultural population. Today, England is a unique country with a capital city of 2½ million inhabitants, with huge factory towns; with industries which supply the needs of the whole world, making practically everything by means of the most complicated machines. --- The population is composed of quite different classes than it used to be and these social groups make up quite a different sort of nation, with new customs and new needs."[6]

One of the needs of the recently urbanised population was some

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5. Ibid cf. Mr. Slaney, M.P. in debate on Public Health Bill 1848 estimating that in 1790 "the labourers who were engaged in husbandry were as two to one to the dwellers of the towns. But those proportions were now exactly reversed." Hansard 3rd series 1848, Vol. 96, col. 411-412.

6. Engels op. cit. n.1 at 23.
It should not be thought, however, that housing conditions in rural areas were much better. Chadwick's Report of 1842 (infra n.22) revealed many examples of deplorable housing in many parts of the countryside, e.g. Tiverton, Devon where many cottages were described as "built on the ground without flooring, or against a damp hill. Some have neither windows nor doors sufficient to keep out the weather, or to let in the rays of the sun, or supply the means of ventilation; and in others the roof is so constructed or so worn as not to be weather tight. The thatch roof frequently is saturated with wet, rotten and in a state of decay."
See also Vere-Hole op. cit. n.3 at 22.

form of shelter. Speculative builders arose to satisfy this need.[7] Unrestrained by any building regulations, they set out to make as much profit as they could by any means they cared to use. The prevailing philosophy of laissez-faire saw them as pioneers of progress forwarding the general happiness by reliance on self-interest.[8] "So houses were built without house drains, and roads without road drains, a state of affairs which spelled cesspools, foecal deposits and unbelievable lack of ventilation. Back to back house building with one privy to thirty buildings, and water supplied for an hour or so a day out of a public stand-pipe were enough to convert the estate into a sea of offal, stinking excrement, and dirt."[9] In Nottingham, many houses were built over shallow drains covered only by the boards of the sitting-room floors.[10] A group of ten houses known as Newton's Rents in Stepney, erected in 1845, consisted of one room measuring 9 x 9 x 8ft.[11] Many of these houses erected for the workers were built of inferior materials: bad timber, porous bricks and mortar composed of the cheapest available material which sometimes included rubbish; such crude methods of building greatly increased the damp and discomfort of houses which were erected in areas where the drainage

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7. Briggs op. cit. n.2 at 267.
   S.E. Finer, "The Life and Times of Sir Edwin Chadwick", (1952) p.214.
   Royston Lambert op. cit. n.2 at 58.

8. G.M. Trevelyan, "English Social History" (1944) p. 528.
   For an expression of this philosophy, see John Austin, "The Province of Jurisprudence Determined" 1832 (ed. H.L.A. Hart, 1955) pp. 104-109.

9. S.E. Finer, op. cit. n.7 at 214-215.

10. Engels op. cit. n.1 at 44.

11. Vere-Hole op. cit. n.3 at 63.

at its best was inadequate and too often was non-existent.[12] Space was saved by thrusting families into cellar dwellings. Engels declared of a part of Manchester, "Everything in this district that arouses our disgust and just indignation is of relatively recent origin and belongs to the industrial age. --- It is only the modern industrial age which has built over every scrap of ground between these old houses to provide accommodation for the masses who have migrated from the country districts and from Ireland. --- The health and comfort of the inhabitants were totally ignored as a result of the determination of landlords to pocket the maximum profit."[13]

Inquiries[14] carried out by private bodies such as the Statistical Societies[15] or by individuals such as Dr. Kay[16] or Engels[17] revealed the terrible results of this period of slum formation. The surveys of the Manchester Statistical Society were some of the earliest attempts to provide objective quantative analysis, obtaining such facts as the number of occupied houses and rooms and the average density of occupation.[18] Other surveys were carried out in various parts of the

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12. Ibid. 62.
13. Engels op. cit. n.1 at 64.
14. For a comprehensive bibliography of literature on the Victorian slums, H.J. Dyos, "The Slums of Victorian London", 11 Victorian Studies 5 (1967).
15. Dyos op. cit. n.14 at 12. Vere-Hole op. cit. n.3 at 15-27. A.S. Wohl, "The Bitter Cry of Outcast London", 13 Int. Review of Social History 189 (1968) at p. 193-195.
16. Dr. J.P. Kay, "The Moral and Physical Condition of the Working Classes Employed in the Cotton Manufacture in Manchester." 2nd ed. 1832.
17. op. cit. n.1.
18. Vere-Hole op. cit. n.3 at 16.

country.[19] All these studies revealed widespread housing problems. Dr. Kay claimed that the over-crowded damp houses, inadequate or non-existent drainage produced conditions which encouraged the spread of infection, whilst Engels used such conditions as evidence of the exploitation brought about by capitalism. The degree of housing inadequacy revealed by these private studies was confirmed by important public investigations; the Reports of the Poor Law Commissions 1838-9,[20] Select Committee on Health of Towns 1840,[21] Edwin Chadwick's famous "Report on the Sanitary Condition of the Labouring Population" 1842[22] and the Royal Commission on the State of Large Towns in 1844.[23] The results of these various inquiries deserve detailed discussion as providing the essential background to the decisions of the Common Law judges in the 1840s.[24]

One of the most serious housing problems at this time was the high percentage of the urban population living in cellars. A study by a Statistical Society of Liverpool showed that there were 7,493 inhabited cellars, housing one seventh of the population of that city.[25] The

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19. Ibid 16-24.

20. Fourth Annual Report of the Poor Law Commissioners, App. A. P.P. 1837-8 XXVIII.
    Fifth Annual Report of the Poor Law Commissioners, App. C.2. P.P. 1839 XX.

21. The Select Committee on the Health of Towns (Slaney Report) P.P. 1840 XI.

22. Published by Poor Law Commission, H. of L. 1842 XXVI. Reprinted M.W. Flin ed. (1965).

23. Commission of Inquiry Into The State of Large Towns and Populous Districts. First Report P.P. 1844 XVII. Second Report P.P. 1845 XVIII.

24. Their importance in the history of public health legislation is discussed infra.

25. Vere-Hole op. cit. n.3 at 18. cf. Engels op. cit. 1 at 43.

1840 Report of the Select Committee on the Health of Towns confirmed these figures and stated that a large proportion of these cellars were "dark, damp, confined, ill-ventilated and dirty.[26] This Report also estimated that 15,000 persons, nearly 12% of the working population, lived in the cellars of Manchester.[27] Reporting five years later, the Royal Commission on the State of Large Towns gave a figure of 18,000 for that city.[28] "In those towns where these abodes prevail, they present similar scenes of misery and wretchedness, and afford frequent instances of the occupation of dwellings totally unfit for the residence of human beings."[29] These cellars sometimes had no windows, so that the only source of light and ventilation was the door and fireplace; there might also be an inner room used for sleeping which was even more deficient in light and air than the first. Cellars were normally about ten or twelve feet square, sometimes less than six feet in height, and the floors in many were just bare earth. Due to lack of drainage, the overflow from the cesspools and gutters rendered the cellars so damp that holes were somtimes dug in the floor by the inmates which filled with stagnant liquid.[30] In a range of cellars in Clitheroe, the beds were found raised on bricks to keep them out of contact with the water.[31] But it should be noted

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26. op. cit. n.21 at 8.
27. Ibid.
28. op. cit. n.23 Second Report 60.
29. Ibid.
30. Ibid First Report Appendix p.14. Vere-Hole op. cit. n.3 at 40.
31. Royal Commission 1845 op. cit. n.23 Second Report 60.

that dampness was not confined to cellars; Dr. Kay describes how not only the cellars but even the ground floors of all the houses in the Little Ireland area of Manchester were damp.[32]

The Royal Commission of 1845 described the position with respect to privy facilities as "almost inconceivable".[33] Sewers were rare in working class areas and so the sanitary facilities consisted of privies which drained into cesspools; the latter being uncovered. As these cesspools were cleansed only once or twice a year, their contents overflowed into the courts and inundated nearby cellars and dwellings. The privies were often built across the ends of courts, thus blocking any ventilation, or were located in the entrance passageways to these courts, or in the cellars of houses, so that in many cases workshops or dwellings were directly above a cesspool.[34] To save space, a number of privies were commonly crowded together in one corner of the court.[35] More disturbing than their condition and location was the relative absence of these "necessaries" in many parts of the large towns. The Royal Commission reported, "in one district in Manchester there were found to be only 33 necessaries for 7,095 persons or 1 to 215 inhabitants. Throughout the whole town of Sunderland the proportion is only 1 to 76 persons. We have also met with an instance of only 1 necessary to 30 families; and it appears that throughout the courts in Liverpool the proportion is generally about 2 to 80 persons. The town of Merthyr Tydvil presents even worse instances. These are quoted as instances of the general deficiency and not as isolated cases."[36]

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32. Kay op. cit. n.14 at 35-36.
33. op. cit. n.23 Second Report 61.
34. Vere-Hole op. cit. n.3 at 47-48.
35. Royal Commission 1845 op. cit. n.23 Second Report at 61.
36. Ibid 39. cf. Engels op. cit. n.1 at 62.

The Royal Commission estimated that in fewer than eight of the fifty towns investigated could a tolerably favourable report be given in respect of water supply, the problem was especially serious in the districts inhabited by the poorer classes.[37] Dr. Southwood Smith, one of the pioneers of public health legislation, described in evidence to the Commission how in Bethnal Green there were to his knowledge whole streets where not a single house had water laid on, in some parts there were but two pumps for the use of all the houses of several streets.[38] Because the supply of water was intermittent, it was only available for short periods and on two or three days in the week. Normally, it would be obtained from a pump situated in the street or court and housewives would queue up with whatever containers they could find. The need to store the water created space problems in crowded one roomed dwellings and suitable receptacles were rarely available so that it was liable to pollution during storage.[39] Engels, noting that the interiors of the dwellings were as dirty as the surrounding streets, asked how the people could be expected to keep clean. "How can these people wash when all that is available is the dirty water of the Irk? Pumps and piped water are to be found only in the better-class districts of the town. Indeed no one can blame these helots of modern civilisation if their homes are no cleaner than the occasional pigsties which are a feature of these slums."[40]

Though it is difficult to get a clear overall picture of the degree of overcrowding existing at the time,[41] there is no doubt that

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37. op. cit. n.23 Second Report 1.
38. Ibid. First Report 30.
39. Vere-Hole op. cit. n.3 at 49-50.
40. Engels op. cit. n.1 at 62.
41. Vere-Hole op. cit. n.3 at 59.

it was severe in many areas. A private study reported in 1842 showed that in 29% of cases surveyed in Kingston upon Hull there were more than 3 individuals per bed and in 13% over 5, and in 103 cases there were 7 or more persons sharing the one bed.[42] Investigations of Manchester, London and Bristol showed that the number of families living in a single room far exceeded the number having two or more at their disposal and that single rooms were sometimes shared between two or more families.[43] A report by Edwin Chadwick in 1843 confirmed that in a startlingly high proportion of cases in London and the industrial towns, one room was the sole accommodation for the whole family.[44] "It is their bedroom, their kitchen, their wash-house; their sitting room, their dining-room; and, when they do not follow any outdoor occupation, it is frequently their workroom and their shop. In this one room they are born, and live, and sleep, and die amidst the other inmates."[45] Engels wrote that, on average, twenty people lived in each of the little houses to be found in parts of the Manchester area in 1845, each house consisting of two rooms, an attic and a cellar.[46] Much of this overcrowding occurred in houses originally built for well to do families but let to the poor as the area deteriorated and the wealthier inhabitants fled to more comfortable surroundings. The

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42. Ibid 18.

43. Ibid 24.

44. In Marylebone, out of 608 families, 159 occupied part of a room, 382 had one room and 61 had two, only 5 families had three rooms and only 1 had four. Report on Interment in Towns P.P. 1843, Vol. XII p. 31.

45. Ibid.

46. Engels op. cit. n.1 at 73.

Select Committee of 1840 described Spitalfield as having many "very ancient large houses, containing ten to twelve rooms, each room inhabited by a separate family."[47] On the other hand, even new houses were heavily multi-occupied.[48] A slightly better off family would live in one or two rooms and let the remainder to single men and lodgers. A witness before the Select Committee on Building Regulations declared, "it is not the practice of the poorer mechanics of London to have separate houses to themselves."[49]

Although of recent construction, the landlord's failure to maintain the premises and sometimes the tenants' destructiveness led to a state of disrepair and decay in many of these houses. Engels observed of St. Giles, London, "there is hardly an unbroken widowpane to be seen, the walls are crumbling, the door posts and window frames are loose and rotten. The doors, where they exist, are made of old boards nailed together. --- Piles of refuse and ashes lie all over the place and the slops thrown out into the street collect in pools which emit a foul stench."[50] In Ashton, where all the cottages were under fifty years old, "there are streets in which the cottages are becoming old and dilapidated. This can be seen in particular at the angles of the walls where the bricks are starting to work loose and fall out. Some

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47. op. cit. n.21 at 17.

48. Vere-Hole op. cit. n.3 at 42.

49. Select Committee on Building Regulations P.P. 1842, X, p. 67 quoted Vere-Hole op. cit. n.3 at 42.

50. Engels op. cit. n.1 at 34.

walls are beginning to crack, so that inside the whitewash tends to flake off."[51] Whilst in the Little Ireland area of Manchester, "the inhabitants live in dilapidated cottages, the windows of which are broken and patched with oilskin. The doors and the door posts are broken and rotten."[52]

The houses of the poor at this time were located in close courts; rows of small houses placed back to back built up at the sides and end with only one entrance frequently extremely narrow and leading to the main road.[53] In Liverpool there were about 2,400 such courts containing a population of 68,345 working men and their families, Birmingham had over 2,000 with a population of 50,000.[54] Most of these courts had no underground sewers and surface gutters were often full of filth. "The atmosphere, which is necessarily close and confined, is often further deteriorated by the presence of open privies, close to which there are often one or more pigsties, tubs full of hogwash, and heaps of offensive manure. These courts are frequently unpaved, and the open channel for dirty water ill-defined so that stagnant puddles form there."[55]

This account has concentrated on the early 1840s because it was in those years that the common law took a firm stand on the subject of the landlord's responsibility for substandard housing. Later courts have tended to follow these earlier cases blindly without further

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51. Ibid 52.

52. Ibid 71.

53. F. Clifford, "A History of Private Bill Legislation" (1887) Vol.II p. 295.

54. Royal Commission 1845 op. cit. n.23 Second Report 37 and App.

55. Ibid.

consideration of the issues involved. The social background to the cases after the 1840s will, therefore, be sketched in less detail. The first point to note is that the process of urbanisation continued throughout the Victorian period. Between 1841 and 1891 the population of London increased from 1,873,676 to 4,232,118. In 1841 only 17.27% of the population lived in London and cities of 100,000 inhabitants or more; by 1891 the proportion had risen to 31.82%.[56] The housing problem, of course, continued throughout that period. Inquiries carried out by Inspectors of the Central Board of Health to see whether the Public Health Act 1848 should apply often revealed terrible neglect by landlords.[57] For example, in Dudley a group of tenants were without water and had to go over half a mile for it. One of them told the inspector, "We may as well talk to that ", stamping her foot on one of the bricks on the footpath, "as talk to the landlord about having any water. He looks after the rent."[58] Overcrowding continued. in 1853 over 62% of the families in Newcastle were living in one or two rooms apiece.[59] It was in the 1850s that Medical Officers of Health Reports began to be published and these confirmed the widespread existence of such housing ills.[60] The Clerkenwell Report for 1856 classified many

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56. Briggs op. cit. n.2 at 59.

57. R.A. Lewis, "Edwin Chadwick and the Public Health Movement" (1952) at 284-285.
R. Rawlinson, "Lectures, Reports, Letters and Papers On Sanitary Questions" (1876) at 111-115.

58. Lewis op. cit. n.57 at 284.

59. Lambert op. cit. n.2 at 58. cf. Vere-Hole op. cit. n.3 at 59.

60. Wohl op. cit. n.15 at 195-197.
Henry Jephson, "The Sanitary Evolution of London" (1907) contains very good summaries and extracts of such reports: 1855-1860 see pp. 103-111; 1860-1870 pp. 166-171; 1870-1880 pp. 242-244.

of the houses in the district as "quite unfit for human habitation" and stated that no more than a third were in "a satisfactory state".[61] Conditions in the 1860s were comprehensively described by two Reports written by Dr. Julian Hunter for the Privy Council[62] which showed both the rural and urban labourers to be "atrociously ill-lodged."[63]

The 1880s saw widespread interest in the problems of slum housing but the subject of that interest continued. Throughout the nineteenth century, there was a stream of pamphlets and books on the subject, much of it in the vein of popular journalism or of travelogue literature.[64] The most important of these publications was a small anonymous penny pamphlet entitled "The Bitter Cry of Outcast London" which appeared in 1883.[65] This pamphlet, which provoked an immense interest in the housing of the poor,[66] vividly described slum conditions, "Walls and

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61. Jephson op. cit. n.60 at 103.

62. Seventh Report of the Medical Officer of Health of the Committee of Council on the State of the Public Health P.P. 1865 XXVI.
Eighth Report ibid P.P. 1866 XXXIII.
The Seventh Report examined rural housing conditions and covered each of the forty counties of England and some 5,375 houses. The Eighth Report dealt with the metropolis, fifty provincial towns and some places in Scotland. Karl Marx quoted at length and detail from these Reports to support his thesis that, "the greater the centralisation of the means of production, the greater is the corresponding heaping together of the labourers within a given space; that therefore the swifter capitalistic accumulation, the more miserable are the dwellings of the working-people." "Capital" Vol. I (1st English ed. 1887) Chap. XXV, Section 5. He regarded Dr. Hunter's Reports as "admirable" and "epoch-making".

63. Sir John Simon, "English Sanitary Institutions" (2nd ed. 1897) at 297. See also for housing conditions at this time, Alexander P. Stewart, "The Medical and Legal Aspects of Sanitary Reform" (1867) at 16-19, 50-59, 83-88.

64. Dyos op. cit. n.14 at 13. Wohl op. cit. n. 15 at 190-191.

65. Reprinted in "Victorian Library" series, 1970, ed. A.S. Wohl.

66. See Wohl op. cit. n.15 for very comprehensive account of the inpact of this pamphlet.
Dyos op. cit. n.14 at 19-20.

ceiling are black with the accretions of filth which have gathered upon them through longer years of neglect. It is exuding through cracks in the boards overhead; it is running down the walls; it is everywhere. What goes by the name of a window is half of it stuffed with rags or covered by boards to keep out wind and rain; the rest is so begrimed and obscured that scarcely can light enter or anything be seen outside."[67] As in the 1840s, so in the 1880s - an official inquiry confirmed these accounts. The Royal Commission on Housing of 1885[68] noted "how widely the single-room system for families is established"[69] and the lack of sanitary facilities;[70] "in Clerkenwell, there are cases --- where there is not more than one closet for sixteen houses. --- In Bristol privies actually exist in living rooms; and elsewhere in the provinces there are instances where no closet accommodation at all is attached to the dwellings of the labouring classes."[71] Extensive structural disrepair continued; in Liverpool "houses were described to be in the last stage of dilapidation --- Few of the roofs were rain-tight, and the walls were alive with vermin. In some cases the walls were crumbling away exuding a green slime, and so rotten that a stick might be thrust through."[72] The existence of cellar dwellings was still causing concern, "in Draper's Place, St. Pancras, there was

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67. op. cit. n.65 at 4.

68. P.P. 1884-5 XXX. The importance of the Report in the history of housing law is considered infra 73

69. Ibid 7.

70. Ibid 8-14.

71. Ibid 11.

72. Ibid 11-12.

described to be a kitchen, twelve feet by ten feet and only six and a half feet high, entirely underground, the ceiling being below the level of the street, and this was inhabited by nine persons."[73]

The next chapter in the history of the slum was provided by Charles Booth's monumental study of the "Life and Labour of The People in London"[74] which discloses a wealth of facts about housing conditions in the last years of Victoria's reign. Street after street of slum housing is described until our sense of outrage that human beings could be so neglected is numbed by the very size of the problem.[75] But certain incidents stick in the mind giving a clear insight into the problems of the age. "Several women came out to see what our business might be, and began to complain of the drains. There appeared to be some special grievance at one of the houses, inside which was an agitated group. At their request, we went in and looked at the closet in the little yard behind. Whether from want of flushing or from stoppage, it was hopelessly blocked and in a most filthy condition. One stalwart woman said that things had been as we saw them for months, and that complaint to the landlord was met with the reply,that if they did not like the houses they could leave them and let someone come in who would pay 7/- instead of 6/-, the present rental. We were told of the numbers who had been made ill by the drains, and one poor thing was pointed out who had just returned from hospital. The sadness of the scene culminated in a small coffin of a child that stood on a table at one side of the room in which we all were."[76]

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73. Ibid 12. Substandard rural housing is discussed infra 24-27.

74. This ran into seventeen volumes, was started in 1886 and completed in 1903. "Charles Booth's London" (1971 ed. A. Fried and R.M. Elman) contains selections.

75. "Charles Booth's London" op. cit. n.74 Chapter 1.

76. Ibid 336-337.

So much of the English law on the responsibility of the landlord for the fitness of his premises has its origins in the nineteenth century that it is pertinent to observe the view of H.G. Wells. He wrote, "it is only because the thing was spread over a hundred years and not concentrated into a few weeks that history fails to realise what sustained disaster, how much massacre, degeneration and disablement of lives was due to the housing of people in the nineteenth century."[77] Conditions improved greatly in the next half century for the population as a whole but a minority continued to suffer from the old housing problems. Overcrowding was especially serious in the twenties and thirties.[78] It was estimated in 1934 that in parts of London "where two families were previously sharing a house and its washing, cooking, storage and lavatory arrangements, three now, in many cases, must do so."[79] The use of underground rooms and basements was another serious problem in many boroughs[80] and the process of multi-occupation increased as shortage forced families into single rooms.[81] A survey carried out by the Association of County Sanitary Officers in 1950 showed that of a million houses inspected in

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77. "Experiment in Autobiography" Vol. 1 (1934) p. 277 quoted Briggs op. cit. n.2 at 17.

78. Hugh Quigley and Ismay Goldie; "Housing and Slum Clearance in London" (1934) at 90-91.
E.D. Simon, "How to Abolish the Slums" (1929) at 5-13.

79. Quigley and Goldie op. cit. n.78 at 87.

80. Ibid 90-93.

81. E.D. Simon, "The Anti-Slum Campaign" (1933) at 88-90.
He described the "houses let in lodgings" as the "super-slums" of Manchester and considered that between 5,000 to 7,000 single-room tenancies existed in the city.

rural areas, only 31% were completely "fit", 27% required minor repairs, 30% needed major works of reconstruction and 12% were unfit.[82] The 1951 Census recorded more than one in five households without exclusive use of a water closet and twice this number without exclusive use of a fixed bath. More than one in ten were without exclusive use of both sinks and stove.[83] A study carried out in 1959 of the urban areas of England and Wales concluded that "a large volume of 19th century property which has survived to the present day is incompatible with modern living standards", pointing out that 35 per-cent of all houses were over sixty years old.

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82. J.B. Cullingworth, "Housing and Local Government" (1966) at 33.

83. C. Fraser Brockington, "A Short History of Public Health" (1956) at 100-101. Overcrowding was still "a serious consideration" ibid 97-98 as was multi-occupation ibid 99.

84. F.T. Burnett and S.F. Scott, "Survey of Housing Conditions in the Urban Areas of England and Wales 1960". 10 Sociological Review 35 at 76.

Chapter 3

The Legislative Background To The Common Law

a) Public Health Acts Dealing With Slum Housing

Legislation to deal with substandard housing can be traced back to at least the sixteenth century[1] and before the 1840s, many towns had secured local statutes to tackle the problem.[2] But the first attempt to legislate for the nation as a whole occurred in 1840 when Mr. R. A. Slaney M.P.[3] introduced a "Bill for Improving the Dwellings of the Working Classes" into the Commons but it was not debated and did not achieve a second reading.[4] Some clauses of this Bill were incorporated in the Buildings Regulation and Borough Improvement Bill which was before both Houses in 1841[5] and 1842[6] introduced by the Marquis of Normandy. This Bill passed both Houses but was

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1 H. Barnes, "The Slum - Its Story And Solution" (1931) pp. 28-29
F. Clifford, "A History of Private Bill Legislation" (1887) Vol II pp. 270-271
E. Chadwick, "Sanitary Condition Of The Labouring Population Of Great Britain" (1842) (M.W. Flinn ed. 1965) pp. 349-350

2 Infra 76

3 He had earlier been responsible for the setting up of the Select Committee which investigated sanitary conditions in that year, supra.

4 Hansard 3rd Series Vol. 55 Col 780. See W. Vere-Hole, "The Housing Of The Working Classes in Britain 1850 - 1914" (1965) p.66 (Unpublished U. Of London Ph.D thesis).

5 Ibid Vol 56 Col 138

6 Ibid Vol 60 col 94

put off pending the Report from the Poor Law Commissioners on sanitary matters.[7]

The Queen's Speech opening the 1845 Parliamentary Session referred to the Royal Commission Report on the Health of Towns and to the need "to devise the means of promoting the health and comfort of the poorer classes of my subjects".[8] Petitions from various parts of the realm were presented in support of such measures.[9] The long-awaited Bill came in July when the Earl of Lincoln moved for leave to introduce the Health of Towns Bill into the House of Commons.[10] But pressure on the parliamentary timetable led to this Bill also being dropped.[11]

The Nuisance Removal Act 1846[12] was the first national statute dealing with substandard housing. Though designed largely as an anti-cholera measure,[13] the Marquess of Lansdowne who introduced it also considered it be "highly expedient to improve the law for better cleansing the habitations of the poorer

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7 Ibid Vol 65 Col 335. See Supra for the Report.

8 Ibid Vol 77 Col 4.

9 Ibid col 449-450; Vol 79 col 233, Vol 81 Col 1343-1344

10 Ibid Vol 82 col 1077

11 Ibid Vol 85 col 1084

12 9 and 10 Vict c 96. See generally on this statute: H. Barnes op cit n 1 p. 91: H. Jephson, "The Sanitary Evolution of London" (1907) p. 40; Sir John Simon, "English Sanitary Institutions" (1897) p.201.

13 Hansard 3rd Series Vol 88 col 926.

classes."[14] It went through without opposition. The Act provided that certain public officers could rec ive a complaint certified in writing by two medical practitioners "of the filthy and unwholesome condition of any dwelling house or other building."[15] These officers could then make a complaint to two Justices of the Peace who would then summon the owner or occupier of the premises before them. Unless there was sufficient cause shown to the contrary, the J.P.s were to make an order "for the cleansing, whitewashing or purifying of any such dwelling house "within two days.[16] Failure to comply with the order entitled the public officers to do so in default. The costs of action in default could be recovered from the owner or occupier unless the J.P.s thought fit to excuse them "on the ground of poverty or other special circumstances".[17] Finally, it should be noted that the Act was only to be in force for two years.[18]

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14 Ibid col 927. At common law, persons creating a common nuisance could be indicted. This remedy was still available as shown by R. v Pedley (1834) 1 Ald & El. 822 but was rarely resorted to on account of its cost. There was also a power of presentment in the ancient Court leet but these had largely fallen into desuetude or were composed of tradesmen who had no experience of sanitary matters and who attended unwillingly. See generally: E. Chadwick op cit n 1 pp. 348-359; F. Clifford op cit n 1 pp. 276-277; Health of Towns Commission, 2nd Report (1845) P.P. 1845 XVIII p.42. Sometimes sanitary legislation was opposed on the grounds that sufficient powers already existed at common law if only they were enforced eg Mr. Urquhart opposing the Public Health Act 1848: Hansard 3 Series Vol 98col 714.

15 Section 1

16 Ibid

17 Section 2

18 Section 18

It has been objected that the "better provision" for the removal of nuisances[19] made by the Act did not amount to much,

> "Ludicrous, truly, was the idea that the countless thousands of nuisances existing in London could be remedied, or even temporarily abated, by so cumbrous, dilatory, and complicated a procedure as the complaint of an individual backed by the certificate (which would have to be paid for) of two doctors to the officer of a more or less hostile and self-interested local body, who might or might not bring the complaint before the Justices, whose decision, even if it were in favour of the complainant, could only effect a reform as far as the precise nuisance complained of was concerned, and that only temporarily, for were the nuisance renewed the whole procedure would have to be gone through again." 20

It was to be another decade before these criticisms were dealt with and then not completely.[21]

The Towns Improvement Clauses Act 1847[22] was designed to assist in the preparation of local legislation on a number of matters including public health. It contained clauses to be inserted by reference into local Acts and covered such matters as the appointment of inspectors of nuisances[23] and officers of health,[24] the provision of drains[25] and privies,[26] keeping them

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19 Preamble

20 H. Jephson op cit n 12 p. 40.

21 Infra

22 10 & 11 Vict. c 34. See generally on this statute; J. Redlich and F.W. Hirst, "The History of Local Government in England" (1903) (B. Keith-Lucas ed. 1958) p. 144; Simon op cit n 12 pp.202-203. For its parliamentary history: Hansard 3rd Series Vol 91 Col 149, 323; Vol 92 Col 304, 732, 821, 1019, 1363; Vol 93 Col 239, 753.

23 Sections 9 - 11

24 Section 12

25 Sections 35 - 37

26 Sections 42-43

in good order,[27] ruinous and dangerous buildings,[28] the cleansing of houses,[29] the prohibition of letting cellars under the height of seven feet[30] and those in courts,[31] and, finally, general enforcement provisions relating to powers of entry,[32] obstruction,[33] the service of notices,[34] ascertainment of the owner's name[35] and action in default.[36] Though this Act is important for its comprehensive treatment of these matters, it must be stressed that it only applied if a local act incorporated its provisions.

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27 Sections 44 - 45

28 Sections 75 - 78

29 Sections 99 - 102

30 Sections 114 - 115

31 Section 113

32 Section 144

33 Sections 145, 153

34 Section 146

35 Section 198

36 Sections 147 - 152

s regards national legislation, it has been observed that, "despite all the strenuous exertions made since 1844, despite the findings of the Health of Towns Commission and three years' continuous parliamentary debate on the subject, the year 1847 had closed, like its predecessors, with no Public Health Act on the statute book."[37] An attempt at passing such an Act had been abandoned because the slow progress of the Bill introduced by Lord Morpeth[38] meant it was unlikely to be passed before the end of session.[39] The Bill had been retarded by strong parliamentary opposition based on the following grounds;[40] It would lead to "centralisation", it encouraged patronage in the appointment of officials, it left out the metropolis, the sanitary problem had been exaggerated and no less than 790 clauses from other statutes were to be incorporated.[41]

In the following session, Lord Morpeth re-introduced his Bill as modified.[42] He referred to the abortive effort of the previous session and explained that the present Bill should "deliberately lay the

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37 S. E. Finer, "The Life And Times of Sir Edwin Chadwick" (1952) p. 294

38 Hansard 3rd Series Vol. 91 col 617-645. See Simon op cit n 12 p. 200 - 204 for an account of his careful handling of the Bill.

39 Ibid Vol 94 col 24-40.

40 Ibid Vol 93 col 727 - 751.

41 Ibid Vol 94 col 26 - 29

42 Ibid Vol 96 col 385 - 402

foundations, and distinctly set forth the provisions, for an efficient measure of sanitary reform."[43] Examples of sanitary evils were given to support the Bill which was intended mainly for the working classes.[44] Lord Morpeth faced similar opposition in the Commons to that expressed against the previous Bill. The exclusion of London was especially resented; "The public had a right to expect that where the greatest nuisances existed, there the remedies should be first applied. And where was that? It was in London, in stinking London, in filthy London, that sanitary measures should begin."[45] The failure of the Bill to repeal the tax on windows which was said to discourage proper ventilation was also heavily criticised[46] as were the dangers of centralisation[47] and patronage.[48] The passage of the Bill in the Lords was much smoother[49]

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43 Ibid col 386

44 Ibid 386, 394-402, see also Vol 98 col 779-787 (Lord Ashley)

45 Ibid 414 (Mr. Wakely). For reforms in London, infra 78-79 .See also Vol 98 col 710,716-720,796

46 Ibid Vol. 96 col 405-406, 409 - 410, 415 - 416. This tax went back to 1696 and had caused windows to be blocked up or their number reduced in new dwellings. It was not abolished until 1851. See generally: H. Jephson op cit n 12 p. 26-27, Vere-Hole op cit n 4 pp. 45-46.

47 Ibid Vol 98 col 712-713, 715-717, 789

48 Ibid Vol 98 col 710-172.

49 Lord Brougham commented, "Every one was in favour of the principle of the Bill. The only question that remained to be settled was that which affected the shaping of the details of the measure." Hansard 3rd Series Vol 100 col 233.

and 31st August 1848 it received the Royal Assent.[50]

It is difficult to over-estimate the importance of the Public Health Act 1848.[51] There had been many local acts[51a] but this was the first to apply to the country as a whole. It should be noted, however, that its application was normally dependent upon a local petition to the General Board of Health signed by one-tenth of the ratepayers.[52] Only in towns where the local death rate exceeded 23 per one thousand could the Board initiate the Act's application.[53] Edwin Chadwick, whose hand was behind both the creation and implementation of the Act, claimed that the chief opponents to its introduction were slum-owners whose property was so bad that it never paid rates and who feared the Act would end this exemption.[54] He held them up to scorn as "the protectionists and defenders of the filth."[55] The subject-matter of the Act

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50 Ibid Vol 101 col. 726

51 11 & 12 Vict c 63. See generally on this statute: Finer op cit n 37 pp. 319-331, W.M. Frazer, "A History of English Public Health 1834-1939" (1950) pp. 45-48, R.A. Lewis, "Edwin Chadwick And The Public Health Movement 1832-1854" (1952) pp.158-177; Simon op cit n 12 pp. 204-210.

51a Infra

52 Section 8

53 Ibid

54 Finer op cit n 37 pp. 434

55 Ibid. Finer gives a mass of contemporary evidence to support these charges: op cit n 37 pp. 435-436.

followed provisions already to be found in local acts and the Towns Improvement Clauses Act of the previous year. There were powers conferred on local boards of health to appoint Inspectors of Nuisances[56] and Officers of Health,[57] to require the provision of drains,[58] waterclosets[59] and the maintenance and cleansing of the same,[60] to require the cleansing of houses and the removal of filth,[61] the closing of cellar dwellings[62] and the supply of water.[63] Enforcement was dealt with by criminal penalties,[64] powers of entry,[65] power to require disclosure of owner's name[66] and procedures for the service of notices.[67]

The year 1848 also saw another Nuisance Removal Act,[68] once again spurred on by the danger of

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56 Section 37

57 Section 40

58 Section 49

59 Section 51

60 Section 54

61 Sections 59 - 60

62 Section 67

63 Section 76

64 Section 133

65 Section 143

66 Section 148

67 Section 150

68 11 & 12 Vict c 123.

cholera.[69] This statute was to replace the 1846 Act due to expire at the end of the parliamentary session and modified its procedure and the sanction behind it. Now the public body was to receive complaints from two local householders or more of the "filthy and unwholesome condition" of any dwelling house and, instead of the requirement of a medical certificate as under the 1846 Act, the public body was to give twenty-four hours' notice of its intention to examine the premises.[70] If upon the examination, it appeared that the house was filthy and unwholesome, then the public body was to make a complaint to a Justice of the Peace who could require the owner or occupier to appear before two J.P.s to answer the complaint. The J.P.s, if satisfied of the condition of the premises, could order him to abate the nuisance.[71] Breach of this order resulted in default action at his expense[72] as under the 1846 Act. Furthermore, unlike the earlier statute, breach rendered the owner or occupier "liable to a penalty not exceeding ten shillings for every day during the continuance of his default.[73]

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69 Hansard 3rd Series Vol 101 Col 613

70 Section 1

71 Ibid

72 Section 3

73 Section 1

Seven years later, the Nuisance Removal Act 1855[74] consolidated and amended the law and procedure relating to the abatement of nuisances. Notice might be given to the nuisance authorities by the person aggrieved, by the nuisance inspector, or by a constable or by two local householders.[75] The justices hearing the complaint might issue an order for the abatement of the nuisance and for the prohibition of a future nuisance.[76] Contravention of any such order gave rise to a criminal penalty and the nuisance authority could enter and do works in default at the expense of the owner or occupier.[77] An important amendment was the power given to magistrates to prohibit the use of a house until it was rendered fit for human habitation.[78] Another amendment was directed specifically at the evils of overcrowding,

> "Whenever the Medical Officer of Health shall certify to the local authority that any

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74 18 & 19 Vict c 121. See generally on this statute: Barnes op cit n 1 p. 138; Jephson op cit n 12 pp. 86-87; Quigley and Goldie, "Housing And Slum Clearance in London" (1934) p. 22; Simon op cit n 12 p. 239. For its parliamentary history, see Hansard 3rd Series Vol 136 col. 923 - 934, 1713 - 1721, 449-451, 671-673, 796 - 802, 1286.

75 Section 10

76 Sections 12 - 13

77 Section 14

78 Section 13

house is so overcrowded as to be dangerous or prejudicial to the inhabitants, and the inhabitants shall consist of more than one family, the local authority shall cause proceedings to be taken before the justices to abate such overcrowding, and the justices shall thereupon make such order as they may think fit, and the person permitting such overcrowding shall forfeit a sum not exceeding forty shillings." 79

Minor changes were made by the Local Government Act 1858[80] and the Nuisance Removal and Diseases Prevention Amendment Act 1860[81] but the next major statute was the Sanitary Act 1866.[82] Implementing many of the proposals made by John Simon as Medical Officer to the City of London [83] and later to the Privy Council,[84] the 1866 Act marked "the beginning

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79 Section 29

80 21 & 22 Vict c 98. These changes included the power to make byelaws imposing a duty to clean privies on the occupier (section 32 (3)) and with respect to ventilation, drainage and the closing of unfit houses (section 34) ,and extension of local authority powers with regard to the supply of water (section 51).

81 23 & 24 Vict c 77. This Act for the first time enabled individual householders to complain directly to magistrates of the existence of a nuisance (section 13).

82 29 & 30 Vict. c 90. See generally on this Statute: Frazer op cit n 50 pp. 108-110, Jephson op cit n 12 pp. 193-194. Simon op cit n 12 pp. 299-301. For its parliamentary history, see Hansard 3rd Series Vol 184 col 306, 1376-1384, 1644-1652, 1679-1687, 1905-1910,2070.

83 For these reports, see Royston Lambert, "Sir John Simon" (1963) pp. 143-160, 167.

84 For these reports, see C. Fraser Brockington, "Public Health in the Nineteenth Century" (1965) pp. 192-234.

of a new era in the progress of sanitary reform."[85] There were many important changes. The definition of nuisance was extended to specifically cover overcrowding.[86] For the first time, the nuisance authority was under a duty to inspect its district to discover nuisances and to enforce the Nuisance Removal Acts.[87] Houses let in lodgings, the scene of some of the worst housing conditions, were subject to a special system of registration and control.[88] Another new provision was that "where there had been two convictions for overcrowding of a house, or for the occupation of a cellar as a separate tenement dwelling-place" within a period of three months, the magistrate had power to direct the closing of such premises for such time as he might deem necessary.[89] In addition to these new measures, the law on the following matters was amended: the cleansing and disinfection of houses,[90] the letting of infected houses,[91] cellar occupation,[92]

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85 Simon 9th Report of the Medical Officer of the Privy Council 1866 P.P. 1867 XXXVII p. 27. Jephson op cit n 12 p. 193 describes it as making "another great step in the sanitary evolution of London and Lambert op cit n 83 p. 381 regards it "as a major landmark in the development of public health activity."

86 Section 19

87 Section 20

88 Section 35, see further supra 42-43

89 Section 36

90 Section 22

91 Section 39

92 Section 42

drainage of houses[93] and the recovery of the cost of the works done by the nuisance authority in default.[94] In the view of John Simon who was writing at the time, "(The Act's) value -- was chiefly prospective; converting a law which was grievously defective into one which contains nearly all requisite provisions for the public health."[95]

The next stage in the history of sanitary legislation was that of consolidation. In 1867, a deputation was sent by the Social Science Association to the Lord President of the Privy Council, the Duke of Marlborough, seeking the consolidation of sanitary legislation and improvement in local health authorities.[96] A Royal Commission was appointed in 1868 to consider sanitary legislation generally.[97] A change of government led to some changes in its composition the following year. Two years later, the Commission published its report which surveyed all the relevant law and its enforcement. The recommendations in the report led to the legislation of 1871 to 1875. The

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93 Section 10

94 Section 34

95 Simon op cit n 12 p. 27

96 M. Flinn, Introduction to A.P. Stewart and E. Jenkins, "The Medical And Legal Aspects of Sanitary Reform" (1867) reprint 1969, p.21.

97 Ibid p. 22. See also Frazer op cit n 50 pp 115-116, Simon op cit n 12 pp. 323-345

98 P.P. 1871 XXXV. See especially pp. 208-210

Local Government Act 1871[99] and the Public Health Act 1872[100] reformed the system of local and central public health administration. In 1875, the entire sanitary law was consolidated in the Public Health Act[1] including certain amendments made by the Sanitary Law Amendment Act 1874.[2] The need for such a consolidation was explained by Sir Charles Adderley, who had presided over the Sanitary Commission, during the debate on the Public Health Act 1872, "the sanitary laws of this country were chiefly inoperative in consequence of their confused, contradictory and scattered condition. The law on the subject of public health was much less defective than confused. -- Even the lawyers were not thoroughly acquainted with the aggregate of law, and were frequently at fault through not knowing under which of a multitude of Acts they ought to proceed."[3]

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99 34&35 Vict. ch. 70

100 35 & 36 Vict c 79

1 38 & 39 Vict c 55. See generally on this statute: Finer op cit n 37 p. 510; Frazer op cit n 50 pp. 119-120; Lambert op cit n 83 pp. 559-563; Quigley and Goldie op cit n 74 pp. 50-51. For parliamentary history, see Hansard 3rd Series Vol 222 col 229-234, Vol 223 col 1245-1263, Vol 234 col 874 - 894, 1359 - 1365, Vol 225 col 637 - 646, 994 - 997, 1467 - 1468, Vol 226 col 267.

2 37 & 38 Vict c 89. The main changes related to acting in default of the local authority (sections 19-20), regulations controlling houses let in lodgings (section 47), orders to prevent the use of polluted wells, pumps or cisterns (section 50) and false representations as to the fitness of infected premises (section 56).

3 Hansard 3rd Series Vol 209 col 600 - 601. He introduced a consolidation bill of his own but later withdrew it.

The importance of the 1875 Act is that it marked the close of thirty years of legislative progress and established a foundation for sixty years of public health practice. As an historian of the period has observed, "It cannot be too emphatically stressed that this Act marked, in legislative terms, not so much a beginning as an end, not so much an extension as a consolidation of terrain already gained by the three previous decades of legislative advance."[4] Throughout, the government stressed that the Bill sought only to consolidate the Law.[5] The Duke of Richmond concluded his speech in the Lords by saying "he did not bring it forward as a great measure of sanitary reform, but as a measure which, by consolidating, with some not unimportant amendment, the Sanitary Acts of the last thirty years, laid a good foundation for such enactments as might in future be deemed necessary for the promotion and maintenance of public health."[6] In fact, the 1875 Act remained in force until 1936 and, as regards sub-standard housing, very few changes were made.[7] Legislation was passed to make further

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4 Lambert op cit n 83 p. 560

5 Hansard 3rd Series Vol 222 col 229-234, Vol 223 col 1256. Mr. Lyon Playfair strongly criticised the Bill because it proposed merely to consolidate the law not substantially reform it. Ibid Vol 223 col 1260.

6 Ibid Vol 225 col 642.

7 "Culminating in this monumental structure, common health legislation came virtually to an end for a quarter of a century -- The task of the next generation would be to put into practice the

continued on next page

provisions for sanitary conveniences,[8] nuisances,[9] verminous houses[10] and the paving[11] and cleansing[12] of common courts, passageways and yards.

The Public Health Act 1936 was based upon a report of a Committee set up under the chairmanship of Addington published in that year.[13] The Committee had been created with the following terms of reference, "with a view to the consolidation of the enactments applying to England and Wales (exclusive of London) and dealing with (a) local authorities and local government, and (b) matters relating to the public health, to consider under what heads these enactments should be grouped in consolidating legislation and what amendments of the existing law are desirable for facilitating consolidation and securing simplicity, uniformity and con-

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7 continued
lessons of the sanitary pioneers embodied in this Act; the age of legislative creation was followed by that of local application:" Lambert op cit n 83 pp. 562 - 563. See also Frazer op cit n 56 p.126. In fact, public health legislation in the 20th century was concerned less with the physical environment than with personal health.

8 Public Health Acts Amendment Act 1890 (53 & 54 Vict c 59) Sections 21-24, Public Health Acts Amendment Act 1907 (7 Edw. 7c 53) Section 39.

9 Public Health Acts Amendment Act 1907 Section 35.

10 Public Health Act 1925 Section 46.

11 Public Health Acts Amendment Act 1907 Section 25.

12 Public Health Acts Amendment Act 1890 Section 27.

13 1936 Cmd 5059

ciseness."[14] The Committee decided that one Act should both amend and consolidate the laws relating to public health. A few provisions of the 1875 Act had been overtaken by subsequent housing statutes and these were left out of the 1936 Act[15] but, as regards that part of public health legislation that relates to the sub-standard house, there were few changes. The vast majority of the sections relevant to this matter were derived directly from the Public Health Act 1875 and therefore, indirectly from the Public Health Act 1848, the Nuisance Removal Act 1855 and the Sanitary Act 1866.

The 1936 Act is still the basic Act today though some new provisions on drains,[16] sanitary conveniences,[17] dangerous premises,[18] food storage accommodation,[19] and verminous premises[20] were added by the Public Health Act 1961 and a 1969 statute[21] made new provision for

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14 "Lumley's Public Health" 12th ed 1952 Vol III p. 2208. See also; Note 181 L.T. 58 (1936)

15 Sections 71-75 relating to cellar dwellings, section 90 relating to houses let in lodgings and section 109 dealing with overcrowding.

16 Section 18

17 Section 21

18 Section 25

19 Section 32

20 Section 35

21 The Public Health (Recurring Nuisances) Act 1969.

recurring nuisances.

b) Housing Acts Dealing with Individual Unfit Houses

So far we have considered those aspects of public health legislation that have a relationship to slum housing. The discussion turns now to those statutes which dealt directly with the problem. The first such statute was the Artizans and Labourers Dwelling Act 1868[1] which was introduced by Mr. Torrens and became known popularly as the Torrens Act. Its operation was limited to individual houses and to London and Urban sanitary districts outside London with a population of 10,000 and upwards.[2] As originally drafted, the object of the Bill was to improve or demolish unfit houses and replace them with better dwellings but the latter object was struck out of the Bill during its parliamentary progress.[3] The Act provided that the officer of health[4] was to report the existence of any inhabited dwelling which was in a

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1 31 & 32 Vict c 130. See generally on this Statute, H. Barnes, "The Slum - Its Story And Solution" (1931) pp. 134,139; Frazer, "A History Of English Public Health 1834-1939" (1950) p. 102; H. Jephson "The Sanitary Evolution of London" (1907) pp. 212-213; Quigley and Goldie, "Housing And Slum Clearance in London" (1934) pp. 23-24.

2 Section 2, First Schedule

3 Select Committee on Artizans' and Labourers' Dwellings Acts 1881 (p.p. 1881 VII)

4 Appointed under Section 4

condition dangerous to health so as to be unfit for human habitation.[5] Upon receipt of this report, the local authority was to cause a copy to be given to the owner with plans and specification of work considered to be necessary to render the house fit.[6] If the owner neglected to do the specified works, the local authority could do so in default,[7] order the premises to be demolished[8] or make a closing order.[9] If a demolition order was made, the landlord was entitled to compensation.[10] There were further provisions enabling householders and J.P.s to complain to the officer of health;[11] regarding the Service of Notices;[12] the determination of tenancies in the case of demolition or closing orders[13] and the obstruction of local authority officials.[14]

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5 Sections 5 - 6

6 Section 7

7 Sections 18-19

8 Section 18

9 Ibid

10 Section 20

11 Section 12

12 Sections 15-17

13 Section 21

14 Sections 35 - 36

The Act of 1868 was amended by the Artizans and Labourers' Dwelling Act (1868) Amendment Act 1879.[15] This latter Statute removed the limitation as to population.[16] It also enabled the owner to require the local authority to purchase premises which were the subject of an order to execute works.[17] The price was to be determined in case of dispute by arbitration.[18] There were further provisions enabling the local authority to recover any expenses incurred in default action[19] and empowering the Metropolitan Board to enforce the Act should the local authority fail to do so.[20] A drafting error in this Act was remedied by a short amending Act passed in the following year which had the somewhat verbose title of the Artizans' and Labourers' Dwellings Act (1868) Amendment Act (1879) Act 1880.[21] Two years later, the Artizans' Dwellings Act 1882[22] extended the previous legislation to cover obstructive buildings which were not necessarily unfit in themselves.[23]

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15 42 & 43 Vict. c 64

16 Section 13

17 Section 5

18 Section 6

19 Section 9

20 Section 12

21 43 Vict. c 8

22 45 & 46 Vict. c 54

23 Section 8

This Act also made a few minor amendments to the Torren Acts.[24]

The Torren Acts were considered by the Royal Commission on Housing[25] set up as a result of the renewed interest in housing in the 1880s[26] but few major reforms were suggested. Evidence was given to the Commission that the owner's power under the 1879 Act to require the local authority to purchase the premises had caused enforcement difficulties.[27] This power was abolished by the Housing Of The Working Classes Act 1885.[28] Another reform resulting from the Commission's work was the consolidation of the law by the Housing Of The Working Classes Act 1890,[29] Part II. The opportunity was also taken to place a duty on local authorities to inspect their district periodically in order to discover and deal with unfit dwellings.[30] The 1890 Act also amended the law relating to closing orders which could now only be granted to the local authority on application to a magistrates court.[31] However, this requirement was

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24 Section 11

25 Royal Commission On Housing 1885 p. 5 P.P.1884-5 XXX

26 See generally supra 47

27 Op cit n 25 p. 31

28 48 & 49 Vict c 72 Section 4.

29 53 & 54 Vict c 70. See generally: Quigley and Goldie op cit n 1 pp. 46-48, 54-59, Jephson op cit n 1 pp. 364-366.

30 Section 32

31 Section 32. See also the Housing Of The Working Classes Act 1903. Section 8.

subsequently abolished by the Housing, Town Planning etc. Act 1909.[32]

The 1909 and subsequent Housing Statutes simplified and extended the powers of local authorities to deal with unfit dwellings. For the first time, local authorities could make a distinction between houses so unfit as to require demolition or a closing order and those which were not unfit to that extent but which still required work to ensure that they would be "in all respects reasonably fit for human habitation."[33] Back to back houses were automatically to be classified as unfit.[34] The 1909 Act also gave powers to make byelaws to control houses let in lodgings[35] and amended the law relating to various matters including action in default of the local authority,[36] powers of entry,[37] closing orders,[38] service of notices,[39] inspections[40] and loss of security of tenure because of local authority action.[41] There were further amendments made ten years later by the Housing, Town Planning Etc Act 1919

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32 Section 17

33 Section 15

34 Section 43

35 Section 16

36 Sections 10-11

37 Sections 15 (2), 36

38 Section 17

39 Sections 15 (8), 41

40 Section 17 (1)

41 Section 17 (4) (5)

mainly as regards the procedure for requiring the owner to execute necessary works.[42] This procedure was again modified by the Housing Etc. Act 1923 to remove the duplication that had resulted from the previous legislation.[43] Two years later, the Housing Act 1925 consolidated all the relevant law dating from the 1890 Act.[44]

The Housing Act 1930 amended the 1925 Act as regards the procedure to be followed in making orders to execute works[45] or demolition orders[46] and as regards the power to make closing orders.[47] A major addition to housing law was made by the Housing Act 1935 which, for the first time, sought to make comprehensive provision for dealing with overcrowding.[48] These provisions reappeared the following year as Part IV of the Housing Act 1936 which again consolidated the law. In 1954, the Housing Repairs and Rents

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42 Section 28. There were further provisions for action to be taken in default of the local authority (sections 3 - 6) and for byelaws to be made in houses let in lodgings (section 26).

43 Section 10 (2)

44 This had been suggested as far back as 1906 by the Select Committee on the Housing Of The Working Classes Acts Amendment Bill 1906. P.P. 1906 IX para. 63.

45 Section 17

46 Section 19

47 Sections 20 - 21

48 Sections 1 - 12

Act establisehd a comprehensive standard for determining whether a house was unfit for human habitation.[49] Otherwise, the provisions of the 1936 Act remained substantially unaffected until the Housing Act 1957 a ain consolidated the law.[50] This is still the basic statute but the Housing Act of 1961, 1964 and 1969 introduced new powers to deal with houses let in multiple occupation to replace those previously applying to houses let in lodgings.[51]

c) Local Legislation And Byelaw Making Powers

The importance of local legislation dealing with slum housing must not be neglected. The clauses to be found in these acts formed the basis of such national legislation as the Public Health Act 1848.[1] Moreover, local legislation has a longer history than national which, in its modern form began in the 1840s.[2] Between the years 1800 and 1845 nearly 400 Improvement

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49 Section 9

50 The Housing Act 1949 s 1 repealed most references to the working classes in housing statutes and minor amendments were made by the Local Government (Miscellaneous Provisions) Act 1953 Section 10.

51 Infra 86-87

1 B. Keith-Lucas, "Some Influences Affecting The Development Of Sanitary Legislation in England" 6 Econ. Hist. Rev 290, 296 (1954): "It was composed essentially of a collection of clauses from the Local Acts of the previous years." See also the Addington Report 1936 Cmd 5059 p 11 P.P. 1935-6 XI; F. Clifford, "A History Of Private Bill Legislation (1887) Vol II p. 322.

2 Supra 52

Acts were obtained for various purposes of local government and some sanitary purposes in 208 towns in England and Wales.[3] Indeed, durin the debate on the abortive Health of Towns Bill 1847 one layer M.P. observed that, "There was hardly a town in England which had not a local Act with reference to its sanitary regulations."[4] Among the provisions of such Acts[5] were those giving the local authority power to order the owners of houses to provide drains connected with the main sewer, to prohibit the letting of cellars in courts or of any cellar of less than a specified height and window area, to appoint sanitary inspectors and to order the cleansing and whitewashing of the houses of the poor.

Though we must not neglect these statutes, it is equally important not to over-estimate their importance. As one historian has observed, "It is well known that right up to the 1840's the local Improvement Acts commonly suffered from two shortcomings. They were frequently limited in their operation to a mere section of the town, failing to include precisely the quarters that were most densely populated or growing most rapidly. Secondly before 1842 it was highly

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3 Clifford op cit n 1 p. 291

4 Hansard 3rd Series Vol 94 col. 27 (Mr. Stuart)

5 See Keith-Lucas op cit n 1 p. 295; Vere-Hole, "The Housing Of The Working Classes in Britain 1850 - 1914" (1965) pp. 67-68 (Unpublished U. of London thesis)

exceptional for the paving and drainage of the courts and alleys, where the dwellings of the poor were to be found, to fall within the scope of local Improvement Acts."[6] Furthermore, the Improvement Commissioners set up the enforce these Acts were "constitutionally, financially, administratively, technically and ideologically ill-equipped to cope with the frightening immensity of the task in the field of public health alone, they seldom touched more than the outer fringe of the problem. For every step they took forward, they fell back two."[7]

Throughout the nineteenth century, local legislation provided a lead for national legislation to follow.[8] For instance, the City of London Sewers Act 1851[9] contained extensive powers to regulate lodging-

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6 E.P. Hennock, "Urban Sanitary Reform A Generation Before Chadwick?" 10 Econ. Hist. Rev. 113 (1957) p. 117. See also Clifford op cit n 1 p. 300.

7 M.W. Flinn, Introduction to E. Chadwick's "Sanitary Condition Of The Labouring Population of Great Britain" (Reproduced 1965) p. 17.

8 See generally, Clifford op cit n 1 pp. 435-493. Dr J. Hunter, 8th Report of the Medical Officer of the Privy Council 1865 App. No 2 P.P.1866 XXXIII.

9 14 & 15 Vict c 91. See generally on this statute, Royston Lambert, "Sir John Simon 1816-1904" (1963) pp. 171-176; Sir John Simon, "Sanitary Institutions" (2nd ed 1897) pp. 253-254.
Dr. J. Hunter op cit n 8 p. 86. For an earlier statute in 1848 see Lambert pp. 89-94. The various Act passed solely for London are discussed by H. Jephson, "The Sanitary Evolution of London" (1907) esp. 82, 356-357.

houses let to more than one family or let at a weekly rent not exceeding 3s.6d. per week.[10] The regulations controlled overcrowding for the first time by providing that not more than one married couple and their children under fifteen years of age could occupy the same sleepin -room.[11] Another local statute with national importance was the Liverpool Sanitary Amendment Act 1864[12] which set a pattern for the Torren Act to follow four years later. The medical offic r of health was to report the existence of any court, alley or premises which were unfit for human habitation or in a condition dangerous to health. The grand jury considered the report and could make "a presentment" to the town council that the Act be applied. The Council was re-

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10 This was the forerunner to the Sanitary Act 1866 Section 35 supra 64

11 See for development of national overcrowding provisions, supra 62 . A Glasgow Act, the Police Act 1862, went much further to deal with overcrowding by providing that, in houses of three apartments or less, every person over 8 years of age was to have 300 cubic feet of space. The number of persons permitted was marked on a ticket attached to the door (section 387). See generally, Hunter op cit n 8 pp. 67-75; W. Thompson, "The Housing Handbook Up To Date" (1903) p. 27, Vere-Hole op cit n 5 pp. 274-275.

12 27 & 28 Vict c 73. As far back as 1846, Liverpool Corporation had obtained what was then considered to be a complete sanitary code: Clifford op cit n p. 461. For another important local Act, see the Liverpool Corporation Act 1908 discussed, J. Clarke, "The Housing Problem" (1920) p. 122. The 1864 statute is discussed by Clifford op cit n 1 pp. 463-465, Hunter op cit n 8 pp. 75-76.

quired forthwith to order the borough engineer to report upon the necessary works which the owner was then ordered to execute unless demolition was required instead. If demolition was ordered, the owner was entitled to compensation.

The importance of local legislation has continued into the twentieth century. In 1965, Birmingham Corporation secured a local Act to prohibit multiple occupation without its approval.[14] The Housing Act 1969 closely followed this earlier Act to give local authorities throughout the country a similar power.[15]

Another aspect of the relationship between National and local legislation is the power given to local authorities by national legislation to make byelaws. As far back as 1835, byelaws could be made "for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough and to appoint by such bye-laws such fines as (the public authority) shall deem necessary for the prevention and suppression of such offences, providedthat no fine so to be appointed shall exceed the sum of five pounds.[16]

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14 Birmingham Corporation Act 1965 c XXII

15 Section 64

16 5 & 6 Will IV c 76
See Second Report of the Commission of Inquiry Into The State of Large Towns 1845, p. 109 (p.p. 1845 XVIII) for a list of boroughs which had used this power.

The Local Government Act 1858 conferred additional byelaws powers including the ability to make a closing order on unfit houses erected after a certain date and as respects the drainage of buildings, water-closets and privies.[17] This provision was re-enacted by the Public Health Act 1875[18] and was subsequently amended to cover the structure of floors, hearths and staircases, the height of rooms, the paving of yards[19] and the height of chimneys and buildings.[20] The 1875 Act also contained extensive byelaw-making powers to regulate houses let in lodgings or occupied by more than one family.[21] These provisions were "designedly excluded" from the Public Health Act 1936 because it was felt that the Housing Acts contained more comprehensive provisions.[22] But the power to make byelaws controlling houses let in lodgings under the Housing Acts[23] was, however, also subsequently repealed in

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17 Section 34. For towns that used this power, See Hunter op cit n 8 pp. 60, 129, 140, 141, 180, 185.

18 Section 157 (4)

19 Public Health Acts Amendment Act 1890 Section 23(I)

20 Public Health Acts Amendment Act 1907 Section 24

21 Section 90

22 Addington Report Cmd 5059 of 1936 pp. 47, 70-71 (P.P. 1935-36 XI)

23 The development of this power in the housing law can be traced thus: Housing Of The Working Classes Act 1885s 8; Housing, Town Planning Etc Act 1909 s. 16; Housing, Town Planning Etc Act 1919 s.26; Housing Act 1925 ss 6 - 7; Housing Act 1935 s.68; Housing Act 1936 ss 6-8.

1954.[24]

d) The Enforcement Of The Law

It would be misleading to consider only the law as enacted. Reference must also be made to the available evidence on how effectively it was enforced. As might be expected, this reveals a mixed picture depending upon the authority, the year and the particular law in question.

From the 1840s onwards there have been complaints of inadequate enforcement. Engels sharply criticised both Manchester and Salford in 1844 for lack of action.[1] In 1846, Newcastle had obtained extensive powers under a local Act but, eleven years later, the town surveyor stated that these had been "allowed to remain wholly inoperative -- no exercise or enforcement of them appeared to have taken place."[2] Yet at about the same time, the Sewers Commission of the City of London had done much to enforce its local Act under the guidance of John Simon, the medical officer of health.[3] Dr.

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24 Housing Repairs And Rents Act 1954 section 11 (5) Some local authorities expressed regret at this repeal: see Elizabeth Burney, "Housing On Trial" (1967) pp. 23-24.

1 F. Engels, "The Condition Of The Working Class in England" (1845) (ed: Henderson and Challoner 1958) pp. 70, 74. For an account of action taken by Manchester in the nineteenth century, see Vere-Hole op cit n 5 p. 346.

2 Sir B. Hall introducing the Nuisance Removal Act 1855. Hansard 3rd Series Vol 136 col 828-930. See also Vere-Hole op cit n 5 p. 369.

3 Lambert op cit n 9 pp. 185 - 186, 191 - 194

Julian Hunter's massive study in 1865 revealed great variation in enforcement.[4] Examples were found from Boston,[5] Bristol,[6] Chelmsford,[7] Leicester,[8] Aberdare[9] and Gateshead[10] to illustrate active enforcement but little was done in Bath,[11] Bradford,[12] Dudley,[13] Exeter,[14] Grimsby,[15] Merthyr Tydvil[16] and Swansea.[17] The following year, another survey by Dr. Buchanan showed similar variation though it is interesting to note that some towns had performed differently in the two years.[18]

The Torrens' Acts appear to have been inadequately

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4 Eighth Report Of the Medical Officer of the Privy Council 1865 App. 2A (P.P. 1866 XXXIII)

5 Ibid 104

6 Ibid 120

7 Ibid 127

8 Ibid 140

9 Ibid 144

10 Ibid 157

11 Ibid 97

12 Ibid 112

13 Ibid 131

14 Ibid 134

15 Ibid 136

16 Ibid 141

17 Ibid 189

18 Ninth Report Of the Medical Officer of the Privy Council 1866 App 2 (P.P. 1867 XXXVII)

enforced by some authorities.[19] This is revealed by the evidence given to the Select Committee which examined those Acts in 1881.[20] In Whitechaple,[21] for instance, the Act was not employed neither was it in Linehouse.[22] But other authorities had done a great deal under the Acts and were able to provide impressive statistics for houses closed, repaired or demolished under them.[23] The Committee itself considered that up to 1875 the Acts were "not infrequently put in force by certain Vestries and Local Boards" but that the Cross Act of that year relating to slum clearance had meant that action was now "rarely taken under the older legislation.[24] Four years later, the Royal Commission on Housing recorded that, although there was much legislation to meet housing evils, "the existing laws were not put into force, some of them having remained a dead letter from the date when they first found place in the statute book."[25]

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19 See generally on enforcement of these Acts; Barnes op cit n 1 pp. 15, 132, 141, 156; Jephson op cit n 9 pp. 254-256 quoting medical officer of health reports of the time; Vere-Hole op cit n 5 p. 280.

20 Select Committee On the Artizans and Labourers' Dwellings Improvement Acts 1881 (P.P. 1881 VII).

21 Ibid Memorandum of Evidence p. 17

22 Ibid p. 5

23 Eg St. Giles Ibid p. 28; Poplar Ibid p. 73; Holborn Ibid p. 104

24 op cit n 20 p X

25 P.P. 1884-5 XXX p.4

Inadequate enforcement persisted into the twentieth century. In 1906, a Select Committee gave many examples of rural authorities that were not enforcing the law.[26] For instance, it was said of Pewsey Rural District that, "throughout the district there is abundant evidence that nuisances, including recurrent nuisances mainly due to defective construction of privies etc. have not been systematically and effectively dealt with. ---- The district council has failed to appreciate adequately its duties and responsibilities and has neglected to perform much of the work for the due execution of which it was constituted."[27] In 1933, the Moyne Committee investigatingthe Rent Acts argued that though sufficient powers to control proper maintenance existed, the enforcement bodies had been negligent in their use.[28] Again, in the fifties[29] there were renewed claims of non-enforcement though the cause was seen to be due to enforcement difficulties rather than neglect.

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26 Select Committee on The Housing Of The Working Classes Acts Amendment Bill (P.P. 1906 IX)

27 Ibid p. 47

28 Cmnd 4397 para 17 (P.P. 1932-3 XIII)

29 J. B. Cullingworth, "Housing And Local Government" (1966) p. 33

The enforcement by local authorities of their Housing and Public Health powers is a subject which still requires detailed research. An examination of medical officer of health reports[1] giving statistics of such enforcement does, however, suggest that some authorities are not using their powers sufficiently. For example, from 1962 to 1968 Islington made an average of only six management orders[2] to deal with multi-occupation. During that period, Brent made only one such order. The Housing Act 1964 permitted local authorities to take over seriously defective premises by means of "control orders".[3] By October 1969 only 32 such orders had been made in the entire country. These and other statistics suggest that exercise of local authority powers is not always equal to the need.

There are various reasons for limited enforcement. Lack of adequately trained public health inspectors is one such factor. The statutory procedure is often complex and time-consuming;[4] it

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1. The following account is based upon research I did in 1970 for a dissertation submitted for the LL.B. degree at the London School of Economics. It covered some twenty five London boroughs taking the period 1957 to 1969. It is also based partly on my experience in the Legal Department, London Borough of Islington in the summer of 1972.
2. Under section 12 of the Housing Act 1961.
3. Section 73.
4. See E.C. Woods, "Housing Control in the Interests of Public Health: An Examination of the Powers and Procedures Available to Local Authorities" (unpublished LL.M. thesis, University of London, 1955).

may take weeks or months for the defect to be remedied as premises have to be inspected, notices served and a reasonable time allowed for the landlord to do the work.[5] The remedies provided for enforcement are often inadequate in practice: actual fines are often minimal, jail sentences are almost non-existent, demolition and closing orders merely aggravate the housing shortage and local authorities are reluctant to do work in default in view of the difficulty in recovering their costs.

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5. In January 1972 a Joint Report of the Director of Public Health and the Director of Legal and Administrative Services for the London Borough of Islington estimated that it could take anything up to 9 months for a Public Health Act nuisance to be removed if structural defects were concerned.

Chapter 4

The Social And Legislative Background To The American Common Law

To place the American common law in its proper context, there follows a brief account of the social and legislative background.[1] Special attention is paid to New York because it was there that the worst housing conditions were found and that pioneer legislation was passed.[2]

Criticism of slum housing in New York goes back to the 1790's[3] and persisted throughout the next century.[4] In 1856 a Special Commission spoke of "the hideous squalor and deadly effluvion; the dim, undrained courts oozing with pollution; the dark narrow stairways, decayed with age, reeking with filfth, overrun with vermin; the rotted floors, ceilings begrimed and often too low to permit you to stand upright; the windows

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1 For more detailed accounts, see
Edith Abbott, "The Tenements of Chicago 1908-1935" (1936)
J. Ford, "Slums And Housing With Special Reference To New York City" (1936) esp. vol pp. 17-252
L. Friedman, "Government And Slum Housing: A Century Of Frustration" (1968)
R. Lubove, "The Progressives And The Slums" (1962)
Edith Elmer Wood, "The Housing Of The Unskilled Wage Earner" (1919)

2 For the special importance of New York, see Wood op cit n p. 46. Lawrence Veiller pointed out that "New York City is absolutely sui generis": "A Model Housing Law" 2nd ed 1920 p. V. See also Friedman op cit n 1 p. 28.

3 Ford op cit n 1 pp. 60-65

4 See generally; Beyer, "Housing And Society" (1965) pp. 34-36

stuffed with rags."[5] Another report published in 1865 estimated that 15,000 people were living in cellars, some of which were below sea level and had water constantly standing in them.[6] The Tenement House Committee of 1894 provided important statistical evidence of inadequate structural and sanitary conditions[7] to back up the vivid descriptions of slum housing drawn by such writers as Jacob Riis.[8] The twentieth century opened with a Report by the Tenement House Commission. This summarised the worst existing evils as insufficiency of light and air, danger from fire, lack of separate toilet and washing facilities, overcrowding, foul cellars and courts, and other like evils, which may be classed as bad housekeeping.[9]

Outside of New York, most of the big American cities could tell similar stories of slum conditions. In 1894, the Federal Commissioner of Labor investigated

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5 Quoted Ford op cit n 1 p. 134. See also Friedman op cit n 1 p. 28.

6 Wood op cit n 1 p. 36

7 Lubove op cit n 1 pp. 91-92, Wood op cit n 1 p. 40 - 41.

8 Jacob Riis, "How The Other Half Lives" (1891). The great contribution of Riis was that he was able to stir up public opinion against the slum in a way in which no official commission had been able to do: see Ford op cit n 1 p. 124, Wood op cit n 1 p. 36.

9 Deforest and Veiller, "The Tenement House Problem" (1903) p. 6

the slums of Chicago, Philadelphia and Baltimore.[10] The conditions regarding sanitation and plumbing were found to be bad in all these cities. About three quarters of the Chicago families were living on premises with insanitary privy vaults.[11] A review of Surveys carried out from 1900 to 1919 revealed slum housing to be a national problem.[12] "The same conditions meet us everywhere - lot overcrowding and room overcrowding, dark rooms and inadequately lighted rooms, lack of water, lack of sanitary conveniences, dilapidation, excessive fire risks, basement and cellar dwellings. There are differences in emphasis. The besetting sin of Philadelphia may be privy vaults, while that of Boston is dark rooms; New York may have no inhabited alleys and Washington no tall tenements, but non can afford to throw stones."[13] A study carried out of Chicago tenements in 1936 showed that great masses of people were still living in "conditions of almost unbelievable discomfort."[14]

Though certain colonial laws sought to regulate housing conditions,[15] the first modern housing law in America was passed by the New York legislature in

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10 "The Slums of Great Cities" (1894), see Abbott op cit n 1 pp. 31-32

11 Abbott op cit n 1 p.32

12 Wood op cit n 1 pp. 7-8, 46-58

13 Ibid p 8

14 Abbott op cit n 1 p. 479. See also Ford op cit n 1 pp. 263 - 278 for a review of housing conditions in American cities during the 1930s.

15 Beyer op cit n 4 p. 448 - 449, Ford op cit n 1 p 20-71

1867.[16] It required ventilation, a proper fire escape, the roof to be kept in good repair, t least one water closet or privy for every twenty occupants, permits to occuby cellar dwellings and the cleansing of every lodging house to the satisfaction of the Board of Health. An amending Act of 1879[17] required that every room in a tenement or loding house should have a window with an opening of at least twelve square feet unless otherwise approved by the Board of Health. Further amendments in 1887 were the result of recommendations made by the Tenement House Commission of 1884.[18] A toilet was required for every fifteen occupants instead of every twenty as under the previous law and occupancy wasforbidden of tenement houses with more than one family to a floor and with halls that did not open directly to the outer air. Another Tenement House Committee established in 1894 led to changes in the law though only a few of the far-reaching recommendations of the Committee were implemented.[19]

The New York Tenement House Act 1901 has been

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16 See Beyer op cit n 4 pp. 450-451; Ford op cit n 1 pp. 154 - 155; Lipskey, "Protest In City Politics" (1970) p. 22, Lubove op cit n 1 p. 24; Wood, "A Century Of The Housing Problem", 1 Law And Contemporary Problems 137 (1933) pp. 138-139.

17 See Beyer op cit n 4 pp.450-451; Ford op cit n 1 p. 164; Lipsky op cit n 16 p. 24; Wood op cit n 1 pp. 76 - 77.

18 Ford op cit n 1 pp. 179-182; Lipsky op cit n 16 p. 27; Wood op cit n 1 pp. 38-39, 77

19 Ford op cit n 1 pp. 185 - 203: Lipsky opcit n 16 pp. 27 - 28.
Lubore op cit n 1 pp. 88 - 100; Wood op cit n 1 pp. 40 - 42.

described as "the most significant regulatory Act in America's history of housing." [20] It resulted from the work of yet another Tenement House Commission established in 1900 with the two great housing reformers, Robert W. DeForest and Lawrence Veiller as Chairman and Secretary. The provisions of the Act were both comprehensive and detailed. There were sections dealing with fireproofing, lighting and ventilation including the cutting of new windows in windowless rooms, the occupation of cellars, the provision of at least one water-closet for every two families, damp-proofing of basements and cellars and the whitewashing or painting of their walls, sufficient water supply and the requirement of 400 cubic feet of air for each adult and 200 feet for each child to prevent overcrowding. Enforcement was dealt with by further sections on procedure and remedies and by the creation of a permanent Tenement House Department.

In 1929 the Multiple Dwelling Law was advanced as a simplification and modernization of the 1901 Act. [21] In fact, it was not so strict as the earlier Act. Originally, it applied only to cities of more than 800,000 population though smaller municipalities could elect its provisions. In 1950 the law was

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20 Ford op cit n 1 p. 205, see generally Ibid pp. 217 - 223; Lipsky op cit n 16 pp. 28-31; Wood op cit n 1 pp 77-78

21 Comment, 40 St. John's L.R. 253, 255 (1966); Ford op cit n 1 pp. 621-624; Friedman op cit n 1 p 26 n 4

amended to make its provisions mandatory for cities with more than the 500,000 population. The Tenement House Law then became a dead letter and was repealed in 1952.[22]

Except for New York, Pennsylvania was the only state to enact a housing law before 1900.[23] Other states had to rely upon local building and health ordinances, most of which had been passed in the 1880's and 1890's.[24] During these two decades,there had been a dramatic increase in the urban population resulting from large-scale immigration.[25] Chicago was more than doubled in size in the years from 1880 to 1890 whilst the twin cities of Minneapolis - St. Paul actually trebled its population.[26] Yet it was not until the New York Law of 1901 had provided a lead that other states followed. Between 1903 and 1909, Pennsylvania, New Jersey, Connecticut, Wisconsin, Indiana and California passed statutes similar to the New York Law.[27] In addition to these states, many cities modelled ordinances on this Law;[28] for instance Chicago did so in 1902.[29]

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22 Friedman op cit n 1 p. 26 n 4

23 Lubove op cit n 1 p. 142

24 Ibid

25 Asa Briggs, "Victorian Cities" (1968) p.80

26 Ibid

27 Lubove op cit n 1 p.145; Wood op cit n 1 pp. 80 - 85. For a detailed account of the Wisconsin law, see L. Friedman and M. Spector, 9 American J. of Legal History 41 (1965)

28 Wood op cit n 1 p. 89

29 Abbot op cit n 1 pp. 34-71 gives a detailed account of the history of tenement house legislation in Chicago up to 1935.

There were further laws passed between 1910 and 1917 which indirectly followed the New York Law. In 1910, Lawrence Veiller, who had been largely responsible for the Law, published "A Model Tenement House Law" which was based to a great extent on the New York Law but which sought to be more widely applicable.[30] Following publication of this book, the States of Kentucky, Massachusetts, Indiana, Pennsylvania and California passed housing laws in the shape suggested by Veiler.[31] The extent to which these laws followed the New York law and the Model Tenement House Law varied. Some State legislation was less strict; Kentucky,for example, only required one water-closet for every four families. Sometimes it set a higher standard: the Massachusetts Acts prohibited the occupation of a room for living purposes unless it had a window opening to the outer air.

Another book by Veiller, "A Model Housing Law" which was first published in 1914, set the pattern for State laws by Michigan and Minnesota in 1917 and by Iowa in 1919.[32] The "Model Housing Law" did not make any very radical change from the New York Law.[33] The changes were generally such as were made necessary by broadening the application from tenement houses

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30 For Veiller's importance to housing reform, see Lubove op cit n 1 pp. 148-149

31 Veiller, "A Model Housing Law" 2nd ed 1920 p VI. See Lubove op cit n 1 p. 145; Wood op cit n 1 pp. 85 - 88

32 Veiller op cit n 31 p. VI

33 For a comparison of the New York Tenement House Act 1901 and Veiller's Model Housing Law, see Wood op cit n 1 pp. 73 - 75.

to all dwellings. One amendment does, however, deserve special note: the New York law required only 400 cubic feet of air for every adult and 200 for every child whereas the "Model Housing Law" required 600 and 300 cubic feet respectively.

There was a lull in legislation to enforce minimum housing standards in the 1920s and the 1930s.[34] Attention turned to slum clearance and the first federal slum clearance legislation was approved in 1933.[35] But the rise of urban renewal programs led to renewed interest in housing codes.[36] The Federal Housing Act of 1949[37] enabled the federal government to give aid to cities for the purposes of urban renewal but this was conditional upon whether "appropriate local public bodies" in such cities had "positive programs -- for preventing the spread or recurrence of slums and blighted areas through the adoption, improvement and modernization of local codes and regulations relating to land use and adequate standards of health, sanitation, and safety for dwelling accommodations." This condition was strengthened by provisions in the Federal Housing Act of 1954[38] under which federal aid for urban renewal required a "workable program" to deal with slums. Housing codes

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34 Friedman op cit n 1 p. 44

35 Title II of the National Industrial Recovery Act 48 Stat. 200 (1933)

36 Friedman op cit n 1 pp. 49-50
Comment, 40 N.Y. U.L.R. 948

37 63 Stat. 414 s 101 (a) (1949)

38 68 Stat. 623 s 303 (1954)

were referred to as one factor in such a program. Ten years later, the Statute was amended so that "no workable program shall be certified -- unless (A) the locality has had in effect, for at least six months prior to such certification -- a minimum standards housing code related but not limited to health, sanitation and occupancy requirements, which is deemed adequate by the Administrator, and (B) the Administrator is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code-."[39]

Spurred on by the federal legislation, there has been a surge of housing codes. By 1950 there were only a dozen or so such codes,[40] by 1955 this had risen to 50,[41] by 1961 to approximately 500[42] and by 1966 to 700[43]. In many ways, these codes are similar to the old tenement house laws.[44] Housing codes cover three main topics: (a) installation and proper maintenance of such facilities as lighting, ventilation and sinks and toilets, (b) limits of density of occupation by establishing a minimum floor area or room volume for given numbers of occupants, (c) standards of proper maintenance and cleanliness for the structure,

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39 78 Stat. 785 (s.301) (1964)

40 Simmons, 15 Buffalo L.R. 572, 579 n 39

41 Comment, 69 Harv. L.R. 1115, 1116

42 Friedman op cit n 1 p. 50

43 Simmons, 15 Buffalo L.R. 572, 579 n 39

44 Friedman op cit n 1 p. 52

including rules requiring the elimination of rodents, vermin, dampness and other unsanitary conditions.[45] The minimum standards required vary with conditions in different communities.

As far back as colonial days, New York's legislation to deal with housing defects was inadequately enforced. In 1657, the Director General of the New Netherlands complained that orders prohibiting the construction of wood or plastered chimneys were being "obstinately and carelessly neglected by many of the inhabitants, either because the fines and penalties are too small and lenient or because they are not levied and executed."[46]

Two centuries later, similar difficulties were experienced in the enforcement of tenement house laws. "An understaffed Board of Health, often subject to political pressures from landlords or builders influential with Tammary, found it difficult to ensure compliance with the law. Burdened with many other duties, the Board of Health had not the time or resources to inspect periodically thousands of tenements

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45 Comment, 69 Harv. L.R. 1115, 1116
See generally; National Commission On Urban Problesm, "Housing Code Standards: Three Critical Studies" (Research Report No. 19) 1969
Guandolo, 25 Geo Wash L.R. 1 (1956)
For accounts of particular housing codes, see
Daniels, 59 Georgetown L.J. 909, 913 (District of Columbia)
Friedman op cit n 1 pp. 52 - 53 (Milwaukee)
Graft, 20 Clev - St. L.R. 260 (Shaker Heights, Ohio)
Lehman, 31 Chicago L.R. 180 (Chicago)
Schoshinski, 15 Amer. U.L.R. 223, 224-225 (District of Columbia)
Walsh, 40 Connecticut Bar J. 539, 546 (Connecticut)

46 Quoted by Ford op cit n 1 p. 31

or to prod indefinitely uncooperative landlords."[47] Certain provisions were found to be unenforceable; for instance, the requirement in the 1887 Act that tenement houses with more than one family to a floor and with halls that did not open directly to the outer air were not be occupied.[48] The Tenement House Commission of 1900 found many examples of lax enforcement: the power to order the vacation of buildings unfit for human habitation had been only rarely exercised in the previous five years and only rarely were penalties for violations of the law actually levied.[49]

Enforcement difficulties did not cease with the passing of the Tenement House Act 1901 but they became less severe and some very important results were achieved. In 1909 it was found that the Tenement House Department had over 66,000 pending violations, many of which had been pending for years.[50] Systematic house-to-house inspection had proven impossible.[51] "A lack of adequate manpower, heavy turnover of personnel, uncooperative landlords and delays in the Corpor-

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47 Lubove op cit n 1 p. 27

48 Ford op cit n 1 p. 181

49 DeForest and Veiller op cit n 9 pp. 31-32, 38

50 Ford op cit n 1 p. 223

51 Ibid

ation Counsel's office and the Courts, continued to hamper the efficiency of the Department."[52] Yet despite these difficulties, much good work was achieved. By 1915, windows had been installed in 300,000 interior rooms of old-law tenements and several thousand school sinks had been replaced by water closets.[53] Four years later, a housing expert could write, "New York, in these days, thanks to fifteen years of efficient tenement house administration, is swept and garnished and repaired. -- Naturally, all tenements are not immaculate. But there are no accumulations of filth, there is no dilapidation or extreme disrepair. There are no privy vaults. Very few of the old hall sinks remain. There is running water in almost every apartment."[54]

New York was not alone in its enforcement difficulties. There is, for instance, a very comprehensive account of the inadequate enforcement of the Chicago housing ordinance first passed in 1902.[55] Certain provisions of the ordinance had never been enforced.[56] It was clear that the standards of housing tolerated and the standards set forth in the letter of the law were completely different.[57]

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52 Lubove op cit n 1 p. 165

53 Ibid

54 Wood op cit n 1 pp. 75-76

55 Abbott op cit n 1 pp. 63-73, 477-491
For inadequate enforcement in Boston and San Francisco, see Wood op cit n 1 pp. 51-52. And, generally Friedman op cit n 1 pp. 47 -55.
Ford, "The Enforcement of Housing Legislation" 42 Pol. Sci. " 549 (1927)

56 Ibid 63-66

57 Ibid 72 - 73

The authorities had found it impossible to require expensive strucural changes.[58] A survey carried out in 1936 revealed that approximately a quarter of the rooms investigated did not have the minimum area of 70 square feet prescribed by the ordinance,[59] that approximately one third of families in the poorest areas did not have separate toilet accommodations in their apartments as required since 1902[60] and that almost half of the rooms used for sleeping purposes were crowded beyond the legal limits.[61] The author concluded that any improvement that had taken place in the tenement house districts in Chicago in the previous quarter of a century resulted not from the enforcement of the ordinance but from general technological progress.[62]

In more recent times, code enforcement has been the subject of many inquiries by legal writers.[63]

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58 Ibid 480

59 Ibid 480 - 481

60 Ibid 481

61 Ibid 481 - 482

62 Ibid 477

63 There are numerous articles on this topic, the following are the most important materials:

Ackerman, 80 Yale L.J. 1093
Carlton, Landfield and Lohen, 78 Harv.L.R.801
Castrataro, 14 New York Law Forum 60
Comment, 69 Harv. L.R. 1115
" 54 Iowa L.R. 580
" 106 U. of Pa. L.R. 437
Dick and Pfarr, 3 Prospectus 61
Gribetz and Grad, 66 Colum L.R. 1254
Guadolo, 25 Geo. Wash L.R. 1
Lehman, 31 U. of Chicago L.R. 180
Levi, 66 Colum. L.R. 275
Marco and Mancino, 18 Clev-Mar. L.R. 368
Marcus, 30 U. of Pitts L.R. 95

Footnote continued

The consensus of opinion is that there has been inadequate enforcement. Many reasons for this are given: housing code standards are said to be too high[64] or too vague,[65] the code enforcement agencies are under-staffed[66] and there is a lack of coordination between departments,[67] judges are too lenient on offenders in sentences and in their willingness to grant adjournments;[68] the procedure is too

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63 continued
National Advisory Comm. on Civil Disorders, Report 1968 p.259
National Commission On Urban Problems, "Legal Remedies For Housing Code Violations", Research Report No. 14, 1968.
National Commission On Urban Problems, "New Approaches To Housing Code Administration", Research Report No. 17, 1969
Schoshinski, 15 Amer. L.R. 223
Waqar, 42 Tulane L.R. 604

64 Lehman, 31 Chi. L.R. 180

65 McClain, 30 U. of Pitts L.R. 529
Walsh, 40 Conn. B.J. 539, 546-548

66 eg Allen, 20 South Carolina L.R. 282,288 (Columbia, South Carolina)
Comment, 55 Min. L.R. 82,92 (Minneapolis, Minn)
Hill, 41 U. of Colorado L.R. 541, 543-544 (Denver, Colarado)
Lipsky op cit n 16 pp 98 - 105 (New York City)
Schoshinski, 15 Amer. U.L.R. 223, 225 n 11 (District of Columbia)

67 eg Comment, 55 Minn. L.R. 82, 94 (Mineapolis, Minn)
" 106 U. of Pa. L.R. 437, 441-442 (Philadelphia)
Krankel, 37 Brooklyn L.R. 387 (New York City)
Lipsky op cit n 16 pp.108-110 (New York City)

68 Comment, 106 U. of Pa. L.R. 437, 450
Friedman op cit n I pp. 46-47
Gribetz and Grad, 66 Colum. L.R. 1254, 1276
Guadolo, 25 Geo Wash. L.R. 1, 14
Lipsky op cit n 16 pp. 112-114
Skelly Wright, 1970 Duke L.J. 425

dilatory,[69] it is difficult to locate landlords[70] and constitutional issues restrict inspection.[71]

The sanctions employed to enforce compliance are all the subject of difficulties: criminal fines are treated merely as additional business expenses,[72] Prison is an empty threat rarely imposed[73] and the prosecution process is time-consuming;[74] action by the agency in default of the owner is too expensive to be widely employed as cities have be n reluctant

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69 eg Comment, 106 U. of Pa. L.R. 437, 448-452
Dick and Pfarr, 3 Prospectus 61, 69-73
Hill, 41 U. of Colorado L.R. 541,544-546
Lipsky op cit n 16 pp. 70, 97-99
Schoshinski, 15 Amer. U.L.R. 223,225-228

70 eg Fetters, 20 Syracuse L.R. 394
Friedman op cit n 1 p. 42

71 eg Boyd, 3 Harv. Civil Rts - Civil Lib.L.R.209
Budd, 30 U. of Cincinnati L.R. 243
Comment, 65 Calum. L.R. 288
" 1967 Utah L.R. 389
2 11 Vill. L.R. 357

72 eg Grad and Gribetz, 66 Colum. L.R.1254,1276-1280
Quinn and Phillips, 38 Fordham L.R. 2.5, 239-241
Walsh, 40 Conn. Bar J. 539, 550

73 eg Grad and Gribetz, 66 Colum. L.R. 1254,1277
Schoshinski, 15 Amer. U.L.R. 223, 228

74 eg Comment, 54 Iowa L.R. 580, 582
Daniels, 59 Georgetown L.J. 909, 916
Joost, 6 New England L.R.1, 10

to make funds available,[75] this last difficulty applies equally to the receivership remedy which carries the further difficulties of finding suitable persons or bodies to act as receivers[76] and that the City may end up with buildings which are no longer economically viable.[77] The drastic remedies of demolition or vacate orders are rarely employed because they do not really solve the problem and result in greater scarcity of housing.[78] Licensing as a method of control suffers from the defect that it must ultimately be enforced by some other remedy and will be subject to all the weaknesses of that other remedy.[79]

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75 eg Comment, 106 U. of Pa.L.R. 437, 446
Daniels, 59 Georgetown L.J. 909, 919-920
Hirsch, 12 St. John's L.R. 159, 161-163
Schoshinski, 15 Amer U.L.R. 223

76 See generally, Pratt, 2 Harv. Civil Rts. - Civil Lib L.R. 219
Rosen, 3 Harv. Civil Rts. - Civil Lib L.R. 311

77 eg Friedman op cit n 1 pp. 65-68
McElhaney, 29 Maryland L.R. 193, 199

78 eg Comment, 106 U, of Pa. L.R. 437, 447-448
Daniels, 59 Georgetown L.J. 909, 917-919
Friedman op cit n 1 pp. 69-71
Schoshinski, 15 Amer. U.L.R. 223, 230-233

79 Daniels, 59 Georgetown L.J. 909, 916-917

Part II

The Contractual Rights of Slum Tenants

Chapter 5

Implied Warranties of Fitness: Origin and Development of the Common Law.

Origin of the Law

An early reference to the destruction of premises rule is to be found in a case decided in 1544 concerning the lease of land and of a stock of sheep.[1] Some members of the Court of Kings Bench are reported to have remarked, obiter, that, "if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder". The rule was clearly stated a century later in the famous case of Parodine v. Jane[2] that a lessee ought to pay "though the house be burnt by lightning or thrown down by enemies, nor is he excused by reason of the fact that he is expelled from his lands by an alien enemy or though the land be inundated". In 1665, the Court of Chancery is reported to have applied the rule by refusing to give relief from payment of rent to the tenant of a wharf which had been carried away by "an extraordinary flood".[3] A series of cases decided in the eighteenth century held that destruction of the demised premises by fire did not relieve the tenant from the covenant to pay rent.[4] Lord Mansfield, a great common law judge, said in one such case, "the consequence of the house being burned down is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during

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1. Richard Le Taverner's Case (1544) 1 Dyer 56a,73 ER 123.

2. (1647) Aleyn 26

3. Cummins v. Carter reported in (1667) 1 Ca in Ch. 83, 22 E.R. 706.

4. Monk v. Cooper (1727) 2 Ld. Raym 1477, 92 E.R. 460.
Pindar v. Ainsley & Ritter (1767) reported in (1786) 1 T.R. 310, 312, 99 E.R. 1112, 1113.
Belfour v. Weston (1786) 1 T.R. 310, 99 E.R. 1112.
Doe v. Sandham (1787) 1 T.R. 705, 99 E.R. 1332 (dictum by Buller J.)
Hare v. Groves (1796) 3 Austr. 687, 145 E.R. 1007.

the whole term. The premises consist of houses only, and the fire has made them quite useless. In March 1763 the premises were worth nothing; but the landlord, if he had insisted on the rigour of the law, might have obliged the plaintiff to pay the rent for nothing during the remainder of the term".[5] Just before the close of the century, the Court of Exchequer decided that Equity would give no relief to the lessee; "the equity of the parties is equal and the rule of law must prevail".[6]

By the nineteenth century, the rule was firmly entrenched in the common law. The case of Baker v. Holtpzaffell[7] provides an illustration. This was an action for the use and occupation of certain premises. It appeared that very shortly after the accrual of the first quarter's rent the premises had been consumed by fire and their ruinous state caused the defendant to cease habitation. The Court of Exchequer Chamber found the condition of the premises to be no defence. In Izon v. Gorton,[8] decided in 1839, the Court of Common Pleas extended the rule to the lease of certain upper floors of a warehouse destroyed by fire.

A series of cases decided from 1825 to 1843 appeared to reject the analogy of the destruction of the premises rule and to hold that the tenant would not be liable for rent in the event that the premises were

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5. Pindar v. Ainsley & Ritter supra n4

6. Hare v. Groves (1796) 3 Anstr. 687 at 699, 145 E.R. 1007 at 1012. On relationship of Law and Equity see infra. p226

7. (1811) 4 Taunt 45, 128 E.R. 244.
See also unsuccessful action by tenant in Chancery, Holtpzaffell v. Baker (1811) 18 Ves. 115, 34 E.R. 261.

8. Izon v. Gorton (1839) 5 Bing N.C. 501, 132 E.R. 1193.
On the view adopted by the American law towards leases of parts of buildings, see infra.
For later eighteenth century cases continuing this line of case, see e.g. Bennett v. Ireland (1858) E. B. & E. 326, E.R.
Saner v. Bilton (1878) 7 Ch. D. 815.
See generally: Notes 17 Conveyancer 54 (1931) 83 Sol. J. 697 (1939).

uninhabitable due to the landlord's failure to maintain them.[9] Edwards v. Etherington[10] was the first of such cases. This was an action in assumpsit for use and occupation. It appeared that the walls of the house were in such a dilapidated state that the tenant was forced to quit. In summing up to the jury, Lord Chief Justice Abbot observed that no rent would be payable if the tenant could show that "he had no beneficial use and occupation of the premises, and that, through no default of his own, but through the fault of a person (the plaintiff) who ought to have taken care that the premises should have been in such a state, as to continue useful to the defendant".[11] Bayley B. said in Collins v. Barrow that a tenant was entitled to quit premises, "if he makes out, to the satisfaction of the jury, that the premises were noxious and unwholesome to reside in"[12] and, in Cowie v. Goodwin, Lord Dennan directed the jury that if the premises were "unfit for proper and comfortable occupation" the tenant would not be liable.[13]

The decision in Smith v. Marrable[14] seemed to be the culmination of this line of authority. A tenant had occupied a furnished house on the agreement that he would stay for five weeks; in fact, he left at the end of one week on account of infestation by bugs. The landlord soughtrent for the other four weeks. Baron Parke stated the issue raised by the case:

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9. See Grimes 2 Valparaiso U.L.R. 189, 195 (1968).

10. (1825) 7 Daw & Ry 117, Ry & M. 268, 171 E.R. 1016.

11. Ibid Ry & M. 268, 269, 171 E.R. 1016, 1017.
cf. Salisbury v. Marshal (1829) 4 Cor. & P. 65, 172 E.R. 609.

12. (1831) 1 M. & Rob. 113, 114, 174 E.R. 38, 39.

13. (1840) 9 C. & P. 378, 173 E.R. 877.

14. (1843) 11 M. & W. 6, 152 E.R. 693.

> "This case involves the question whether in point of law, a person who lets a house must be taken to let it under the implied condition that it is in a state fit for decent and comfortable habitation, and whether he is at liberty to throw it up, when he makes the discovery that it is not so."[15]

Having stated the problem in such broad language, he referred to Edwards v. Etherington and Collins v. Barrow and stated this equally broad principle of law:

> "These authorities appear to me fully to warrant the position that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises are free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state."[16]

Anyone hearing this judgement, in which Alderson B. and Gurney B. concurred,[17] must have thought the law was clearly that the landlord impliedly warranted the fitness of the premises.

Some doubt about the decision in Smith v. Marrable may have lingered on, however, due to the decision of the same Court, the Court of Exchequer, in the case of Arden v. Pullen[18] a year earlier involving similar facts to earlier cases. The defendant had agreed to rent a house for three years but left before that period had expired due to the bad construction, neglect of maintenance, decay and general unfitness. Judgement was

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15. Ibid at 8, 694.

16. Ibid.

17. For judgement of Lord Abinger C.B. concurring in the result, see infra 224

18. (1842) 10 M. & W. 322, 152 E.R. 492.

ordered for the plaintiff. Baron Alderson reviewed the two lines of decisions before him and came down in favour of the destruction of premises cases, "the rule laid down by Tindal C.J. in Izon v. Gorton[19] is the correct one, that, in order to enable a tenant to avoid his lease, there must be a default on the part of the landlord .--- The case of Collins v. Barrow[20] cannot be law, unless it is put upon that ground".[21] Lord Abinger C.B. observed that the case "raised the question whether, when a house turns out to be uninhabitable from such causes as existed in the present instance, the landlord is bound to repair it" and continued, "I think, that without some express stipulation, he is under no such obligation".[22] Clearly, the decision in Smith v. Marrable was in conflict with such sentiments and may have been thought to overrule this earlier case.[23] It could be distinguished, in any event, because in Arden v. Pullen the landlord's replication had stated that the tenant was in breach of his covenant to repair.

The position so far may be summarised thus: a number of cases dating from the sixteenth century had decided that the landlord would not be liable for the destruction of the premises by natural causes, another series of cases dating from 1825 had held that this rule was not applicable

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19. Supra 106

20. Supra 107

21. (1842) 1 C.M. & W. 322, 328, 152 E.R.492, 495.

22. Ibid 327, 495.

23. No reference was made to Arden v. Pullen but it would seem to have been impliedly overruled. Support for this is found in the decision of Lord Abinger. In Arden v. Pullen he had expressly overruled Edwards v. Etherington and Collins v. Barrow but when Baron Parke cited these cases in Smith v. Marrable, Lord Abinger said he was "glad that authorities have been found to support the view which I took at the trial".

where the landlord had failed to keep premises fit. This second line of cases had been rejected by the Court of Exchequer in Arden v. Pullen decided in 1842 and the destruction of premises rule held to apply to unfitness caused by the landlord's failure. A year later, the same Court had decided Smith v. Marrable which, in its turn, overruled Arden v. Pullen. Before the year ended, another twist had been added to the development of the law by the decision, once again of the Court of Exchequer, in Sutton v. Temple.[24] The defendant had leased land from the plaintiff to provide "eatage" for his animals. Several died from the effects of a poisonous substance which had accidentally been spread over the field. It was held that the unfitness of the land was no defence to an action for rent. Lord Abinger C.B. declared with surprising directness in view of prior developments:

> "I take the rule of law to be, that if a person contracts for the use and occupation of land for a specified time and at a specified rent, he is bound by that bargain, even though he took it for a particular purpose, and that purpose be not attained."[25]

Smith v. Marrable was "materially distinguishable" as it concerned a furnished house. Parke B., who only months before had stated a contrary rule without any qualification, agreed.[26] Gurney B. concurred "but I must say with some difficulty, for I think it is not easy to distinguish this case from -- Smith v. Marrable -- but as this relates to land, and not also to goods and chattels, it may admit of some distinction".[27] Baron Rolfe thought it "very probable that the two cases may be so distinguished; but, if not, I should prefer at once to overrule that decision than to

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24. (1843) 12 M. & W. 52, 152 E.R. 1108.

25. Ibid 62, 1112

26. Ibid.

27. Ibid.

follow it in the present case".[28]

A case decided in 1844 firmly indicated the trend of future common law and is the leading case on the landlord's duty of fitness and repair with regard to unfurnished premises. The plaintiff in Hart v. Windsor[29] had let to the defendant a house and garden for three years and the tenant had covenanted to pay rent and to preserve the premises in good repair. Before the three years were up, the tenant abandoned the premises. As a defence to this action for rent, the defendant argued that the house was not in a fit state or condition for habitation by reason of the same being infested with bugs. Once again,[30] Baron Parke clearly stated the question which he considered to be before the Court:

> "The point to be considered, then is, is whether the law implies any contract as to the condition of the property demised, where there is a lease of certain ascertained subjects being real property, and that lease is made for a particular object."[31]

This time, however, the learned Baron came to a different conclusion:

> "We are all of opinion --- that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let."[32]

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28. Ibid 67, 1114.

29. (1843) 12 M. & W. 69, 152 E.R. 1114.

30. See Smith v. Marrable supra.

31. (1843) 12 M. & W. 69, 85, 152 E.R. 1114, 1121.

32. Ibid 88, 1122.

The Development of the English Law

So far the origins of the rule have been discussed, it is now time to relate its development. Before embarking upon this survey, it is necessary to explain why certain cases have been excluded. It must be stressed that our concern is with warranties of fitness and repair which could be implied in the letting of residential premises. Any statements made in cases on the landlord's liability in tort are, strictly speaking, obiter and are placed to one side.[33] This test excludes many of the supposed leading cases.[34] Cases concerning commercial and industrial

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33. Cf. West, 25 Conv. 184, 187.

34. e.g. Keats v. Cardogan (1851) 20 L.J.C.P. 76.
Bottomley v. Bannister [1932] 1 K.B. 458.
A fortiori, it excludes those cases relating to the landlord's liability in tort to third parties;
e.g. Robbins v. Jones (1863) 15 C.B. (N.S.) 221.
Lane v. Cox [1897] 1 Q.B. 415.
Tredway v. Machin (1904) 91 L.T. 310.
Cavalier v. Pope [1906] A.C. 428.
Travers v. Gloucester [1947] 1 K.B. 71.
Sometimes it is difficult to decide if an action is founded in tort or contract. Davis v. Foot [1940] 1 K.B. 116 is especially difficult. This case has been dealt with as part of the law on implied warranties by West op. cit. 33 and North 29 Conv 207 (1965)
It is submitted that this view is wrong and that it was a case on tort because

1) The plaintiff was the tenant but his wife suing, not for the benefit of his estate, but "for compensation by way of damages to her in respect of this disaster, through the escape of gas and the loss of her husband".

2) The appeal to the Court of Appeal seems to have been from the trial court's finding of negligence only.

3) Argument by counsel for both parties dealt only with negligence and only cases on this point were cited, e.g. Cavalier v. Pope, Lane v. Cox and Bottomley v. Bannister supra.

4) The judgements proceed almost entirely on the basis of negligence and cite only Bottomley v. Bannister in support. The only contractual point discussed was whether the landlord had entered into a contract to remove the gas fire. This has nothing to do with an implied term in the letting.

lettings[35] can be easily distinguished[36] as can agricultural leases.[37] Finally, cases on the "legal unfitness" of the premises[38] are clearly not dealing with the same subject-matter and so are excluded from this account.

Another preliminary statement needs to be made. It is proposed to discuss the question of the implied warranty of fitness at the commencement of the term separately from that of the implied warranty of fitness and repair during the term.[39] As observed later, these two matters, though closely related, can yet be validly distinguished. Having cleared the paths we are to follow from those others which interweave with them and which would lead us astray, and having divided the two routes before us, we can proceed.

Twenty years after Hart v. Windsor a similar decision was reached by Sir John Romily M.R. in Chappell v. Gregory.[40] The landlord sued for specific performance and, as a defence, the tenant pleaded the unfit

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35. e.g. Manchester Bonded Warehouse v. Carr (1880) 5 C.P.D. 507 Gott v. Gandy (1853) 2 El. & Bl. 845, 118 E.R. 984.

36. See for a justification,infra. p184

37. e.g. Erskine v. Ardeane (1873) 8 L.R.Ch. 756. Chester v. Cater [1918] 1 K.B. 247. See for a justification of this distinction, infra. p222

38. e.g. Edler v. Auerbach [1949] 2 A.E.R. 692. Hill v. Harris [1965] 2 A.E.R. 358.

39. It is not always easy to make this distinction, see West Op.cit. n.33 at 187. Davis v. Foot op. cit. n.34 is again a difficult case and has been seen by West as concerning liability at the commencement of the lease. West op. cit. n.33 at 192. The main argument advanced for the tenant in that case, however, was that the defect occurred "after the contract of tenancy was entered into" though before actual possession took place. Counsel rested his argument almost entirely on this point and sought to distinguish Bottomley v. Bannister on the strength of it. It is submitted, therefore, that if this case be seen as an action in contract (see n.34 supra), it relates only to the contractual liability of the landlord during the term and not at its commencement.

40. (1863) 34 Beav. 250, 55 E.R. 631.

condition of the premises. The Master of the Rolls reached his conclusion without reference to any authority:

> "In the absence of (an express promise to repair), a man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor 'This house is not in a proper condition and you or your builder must put it into a condition which makes it fit for my living in' --- There is no implied warranty in the letting of a house."[41]

Another twenty years later, in 1886, the next case on this point was decided: Bartum v. Aldous.[42] Once again, a landlord sued for rent but, in this case, there was a counter-claim by the tenant in respect of the bad drains, escape of sewer gas and general dampness. Giving judgement in the Queen's Bench Division, Grantham J. found for the landlord. He held that where a landlord lets an unfurnished house, there is no implied covenant by him that it is fit for habitation.

We have to wait almost fifty years, until 1933,[43] for the next decision directly in point. In Cruse v. Mount[43] a house had been converted into flats. After leasing a flat for a few months the plaintiff tenant decided to vacate because of its dangerous state and generally unsatisfactory condition. This case, which was decided in the Chancery Division, will be given detailed discussion later. At present, it is sufficient to note that Maugham J. felt bound by authority to hold that there was no implied condition that the flat was fit for habitation or even that it was part of a dangerous structure.

Since 1933, no cases appear to have been reported in which the specific point under discussion has arisen. Dicta there has certainly

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41. Ibid 252-3, 632.

42. (1886) 2 T.L.R. 237.

43. [1933] 1 Ch. 278.

been[44] but apparently no cases which depend upon the resolution of this point for their decision.

Turning now to the second rule, that which states that there is no duty to repair or keep the premises fit during the term. The next case following those of the 1840s was the decision of the Divisional Court in 1876, that of Colebeck v. The Girdlers Co.[45] Here, the defendants were owners of a certain house which they demised to the plaintiff who used it in his trade as a boarding house keeper. The defendants still retained control of a neighbouring house which was essential to the support of that demised. The supporting house was not properly maintained causing the walls of the plaintiff's house to give way. It was held that there was no implied covenant on the part of the defendant to support the house let to the plaintiff.

Norris v. Catmur[46] was decided in 1885. A sub-lessee who was injured by the defective state of the premises sought to impose liability on the head lessor by virtue of an implied covenant. The High Court judge deciding the case rejected this argument. It was clear, he said, that the head tenant could have sustained no action against the landlord for non-repair and the plaintiff, as sub-lessee, could be in no better position than the head tenant.

The case of Groves v. Cheltenham and East Gloucester Building Society[47] came before the Divisional Court in 1913. It was an appeal from a county court judge on a point of practice. The trial judge had given

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44. e.g. Ball v. L.C.C. [1949] 2 K.B. 159, 167.
Penn v. Gatenex [1958] 1 A.E.R. 712, 717, see infra116

45. (1876) 1 Q.B. D. 234.

46. (1885) C. & E. 576.

47. [1913] 2 K.B. 100.

judgement for the plaintiff tenant who had alleged that there was an implied term of repair in the tenancy agreement. The court considered the whole of the evidence given in the county court and, finding that there was no evidence upon which the county court judge could have found for the plaintiff, allowed the appeal.

Johnson v. London and Westcliffe Properties Ltd.[48] was a decision of the Queen's Bench Division. The tenant had suffered injuries when rotten floor boards gave way and her action was based on an implied term of her tenancy that the landlords should do all repairs that were reasonably necessary. She was unsuccessful, it being held that there was no such term.

Penn v. Gatenex[49] was decided by the Court of Appeal in 1958. The tenant had leased a flat with the use of fixtures and fittings including a refrigerator. When the refrigerator broke down, the tenant brought an action for breach of an implied term that the landlord would keep the installation in proper working order. The majority found for the defendant. Lord Justice Parke stated the view that,

> "So far as the demised premises themselves are concerned, I take it to be the law that, in the absence of express covenant, a landlord is under no obligation to keep the premises in repair. No such covenant will be implied. Apart, therefore, from (certain words in the lease) -- the position is, I think, plain. The refrigerator, being clearly a fixture, would have passed in the demise to the tenants and there would have been no warranty that it was then in reasonable working order, much less a warranty or implied term that the landlord would keep it in reasonable working order throughout the letting."[50]

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48. [1954] J.P.L. 360.

49. [1958] 1 A.E.R. 712.

50. Ibid 717.

The final case to note is Sleafer v. Lambeth Borough Council,[51] another Court of Appeal case. The plaintiff was a weekly tenant of the borough council who was injured when the letter box knocker which he used to close his front door came off and caused him to fall backwards against an iron balustrade. Counsel's argument that the landlord had undertaken, as a matter of business efficacy, to keep the premises in a fit state for human habitation did not win the approval of the court.

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51. [1960] 1 Q.B. 43.

The Weight of Authority

The rules excluding liability for fitness and repair have been described variously as "an axiom" of the law of landlord and tenant,[52] as "trite law".[53] An important text-book on the subject states, "it cannot be too clearly understood or too often stated that the landlord is under no liability to do any repairs to the premises let by him unless he has agreed to do so".[54] How far can such sweeping statements be supported by the case law? It is submitted that the law is not nearly so settled nor so well established as these statements would suggest.

It has been seen that the rule that there is no implied warranty of fitness at the commencement of the term rests on only six cases.[55] The weight of these authorities will now be considered. The three earliest authorities (Hart v. Windsor,[56] Sutton v. Temple[57] and Arden v. Pullen[58])

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52. Wellings, 28 Conv. 6, 11 (1964).

53. Cross v. Piggott [1922] 32 Man. 362, 69 D.L.R. 107, per Mathers C.J.K.B. Smith v. Gallin [1956] O.W.N. 432, 3 D.L.R. (2d) 302, 304 per Mackay J.A.

54. M.F. Cahill; "The Householder's Duties Respecting Repairs", 2nd. ed. 1930, p.195.
For other such assertions as to the English law, see e.g. Foa; "General Law of Landlord and Tenant" 8th ed. (1957), p.134-135.
Hill & Redman; "Law of Landlord and Tenant", 15th ed. (1970), p.214-219.
Woodfall; "Law of Landlord and Tenant", 27th ed. (1968), p.
Worsfold; "The Law of Repairs and Dilapidations", 2nd ed. (1934), p.65.
Note 89, Sol. J. 313 (1945).
Note 108, L.J. 163 (1958).
Magnus, 104, L.J. 35 (1954).
Plummer, 9 M.L.R. 42 (1946).

55. Supra 105-118

56. Supra 111

57. Supra 110

58. Supra 108

can be distinguished on two or more grounds. In none of these cases did the tenant claim damages for breach of any implied warranty, the condition of the premises being pleaded as a defence to an action for rent. As Glanville-Williams has pointed out, "although the court was clearly against the existence of such an implied warranty, the point was not technically before the court and its remarks on it were obiter".[59] At most, therefore, these cases are authority for the proposition that a tenant has no right to withhold rent in respect of any implied obligation as to the condition of the premises or their repair.[60] Moreover, these three cases can all be distinguished on their facts from the situation with which we are concerned - that of a house let for residential purposes with no express covenants as to fitness or repair. Sutton v. Temple was concerned not with a residential lease but one for farming and in both Hart v. Windsor and Arden v. Pullen there were express covenants by the tenants to do repairs.[61] Although the particular repair covenants in those cases may not have covered the condition of the premises, it can be argued that the effect of such express covenants relieved the landlord of any implied covenant.[62]

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59. Williams 5 M.L.R. 194, 196 (1942).
cf. West 25 Conv. 184, 190 (1961), "The point was --- only indirectly in issue", and
Counsel for the tenant in Gott v. Gandy in which a business tenant brought an action for breach of an implied obligation to repair; "the question of the obligation of the landlord to repair has hitherto arisen only by the tenant setting it up as an answer to an action for the rent or by leaving the premises on that account, in both of which cases no doubt it has been held that he could not adopt that course. The present point has never been decided".
(1853) 2 El. & Bl. 845. 118 E.R. 984. (emphasis added)

60. West op. cit. n.59 at 190.

61. e.g. the tenant in Hart v. Windsor had covenanted "to preserve the messuage and premises in good and tenantable repair".

62. West op. cit. n. 59 at 190.

These cases decided in the 1840s have been described as "the pillars of this section of the law"[63] but it is important to note that some support was sought in prior decisions by the judges deciding them. Though no authority was cited in Sutton v. Temple, in Arden v. Pullen Alderson B. relied upon Izon v. Gorton[64] as the correct precedent and in Hart v. Windsor many other cases on the destruction of premises rule[65] were relied upon by Baron Parke who concluded,

> "It appears, therefore, to us to be clear upon the old authorities that there is no implied warranty on a lease of a house or of land, that it is, or shall be reasonably fit for habitation or cultivation."[66]

Later, he refutes the argument for an implied warranty of fitness by saying,

> "The principles of the common law do not warrant such a position."[67]

At first glance, the cited cases may well seem to be authority for the proposition enunciated by Parke B. If actual destruction of the premises does not relieve the tenant of his obligations, the lesser matter

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63. West op. cit. n.59 at 190.

64. (1839) 5 Bing N.C. 501, 132 E.R. 1193, 8 L.J.C.P. 272, Supra. p106

65. Richard Le Taverner's Case (1544) 1 Dyer 56a, 73 E.R. 123, supra p105
Paradine v. Jane (1647) Aleyn 26, E.R. supra105
Carter v. Cummin (1667) 1 Ca. in Ch. 83, 22 E.R. 706, supra105
Monk v. Cooper (1727) 2 Ld. Raym 1477, 92 E.R. 460, Supra105
Pindar v. Ainsley and Ritter (1767) reported (1786) 1 T.R. 310, 312 99 E.R. 1112, 1113, supra105
Belfour v. Weston (1786) 1 T.R. 310, 99 E.R. 1112, supra105

66. 12 M. & W. 69, 86, 152 E.R. 1114, 1122.

67. Ibid 88, 1122.

of unfitness for habitation should surely not have that effect. A closer inspection, however, reveals the analogy to be false. As Glanville-Williams has pointed out,[68] the Paradine v. Jane line of cases concerned a subsequent failure of consideration, destruction after the term, whereas the cases presently under discussion were cases of initial failure of consideration. "If the justification for Paradine v. Jane is that the tenant takes the risk of the destruction of the premises (or other failure of consideration) during the term,[69] this in itself excludes a case where the destruction has already taken place at the commencement of the term, and a fortiori it excludes a case where the destruction has already taken place at the making of the contract for the lease." Moreover, the earlier line of cases was concerned with frustration - something beyond the control of both parties. In the case of a house which is not fit for habitation, it is not beyond the power of the lessor to put it into a fit state.[70] On close examination of the "old authorities" which Parke B. claimed to follow in Hart v. Windsor, the "therefore" which he used becomes something of a non sequitur.[71]

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68. Williams op. cit. n.59 at 195.

69. This justification was suggested by Comment 4 M.L.R. 257 (1941). Counsel in Hart v. Windsor advanced a similar argument. Having pointed out the destruction cases concerned events happening after the lease, he said that if destruction occurred at the commencement of the lease, then there would have been a breach of the implied condition that the house was in existence. "And there is no distinction between the case where there is a house in existence, and that where the house in not habitable." 12 M. & W. 69, 75, 152 E.R. 1114, 1117.

70. This point was made by counsel for the tenant in Arden v. Pullen (1842) 10 M. & W. 322, 326, 152 E.R. 492, 495.

71. cf. Note, 103 Sol. J. 852, 853 (1959).

In assessing the weight of the three cases now under discussion, it is also necessary to look at the treatment of cases which the court decided not to follow and yet which were clearly in point. Those decisions from 1825 to 1840 which culminated in Smith v. Marrable[72] clearly posed a problem for the court in later cases. In Arden v. Pullen, Alderson B. argued that the statement of facts in Collins v. Barrow[73] was wrongly reported and that there was probably an agreement by the landlord to repair.[74] If not, it could not be law. In Sutton v. Temple, the court was at pains to distinguish Smith v. Marrable which it did on the basis that the contract was there one of a mixed nature - house and furniture.[75] All the judges concurred in this distinction though Gurney B. did not find the distinction easy and Rolfe B. was, if necessary, prepared to overrule the troublesome precedent. Those difficulties which Baron Parke must have felt in Sutton v. Temple were confronted in Hart v. Windsor. Doubt was first cast upon the correctness of the reports of Edwards v. Etherington, Collins v. Barrow and Salisbury v. Marshall and then they were declared not to be law.[76] Smith v. Marrable was distinguished on the basis that it concerned a ready furnished house but the noble Baron was forced to recant his own judgement, "that case certainly cannot be

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72. Supra 107

73. (1831) 1 M. & Rob. 113, 174 E.R. 38, supra.

74. (1842) 10 M. & W. 322, 328, 152 E.R. 492, 495.

75. Supra 110

76. (1844) 12 M. & W. 69, 86-87, 152 E.R. 1114, 1122.

supported on the grounds on which I rested my judgement."[77] It may be noted that the distinction was somewhat artificial; the furniture was not mentioned in the agreement in Smith v. Marrable, the argument did not proceed on that basis and only one judge referred to it in his decision.[78]

To summarise this discussion on the weight of those cases in which the common law rules may be said to have had their origin, it can be said that statements as to those rules were, strictly speaking, obiter and each case can be distinguished on its facts. The "old authorities" which the court purported to follow are not really in point. More recent cases which were clearly in point had to be overruled and finally a recent decision of the same court, Smith v. Marrable had to be somewhat artificially distinguished and the judge, who gave the decision of three members of the court in that case, forced to recant. All in all, the common law rules cannot be said to have had an easy birth.

The case of Chappell v. Gregory[79] suffers from the fact that statements made as to the implied warranty of fitness are, again, strictly speaking obiter. The plaintiff-landlord sought specific performance and there was no counterclaim by the defendant for breach of any implied warranty.

The point was clearly before the court in Bartum v. Aldous[80] because the defendant tenant counterclaimed for breach of an implied warranty of fitness. However, this is not a binding decision being that of a single judge in the High Court. Furthermore, it is to be noted that the report is inadequate; the decision of the judge being reported in only a few lines, his own words are not used, his reasoning is not shown and no cases are cited.

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77. Ibid 87, 1122.

78. See counsel for tenant in Hart v. Windsor ibid 75, 1117.

79. Supra 113

80. Supra 114

The decision in Cruse v. Mount[81] was also squarely on the point. In this case, the tenant had brought an action based partly upon breach of an implied warranty of fitness. Once again, a couple of comments are in order. First, the case concerned not a house but a flat and, as will be illustrated later, the two types of accommodation may be distinguished. Second, once again this was a decision of one High Court judge and so not binding on subsequent courts.

It will now be apparent that, with regard to the landlord's duty to provide the tenant with fit premises at the commencement of the term, the law is by no means as well settled as it is normally supposed to be When all those cases which are not directly relevant are cut away, we are left with only six cases. Four of these can be said to contain only dicta if strict rules of interpretation are applied and the other two are of High Court status. True, many obiter dicta of eminent judges[82] can be quoted in support of the rule, as can statements of learned writers of text-books and articles;[83] cases from the Commonwealth[84] and the United States[85] can be cited in abundance. Despite the great weight of such persuasive authority, it is submitted that it is open to any court to hold that in the letting of either a house or a flat, there is an implied term

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81. Supra 114

82. Supra n. 44.

83. Supra n. 54.

84. Infra 129

85. Infra 131

that the premises be fit for habitation at the commencement of the tenancy.[86]

What of the implied warranties of fitness and repair during the term? The case of Arden v. Pullen has already been discussed.[87] Colebeck v. The Girdlers Co.[88] can be distinguished on two or three grounds. Whilst the tenant used the premises for residential purposes, they were also used for business purposes in that the plaintiff was a boarding house keeper. In such a situation, the application of the rule caveat emptor is more easily justified. As the plaintiff was going to use the premises for profit, it was not unreasonable to expect him to employ a surveyor.[89] Secondly, the plaintiff was under an express covenant to repair, and whilst it was held that this did not extend to the provision of support, the express covenant by the tenant could be argued to have relieved the landlord of any implied obligation. Finally, a distinction may be drawn between an implied obligation to repair and an implied obligation to provide support which is more onerous.

Norris v. Catmur[90] was clearly on the duty to repair. However, it was the decision of one judge in the High Court and is very briefly

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86. cf. conclusion reached by West op. cit. n.59 at 193, "the authorities are not nearly so strong as is sometimes supposed." However, our arguments differ as he omits Arden v. Pullen, Chappell v. Gregory and Bartum v. Aldous from discussion but includes Manchester Bonded Warehouse v. Carr (supra n. 35 at p.) and Davis v. Foot (supra n. 34 at p.) which are here excluded. He also thinks that only the House of Lords can change the rule in the light of the decisions of Appeal Courts in Hart v. Windsor and Carr. It is submitted here that Carr is not in point and that Hart can be distinguished.

87. Supra 120-123

88. Supra 115

89. See further infra 189-190.

90. Supra 115

reported. Statements made as to the landlord's liability to his immediate tenant are obiter because the action was brought by a sub-tenant. Clearly, a distinction could be drawn between the landlord's liability to his head tenant and his liability to his sub-tenant.

In deciding Groves v. Cheltenham and East Glos. Building Society[91] the Divisional Court made no direct reference to the question of implied warranties. The appeal was on a point of practice only though the court did, by implication, decide against any such warranties.

Johnson v. London and Westcliff Properties Ltd.[92] is a case squarely on the landlord's duty to repair during the term. But, here again, this was the decision of one High Court judge.

Only one of the Court of Appeal judges in Penn v. Gatenex directed his mind to the specific point under discussion. Sellers L.J. based his judgement on the specific words of the lease and found an express covenant by the landlord to maintain the refrigerator in proper working order. Lord Evershed M.R. also based his judgement on the wording of the lease and did not direct his mind to the question whether, apart from the words of the lease, an implied duty of maintenance arose from the mere relation of landlord and tenant. Only Lord Justice Parke discussed this point. His declaration against such a duty proceeds more by assertion than argument and no authority is cited.[93]

Finally, in Sleafer v. Lambeth B.C.,[94] the Court of Appeal clearly

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91. Supra 115

92. Supra 116

93. Supra 116

94. Supra 117

assumed that no implied warranty of fitness or repair existed.[95] But, it should be noted that the case was argued on both sides, and the judgements given, on the basis of the specific terms in the tenancy agreement. Lord Justice Omerod pointed out, "it is not in issue that, so far as an ordinary tenancy is concerned, where the question of repairs is not raised in the tenancy agreement, there is no obligation on the landlord to keep the premises in repair".[96] The narrow basis of the decision also appears from the reply by tenant's counsel to Morris L.J.'s statement, "You are asking us to make new law". Counsel replied, "A decision in favour of this submission would only apply to weekly tenancies where the tenant is precluded from doing repairs",[97] i.e. where the express covenant in that case is part of the tenancy agreement. No case can be a precedent for a proposition which was not before the court, and here we are expressly told that the question of an "ordinary tenancy" was not in issue.

If, as has been submitted, the cases of Arden v. Pullen, Colebeck v. The Girdlers Co. and Norris v. Catmur can be distinguished on the facts, only the four cases of Groves v. Cheltenham & East Glos. Building Soc., Johnson v. London and Westcliff Properties Ltd., Penn v. Gatenex and

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95. "It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on the landlord to keep the demised premises in repair." [1960] 1 Q.B. 43, 62 per Willner L.J.

96. [1960] 1 Q.B. 43, 59.

97. Ibid 49. Morris L.J. heeded this reply; he said that tenant's counsel's "submission depends --- on the actual condition in this contract". Ibid 55.

Sleafer v. Lambeth B.C. remain. Johnson was a decision of the High Court. In Groves, the Divisional Court is not reported as having expressly discussed landlord-tenant law at all and the court's view on this matter has to be implied. Taking the two Court of Appeal cases of Penn v. Gatenex and Sleafer v. Lambeth B.C. together, only one judge directed his mind to the specific point under discussion.

Viewed in the light of the implied decision in Groves, the judgement of Lord Parke C.J. in Penn and the clear assumption made by the Court of Appeal in Sleafer, it is not possible to deny that binding precedent hold that the landlord is under no duty of repair or fitness during the term of the lease. Only the House of Lords can now change that rule. But, even allowing for this fact, it seems clear that once again the common law is not nearly so well established as is often suggested.

The rules formulated by the English courts have been faithfully followed in those Commonwealth countries with common law systems. The case of Denison v. Nation[1] decided in 1861 by the King's Bench of Upper Canada, sets the picture of that country. To the landlord's action for rent, the tenant pleaded that he had been forced to quit by the "wet, damp, unwholesome, noisome, offensive" condition of the premises. The court declared,

> "The law is now fully settled by the case of Hart v. Windsor that the fact of premises demised having become unfit for occupation by reason of want of repair, or from defective drainage or from a nuisance existing on the premises, will not exempt the tenant from payment of rent if from such cause he shall quit possession of the premises."[2]

The decision has been followed in a number of later cases,[3] so that by 1956, the Ontario Court of Appeal could say,

> "It is trite law that, in the absence of an express covenant, there is no implied obligation on the part of the landlord of an unfurnished house or apartment to keep it in repair and there is no implied covenant by the landlord that it is or shall continue to be reasonably fit for occupation."[4]

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1. (1861) 21 U.C.R. 57.
2. Ibid.
3. Macquarie, 11 Can. B.R. 424 (1933).
   See Williams, "Notes on the Canadian Law of Landlord and Tenant" (3rd ed. 1957), pp.195, 359-360.
   e.g. Gilles v. Morrison (1882) 22 N.B.R. 207; Harrod v. Watt (1905) 1 W.L.R. 216; St. George Mansions Ltd. v. Hetherington (1918) 42 O.L.R. 10, 13 O.W.N. 367, 41 D.L.R. 614; Terrabain v. Ferring (1917) 2 W.W.R. 381, 35 D.L.R. 632.
4. [1956] 3 D.L.R. (2d) 302, 304.
   See also Karasevich v. Birbain [1957] 23 W.W.R. 192, 12 D.L.R. 198.

Some recent Australian[5] and New Zealand cases have provided support for the common law rules. Although Pampis v. Thanos[7] was concerned with furnished premises, the Supreme Court of New South Wales repeated the general rule that there was no implied warranty of fitness in the case of unfurnished dwellings. Recent decisions of the Supreme Court of New Zealand are also of persuasive authority. In Felton v. Brightwell it was said that there was "no obligation as a lessor during the term of the lease to repair or maintain improvements".[8] This brief survey suggests that the Commonwealth courts have shown little originality in developing this area of the law and have been content to follow what is regarded as the well-settled law of England.

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5. See generally; Nedovic and Stewart, 7 Melbourne U.L.R. 258 (1969).

7. (1967) 69 S.R. (N.S.W.) 226, [1968] 1 N.S.W.R. 56, 87 W.N. (Pt. 2) 161.
8. [1967] N.Z.L.R. 276, 277 (lease for dairy).
   cf. Balcaim Guest House Ltd. v. Weir [1963] N.Z.L.R. 301 (guest house).

a) The Old Law

The destruction of premises rule appears to have been introduced into American law by the decision of the Supreme Court of Pennsylvania in the 1787 case of Pollard v. Shoaffer.[1] A landlord brought an action for rent and the tenant pleaded that he had been dispossessed by the British Army during the War of Independence. The court held that this did not show a good defence. Just after the turn of the century, the judges of New York stated the view that, "it may be safely said there is not a case in the books where the destruction of the demised premises has been held to excuse the tenant from the payment of rent on an express covenant; but in every case where a defence on that ground has been attempted, it has failed".[2] During this period the Supreme Judicial Court of Massachusetts held that the loss was entirely that of the tenant[3] and the Maryland Court of Appeal said that he should stand by his contract to pay rent notwithstanding destruction of the premises by a mob.[4] Maine followed this line of cases in 1836,[5] Ohio in 1841[6] and Delaware in 1852.[7]

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1. (1787) 1 Dallas (Pa) 210.
   See also Smith v. Ankrin (1825) 13 Serg & R (Pa) 39 (flood).
2. Hallett v. Wylie (1808) 3 Johns (N.Y.) 44,see further 225
3. Fowler v. Bott (1809) 6 Mass. 63, see further infra173
4. Wagner v. White (1819) 4 Har. & J. (Maryland) 564, see further infra. p.
5. Hill v. Woodman (1836) 14 Me. 38.
6. Lim v. Ross (1841) 10 Ohio 412.
7. Peterson v. Edmonson (1852) 5 Harrington (Del) 378.
   See also Burger v. Boyd (1869) 25 Ark. 441; Cowell v. Lumley (1870) 39 Cal. 151; Warren v. Wagner (1883) 75 Ala. 188, Lampher v. Glenn (1887) 37 Minn. 4,33 N.W. 10.

The development of the American law on implied warranties of fitness has followed a course parallel to that of English law. One of the earliest cases was Westlake v. De Graw[8] decided by the New York Supreme Court in 1841. This was an action for rent and, as in the English cases, decided during the same period,[9] the tenant offered to show that the premises were uninhabitable. This offer was rejected,

> "It would...be the introduction of a new principle into the law of landlord and tenant, and one liable to great abuse, to give countenance to this defence."[10]

A similar offer was rejected by the same court four years later in Cleves v. Willoughby,

> "The principle on which this offer was made... cannot...be maintained. There is no such implied warranty on the part of the lessor of a dwelling house as the offer assumes."[11]

The Supreme Judicial Court of Massachusetts came to a like decision a few years later, placing reliance upon the English decisions of Sutton v. Temple and Hart v. Windsor.[12] By 1852 the law was considered well-settled as is revealed by the judgement in Foster v. Peyser,

> "The second question was whether there is an implied covenant in a sealed lease of a house for a private residence that it is reasonably fit for habitation....It is well settled, by authority that there is not."[13]

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8. (1841) 25 Wendell Sup. Ct. 668. cf. Hill v. Woodman (1836) 14 Me. 38.
9. Supra p110
10. (1841) 25 Wendell Sup. Ct. 668, 672.
11. (1845) 7 Hill 83, 86.
12. Dutton v. Gerish (1851) 9 Cush.89. For these decisions, see supra p.
13. (1852) 9 Cush. 242. In Howard v. Doolittle, the New York Superior Court said there was "probably no rule of the common law more completely settled by a long series of adjudications". (1854) 3 Dver 464, 473.

Later courts, even in those states which had accepted the common law as of 1607, followed the decisions of the English judges after 1840 as if the newly formulated rules had always existed.[14]

The Supreme Court of the United States adopted the views of the English courts in 1893.[15] The plaintiff had rented a house from the Union Pacific Railway on the terms that she would board its employees. She was completely new to the area and had never lived in a mountainous region. On the other hand, the Railway knew of the danger of snowslides. Such a disaster occurred and the plaintiff was injured and her children killed. The Supreme 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.

Over the century from 1850, the rules spread throughout the United States.[16] Literally hundreds of cases[17] bear witness to their absorption into the body of American law. Leading works of reference[18] add further

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14. Comment, 42 U.Pa.L.R. 114(1894). Grimes, 2 Val. U.L.R. 189,198 (1968). For early cases extending rules to other jurisdictions, see e.g. Carson v. Godley (1856) 26 Pa. 117; Brewster v. De Fremery (1867) 33 Cal. 341; Kaufman v. Clark (1869) 7 D.C. (Mackay) 1; Lucas v. Coulter (1885) 104 Ind. 81, 3 NE 622; Davidson v. Fischer (1888) 11 Cols. 585, 19 P.653.

15. Doyle v. Union Pacific Railway (1893) 147 U.S. 413.

16. But note that it was still a case of first impressions for the Supreme Court of Hawaii in Lemle v. Breeden (1969) 462 P.2d 470, 471 infra.p.

17. Cases collected 4 ALR 1453, 13 ALR 818, 29 ALR 53 and 34 ALR 711; works listed n18, articles listed in n.19.

18. 1 American Law of Property (Casner ed. 1952) s.3.45 p. 267, s.3.78, p.347. 32 American Jurisprudence, "Landlord and Tenant", s.247. 36 Corpus Juris p. 43-47. 51c Corpus Juris Secundum, s.303-305, p.768 et seq. 2 Powell "Law of Real Property" ss.227, 233. 2 Walsh "Commentaries on the Law of Real Property" s.163, p.219. cf. Poverty Law Reporter s. 2120.

support.[19] Thus, the American Law of Property states, "there is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adopted to the purpose for which they are leased".[20] In an annotation to be found in the American Law Report,[21] numerous authorities from many States are cited to support the proposition that, "the great weight of authority is to the effect that in the absence of statute, there is no warranty implied in the letting of an unfurnished house or tenement that it is reasonably fit for habitation." A further mass of cases is used to illustrate that, "the courts have also found occasion to hold that there is no implied warranty that the demised premises will continue habitable during the term."[22] The rules have been applied to protect the landlord from liability for a variety of conditions;[23] defective plumbing and drains, want of repairs, smells, dampness, disease, vermin[24] and inadequate heating and water supply. It has been held that there is no implied warranty of safety[25] nor does the landlord warrant that he will improve the premises.[26] The tenant must carry the burden of such matters.[27]

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19. The law review articles discussing this topic are too numerous to list. The following are especially important: Jaeger, 46 Chi-Kent L.R. 123, 47 Chi-Kent L.R. 1 (1970); Levine, 2 Conn. L.R. 61 (1969); Schoshinski, 54 Geo. L.J. 519, 521-523 (1966); Skillern, 44 Denver L.J. 387 (1967).
20. op. cit. n. 18 at p. 267.
21. 4 A.L.R. 1453.
22. Ibid. 1455.
23. Ibid. 1468-1480, 13 A.L.R. 818-819; 20 A.L.R. 1369, 1394, 29 A.L.R. 52, 53-55; 34 A.L.R. 711, 712, 64 A.L.R. 900, 909.
24. And see J.F. Ghent, 27 A.L.R. 3d 924, 928-933 (1969).
25. 36 C.J. p.44, 51C C.J.S. s.303, p.770.
26. 49 Am. Jr. 2d s.776, p.718.
27. 49 Am. Jr. 2d s.774, p.717.

Recent decisions in many states show that the common law rules have lost none of their force in those jurisdictions.[28] The decision of the Court of Appeals of North Carolina in the 1970 case of Thompson v. Shoemaker[29] provides an illustration. The tenant sued to recover money paid in rent for a dwelling which was allegedly substandard and unfit for habitation, she also sought damages for alleged injury to personal property and for mental and physical suffering. Her action was rejected,

> "Under the common law rule in effect in this jurisdiction, a lessor is under no implied covenant to repair the premises, and in the absence of an agreement between the parties to the contrary, is not under a duty to keep the premises under repair, or to repair defects existing at the time the lease is executed."[30]

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28. On the rule that there is no implied warranty of fitness for habitation at the commencement of the term, see: Delaware - Brandt v. Yeoger (1964) 199 A.2d 768; Indiana - Pointer v. American Oil Co. (1969) 295 F.Supp. 573; Iowa - Fetter v. City of Des Moines (1967) 149 N.W. 2d 815; Maine - Cole v. Lord (1964) 202 A.2d 560; Massachusetts - Carney v. Berault (1965) 204 N.E. 2d 448; Mississippi - Floyd v. Lusk (1966) 190 So. 2d 451; Pennsylvania - Smith v. M.P.W. Realty Corp. (1967) 225 A.2d 227; Tennesee - Parris v. Sinclair Refining Co. (1966) 359 F. 2d 612; Texas - Cameron v. Calhoun-Smith Distributing Co. (1969) 442 S.W. 2d 815; Washington - Teglo v. Porter (1965) 399 P.2d 519.

    On the rule that there is no implied undertaking by the landlord that he will maintain the property during the term, see: Connecticut - Kowinko v. Salecky (1969) 260 A.2d 892; Panarani v. Johnson (1969) 256 A.2d 246; Kansas - Home Ins. Co. v. Hamilton (1968) 395 F.2d 108; Kentucky - Parson v. Whitlaw (1970) 453 S.W. 2d 270; North Carolina - Thompson v. Shoemaker (1970) 173 S.E. 2d 627; South Carolina - Sheppard v. Nienow (1970) 173 S.E. 2d 343.

29. (1970) 173 S.E. 2d 627. Comment, 49 N.C.L.R. 569 (1970)

30. Ibid.

b) The New Law

The trend towards implying warranties of fitness and repair into leases dates only from the 1960s. During the earlier century of legal development, there was only the occasional voice protesting against the harshness of the common law rules.[31] It was only in the sixties and seventies that others began to join in the cry to retrace the path of the common law back to that which had applied before the decisions of the English Court of Exchequer in the 1840s.[32]

The Supreme Court of Wisconsin led the way in 1961 with its decision in Pines v. Perssion.[33] A group of students had taken the lease of a house; they found it to be dirty and in a bad state of repair violating several building code provisions. After fruitless efforts to remedy the defects, they brought this action to recover a deposit paid to the landlord. Finding that "the frame of reference in which the old common law rule operated has changed", the court concluded,

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31. Cf. Leonard v. Armstrong (1889) 73 Mich. 577, 41 N.W. 695.
See exception made to general rule in leases of only part of a building, infra. p175
Bowles v. Mahoney (1952) 202 F.2d 320, 325, Bazelon J. dissenting, described the rule conferring immunity on the landlord "as an anachronism which has lived on through stare decisis alone rather than through pragmatic adjustment to the felt necessities of our time. I would therefore discard it and cast the presumptive burden of liability upon the landlard."
Noted, Neuner, 41 Georgetown L.J. 115 (1952).

32. Supra 106-110
For other accounts of development of law in this period, see A.B.A., 6 Real Prop. Probate & Trust J. Comment, 40 Fordham L.R. 123 (1971). Josephson, 12 Wm. & Mary L.R. 580, 588-595 (1971). Kane, 20 Cleveland-State L.R. 169-170 (1971). King, 32 Ohio State L.J. 207, 207-212 (1971). Leippe, 49 North Carolina L.R. 175 (1970), Lockitski, 16 Vill. L.R. 710, 718-721 (1971). Madden, 22 Syracuse L.R. 997 (1971). McCarthy, 1970/71 Annual Survey of Amer. Law 365. Sanders, 11 J. Family Law 775 (1972). See generally, Purver, 40 A.L.R. 3d 646 (1971).

33. (1961) 111 N.W. 2d 409. Noted, Chimelinski, 45 Marquette L.R. 630 (1962).

"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 increase is too important to be rebuffed by that obnoxious legal cliché coveat emptor."[34]

The reasoning of the Wisconsin Court was adopted six years later by the Supreme Court of California in Buckner v. Azulai.[35] Pines was cited with approval and the court said it would not adopt the old rule that there was no implied warranty of habitability in leases of housing accomodation as this rule was inconsistent with legislative policy concerning housing standards. Although Pines and Buckner led the way the scope of the decisions was not clear; Pines concerned a furnished house[36] and Buckner may have been restricted by possible reliance on a statute imposing a duty to repair on the landlord.[37]

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34. Ibid.

35. (1967) 59 Cal. Rptr. 806 Noted Comment, 27 Maryland L.R. 430 (1967) Comment, 13 N.Y.L.F. 383 (1967), cf. Grigsby v. Robb (1969) Poverty Law Reporter s.10, 241, a lower court decision holding that landlord's action in removing door from its hinges was a breach of the implied warranty of habitability.

36. In Earl Millikin Inc. v. Allen (1963) 124 N.W. 2d 651, the Supreme Court of Wisconsin, citing Pines as authority, opted for a broad construction of the holding. Applying the warranty to the lease of a retail store building, they said,

    "The covenant of possession implied not only that the tenant will be able to physically occupy the premises on the date of delivery of possession but that he will also be able to use the premises for its intended purpose."

    But see later decision of same court in Posnanski v. Hood (1970) 174 N.W. 2d 528 infra 213

37. Infra 216

The Supreme Court of Hawaii was the first court to give detailed attention to the common law rules and, having considered them fully, decided not to follow them. The plaintiff in Lemle v. Breeden[38] had leased a dwelling from the defendant but, having taken possession, he was forced to abandon the bedroom for the living room and later abandoned the whole house owing to the presence of rats. The court considered the historical background to the common law rules and attempts to mitigate their severity and then decided,

> "Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended."[39]

Lemle concerned the lease of a furnished house but in the subsequent case of Lund v. MacArthur any suspicions that this fact limited its scope were removed. "Today we hold that an implied warranty of habitability exists in unfurnished as well as furnished dwellings."[40]

The trend towards the rejection of the old law and its replacement with the implied warranty of habitability can be clearly seen in some recent decisions of the Courts of New Jersey. Until 1969, this state followed the common law rules.[41] The case of Reste Realty Corp. v. Cooper[42] marked a turning point. A business tenant had suffered

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38. (1969) 462 P2d 470. Noted Comment, 38 Fordham L.R. 818 (1970) Cuthrell, 2 St. Mary's L.J. 106 (1970), Klinek 19 De Paul L.R. 619 (1970).

39. Ibid 474.

40. (1969) 462 P2d 482.

41. Naumberg v. Young (1882) 44 N.J.L. 331, Coleman v. Steinberg (1969) 253 A2d 167. See Griffinger, 92 N.J.L.J. 417 (1969), Feldman, 92 N.J.L.J. 641 (1969), Goldberg, 93 N.J.L.J. 109 (1970).

42. (1969) 251 A2d 268.

damage due to rainwater flooding into the premises from an outside driveway. The question of the implied warranty was only one of the issues raised in the case and the Court was hesitant,

> "It will not be necessary to deal at any length with the suggested need for re-evaluation and revision of the doctrines of coveat emptor and implied warranties in leases."[43]

Though cautious, the direction of the court was unmistakable as the Supreme Court proceeded,

> "In our judgement present day demands of fair treatment for tenants with respect to latent defects remediable by the landlord either within the demised premises or outside the demised premises, require imposition on him of an implied warranty against such defects--- Such warranty might be described as a limited warranty of habitability."[44]

The following year, the Superior Court elaborated this decision in <u>Academy Spires Inc.</u> v. <u>Jones</u>.[45] It found that the landlord had violated "the implied warranty of habitability provided by <u>Reste Realty Corp.</u> v. <u>Cooper</u>".[46] No longer is the warranty qualified as "limited" and the court in words, restrictive in appearance but expansive in reality, went on to develop the doctrine, "the warranty is one of habitability and is not a warranty against all inconveniences or discomfort".[47]

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43. Ibid.

44. Ibid. This case has been severely criticised for failing to state clearly what it was doing; Aikenhead, 31 U. Pitts. L.R. 138 (1969). For a defence of the case, see Laird, 24 Rutgers L.R. 508 (1970).

45. (1970) 261 A 2d 413.

46. Ibid.

47. Ibid.

Marini v. Ireland,[48] decided by the Supreme Court of New Jersey in 1970, firmly established the implied warranty of habitability as part of the law of that state. The landlord sought possession based upon the tenant's nonpayment of rent. The tenant's defence alleged that she had spent the money in repairing a toilet rendered defective by the landlord's failure to honour the implied warranty of habitability. She claimed that breach of the implied warranty gave rise to a self-help remedy permitting her to repair and then offset the cost against her rent. The court noted that, as there was no express covenant to repair, it was obliged to determine "whether there arises an implied covenant, however categorised, which would require the landlord to make repairs".[49] The determination made was in favour of implying such a covenant,

> "In a modern setting, the landlord should, in residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness --- It is a mere matter of semantics whether we designate this covenant one 'to repair' or 'of habitability and livability fitness'. 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. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable."[50]

48. (1970) 265 A 2d 526. Noted Madden, 22 Syracuse L.R. 997 (1971), Mahoney, 16 Vill L.R. 395 (1970).

49. (1970) 265 A 2d 526, 532.

50. Ibid 534.

These words do, indeed, bear witness to the demise of the common law rules. Later decisions from New Jersey show that some important questions remain unanswered. Marini seemed to confine the tenant's remedies to repair and deduct or vacation of the premises. A later court,[51] finding a breach of the implied warranty, has added partial abatement of rent as a remedy. Another lower court[52] has doubted whether the implied warranty covers defects obvious to the tenant at the time of letting. These and other questions must be discussed later.[53] What is clear, however, is that the last few years have seen New Jersey change from strict adherence to the common law rules to a firm rejection of such rules.

Important as these decisions of State Courts are, the leading case is now that of the United States Court of Appeal, District of Columbia Circuit, in Javins v. First National Realty Corp.[54] The

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51. Academy Spires v. Brown (1970) 268 A 2d 556, infra147
52. Berzito v. Gambino (1971) 274 A 2d 865, infra148
53. Infra145
54. (1970) 428 F 2d 1071. Cert. denied (1970) 400 US 925. Noted: Bokor, 23 U.Flo. L.R. 785 (1971), Chaffin, 42 Miss. L.J. 523 (1971), Cohen and Cooke, 39 Geo. Wash. L.R. 152 (1970), Comment; 1970 Duke L.J. 1040 (1970), Comment: 84 Harv. L.R. 729 (1971), Comment: 56 Iowa L.R. 460 (1970), Comment: 55 Min.L.R. 354 (1970), Comment: 66 N.W.U.L.R. 227 (1971), Comment: 24 Vand. L.R. 425 (1971), Jefferson, 6 Harv. Civil Rts.-Civil Lib. L.R. 193 (1970), Kelly, 20 Buffalo L.R. 567 (1971), King, 32 Ohio State L.J. 207 (1971), Lyons, 46 Notre Dame Lawyer 801 (1971), Martin, 39 U. Cin. L.R. 600 (1970), Wesner, 16 Vill. L.R. 383 (1970), Zenor, 56 Cornell L.R. 489 (1971).

issue in Javins was whether housing code violations which arose during the term of a lease had any effect upon the tenant's obligation to pay rent. In the three cases consolidated in this action, three tenants leased separate apartments in a large Washington slum complex. The landlord sought possession based on non-payment of rent. The tenants admitted non-payment but alleged numerous violations of the housing code. The lower court and the District of Columbia Court of Appeals rejected this defence. These decisions were now reversed and the court held,

> "a warranty of habitability measured by the standards set out in the Housing Regulations for the District of Columbia is implied by operation of law into leases of urban dwelling units covered by those Regulations."[55]

After a detailed review of the old law and the arguments in favour of change, the Court concluded that, "the common law itself must recognise the landlord's obligation to keep his premises in a habitable condition."[56] Again there are difficulties in determining the scope of the decision; can the tenant require the landlord to supply additional facilities?[57] Does it apply to single-occupancy as well as to multiple dwellings?[58] But once again, above the inevitable difficulties and doubts created by such a major upheaval in the law, there stands the clear proof that the old rules of the common law are losing their grip on American law.

The Supreme Courts of New Hampshire and Illinois threw off the restrictions of the common law rules in 1971 and 1972 respectively.

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55. (1970 428 F 2d 1071, 1072.
56. Ibid 1077.
57. Infra 150
58. Infra 152

Kline v. Burns,[59] before the Supreme Court of New Hampshire, was an action by tenants to recover all rent paid during occupancy of premises on the ground that they were in violation of the city housing code. Holding that the tenant's rent liability was limited to the difference between the agreed rent and the reasonable rental value of the premises in their condition while occupied, the court declared that,

> "in a rental of an apartment as a dwelling unit, be it a written or oral lease, for a specified time or at will, there is an implied warranty of habitability by the landlord that the apartment is habitable and fit for living. This means that at the inception of the rental there are no latent 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."[60]

Jack Spring Inc. v. Little[61] was another possession action by the landlord to which the tenant pleaded the uninhabitable nature of the premises. The Supreme Court of Illinois quoted extensively from Javins and continued,

> "We find the reasoning in Javins persuasive and we hold that included in the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code."[62]

In addition to these cases decided by Appeal Courts, some lower court decisions in other states deserve mention. In a 1970 Colorado County Court case,[63] the court noted that the Colorado Supreme Court

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59. (1971) 276 A 2d 248.

60. Ibid 251-252.

61. (1972) 280 N.E. 2d 208. Noted, Comment, 66 N.W.U.L.R. 790 (1971-2).

62. Ibid 217.

63. Bonner v. Beecham (1970) Poverty Law Reporter, para. 11,098.

had never considered the conflict between the housing code imposing obligations on the landlord and the common law rules conferring immunity. Discovering no precedent in Colorado to the effect that the old common law should prevail over legislative policy, the court found a breach of the implied warranty citing Pines as authority. Three recent decisions of lower courts in New York have also found an implied warranty. In Sayke v. Bishop,[64] the tenant was able to show that he had been intermittently deprived of adequate heat and water by the landlord. Finding a breach of the implied warranty, the New York District Court awarded him the full rent already paid for the months in which the breach occurred. In another recent case,[65] the New York City Civil Court reviewed the developing law, distinguished previous decisions and implied a warranty of habitability which was held to be a defence to the landlord's action for possession based on non-payment of rent. This decision was followed soon afterwards by the same court.[66]

64. (1969) Poverty Law Reporter, para. 10, 789.

65. Amanuensis v. Brown (1971) 318 N.Y.S. 2d 11.

66. Jackson v. Rivera (1971) 318 N.Y.S. 2d 7.

Problems of the Implied Warranty of Habitability

a) The Standard of Fitness

Determining the standard required by the implied warranty of habitability has been one of the most difficult questions posed by the decisions. Lemle said that "in considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors."[1] But the court concluded, "Each case must turn on its own facts."[2] A later decision of the Supreme Court of Hawaii added that "an inquiry into the nature of the defects would seem essential in determining materiality. For example, a wiring defect may pose an immediate fire hazard such that a tenant cannot reasonably be expected to sleep on the premises. On the other hand, a wiring defect may be in a single non-essential circuit which can be turned off at a circuit box until repaired at some later time."[3]

The Superior Court of New Jersey observed in Academy Spires Inc. v. Jones that "not every transient inconvenience of living attributable to the condition of the premises will be a legitimate subject of litigation. The warranty is one of habitability and is not a warranty against all inconvenience or discomfort. Reste Realty Corp. v. Cooper[4] clearly implies that to be actionable the breach must be so substantial as to amount

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1. (1969) 462 P. 2d. 470, 476.
2. Ibid
3. Lund v. MacArthur (1969) 462 P. 2d. 482, 484.
4. (1969) 251 A. 2d. 268.

to constructive eviction." The leading New Jersey decision, Marini v. Ireland,[6] described the landlord's duty as ensuring that there were "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 the facilities will remain in usuable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable. --- It must be implied that he has further agreed to repair damage to vital facilities caused by ordinary wear and tear during said term. Where damage has been caused maliciously or by abnormal or unusual use, the tenant is conversely laible for repairs. The nature of vital facilities and the extent and nature of maintenance and repair required is limited and governed by the type of property rented and the amount of rent reserved."[7]

The language used in Marini has been heavily criticised. It has been said that the limitation of the warranty to latent defects strips the case of much of its vitality.[8] Housing shortage and consequential unequal bargaining positions between landlords and tenants may force tenants to accept premises even if discoverable defects are present. It is concluded that

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6. (1970) 265 A. 2d. 526.

7. Ibid 534.

8. Mahoney, 16 Vill. L.R. 395, 404 (1970).

"if a literal construction results, the instant case will have done little to alter landlord-tenant relationships."[9] Another important question left unanswered by Marini is the definition of the term "vital facilities" which are covered by the implied warranty.[10] It has been objected that there is no logical nexus between the amount of rent paid, and the essential nature of the facility as construed by the court. However modest the rental payments may be, it could not serve to mitigate the landlord's responsibility with respect to plumbing, heating, electricity and other basic necessities.[11] Another commentator has suggested that courts should adopt guidelines from cases which have evolved under the doctrine of constructive eviction.[12] In addition, courts could also borrow from housing regulations which are intended to assure minimum standards of habitability for residential leaseholds.[12]

Later decisions by New Jersey Courts have gone some way to clarifying the standard required. The tenant in Academy Spires v. Brown[13] asserted that the implied warranty had been breached because the landlord had failed to supply heat and water service to a ninth-story apartment, the incinerator did not function; the hot water supply failed, water leaked into the bathroom, there were defects in venetian blinds; the plaster in

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9. Ibid.
10. Madden, 22 Syracuse L.R. 997, 1014 (1971).
11. Mahoney, 16 Vill. L.R. 395, 406 (1970).
12. Laird, 24 Rutgers L.R. 503, 518, n.30 (1970).
13. (1970) 268 A. 2d. 556.

the walls was cracked, and the apartment was unpainted. The court held that some of these clearly went to bare living requirements. "In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability."[14] But malfunction of venetian blinds and water leaks, wall cracks, lack of painting were not included in the covenant. "Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability."[15] The premises in Berzito v. Gambino[16] were also found to be uninhabitable: "Even an incomplete and undetailed enumeration of the conditions encountered by the tenant demonstrates the finding of the court: few screens, some ripped; no storm windows; missing windows boarded up; gaps in window panes, sash and door frames; no radiators in two of the four rooms; holes in floors and walls; falling plaster; bathtub resting on wooden blocks; inoperable electric fixtures; sewage backup in cellar, and infestation by roaches and rodents."[17]

The Javins[18] case gave only general outlines to determine whether the warranty had been breached. The court stated that in order to constitute such a breach, the housing code violations

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14. Ibid 559.
15. Ibid. cf. Greiner, 12 Vill. L.R. 631 (1967).
16. (1971) 114 N.J. Super 124, 274 A. 2d. 865.
17. Id. 866.
18. (1970) 428 F. 2d. 1071.

must affect the tenant's apartment or the common areas he uses, must not be caused by his own wrongful action, and need not be discovered by city inspectors.[19] It was said that "one or two minor violations standing alone which do not affect habitability are de minimis and would not entitle the tenant to a reduction in rent."[20] The opinion did not attempt to establish the factors which would constitute "habitability" nor did it indicate how substantial, in terms of severity and number, the housing violations must be. Commentators have suggested that the vagueness of the standard enunciated in Javins may preclude effective assertion by tenants of their rights.[21] When a tenant makes the decision to use the remedy of rent-withholding, he will have to take a gamble that the court's conception of rent-impairing violations will not differ from his own. From the landlord's viewpoint, this vagueness may allow the jury to unleash their prejudices against the traditionally villainous slum landlord.[22] It has been suggested that clearer judicial tests should be devised by subsequent courts to avoid unpredictable results.[23]

A later decision in the District of Columbia has placed a severe restriction on the scope of the duty owed under Javins. Williams v. William J. Davis[24] was an action by landlords to

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19. Ibid 1082, n.62.
20. Ibid 1082, n.63.
21. Cohen and Cooke, 39 Geo. Wash. L.R. 152, 163 (1970). Comment, 56 Iowa L.R. 460, 467 (1970).
22. Comment, 56 Iowa L.R. 460, 467 (1970).
23. Jefferson, 6 Harv. Civil Rts.-Civil Lib.L.R. 193, 200 (1970).
24. (1971) 275 A. 2d. 231.

recover possession of the premises on the grounds of non-payment of rent. The tenants defended on the grounds that the landlord had failed in his duty to provide adequate protection from criminal activity. The District of Columbia, Court of Appeals considered their reliance on Javins to be misplaced, "The holding in Javins was that 'since the lessee continues to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term.' Here the appellants are not contending that the landlord failed to keep the premises existing at the beginning of the lease, but seek to compel the landlord to supply facilities not existing when the lease was made and not required by the Housing Regulations."[25] The words quoted from Javins are also open to another restrictive interpretation; that the implied warranty is limited to those cases in which housing code violations arise during the lease term.[26] The court can be taken as saying that the tenant is only entitled to

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25. Ibid 232, cf. Gallagher, Associate J. "I concur, though I do not interpret -- Javins with as much restriction as the majority opinion appears to do."

26. With regard to the commencement of the lease, this statement is obiter. The court expressly noted, "We point out that in the present case there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases." cf. Comment, 84 Harv. L.R. 729, 735-736 (1971). In Berzito v. Gambino (1971) 274 A. 2d. 865, the District Court of New Jersey was inclined to the view that the implied warranty of habitability only applied to defects arising after the letting but it was not necessary to resolve the question in that case.

expect the premises to be kept in "their beginning condition". If both these restrictive interpretations are correct, Javins provides fairly limited aid to the tenant; it does not enable the tenant to claim more than that the premises be kept in their "beginning condition" even if that condition is sub-standard[27] or if improvements need to be carried out during the term.

The standard required was more fully explained by the Supreme Court of New Hampshire in Kline v. Burns,[28] "In order to constitute a breach of the implied warranty of habitability the defect must be of a nature and kind which will render the premises unsafe, or unsanitary and thus unfit for living therein. --- The nature of the deficiency, its effect on habitability, the length of time for which it persisted, the age of the structure, the amount of the rent, the area in which the premises are located, --- whether the defects resulted from malicious, abnormal, or unusual use by the tenant, are among the factors to be considered in deciding if there has been a breach of the warranty of habitability. --- The existence of a breach is usually a question of fact to be determined by the circumstances of each case."[29] In Sayko v. Bishop,[30] a lower court of New York found that rat infestation plus inadequate

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27. Of course, the decision in Brown v. Southall Realty (1968) 237 Ad. 834 may aid the tenant in this situation, infra 307
28. (1971) 276 A. 2d. 248.
29. Ibid 252. The court also repeated the standard set by Marini.
30. Poverty Law Reporter, s.10, 789 (1969).

heat and water constituted a breach of the implied warranty and in Amanuensis v. Brown[31] the New York City Civil Court said the test was one of substantial violations of the Housing Code seriously affecting the habitability of the premises.[32]

b) Covenant Restricted to Multi-Unit Buildings?

An important restriction was placed on the Javins decision by the District of Columbia Court of Appeals in Williams v. Auerbach.[33] This was an action by the tenant of a single-family dwelling against his landlord for injuries sustained when ceiling plaster in a bedroom fell and struck him. The landlord moved for a directed verdict and the tenant argued, inter alia, that Javins established a duty on the part of the landlord to maintain the premises in accordance with District of Columbia Housing Regulations. Upholding the directed verdict for the landlord, the court stated that, "the Javins decision, cited by appellant, is not dispositive of the matter, for all the tenants involved in these cases were occupants of apartments in a multi-unit building."[34] The same restriction was expressly imposed by the Supreme Court of Illinois in giving birth to the implied warranty in Jack Spring Inc. v. Little, "this case -- is applicable only to the factual situations here presented, the

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31. (1971) 318 N.Y.S. 2d. 11, 19.

32. For an analysis of the respective merits and demerits of a standard based on housing codes and a standard developed by the courts on a case to case basis, as in the case of sale of goods law, see Lockitski, 16 Vill. L.R. 710, 725-728 (1971). For other suggestions as to the standard which should be imposed, Greiner, 12 Vill. L.R. 631, 637 (1967); Josephson, 12 Wm. & Mary L.R. 580, 596-598 (1971).

33. (1972) 2?5 A.2d. 701.

34. Ibid 704.

occupancy of multiple dwelling units."[35] On the other hand, Pines[36] and Lemle[37] are both leading cases concerned with single-family dwellings and the premises in Marini[38] consisted of a two family duplex. The Supreme Court of New Hampshire merely referred to the rental "of an apartment as a dwelling unit" in Kline v. Burns.[39]

c) Tenant's Lack of Security

One difficulty which could prove fatal to successful implementation of the implied warranty concept is the possibility that the tenant will be served notice to quit. The United States Court of Appeals specifically noted in Javins, "Our holding, of course, affects only eviction for non-payment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground."[40] District of Columbia law recognises the defence of retaliatory eviction[41] but this case emphasises the need for the courts to recognise not only the right of the tenant to an implied warranty in the lease but also a defence of retaliatory eviction

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35. (1972) 280 N.E. 2d. 208, 218. Ryan J. dissenting, though that the implied covenant should extend to all dwelling units covered by the code not only multiple-unit dwellings.
36. (1961) 111 N.W. 2d. 409.
37. (1969) 462 P. 2d. 470.
38. (1970) 265 A. 2d. 526.
39. (1971) 276 A. 2d. 248.
40. (1970) 428 F. 2d. 1071, 1083, n.64.
41. Edwards v. Habib (1968) 397 F. 2d. 687 cert. denied (1969) 393 U.S. 1016. Infra 995

to an action for possession. Moreover, the tenant will still have to gamble that not only will the state of the premises be a defence to possession based on non-payment of rent[42] but also that the defence of retaliatory eviction can be made out to any subsequent possession actions. There is no conclusive answer to another difficulty, how long may the tenant remain in possession without paying rent once the Javins defence to a possession action based on non-payment is made out?[43] If the landlord will not or is unable to remedy the violations, may he stay there for ever?

d) Exclusion or Waiver

Can the landlord nullify the implied warranty of habitability simply by a term excluding it in the tenancy agreement? It will be seen that many leases are merely contracts of adhesion,[44] is all this judicial creativity to come to nothing because of an extra term inserted into mass-produced documents?[45] The Javins court saw the danger and took action, "the duties imposed by the Housing Regulations may not be waived

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42. Supra

43. Bokor, 23 U. Fla. L.R. 785, 790 (1971). Cohen and Cooke, 39 Geo. Wash. L.R. 152, 164 (1970).

44. Infra 190

45. For exclusion clauses generally, see infra
It is not difficult to find historical examples of landlords avoiding duties simply by the use of lease terms. Rights conferred on Irish tenants by the Land Act 1870 were waived by requiring the tenant to sign a printed form to this effect. Even Charles Stewart Parnell used a lease on his estates whereby his tenants lost some of their rights. N.D. Palmer, "The Irish Land League Crises" p. 59 (1940). The Land Act 1871 s.22 permitted contracting out of its provisions only in limited circumstances.

or shifted by agreement if the Regulations specifically place the duty upon the lessor."[46] "Any private agreement to shift the duties would be illegal and unenforceable."[47] In Jack Spring, however, the Illinois Supreme Court stated that a disclaimer of the duty to repair was to be considered by the circuit court on remand in determining whether the landlord was in breach.[48]

A closely allied problem is the possibility that some courts, insensitive to "contemporary housing realities"[49] may hold that a tenant who accepts or continues to live in sub-standard premises has waived his legal rights. Although not held to apply to the facts of that case,[50] the Supreme Court of New Jersey stated the general rule in Reste Realty v. Cooper that "a tenant's knowing acceptance of a defective leasehold would normally preclude reliance upon any implied warranty."[51] One of the factors which the Supreme Court of New Hampshire considered relevant in deciding whether there had been a breach of the implied warranty was whether the tenant waived the defects.[52] If disclaimer clauses are upheld and if the tenant's knowing

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46. (1970) 428 F. 2d. 1071, 1081-1082.
47. Ibid 1082, n.58. See Josephson, 12 Wm. & Mary L.R. 580, 597-598 (1971).
48. (1972) 280 N.E. 2d. 208
Comment, 66 N.W.U.L.R. 790, 795 (1971-2).
49. Supra 194
50. In view of an express promise to remedy the defect and the existence of an express covenant of quiet enjoyment in the lease.
51. (1969) 251 A. 2d. 268
52. Kline v. Burns (1971) 276 A. 2d. 248, 252.

acceptance of defective premises is construed as a waiver of the implied warranty, the implied warranty will cease to exist as a practical matter where landlords enjoy a powerful bargaining position or where housing shortage forces the tenant to take premises which would otherwise not be accepted.[53]

e) Summary Trials No Longer Summary

One consequence of the recent cases finding an implied warranty is that they have added to the number and length of trials. By adding to the defences available to the tenant, they have rendered summary actions for possession no longer summary. This was recognised by the New Jersey Supreme Court in Marini, "we realize that the foregoing may increase the trials and appeals in landlord and tenant dispossess cases and thus increase the burden of the judiciary."[54] However, the court went on to warn that the decision did not constitute an invitation to obstruct the recovery of possession by a landlord legitimately entitled thereto.[55] From the tenant's point of view, he may be paying rent long after the premises have become uninhabitable because his remedy is subject to the inadequacies and delay of the court system, problems aggravated by the additional case-load produced by the new law.[56]

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53. cf. Reitmeyer v. Sprecher (1968) 243 A. 2d. 395, 398 (Pa) Infra 193

54. (1970) 265 A. 2d. 526, 535.

55. Ibid

56. Comment, 24 Vand. L.R. 425, 430 (1971). Jefferson, 6 Harv. Civil Rts-Civil Lib. L.R. 193, 200-201 (1970).

Remedies for Breach of the Implied Warranty of Habitability

The Supreme Court of Hawaii observed in Lemle that "it is a decided advantage of the implied warranty doctrine that there are a number of remedies available".[1] "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."[2] The section discusses what those remedies are,[3] their effectiveness is dealt with later.[4]

The basic remedy for breach of contract is the right to seek damages, this remedy is applicable to breach of the implied warranty. Lemle expressly recognised such a right[5] though the tenant in that case was seeking rescission. The tenant in Kline v. Burns brought actions against his landlord to recover all rent paid during occupancy of the premises on the ground that the rental was in violation of the city housing code. The Supreme Court of New Hampshire noted that the tenant can obtain relief for breach of the implied warranty by instituting an action and held that the measure of damages would be the difference between the agreed rent and the fair

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1. (1969) 462 P. 2d. 470, 475.

2. Ibid

3. See generally, Allen, 20 South Carolina L.R. 282, 291 (1968); Comment, 54 Iowa L.R. 580, 595 (1969); Hill, 41 U. Colo. L.R. 541, 564 (1969); Hay, 16 Howard L.J. 366, 377 (1971); Sanders, 21 Drake L.R. 300, 310-311 (1972).

4. Infra Part VI

5. (1969) 462 P.2d. 470, 475.

rental value of the premises as they were during their occupancy by the tenant in the unsafe, unsanitary or unfit condition.[6] The New York City Civil Court was prepared to hold in Amanuensis v. Brown[7] that breach of the implied warranty of fitness for use could result in damages but held that the tenant's counterclaim failed because it had not been proved that the damages exceeded the amount of rent already withheld by the tenant.

The right to rescind the lease was recognised by the court in Lemle. The plaintiff had vacated the premises after three days because of the presence of rats and he brought an action to recover the money which he had previously paid as rent in advance. The trial court ruled that he was entitled to recover back a portion of the money plus interest. This ruling was affirmed by the Supreme Court of Hawaii on the ground that "there was a material breach of the implied warranty of habitability and fitness for the use intended which justified the plaintiff's rescinding the rental agreement and vacating the premises."[8] Earlier, in Pines v. Perssion,[9] the Wisconsin Supreme Court held that a breach of the warranty entitled the tenant to abandon the premises, discharged him from liability for future rent and enabled him to recover a deposit paid to

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6. (1971) 276 A. 2d. 248, 252.
7. (1971) 318 N.Y.S. 2d. 11.
8. (1969) 462 P. 2d. 470, 476.
9. (1961) 111 N.W. 2d. 409.

the landlord. The right to rescission has also been recognised by the Supreme Court of New Jersey in Reste Reality v. Cooper[10] and Marini v. Ireland.[11]

Marini v. Ireland recognised a further remedy open to the tenant; the right to remedy the defect and then recover the cost thereof by deductions from future rents. The tenant in that case alleged that she discovered that the toilet in her apartment was cracked and that water was leaking onto the bathroom floor. Attempts to get the landlord to repair were unsuccessful and she hired a plumber to do the necessary work. The cost of hiring the plumber was deducted from the next rent payment and the landlord instituted a dispossess action for non-payment of rent. The Supreme Court reversed the trial judge's order granting the landlord possession. Having found that the implied warranty of habitability had been breached, the court concluded, "if --- a landlord fails to make the repairs and replacements of vital facilities necessary to maintain the premises in a livable condition for a period of time adequate to accomplish such repair and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents. The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make the necessary replacement or repair. If the tenant is unable

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10. (1969) 251 A. 2d. 268.

11. (1970) 265 A. 2d. 526, 535. See generally on right to rescission for breach of implied warranty, Daniels, 59 Geo. L.J. 909, 934 (1971).

to give such notice after a reasonable attempt, he may nonetheless proceed to repair or replace."[12] In Bell v. Tsintolas Realty Co. the United States Court of Appeals for the District of Columbia Circuit also recognised the right to repair and deduct, stating that the tenant could have a defence to a non-payment claim by demonstrating "that some portion of his potential payment of rent was instead expended on repairs to the premises."[13] The Civil Court of the City of New York has also recognised this remedy in Jackson v. Rivera,[14] another case concerning a defective toilet which the tenant had repaired.

Dicta support the existence of two further remedies available to the tenant. In both Lemle[15] and Kline v. Burns,[16] the court specifically states that the basic contract remedy of reformation will be applicable. The United States Court of Appeals added this note to the decision in Javins, "In extending all contract remedies for breach to parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability."[17]

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12. (1970) 265 A. 2d. 526, 535. See Madden, 22 Syracuse L.R. 997, 1013-1014 (1971).
13. (1970) 430 F. 2d. 474, 484. See Daniels, 59 Geo. L.J. 909, 938-939 (1971).
14. (1971) 318 N.Y.S. 2d. 7.
15. (1969) 462 P. 2d. 470, 475.
16. (1971) 276 A. 2d. 248, 252.
17. (1970) 428 F. 2d. 1071, 1082, n.61.

The most radical remedy recognised by the courts has been that of rent-withholding or partial abatement of rent.[18] The Pines decision held that the tenant would not be liable for the agreed but rather for the "reasonable rental value of the premises during the time of actual occupancy."[19] The right of a tenant to withhold rent in New Jersey is far from clear. The Supreme Court in Reste Realty v. Cooper suggested that equitable principles would permit the tenant to remain in possession and then the court would fix the reasonable rental value during the period of occupancy.[20] But in Marini v. Ireland the same court stated the tenant's right to repair and deduct and then continued, "this does not mean that the tenant is relieved from the payment of rent so long as the landlord fails to repair."[21] A New Jersey District Court held in Academy Spires v. Brown[22] that the language in Marini must be considered in the light of

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18. Cohen and Cooke, 39 Geo. Wash. L.R. 152, 163-164 (1970). Comment, 84 Harv. L.R. 729, 736-737 (1971). Comment, 56 Iowa L.R. 460, 469-470 (1970). Comment, 66 N.W.U.L.R. 790, 796-798 (1971-2). Daniels, 59 Geo. L.J. 909, 934-935 (1971). King, 32 Ohio State L.J. 207, 214-216 (1971). Martin, 39 U. Cin. L.R. 600, 608-609 (1970). Weiner, 16 Vill. L.R. 383, 393 (1970).

19. (1961) 111 N.W. 2d. 409, 413.

20. (1969) 251 A. 2d. 268, 277, n.1. cf. Academy Spires Inc. v. Jones (1970) 261 A. 2d. 413 where the Superior Court of New Jersey said that upon breach of the implied warranty, the County District Court has ample power "to offer (the tenant) the choice between vacating or paying, not what his lease expressly recites but what, in view of the landlord's breach, he truly owes".

21. (1970) 265 A. 2d. 526, 535.

22. (1970) 268 A. 2d. 556. cf. Berzito v. Gambino (1971) 274 A. 2d. 865 where a New Jersey District Court held that the tenant was only liable to pay the value of the premises in their actual condition and not the rent stipulated in the tenancy agreement upon the landlord's breach of an express warranty of habitability.

of the facts of that case, it did not apply to multi-family dwellings where tenants were not able to repair and deduct. The tenant was, therefore, allowed a twenty five per cent abatement of rent.

Javins clearly recognises the remedy of rent-withholding. Throwing aside the ancient property rule of independence of covenants[23] it was held that "under contract principles -- the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition."[24] One of the questions for the finder of fact to decide would be "what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach?"[25] If no part of the tenant's rental obligation is found to have been suspended, then the landlord should be given possession. If, however, it is found that the entire rent obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail. Should it be found that only part of the rent has been abated and that some is still owed to the landlord, the landlord should not be given possession if the tenant agrees to pay the partial rent

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23. Infra 853
24. Javins v. First National Realty Corp. (1970) 428 F. 2d. 1071, 1082-1083.
25. Ibid.

found to be due.[26] Thus, with Javins the tenant can set-off against a claim for rent due in an action for rent or in an action for possession based on nonpayment of rent. This set-off can reduce the rent owed in part[27] or in whole depending on the seriousness of the violations and provides a defence to a possession action based on nonpayment.

The Supreme Court of New Hampshire decided in Kline v. Burns that if the implied warranty is breached then "the tenant's rent liability will be limited to the difference between the agreed rent and the reasonable rental value of the premises in their condition while occupied."[28] In Bonner v. Beecham,[29] the Colorado Court found that no rent would be due where the landlord breached the implied warranty of habitability and failed to maintain the housing code standards since that would amount to a failure of consideration; failure to pay rent could not be grounds for eviction since no rent was due. A similar result was reached in Sayko v. Bishop[30] except that the tenant was awarded full rent already paid. The court in Amanuensis v. Brown was inclined to the view that the landlord's breach should normally lead to a partial abatement of rent rather than complete suspension.[31] But the landlord's use of

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26. Ibid
See Daniels, 59 Geo. L.J. 909, 934-935 (1971). King, 32 Ohio State L.J. 207, 215 (1971).

27. Some commentators have expressed doubt as to methods available to carry out this apportionment, infra

28. (1971) 276 A. 2d. 248, 252.

29. (1970) Poverty Law Reporter para. 11, 098.

30. (1969) Poverty Law Reporter para. 10, 789 (N.Y.District Court).

31. (1971) 318 N.Y.S. 2d. 11, 20.

long-continued violations of the housing code as an integral part of his plan to effectuate the removal of the tenants demanded the denial of all rent in that particular case.[32] The attitude of the Illinois Supreme Court towards rent-withholding seems unclear. Jack Spring Inc. v. Little[33] held that affirmative defences alleging breach of the implied warranty of habitability were germane to possession actions based on nonpayment of rent as going to question whether tenants were indebted to the landlord for rent. But the court also specifically stated that the case did not alter the long established rule that liability for rent continues so long as the tenant retains possession of the premises.[34]

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32. Ibid

33. (1972) 280 N.E. 2d. 208, 217.

34. Ibid
cf. Comment, 66 N.W. U.L.R. 790, 796-798 (1971-2).

Conclusion.

Commentators have greeted the implied warranty of habitability cases with mixed feelings though generally the reception has been favourable. Marini is said "to have made a significant improvement in the tenant's situation with respect to his quest for better housing."[1] Javins has been described variously as "an enlightened decision",[2] "a bold step forward",[3] a "justified" decision,[4] "a step toward a realistic solution",[5] "an encouraging and significant development"[6] and "a step toward attainment of equitable property laws".[7] One commentator has said it is a decision "to be applauded"[8] and another has said, "the Javins decision, both in theory and practical application, is an important testament to the viability of judicial process in an extremely complex socio-economic context. In reaching its decision the court displayed a high degree of jurisprudential ability."[9] The "thorough analysis and complete documentation" of the Javins court has been praised.[10]

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1. Mahoney, 16 Vil.. L.R. 395, 409 (1970).
2. Comment, 56 Iowa L.R. 460, 472 (1970).
3. Jefferson, 6 Harv. Civil Rts - Civil Lib. L.R. 193, 204 (1970).
4. Cohen and Cooke, 39 Geo. Wash. L.R. 152, 165 (1970).
5. Lyons, 46 Notre Dame Lawyer 801, 806 (1971).
6. Comment, 24 Vand. L.R. 425, 430 (1971).
7. Bokor, 23 U. Fla. L.R. 785, 791 (1971).
8. King, 32 Ohio State L.J. 207, 216 (1971).
9. Martin, 39 U. of Cin. L.R. 600, 608 (1970).
10. Chaffin, 42 Miss. L.J. 523, 529 (1971).

A cautious reception has been given by some writers in view of the difficulties left unresolved by the new law; "it may not improve the housing situation of the poverty tenant significantly",[11] "its application will be limited by its failure to support its novel holdings with sufficient legal analysis and to address itself to a number of practical considerations",[12] "its unanswered questions and vague standards may mean that the tenant's plight will not be mitigated in any real sense".[13]

Two powerful voices of the "legal establishment" have denounced the decision in <u>Javins</u>. W.H.E. Jaeger[14] refers to it as an "extreme of judicial legislation",[15] "an opinion at times almost bizarre, not to say weird"[16] which "rode roughshod over the rules of property law".[16] He accepts that greater consumer protection is a desirable result but asks if it should have been achieved by overruling "half a millennium of precedent".[17] The A.B.A. Section of Real Property, Probate and Trust Law[18] has been strongly critical. "In the future, this

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11. Jefferson, 6 Harv. Civil Rts-Civil Lib. L.R. 193, 203 (1970).
12. Ibid 204.
13. Comment, 56 Iowa L.R. 460, 472 (1970).
14. Editor of ed. of Williston "Contracts".
15. 47 Chi-Kent L.R. 1, 74 (1970).
16. Ibid 53.
17. Ibid 60.
18. Report of the Committee on Leases, 6 Real Prop., Probate and Trust J. 550 (1971).

case may well be hailed as the Miranda decision[19] of residential evictions in the District of Columbia. It would appear to encourage every slum tenant to repeatedly create housing violations during his tenancy, which may be futile for the landlord to repair, report such violations to the housing authorities and then refuse to pay future rent. Manifestly, the result is completely unfair to the landlord who has an investment in the property. It is submitted that to cast aside well established principles of real property law to reach what may be considered to be a socially desirable result is an usurpation of the legislative process. If the courts in other jurisdictions follow Judge Wright's[20] 'relevancy' approach, the principles of real estate law in the residential eviction area will be in a constant state of flux bordering on chaos --- If Judge Wright's decision is followed by other courts, the supply of housing units will decline faster than the units can be constructed under the federal programs.[21] The result will be that many lower income families will be unable to obtain housing in the larger cities, which is the opposite of the result Judge Wright apparently intended."[22]

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19. Miranda v. Arizona (1966) 348 U.S. 436 in which the Supreme Court of the United States ruled that, before a person is questioned by the police, he must be informed that he may remain silent and that if he wishes to have a lawyer present at his questioning and cannot afford one, the state will provide one free of charge.

20. Judge Skelly Wright, author of the opinion in Javins.

21. Other commentators have criticised the cases implying a warranty of habitability on the grounds that they ignore the economic consequences of such a decision; Comment, 56 Iowa L.R. 460, 470-471 (1970). Jefferson, 6 Harv. Civil Rts-Civil Lib. L.R. 193, 201 (1970). King, 32 Ohio State L.J. 207, 216 (1971). This problem is discussed supra

22. 6 Real Prop., Probate and Trust J. 550, 576 (1971).

1) Lease: Conveyance or Contract?

Many of the difficulties arising in landlord and tenant law owe their origin to the failure of the common law to firmly classify the lease as either a conveyance or a contract.[1] This failure has bedevilled the law relating to repairs no less than other areas.

Historically, the lease began its life as a contract.[2] "The creation of a lease for years was not at first the grant of a property right but the making of a contract; and the only tenure to survive in England today did not begin as a tenure at all."[3] It was difficult to fit leaseholds into the feudal system;[4] they were essentially commercial intruders into a way of looking at property which was uncommercial and which was primarily concerned with the public duties owed by holders of land.[5] Leases were primarily investments of capital,[6] the tenant was an investor and sometimes in effect a money-lender.[7] The income from the land was divided between landlord and tenant, the former taking a fixed rent and the latter the undefined residue of the profits arising from the exploitation

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1. cf. Lesar, 35 N.Y.U. L.R. 1279 (1961).
2. Leases can be traced back to at least the twelth century; Pollock and Maitland; "History of English Law " 2nd ed. 1911 Vol. II, p. 111-113.
3. S.F.C. Milsom, "Historical Foundations of the Common Law" (1969) p. 127. The lease was thought by Glanvil to create a purely contractual relationship and not a tenurial one: A.B. Simpson, "Introduction to the History of the Land Law" (1961) p.70.
4. Simpson op. cit. n.3 at 233.
5. F.H. Lawson, "Introduction to the Law of Property" (1958) at p.118.
6. W.S. Holdsworth, "History of English Law " Vol. III 1st ed. 1909 p. 182.
7. Milsom op. cit. n.3 at 128.

of the land.[8] Large sums of money were sometimes invested in leases; for a beneficial lease was one of the modes by which money could be raised on the security of land and a fair rate of interest secured for the lender without his incurring the guilt of usury.[9] The lease was a chattel interest and so also capable of being bequeathed.[10] On the other hand, as the tenant had no estate in the land itself, he had no right to recover it should it be dispossessed by anyone other than the landlord.[11] As against the landlord, he would have a right "in covenant, in contract"[12] but as against third parties, he was unprotected. An ejectment by a third person was a wrong to the landlord not to the tenant and only the landlord could bring action, the tenant's right was "jus in personam" and not a "jus in rem";[13] he had no right in the land.[14]

The first step from contract to conveyance appears to have been taken in 1235 by the introduction of a writ for use against the lessor's grantee. The writ "quare ejecit infra terminum"[15] allowed direct recovery of the land from the grantee: the lease "had taken the first seductive step on the path from contract to property.[16] The next step was to give the tenant

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8. Lawson op. cit. n.5 at 118.
9. Holdsworth op. cit. n.6 at 111, 182.
10. Pollock and Maitland op.cit. n.2 at 115; Holdsworth op. cit. n.7 at 182.
11. Holdsworth op. cit. n.6 at 180; Milsom op. cit. n.3 at 128; Pollock and Maitland op. cit. 2 at 106-107.
12. Milsom op. cit. n.3 at 128.
13. Holdsworth op. cit. n.6 at 180.
14. Pollock and Maitland op. cit. 2 at 106.
15. Holdsworth op. cit. n.6 at 181; Milsom op. cit. 3 at 129; Pollock and Maitland op. cit. n.2 at 107-108.
16. Milsom op. cit. n.3 at 129.

protection from ejectors in general; this was achieved by the development of a new action which accused the defendant of having entered and broken the plaintiff's close "with force and arms and against the king's peace." This was known as the action of "ejectio firmae".[17] At first, he could only recover damages in such an action, whereas by an action "quare ejecit" he might recover the land itself.[18] But just at the close of the middle ages, at the turn of the fifteenth century, it was decided that the tenant was allowed to recover by the writ "ejectio firmae" not only damages but also the land itself.[19] The lease now enjoyed the essential characteristic of real property:[20] the courts would restore to a dispossessed tenant the land, the thing itself (the "res") and not merely give compensation for the loss. The tenant now had an estate in the land.

The hybrid nature of a lease, reflecting its early development from contract to conveyance, was apparent in the sixteenth and seventeenth centuries[21] when the main principles of landlord-tenant law began to be settled upon their modern

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17. Holdsworth op. cit. n.6 at 181. Milsom op. cit. n.3 at 129. Pollock and Maitland op. cit. n.2 at 108-109.
18. Holdsworth op. cit. n.6 at 181.
19. Holdsworth op. cit. n.6 at 183, who explains the economic reason for the change. Milsom op. cit. n.3 at 131. Pollock and Maitland op. cit. n.2 at 109.
20. Holdsworth op. cit. n.6 at 3-4.
21. Holdsworth op. cit. n.6 Vol. VII p. 238-96. Holdsworth, "An Historical Introduction to the Land Law" 1st ed. 1927 p. 230-255. Simpson op. cit. n.3 p. 229-233.

basis.[22] Between lessor and lessee there was both privity of contract and privity of estate so that if a lessee assigned his estate, though privity of estate has ceased, the tenant continued to be liable for the rent.[23] The hybrid quality of leasehold came out again in connexion with the Statute of Wills 1540.[24] The leasehold interest in lands came to be treated in part as an interest in land, as real property, and in part as a chattel interest: it became a chattel real.[25] The confusion continued into the eighteenth century. Blackstone defined the lease in one place as a contract[26] and, in another, as a conveyance.[27] It was in the early nineteenth century that the long-standing schizophrenia of the law of landlord and tenant revealed itself with regard to the condition of the premises.

One factor behind the rule that destruction of the premises did not relieve the tenant of the duty to pay rent was clearly the concept of a lease as a conveyance of an estate in land.[28] The common law judges reasoned that, as rent issues

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22. Holdsworth "An Historical Introduction to the Land Law" 1st ed. 1927, p. 231.

23. Ibid 240.

24. Simpson op. cit. n.3 at 233.

25. Ibid. See Ridout v. Pain (1747) 3 Atk. 486, 492, E.R.

26. "An estate for years is a contract for the possession of lands or tenements for some determinate period." 1 Bl.Comm. (Chitty's ed. 1866) Book II, p.112.

27. "A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will but always for a time less than the lessor hath in the premises." 1 Bl.Comm. (Chitty's ed. 1866) Book II, p.255.

28. Comment, 42 U. Pa. L.R. 114 (1894); Comment, 11 Va.L.R. 56, 58 (1924); Comment, 13 Iowa L.R. 328 (1927); Lesar, 35 N.Y.U.L.R. 1279, 1284 (1960). Williston, 9 Harv.L.R. 106, 128 (1895).

from the land rather than the buildings, it continued after the destruction of the latter as the former still remained.[29] Thus in Baker v. Holtpzaffell, where the premises had been destroyed by fire, Lord Mansfield declared,

> "The land was still in existence and there was no offer on the part of the defendant to deliver it up."[30]

The argument was extended in Izon v. Gorton[31] where the lease had been for upper floors of a warehouse and a fire prevented the tenants using them. Holding that rent was still due, Tindal C.J. referred to Baker and continued,

> "(T)hough in that case --- some stress was placed by the court upon the fact that the land was still in existence, and there was no offer on the part of the defendant to give it up, so it might be argued in the present case, the space enclosed by the four walls still continued as marked out by them."[32]

The clearest American statement of the conveyance concept providing the rationale behind the rule is found in the Massachusetts case of Fowler v. Bott,[33] another case of destruction of the premises by fire,

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29. W. Holdsworth, "An Historical Introduction to the Land Law" 1st ed. (1927) p. 239; "History of English Law" Vol. VII p. 262.

30. (1811) 4 Taunt 45, 46, 128 E.R. 244.

31. (1839) 5 Bing N.C. 501, 132 E.R. 1193.

32. Ibid at 507, 1195. Contrast U.S. cases on partial destruction supra 175 cf. Graves v. Berdan (1863) 26 N.Y. 498, 503 (Wright J. dissenting).

33. (1809) 6 Mass. 63. See also Hare v. Groves (1796) 3 Anstr. 687, 699, 145 E.R. 1007, 1011, Per Chief Baron Macdonald, "The lessee is owner of the house during the lease, the lessor after its expiration."

> "A lease for years is a sale of the demised premises for the term: and unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents or any other deterioration. The rent is, in effect, the price, or purchase money, to be paid for the ownership of the premises during the term; and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser."[34]

The lease being a conveyance of an interest in land, the destruction of the premises did not mean a failure of consideration. The lessee had received what he had bargained for - ownership of a term - when the lease became effective. Rent was merely the purchase price paid in instalments.[35]

This concept as a lease as a conveyance of an estate in land was also the theoretical foundation for the refusal of the common law to imply warranties of fitness and repair. Counsel for the landlord in Hart v. Windsor had advanced the argument,

> "This is --- an action of debt on the implied covenant in law, arising out of the reservation of the rent made on the creation of the estate granted in the land --- and so long as that estate remains, the rent is payable, whatever may be the condition of the demised premises."[36]

Baron Parke, giving the judgement of the court, accepted this view,

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34. (1809) 6 Mass. 63, 67.

35. cf. Counsel for landlord in Hart v. Windsor who, having received several cases on the destruction of premises, concluded: "it is clear upon all the old authorities that the contract is a demise of real estate, affects only the land or other thing demised out of which the rent issues, without reference to its quality and condition. Whatever changes may take place, the implied covenants of the lessor and lessee (i.e. the covenant to pay rent in this case) continue so long as the land remains." (1844) 13 L.J. EX.R.129, 134.

36. (1844) 12 M. & W. 69, 83. 152 E.R. 1114, 1120.

"Considering this case without reference to the modern authorities which are said to be at variance,[37] it is clear from the word 'demise' --- the law implies a covenant --- for title to the estates 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 covenant for any particular state of the property at the time of the demise; and there are many, which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised. [cases on destruction of premises cited[38]] --- In all these cases, the estate of the lessee continues and that is all the lessor impliedly warrants --- The implied contract relates only to the estate not to the condition of the property."[39] (emphasis added)

The American law also justified the landlord's immunity by reference to the conveyance concept. Thus in Doyle v. Union Pacific Railroad Company, Mr. Justice Shiras of the U.S. Supreme Court said,

"A tenant is a purchaser of an estate in the land or buildings hired; and --- no action lies by a tenant against a landlord --- in the absence of an express warranty or of active deceit."[40]

Again, it was said in the Connecticut case of Gallagher v. Butten,

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37. Presumably Edwards v. Etherington, Collins v. Barrow cited by counsel for tenant ibid 74, 1117. For these cases, see supra p 106-107

38. For cases cited see supra p120

39. (1844) 12 M. & W. 69, 85-86. 152 E.R. 1114, 1121-1122. See Note, 184 L.T. 47 (1937).

40. (1892) 147 U.S. 413, 425, 13 Sup.Ct. 333, 337.

"By such a lease the lessee purchases an estate in the premises rented, and the rule of caveat emptor applies, making it ordinarily the duty of the lessee as such purchaser to make such examination of the premises as is required to ascertain whether the premises have fallen into decay."[41]

A rejection of the conveyance approach and some acceptance of a contractual concept is evidenced in the general American doctrine of releasing the tenant from rent where he has let a room or apartment without the subjacent earth and the structure is destroyed.[42] One of the earliest cases holding to this rule was the decision of the Ohio Supreme Court in Winton v. Cornish.[43] The question was whether the tenant of a store-room and cellar could refuse to give up possession of land when the entire building was destroyed by fire. The decision clearly proceeds on a contractual analysis, "The owner of the land can convey it, or the profits of it, for such terms and in such parcels as he thinks proper. He can grant the right to take all the minerals underneath, or those twenty feet below the surface only; to dig all the turf, to inhabit a cave, if there

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41. (1900) 73 Conn. 172, 175. 46 Atl. 819, 820. cf. Becar v. Flues (1876) 64 N.Y. 518 [lease was said to be "like the sale of specific personal property to be delivered."] See also Bowe v. Hanking (1883) 135 Mass. 380; Stevens v. Pierce (1890) 151 Mass 207; Valin v. Jewell (1914) 88 Conn. 151, 90 Atl. 36. See also, American Law of Property p.167 (1952); Becker, 4 Wisc. L.R. 489, 490 (1928); Grimes, 2 Val. U.L.R. 189, 192 (1968); Harkrider, 26 Mich. L.R. 160, 261, (1928); Lesar, 35 N.Y.U.L.R. 1279, 1285 (1960); Schwartz, 33 Am. Trial Lawyers J. 122, 129-130 (1970); Simmons, 15 Buff. L.R. 572, 575 (1966).

42. See 32 Am.Jur. L. & T. s.495; 51 C.J.S. L. & T. s.99; Thompson Vol. 3A. s.1299, 1315; 2 Powell s.233(2). Comments: 42 U.Pa.L.R. 114, 118 (1894); Comment 11 Va.L.R. 56, 57 (1924); Comment 13 Iowa L.R. 328, 392 (1927). Hickel, 34 Mo.L.R. 132 (1969).

43. (1832) 5 Ohio 477.

is one, to occupy a room in the third story, to occupy a second story, a room in the first story, or the cellar, or a part of the cellar. By such grants the land does not pass. When the mineral or the turf is exhausted, the grantee has no right to enter the premises. When the cave is destroyed by a convulsion or otherwise, there is nothing that was granted remaining. It is so of the rooms or cellars of a house."[44] This modification of the property concept was motivated partly by practical considerations; for in leases or parts of premises, "the tenants cannot all have the soil, they cannot all have the realty."[45] So, it was decided that such a lease "gives the lessee no interest in the land upon which the building stands."[46] No rent was payable because he could not have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms and so there had been a failure of consideration.[47] This analysis adopted by American cases has not been approved by English cases[48] though an important text-book has suggested that it is applicable.[49]

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44. Ibid p.478 (emphasis added).

45. Stockwell v. Hunter (1846) 11 Metcalf 448, 456.

46. Groves v. Berdan (1863) 26 N.Y. 498, 499.

47. See also Kerr v. The Merchants Exchange Co. (1839) 3 Edw.Ch. 315 (N.Y.); Womack v. McQuarry (1867) 28 Ind. 103; McMillan v. Soloman (1868) 42 Ala. 356; Buerger v. Boyd (1869) 25 Ark. 441; Ainsworth v. Ritt (1869) 38 Cal.89. Harrington v. Watson (1883) 11 Ore 143, 3 Pac. 173. For a recent decision: Crow Lumber v. Washington Co.Library Board (1968) 428 S.W. 2d. 758. Noted Hickel, 34 Mo.L.R. 139 (1969).

48. See Izon v. Gorton quoted supra

49. Woodfall, "Landlord and Tenant" 27th ed. 1968 p. 967.

A rejection of the conveyance concept in favour of contract was also the rationale of a minority American view which rejected the common law rule and held that destruction of any leased premises relieved the tenant from the duty to pay rent.[50] The destruction of the premises was seen as a substantial failure of consideration relieving the tenant from his obligations. South Carolina was the first state to adopt this analysis as far back as 1792 in the case of Boyly v. Lawrence.[51] The defendant had rented a shipyard from the plaintiff for ten years. In an action to recover upaid rent, the defence was that the property had been destroyed by the British during the war of 1776. Giving judgement for the defendant, the court said, "that the defendant ought to pay for the time he peaceably enjoyed the premises but not for any time he was prevented by the casualties of war." That decision was followed a few years later in a case in which a storm had destroyed the house.[52] The leading case is Coogan v. Parker.[53] After an attempt to reconcile the prior cases with the common law rule, the Supreme Court of South Carolina declared this basic contractual approach, "If parties contract with reference to the occupation of a dwelling house, the destruction of that dwelling house is clearly the destruction of that which they had in view, and was the basis

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50. See Bruton, 10 So.Car.L.R. 119, 145-6 (1948). Comment, 13 Iowa L.R. 328, 329 (1927).

51. (1792) 1 Bay 499.

52. Ripley v. Wightman (1828) 4 McC. 447.

53. (1870) 2 S.C. 255, 16 Am. Rep. 659.

and consideration of their contract."[54]

The two states following South Carolina clearly did so in the light of an analysis of a lease in terms of a contract. Thus, in Whittaker v. Hawley,[55] the Supreme Court of Kansas stated, "a lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant, rather than a purchase single and completed of a term or estate in lands -- The whole consideration of a lease does not pass till the term is ended. --- The clear tendency of the rulings has been to do away with the common law technicalities concerning real estate, and to bring the rules of the common law more in harmony with those respecting personal property."[56] The Supreme Court of Nebraska was equally clear, "a lease for real estate is not a bargain and sale for a given time of the lessor's interest in the leased premises. It is rather a hiring or letting of property for a certain time; and for a named consideration. -- The promise to pay a stated sum of money as rent for leased premises for a certain term is based upon the presumption that the leased premises shall exist for the term."[57]

The line of early English cases which seemed to place the landlord under a duty of fitness[58] reveals a tendency towards

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54. (1870) 2 S.C. 255, 275.

55. (1881) 25 Kansas 674.

56. Ibid at 687-688.

57. Wattles v. South Omaha Ice & Coal Co. (1897) 50 Nebraska 251, 69 N.W. 785 at 789. Noted: Comment 10 Harv. L.R. 527 (1896); Comment 45 U. Pa.L.R. 212 (1897).

58. Supra p106-107

contractual analysis.[59] The leading case of Edwards v. Etherington,[60] where the tenant was held not liable to pay rent for a dilapidated house, shows Lord Justice Abbott looking at the lease as he would at a contract for goods and chattels; he asks whether there had been "beneficial use" and enjoyment by the tenant. To his mind, this beneficial use was the essence of the contract not whether a legal title to real property had passed.

The doctrinal justification for the twentieth century implied warranty of habitability cases is a recognition that leases establish a contractual relationship between the parties as against being regarded merely as a conveyance of an estate in land.[61] The Supreme Court of Hawaii in Lemle v. Breeden considered the common law conceptions as no longer viable, quoted with approval an authority in the field of Landlord-Tenant law to the effect that "the ordinary lease is in part a bilateral contract --- both a conveyance and a contract"[62] and concluded that "a lease is, in essence --- a contractual relationship."[63] "From that contractual relationship an implied warranty of habitability and fitness for the purpose intended is a just and necessary implication."[64] The United

59. Comment, 42 U.Pa. L.R. 114, 116 (1894).
60. (1825) 7 Dow. & Ry. 117, Ry. & M. 268, 171 E.R. 1016.
61. For conveyance theory, supra, 74
62. Lesar, 35 N.Y.U.L. Rev. 1279, 1281 (1960).
63. (1969) 462 P. 2d. 470, 474.
64. Ibid

States Court of Appeals, District of Columbia Circuit, also employed a contractual analysis in Javins,

> "Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord tenant responsibilities, they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings."[65]

Lemle[66] and Kline v. Burns,[67] a decision of the Supreme Court of New Hampshire, point out that the basic contract remedies will be available to the tenant for breach of this contract.[68]

The tendency to see leases as another type of contract has been justified on the grounds of the changed social function of the landlord and tenant relationship. The court observed in Javins[69] that the assumption of landlord-tenant law that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrian society. "In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city

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65. (1970) 428 F.2d. 1071, 1080, "Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract." cf. Lindsey v. Normet (1972) 405 U.S. 56 Mr. Justice Douglais dissenting.

66. (1969) 462 P.2d. 470, 475.

67. (1971) 276 A.2d. 248, 252.

68. cf. judgement of Supreme Court of Missouri in Minton v. Hardinger (1968) 438 S.W.2d. 3, a decision on the landlord's liability in tort for defective parts of the premises under his control; "We cannot accept the assumption basic to defendant's contention - namely, that what existed between the parties here was the kind of lease that could properly be regarded as equivalent to the sale of the premises for the term. What is involved here is a one month, short-term, oral letting of a furnished apartment for immediate occupancy by a family of three. --- This cannot fairly be regarded as a traditional lease of real estate. --- It was a letting of the space on the second floor."

69. (1970) 428 F.2d. 1071.

dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land thirty to forty feet below or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well know 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."[70] Other courts implying warranties of fitness have agreed with this analysis. The Supreme Court of Hawaii has pointed out, "the vast majority of tenants do not reap the rent directly from the land but bargain primarily for living purposes."[71]

In 1500, when it was firmly decided that the tenant had an interest in the land,[72] this reflected the true character of the arrangement. Land was the essence of the agreement; its value was in the crops that could be grown or the livestock that could be raised.[73] Land rather than housing was the basis of the transaction. The buildings were relatively unimportant.[74] Common law judges were reflecting this early social function of the lease as the commercial exploitation of

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70. Ibid 1074.

71. Lemle v. Breeden (1969) 462 P.2d. 470. cf. Supreme Court of New Hampshire in Kline v. Burns (1971) 276 A.2d. 248, 250-251.

72. Supra 170

73. Garrity, 46 J. of Urban Law 695, 700 (1969); Grad, "Legal Remedies for Housing Code Violations" (1968) p.110. Holdsworth op. cit. n.6 at 230-231. Moran, 19 De Paul L.R. 752, 753 (1970); Quinn and Phillips, 38 Fordham L.R. 225, 226-232 (1969).

74. Ibid

land when they gave greater weight to the continuance of the land rather than to the destruction or unfitness of the buildings.[75]

With the process of urbanisation caused by the Industrial Revolution, the lease changed its primary social purpose.[76] No longer did the parties negotiate over the land; shelter was now at the heart of the bargain.[77] When Hart v. Windsor[78] was decided, the thousands upon thousands of tenants in the newly created slums[79] were in no position to reap the benefits of the land - what they rented was a roof over their heads. Most certainly, this is the case with the typical urban tenant of today who increasingly rents not land but space in a building, possibly several storeys above the ground. To tell such a tenant, when his shelter can no longer be enjoyed, that he still retains an interest in the land reveals an inability to appreciate the profound change in the nature of the lease caused by fundamental social changes.[80] The modern lease is a strange bedfellow to the early agricultural lease from which the law of landlord and tenant grew;[81] the function of the

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75. Supra 171

76. The extension of the landlord-tenant relationship to urban properties began at least as early as 1500. Holdsworth op. cit. n. at 231. But only in the eighteenth century did residential lease assume widespread importance; C.W. Chalkin, "Urban Housing Estates in the Eighteenth Century" 5 Urban Studies 67 (1968).

77. Bennet, 16 Texas L.R. 47 (1937).

78. (1844) 12 M. & W. 69, 152 E.R. 1114 supra

79. Supra 35

80. Grad op. cit. n.2 at 111-112.

81. Comment, 7 Washington L.R. 301 (1932).

lease has changed, and, it is submitted, recent American cases are correct in applying a law which takes account of this metamorphosis. The question remains, however, whether the conceptual justification for the new law is valid.

There is no doubt that the lease is more than a contract in English law; it also creates an estate in the tenant. This is clearly shown by modern cases dealing with the question whether the doctrine of frustration applies to leases. Lush J. said in London and Northern Estates Co. v. Schlesinger, "it is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant."[82] These words were quoted a few years later by the Earl of Reading C.J. in Whitehall Court Ltd. v. Ettlinger and he continued, "the agreements contained in the leases are not only contracts, they also create an estate by demise for a term of years."[83] The decision of the House of Lords in the Cricklewood[84] case left the question of the frustration to leases undecided[85] but all the judges,[86] even

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82. [1916] 1 K.B. 20, 24.

83. [1920] 1 K.B. 680, 687. Decision approved by House of Lords in Matthey v. Curling [1922] 2 A.C. 180.

84. [1945] A.C. 221.

85. Two judges (Viscount Simon and Lord Wright) said frustration could apply; two said it could not (Lord Russell of Killowen and Lord Goddard) and one (Lord Porter) was neutral. The Court of Appeal has decided that it is not free to apply frustration to leases: Denman v. Brise [1949] 1 K.B. 22.

86. "A lease of land creates in the lessee an estate" Viscount Simon [1945] A.C. 221, 228. Lord Wright agreed with Lush J.'s statement in Schlesinger ibid 233. "A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land." Lord Russell of Killowen ibid 233. Lord Goddard said landlord's interest in the demised property becomes vested in the tenant, ibid 245.

those in favour of applying the doctrine to leases, described the lease as creating an estate in the tenant. All the leading text-books on landlord and tenant law agree.[87] Indeed, statute has now put this view beyond question.[88] Commonwealth law is to the same effect[89] though some Canadian provinces have legislated to expressly abolish the status of the lease as a conveyance[90] or to mitigate the consequences flowing from such a classification.[91]

The weight of American law is also that the lease is not only a contract but conveys an interest in land to the tenant. One commentator has said, "with a lease, we are dealing very little with the law of contracts. The core of lease law is that a lease is primarily a conveyance."[92] Another has warned, "the only safe approach to this law is by always remembering and applying the principle of tenure, and that the terms of the lease running with the land are the terms of the

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87. Foa, "The General Law of Landlord and Tenant" 8th ed. 1957, p. 1. Hill and Redman, "Law of Landlord and Tenant" 15th ed. 1970, pp.3, 6 cf. p.573. Woodfall, "Landlord and Tenant" 27th ed. 1968, p.2.

88. Law of Property Act 1925, s.1(1)(b).

89. Ontario Law Reform Comm. "Interim Report" (1968) 10-11, 52-58. Foster v. Caldwell [1948] 4 D.L.R. 70.

90. "For the purposes of this Part, the relationship of landlord and tenant is one of contract only, and a tenancy agreement does not confer on the tenant an interest in land." S.B.C. 1970 c.18 s.35.

91. e.g. doctrine of frustration to apply: R.S.O. 1970 c.236, s.88; S.B.C. 1970 c.18, s.41, R.S.M. 1970 c.L70, s.90. duty on landlord to mitigate damages on tenant's wrongful abandonment of premises: R.S.O. 1970 c.236, s.92; S.B.C. 1970 c.18 s.45; R.S.M. 1970 c.L70, s.94. For mutuality of covenants doctrine infra

92. Friedman, 33 Cornell L.Q. 165, 166 (1947).

tenure by which the tenant holds his estate from the landlord."[93] On the other hand, some American judges have been far more willing than their English counterparts to apply contractual analysis to the landlord and tenant relationship.[94] This has led some observers to conclude that the choice between contract and conveyance is a false one: the lease is both.[95] If the warp is conveyance, the woof is contract and neither alone makes a whole cloth."[96]

It is submitted that, in the case of residential tenants, these conceptual problems are both unnecessary and misleading. Such a lease is quite unlike the early common law agrian leases which could rightly be characterised as conveyances of an estate in land. The parties do not think in terms of legal ownership for the term but rather of beneficial use and enjoyment of shelter. Again,to call the lease a contract is equally misleading. Contract means essentially agreement. It is clear that many of the most important terms in residential

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93. Walsh, "Commentaries on the Law of Real Property" Vol. 2 (1947) p. 108. cf. 51 C.J.S. s.202(3). For a recent case viewing lease as a conveyance: Mississippi State Highway Commission v. Central Land and Rental Corp. (1970) 239, So. 2d. 335.

94. Supra 175 as to mutuality of covenants infra 253 cf. 1 American Law of Property (Casner ed. 1952) p. 203.

95. Woodruff, 8 U. of Kansas City L.R. 35, 46 (1939).

96. 1 American Law of Property (Casner ed. 1952) p. 203.

leases are not the result of agreement reached by the parties but are instead imposed by statute. This is certainly the case in England; rent and termination of the arrangement must be in accordance with statutory controls and other terms may be included in the lease not at the wishes of the parties but as the result of legislation. The courts should cease arguing over empty concepts and apply the law which is most suitable to enable the lease to satisfy its modern social function as a device to provide shelter for those who are unable to buy or prefer not to do so. Contemporary social realities not archaic legal concepts should be the criterion.

2) Freedom of Contract or Contract of Adhesion?

a) Caveat Emptor

The philosophy contained in the phrase "caveat emptor" was clearly one of the reasons for the destruction of premises rule. The desire to leave the tenant to seek his own protection was strongly expressed by Chief Baron Macdonald in Hare v. Groves,

> "In the present case there was a full capacity to demise the thing leased, on any terms which the parties might agree upon. The possibility of destruction by fire was in their contemplation in making the lease; and it would have been very easy to provide against the payment of rent in such an event, or for apportioning the rent on a partial loss, if such had been the intention of the parties: on the contrary, the lessee has expressly stipulated to pay the rent during the term at all events; and it is very difficult to say that this was not the intention."[1]

Lord Eldon noted in Holtzapffel v. Baker that the tenant was quite free to stipulate that he would not be liable for rent in the event of destruction by fire.[2]

The same viewpoint was taken in some of the leading American cases. Thus, in Wagner v. White, the Court of Appeals of Maryland stated that tenants,

> "may protest themselves by the terms of their leases: and the omission to do so shows a willingness to incur all risks. --- The defendant has bound himself by express agreement, without any reservation or exception, to pay the rent, and he must stand by his contract."[3]

1. (1796) 3 Anstr. 687, 693, 145 E.R. 1007, 1010.
2. (1811) 18 Ves. 115, 34 E.R. 261.
3. (1819) 4 Harris & Johnson 564, 566. See also Samuel Peterson v. Edmondson (1852) Harrington (Delaware) 378.

These expressions of the individualistic doctrine were endorsed by Chancellor Kent in his commentaries,

> "But I apprehend that the law --- rests on solid foundations of justice and policy. It is to be observed that the case only applies to express agreements to pay; and if a party will voluntarily create a duty or charge upon himself, he ought to abide by it when the other party is not in fault, and when he might have provided if he had chosen, against his responsibility in case of such accidents."[4]

Laissez faire ideology was an important factor behind the no implied warranties of fitness rule. This appears clearly from the early cases. As Alderson B. said in Arden v. Pullen, "the tenant ought to examine the house before he takes it."[5] It was not considered the role of the law to step in to protect a tenant who had failed to look after his own interests. In a classic statement of early Victorian philosophy, Baron Parke said in Hart v. Windsor,

> "It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any fitness in the subject for the purpose intended, they should express that meaning."[6]

Sir John Romily M.R. expressed the same view twenty years later in Chappell v. Gregory, "a man who takes a house from a lessor takes it as it stands; it is his business to make stipulations beforehand."[7]

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4. 3 Kent "Commentaries" 467.
5. (1842) 10 M. & W. 322, 326, 152 E.R. 492, 494.
6. (1844) 12 M. & W. 69, 88, 152 E.R. 1114, 1122.
7. (1863) 34 Beav. 250, 253, 55 E.R. 631, 632.

Caveat emptor has also been the driving force of the rules as applied to farming and business leases. Gott v. Gandy[8] concerned the lease of some workshops. Rejecting a claim that the landlord was liable for damages caused to the tenant's goods by the fall of a defective chimney, Erle J. claimed that the tenant was asking the court "to violate a very important legal principle. For it is most important that the parties making a contract should be permitted to regulate the terms for themselves and that courts of law should decide upon the terms which it appears to have been the intention of the contracting parties to agree upon."[9] This judicial philosophy was extended to farming leases by Mellish L.J. in Erskine v. Adeane, "the law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee, he must take the property as he finds it."[10] With regard to such commercial leases, the doctrine of caveat lessee still has vitality. So, in 1963, the Supreme Court of New Zealand quoted Baron Parke's words without comment in a case regarding a guest house[11] and in 1965 the Court of Appeal applied the doctrine to the lease of a confectionary and tobacco business found to be "legally unfit."[12]

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8. (1853) 2 El. & Bl. 845, 118 E.R. 984.
9. Ibid 8 9
10. (1873) L.R. 8 Ch. 756.
11. Balcairn Guest House Ltd. v. Weir [1963] N.Z.L.R. 301, 304.
12. Hill v. Harris [1965] 2 A.E.R. 358. Noted, 39 Aust. L.J. 175 (1965), approving dictum of Devlin J. in Edler v. Auerbach [1949] 2 A.E.R. 692.

This desire to preserve the sanctity of contract is also apparent in the American cases holding the landlord free of implied warranties of fitness. As one of the earliest cases noted, "the maxim caveat emptor applies to the transfer of all property, real, personal and mixed; and the purchaser generally takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject."[13] This is often given as the reason for the rules of the common law. Either the tenant should inspect[14] or he should secure an express warranty.[15]

b) Contract of Adhesion

During the past few decades, the whole concept of freedom of contract has been subjected to severe criticism. With the increasing standardization of contracts in the present century, doubts have been expressed as to the fundamental concept of a contract as a voluntary agreement made by equal parties.[16]

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13. Cleves v. Willoughby (1845) 7 Hill 83, 86.

14. 51C C.J.S. s.303, p.769, s304, p.774. e.g. Comment, 62 Harv. L.R. 669, (1948); 24 Vand. L.R. 425, 426 (1971); 54 Iowa L.R. 580, 590 (1969); 7 Temple L.Q. 215, 216 (1932); 22 Mich. L.R. 847 (1923). Calandriello, 29 Geo. L.J. 1046, 1047 (1941). Frohmeyer, 11 Ore. L.R. 201, 204 (1931).

15. 1 American Law of Property (Casner ed. 1952) p. 267. Simmons, 15 Buffalo L.R. 572, 575-6 (1966).

16. Ehrenziveig, "Adhesion Contracts in the Conflict of Laws" 53, Colum. L.R. 1072 (1953). Friedman, "Changing Functions of Contract in the Common Law" 9 U. of Toronto L.J. 15, 23 (1951). Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract", 43 Colum L.R. 629 (1943). Lenhoff, "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in Light of American and Foreign Law", 36 Tul. L.R. 481 (1961). Llewellyn, "What Price Contract?" 40 Yale L.J. 704, 736 (1931). Llewellyn, Book Review 52 Harv. L.R. 700 (1939). Slawson, "Standard Form Contracts and the Democratic Control of Lawmaking Power", 84 Harv.L.R. 529 (1971).

Where the contractual terms are drafted by the party with superior bargaining power and then offered to the other party on a "take it or leave it" basis, it cannot be said that the resulting contract is voluntary in any real sense. The capacity of the weaker party is so grossly unequal that he has not really been permitted to bargain at all. Academic doubts were given judicial expression by Frank J. in Siegelman v. Cunard White Star,

> "The ticket is what has been called 'contract of adhesion' or a 'take it or leave it' contract. In such a standardized or mass production agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract' cannot be applied rationally. Such a contract is 'sold not bought'. The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather."[17]

In the leading case of Henningson v. Bloomfield Motors,[18] the Supreme Court of New Jersey applied this reasoning to the sale of a car.

There has been a growing recognition[19] that these

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17. (1955) 221 F.2d. 187, 204 (dissenting opinion). Cf. Campbell Soup v. Wentz (1948) 172 F.2d. 80.

18. (1960) 32 N.J. 358, 161 A.2d. 69.

19. But it should be noted that standard form leases are not a new development. In Philips v. Stevens (1819) 16 Mass. 237, where the tenant had unknowingly covenanted to rebuild premises destroyed by fire, the Supreme Judicial Court of Massachusetts observed, "Printed forms of leases are most generally made use of, and when they are not obtained, copies are made from books of forms, or from some old instrument in print." The first fairly widespread use of such leases is said to have occurred around 1895 and to have become universal by the 1930s; Comment, 16 U. of Chi. L.R. 243, 249 (1946). Widespread feelings of injustice led the Association of the Bar of the City of N.Y. to prepare a new form of standard-form lease in 1936 more favourable to tenants but the harsher standard form leases continued to be generally used; Comment, 13 N.Y.U.L.Q. Rev. 592 (1935), Gale, 19 Chi-Bar Rec. 57 (1937).

considerations apply to the leasing of dwellings.[20] Professor Schoshinski has observed,

> "All the elements of adhesion contracts and characteristic circumstances surrounding their execution exist in the case of a lease by an indigent tenant. Most landlords use a standardised form of lease or at least standardised language. The landlord is the draftsman and the terms strongly favour him. The tenant has no choice but to adhere by signing the lease or to reject the entire transaction and remain homeless."[21]

This inequality in bargaining power results in one-sided, often oppressive lease provisions. This was confirmed by an empirical study of residential leases carried out amongst tenants in Michigan.[22] The following conclusions were tentatively advanced on the strength of the assembled data.[23] In the first place, about half of a highly educated sample population never, in any meaningful sense, read the leases presented to them for signature, primarily because of a combined sense of powerlessness and frustration with the forbidding jungle of legal expertise. Second, while about 70% of the tenants thought most of their lease terms were "fairly easy to understand" at best only 50% were able to answer simple problems posed about typical lease terms. Third, many tenants felt that a number of typical lease terms were either "somewhat unfair" or "grossly unfair". Finally, and perhaps of most

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20. Allen, 20 South Carolina L.R. 282, 290 (1968). Annot, 175 A.L.R. 8, 92. Arbitter, 111 U.Pa.L.R. (1963). Bell, 1966 Wisc. L.R. 583. Gale, 19 Chi.Bar Rec. 57 (1937). Garrity, 46 J. of Urban Law 695, 715-718 (1969). Joost, 6 New England L.J. 1, 32-33 (1970). Lesar, "Landlord and Tenant" s.3.78 n.3 (1957). Schoshinski, 54 Geo.L.J. 519,552 (1966). Simon, 47 Texas L.R. 1160, 1177-1181 (1969).

21. Schoshinski, 54 Geo. L.J. 519, 555 (1966).

22. Mueller, 69 Mich. L.R. 247 (1970).

23. Ibid 276-277.

importance, the standard-form lease did not appear to be a negotiated document. Only a few tenants, generally persons whose occupational skills made them better equipped than the average person for the bargaining process, had achieved a limited measure of success in requesting alterations in the standard-form lease. The problem of standard-form leases arises no less commonly in the case of public housing where leases are written so as to deprive tenants of rights and make tenancy a matter of administrative discretion.[24]

Some American courts have now accepted the standard-form lease as a contract of adhesion. The Appellate Court of Illinois said in Simmons v. Columbus Venetian Stevens Buildings,

> "When such form leases are made it is highly improbable that each of the printed clauses in the leases is subject to negotiation as a matter of offer and acceptance and therefore a matter of freedom of contract. It can be safely assumed that, as the pleadings in the instant case show, such leases are usually submitted as a matter of take it or leave it."[25]

In Reitmeyer v. Sprecher,[26] the Supreme Court of Pennsylvania recognised that the average prospective tenant vis a vis the prospective landlord occupies a disadvantageous position. This absence of a free bargaining position may force the tenant to take premises which he would otherwise refuse. "If our law is to keep in tune with our times we must recognise the present

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24. Friedman, "Government and Slum Housing" 138 (1968). In particular, "Housing Authorities, probably without exception, use a lease form which allows speedy eviction of undesirable tenants." ibid 132-133.

25. (1958) 20 Ill. App. 2d. 1, 155 N.E. 2d. 372, 386-7.

26. (1968) 431 Pa. 284, 243 A.2d. 395.

day inferior position of the average tenant vis a vis the landlord when it comes to negotiating a lease."[27] A Federal Court has also taken judicial note of contemporary housing realities rendering freedom of contract concepts inapplicable.[28]

c) American "Contemporary Housing Realities"

An awareness of such "contemporary housing realities"[29] has led to a rejection of the old common law rules. The Supreme Court of Hawaii explained in Lemle v. Breeden that these rules may once have had some basis in social practice; "at common law, leases were customarily lengthy documents embodying the full expectations of the parties. There was generally equal knowledge of the condition of the land by both landlord and tenant."[30] In an urban age, conditions had changed, the parties often signed standardized leases and the element of free bargaining was absent.[31] As the United States Court of Appeals noted in Javins v. First National Realty Corp.,

> "The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rented housing market, such as racial and class discrimination and standardized form leases mean that the landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power."[32]

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27. Ibid 398.
28. Santiago v. McElroy (1970) 319 F. Supp. 284, 294. U.S. District Ct., E.D. Pa. Holding distress procedure to be unconstitutional.
29. Lemle v. Breeden (1969) 462 P.2d. 470, 474.
30. Ibid 472-473.
31. Ibid.
32. (1970) 428 F.2d. 1071, 1079. Cf. Jones v. Sheetz (1968) 242 A.2d. 208; Diamond Housing Corp. v. Robinson (1969) 257 A.2d. 492.

The Supreme Court of New Hampshire has also recognised that in today's housing market, the landlord is usually in a much better bargaining position and that this results in rental of poor housing.[33] Such considerations led to these courts to reject the rationale of the old cases and to imply a warranty of habitability.

d) The English and Commonwealth Situation

In England, the myth of freedom of contract remains the prevailing view. An authoritative work on the law of disrepair explains with misleading simplicity,

> "A contract of tenancy is prepared on behalf of the landlord in draft form and is submitted to the tenant for his approval before it is completed. It is not obligatory upon the tenant to accept the landlord's terms. He may require modification of the terms as originally drafted or, if those terms do not suit him, he may refuse to proceed further with the matter."[34]

It has only been on rare occasions that the falseness of such a legal fiction has been perceived and then mainly by non-lawyers. At the time that Sir John Romily M.R. was insisting that it was the tenant's business "to make stipulations beforehand" if he desired decent housing,[35] Sir John Simon was describing the realities of the situation, "there are landlords who deem any stye good enough for their labourer and his family, and who yet do not disdain to drive with him the hardest possible bargain for rent. It may be but a ruinous one-bedroomed hut, having no

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33. Kline v. Burns (1971) 276 A.2d. 248, 251.
34. B.W. Adkin, "The Law of Dilapidations", 6th ed. 1963 (ed. W.A. West).
35. Chappell v. Gregory (1863) 34 Beav. 250, 253, 55 E.R. 631, 632.

fire-grate, no privy, no opening window, no water supply but the ditch, no garden - but the labourer is helpless against the wrong. Even the base principle of caveat emptor is inapplicable where the prime necessaries of life are concerned and no alternative purchase can be made."[36]

In more recent years, some Commonwealth commentators have also doubted the common law assumptions, "The privileged status enjoyed by the landlord often places the tenant in an extremely difficult position. If he is a person of limited means, such as an old age pensioner, his prime requirement will be cheap accommodation. Faced with such a tenant it is not difficult for a landlord to impose his will within the lease itself. The pensioner will have little, if any, bargaining power. When housing is in short supply, statistics indicate that an unscrupulous landlord is able to rent premises in such poor condition that they ought to be a disgrace to our civilised community."[37] One of the assumptions underlying the Ontario Law Reform Commission Report on Landlord and Tenant Law, which recommended radical reforms, was quite contrary to that taken by Common Law judges; "the extent to which contractual

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36. "Seventh Report of the Medical Officer of the Privy Council" p. 12, 1864. P.P. See generally on Simon's Report Supra 63
The minority Report of the Royal Commission on Agriculture 1881 testified that, "Freedom of Contract cannot be said in any real sense to exist between the majority of Irish occupying tenants and their landlords." A letter to "The Times" Sept. 15, 1880, said with reference to the Irish tenant at will, "Freedom of contract to a man so circumstanced was not a less empty term than freedom of flight when applied to a bird whose wings are clipped." See N.D. Palmer, "The Irish Land League Crises" (1940) p. 18.

37. Nedovic and Stewart, 7 Melbourne U.L.R. 258, 262 (1969).

provisions can equalise the position of residential tenants is limited by the disparity of bargaining power between the parties."[38]

The evidence that tenancy terms are imposed and not bargained in England no less than in the United States is considerable. The tendency of some immigrant landlords to impose detailed rules upon their tenants was noted by Rex and Moore in their study of a poverty area in Birmingham.[39] Letters to "The Times" have referred to the "Landlords' Leases" used by certain large property companies even in the case of relatively well off tenants. The chairman of a Tenants' Association wrote,

> "At present a sellers' market operates and landlords are therefore able to impose 'landlords' leases' on the tenants. --- 'Landlords' leases' invariably deny tenants any control over the cost and standard of repairs and maintenance."[40]

Another correspondent, himself a landlord, found such a lease "shocking" and "monstrous".

> "It is so one-sided, so weighted in favour of the landlords, so full of pitfalls for the tenant, that in a democratic society, it should not be legally permissible."[41]

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38. "Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies", p. 11 (1968).

39. Rex and Moore, "Race, Community and Conflicts", p. 139-140, e.g. times for tenants to be in or for radios and gramaphones to be off. One Indian landlord required his tenants to sign a detailed set of rules including "the landlord has a right to make any change" over a 2d. stamp.

40. "The Times" 12 April 1972.

41. "The Times" 11 April 1972. He suggested legislative reform.

Council tenants are likewise subjected to formidable "conditions of tenancy" normally written into the rent book. In his study of Lancaster, Cullingworth points out that such conditions are generally accepted as being reasonable though 20% of tenants thought some rules were unreasonable, especially one which placed responsibility for minor internal repairs upon the tenant.[42] One term laid down by Bradford Corporation was the subject of criticism by the Director of Bradford Shelter Housing and Renewal Experiment in 1971.[43] The term purported to make the tenants entirely responsible for the cost of making good any damage to the premises or replacement of fixtures damaged or removed.[44] The wording of this term was later altered to cover only the tenant's wilful act, neglect or want of proper care.[45]

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42. J.B. Cullingworth, "Housing in Transition", 183-184, 195-196 (1963). The tenant is obliged to do interior decoration, see to fencing, electric fuses, door furniture, W.C. pans, wash-basins, broken windows etc. He notes that the rule requiring minor internal repairs had been introduced just before the date of the survey, "no doubt the complaints would have been considerably reduced had the survey been carried out later."

43. Bradford S.H.A.R.E., "The Role of a Housing Aid Service in Promoting Policy Change", p. 6 (1972).

44. To the extent that such a broad term violated the Housing Act 1961 s.32 it was not enforceable. But, of course, few tenants would have been aware of this fact.

45. Bradford S.H.A.R.E. op. cit. n.43 p. 17.

3) Related Areas of Law

a) Consumer Protection Law

In Javins v. First National Realty Corp. the United States Court of Appeal stated that its approach to the common law of landlord and tenant "ought to be aided by principles derived from the consumer protection cases."[1] After an examination of implied warranties in sales of goods cases, the court declared,

> "We believe that the consumer protection cases --- require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which these cases rest."[2]

A New Jersey Court has said of the new trend in landlord-tenant law,[3]

> "The thrust of law in this State is in the direction of consumer protection. Viewed from this aspect, Marini[4] is in the stream of thought blazed by Henningsen v. Bloomfield Motors.[5] --- Lemle v. Breeden[6] and Pines v. Perssion[7] are examples of application of this approach to landlord and tenant relations."

The analogy of the implied warranty in sale of goods cases, although only recently adopted by courts, is by no means a novel argument. In the English cases of Hart v. Windsor and Sutton v. Temple, the main argument for the tenant was based on the law to be found in such cases[8] and in Howard v. Doolittle,

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1. (1970) 428 F.2d. 1071, 1079.
2. Ibid.
3. Academy Spires v. Brown (1970) 268 A. 2d. 556, 560.
4. Marini v. Ireland (1970) 265 A. 2d. 526 supra.
5. (1960) 32 N.J. 358, 161 A. 2d. 69 - a leading case on the warranties implied in sale of chattels.
6. Supra 138
7. Supra 136
8. Infra 201

decided by the New York Superior Court in 1854, counsel for the tenant claimed the law to be anomolous, "there is no more reason why the promise of a tenant to pay rent should be enforced when the consideration for that promise has failed, than that his promise based on a sale or the use of personal property should be enforced when he has ceased to possess or use that."[9]

It is fascinating to attempt to understand why the law in these two areas ever diverged. Prior to Hart v. Windsor and the other cases of the 1840s, a number of cases had been decided which show a clear willingness on the part of some of the judges to find implied warranties as to quality in the sale of goods.[10] Jones v. Bright,[11] decided in 1829, was authority for the proposition that, if to the knowledge of the seller, the buyer required goods for a particular purpose and relied upon the seller's skill and judgement, the seller impliedly undertook that the goods were suitable for this purpose. Brown v. Edgington[12] had decided in 1841 that a supplier of

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9. (1854) 3 Dver. 464, 472. Cf. Bowles v. Mahoney (1952) 202 F. 2d. 320, 326 Brazdon J. dissenting.

10. See generally, Hamilton, "The Ancient Maxim Caveat Emptor" 40 Yale L.J. 1133, 1175-1177 (1931); Llewelyn, "On Warranty, Quality and Control", 36 Colum. L.R. 699, 719-720 (1936). The cases are collected and discussed in Llewelyn, "Cases and Materials on the Law of Sales" (1930) 270 ff. Cf. Williston, "Representation and Warranty in Sales", 27 Harv. L.R. 1 (1913). Bridge v. Wain (1816) 1 Stark N.P.C. 504, 171 E.R. 543. Shepherd v. Kain (1821) 5 B. & A. 240, 106 E.R. 1180. Parker v. Palmer (1821) 4 B. & A. 387, 106 E.R. 978. Lorymer v. Smith (1822) 1 B. & C. 1 107 E.R. 1

11. (1829) 5 Bing. 533, 130 E.R. 1167.

12. (1841) 2 Man. & Gr. 279, 133 E.R. 751.

rope was under an implied duty to warrant the fitness of the rope for the purpose for which it was to be used. The following year, Shepherd v. Pybus[13] was decided. This was another decision of the Court of Common Pleas. It related to the sale of a specific barge which proved inadequate for the buyer's purpose of carrying cement. It was decided that, though there was no warranty that the barge was fit to carry cement, there was an implied warranty that the barge was reasonably fit for use as an ordinary barge. A learned authority on the law of contract has described this as "the first case --- which clearly held that on the sale of a specific chattel, a warranty of quality might be implied without any express promise or representation by the seller."[14]

In both Sutton v. Temple[15] and Hart v. Windsor, these cases were cited by counsel for the tenant. Having shown that there was an implied warranty of fitness for purpose in the sale of specific goods, counsel in Hart v. Windsor continued,

> "Warranties of this nature run through the whole law of this country. If I insure a ship from London to Culcutta, there is an implied warranty that she is seaworthy and fit for the intended voyage. --- There is no sound distinction in this respect between real and personal property. The law is the same on the sale of a chattel and the letting of real property; and if I let a house for the purpose of habitation it is implied that I warrant that it is fit for that purpose."[16]

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13. (1842) 3 Man. & G. 868, 133 E.R. 1390.
14. Williston op. cit. n.10 at p. 1.
15. (1843) 12 M. & W. 52, 60 citing Shepherd v. Pybus, 152 E.R. 1108, 1111.
16. (1844) 12 M. & W. 69, 72, 152 E.R. 1114, 1116 citing Brown v. Edgington, Bridge v. Wain and Shepherd v. Kain.

In both cases, however, the court rejected the analogy. Having given a somewhat restricted view of the law decided in sale of goods cases, Parke B. said in Sutton v. Temple that it had "no direct bearing upon the present case".[17] His treatment of these cases in Hart v. Windsor was equally expeditious,

> "It is not necessary to refer to the cases on the implied warranty of chattels further than to say that the rule of the common law which prevails in general --- that there is no implied warranty on the sale of specific goods has had exceptions engrafted upon it. --- Such are the cases of Brown v. Edgington, Shepherd v. Pybus and others. These have no bearing on the present case."[18]

In the absence of reasons given by the court for its treatment of these cases, one can only use conjecture, but it seems very likely that an explanation of such treatment must be found in the rivalry between the three common law courts at this time. This rivalry and the difference in social philosophy revealed is truly startling. Against the cases already cited from the Courts of Common Pleas and King's Bench must be placed those from Exchequer such as Parkinson v. Lee[19] decided in 1802, Barr v. Gibson[20] and Chanter v. Hopkins[21] in 1838. These cases reveal the "anti-warranty"[22] attitude of

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17. op. cit. n.15 at p. 64, 1113.
18. op. cit. n.16 at p. 86, 1122.
19. (1802) 2 East. 314, 102 E.R. 389.
20. (1838) 3 M. & W. 389, 150 E.R. 1196.
21. (1838) 4 M. & W. 399, 150 E.R. 1484.
22. Llewelyn, 36 Colum. L.R. 699, 720 n.67 (1936).

the Court of Exchequer. For example, it was held in Barr v. Gibson that there was no implied warranty in the sale of a ship that it was in a seaworthy or serviceable condition. Karl Llewelyn noted that this attitude "had been clear and consistent for years",

> "One thing stands open to view: up to the '50s the three common law courts of England operate along strikingly diverse lines --- Each most anti-commercial decision of the period is found in the Exchequer, and none that I have found there is really forward-looking --- It is amazing to think that any lawyer could have thought all three were announcing and applying a single body of law."[23]

This would seem to explain the off-hand attitude of the court in Hart v. Windsor and Sutton v. Temple to the sale of goods cases which had been decided by the two other common law courts. One is left to wonder whether the present law as to the letting of a house would be the same if the cases of Arden v. Pullen, Sutton v. Temple and Hart v. Windsor had been decided in the Courts of King's Bench or Common Pleas.

It has been suggested that "caveat emptor ought to be abandoned in leases of reality for the identical reasons it was

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23. Ibid 719-720. Cf. Hamilton, "The Court of the Exchequer proved much the more willing to leave business to its own devices". 40 Yale L.J. 1133, 1176 (1931). For cases decided after 1844, see e.g. Omrod v. Hath (1845) 14 M. & W. 651, 153 E.R. 636; Burnby v. Bollett (1847) 16 M. & W. 644, 153 E.R. 1348. As late as 1849, Baron Parke denied that in the sale of goods, the seller impliedly undertook to transfer a good title: Morley v. Attenborough (1849) 3 Exch. 500, 154 E.R. 943.

abandoned in the sale of chattels."[24] The court in Javins v. First National Realty Corp. advanced the following comparisons and reasons,

> "The tenant must rely upon the skill and bona fides of his landlord at least as much as the car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with 'the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose'."[25]

Some commentators have applauded this reasoning as a logical extension of the consumer protection cases and the modern tendency to see the leases as essentially a sale of shelter rather than a conveyance of an estate in land.[26]

The analogy between landlord-tenant law and consumer protection has been seen by other courts and commentators as

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24. Plevan, 50 Boston U.L.R. 24, 38 (1970). Cf. Comment, 35 Ind. L.J. 361, 368-369 (1959); Comment 55 Minn. L.R. 354, 357 (1970); Greiner, 12 Vill. L.R. 631, 635 (1967); Joost, 6 New England L.R. 1, 30 (1970); Kane, 20 Cleveland-State L.R. 169, 171-172 (1971). On American consumer protection law see Uniform Commercial Code ss. 2-314 to -315 and e.g. Jaeger, "Warranties of Merchantability and Fitness For Use - Recent Developments", 16 Rutgers L.R. 493 (1962); Jaeger, "The Warranty of Habitability" 46 Chi-Kent L.R. 123, (1969), 47 Chi-Kent L.R. 1, 1-26 (1970); Leigh-Jones, "Product Liability: Consumer Protection in America", 27 Cambridge L.J. 54 (1969); Prosser, "The Implied Warranty of Merchantable Quality", 27 Minn. L.R. 117 (1943).

25. (1970) 428 F. 2d. 1071, 1079 quoting Henningsen v. Bloomfield Motors Inc. (1960) 32 N.J. 358, 375, 161 A. 2d. 69, 78.

26. Comment, 55 Minn. L.R. 354 (1970). Zenor, 56 Cornell L.R. 489, 500 (1971).

misleading. In Haliday v. Green,[27] the California District Court of Appeal distinguished the position of "a builder holding out for public use a defectively constructed building" and that of a manufacturer who places a defective product on the market. Three "inherent differences" were said to have motivated the development of separate legal principles governing liability in these two areas.

> "In the first place, the builder or contractor is seldom in a position to limit his liability by express warranties and disclaimers and thereby defeat the recovery of an occupant injured by a defective building.
>
> In the second place, it is considerably less difficult for the occupant of a building to trace the source of a defect to the builder or contractor than it is for a consumer to trace the source of a defect through the modern, complex systems of manufacture and assembly of a product and its distribution through jobbers and retailers.
>
> Third, and insofar as our case is concerned, the most important distinction lies in the opportunity to make a meaningful inspection of the retailed product as contrasted with the inspection of a building before using it."[28]

The economic differences have been noted by commentators critical of the Javins analogy. It has been said that the implication of warranties in the consumer area rests on the judgement that the financial risks associated with product defects are best allocated by imposing them on sellers or manufacturers who can absorb part of the risk themselves and pass part of it on to the consumer in the form of higher prices.

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27. (1966) 53 Cal. Rptr. 267.

28. Ibid 271.

misleading. In Haliday v. Green,[27] the California District Court of Appeal distinguished the position of "a builder holding out for public use a defectively constructed building" and that of a manufacturer who places a defective product on the market. Three "inherent differences" were said to have motivated the development of separate legal principles governing liability in these two areas.

> "In the first place, the builder or contractor is seldom in a position to limit his liability by express warranties and disclaimers and thereby defeat the recovery of an occupant injured by a defective building.
>
> In the second place, it is considerably less difficult for the occupant of a building to trace the source of a defect to the builder or contractor than it is for a consumer to trace the source of a defect through the modern, complex systems of manufacture and assembly of a product and its distribution through jobbers and retailers.
>
> Third, and insofar as our case is concerned, the most important distinction lies in the opportunity to make a meaningful inspection of the retailed product as contrasted with the inspection of a building before using it."[28]

The economic differences have been noted by commentators critical of the Javins analogy. It has been said that the implication of warranties in the consumer area rests on the judgement that the financial risks associated with product defects are best allocated by imposing them on sellers or manufacturers who can absorb part of the risk themselves and pass part of it on to the consumer in the form of higher prices.

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27. (1966) 53 Cal. Rptr. 267.

28. Ibid 271.

Some products may be forced off the market but there is a ready supply of substitute goods. It is suggested that this is not the case with housing and that landlords who are unable to pass off the cost of better housing onto other tenants will be forced out of business.[29] Moreover, the landlord and the business man may not share the same economic motivations. Because of the tight housing market, the slum landlord may not worry about the reputation of the quality of his product.[30]

Weighing up the reasons for bringing lease law into line with consumer law and the supposed justifications for the present distinction, it is submitted that English judges should adopt the consumer rationale to the law of landlord and tenant. The economic differences are not to be overlooked but such differences seem out-weighed by the justifications advanced by the Javins court for equating the positions of tenants and consumers. The "inherent differences" noted in Halliday v. Green are not convincing; the first is disproved by the widespread existence of exclusion clauses in American leases[31] and, in any event, limitation of liability would seem contrary to public policy.[32] The second reason, that it is easier for the occupant to trace the person who produced the defect, seems a strange reason for denying a cause of action; it seems to say that the law should give the occupant a right only if he is able to exercise it with

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29. Comment, 84 Harv. L.R. 729 (1971).

30. Jefferson, 6 Harv. Civil Rts - Civil Lib. L.R. 193, 199, n.54 (1970).

31. Infra 971

32. Infra 981

difficulty. Finally, the opportunity to inspect is often illusory in view of the housing shortage, the tenant must take the house with even patent defects,[33] and there is no reason to think that a house is easier to inspect than many chattels. Electrical systems and plumbing are no easier to inspect than the mechanics of a motor car. In both cases, as Javins notes,[34] the supplier's skill and good faith must be relied upon. In the law of the sale of goods, the warranties of fitness implied by the common judges[35] and now codified in the Sale of Goods Act 1893 s.14 "have virtually destroyed the force of the injunction caveat emptor".[36] It seems strange that even a sixpenny plastic catapult must be fit for its purpose[37] but that there is no common law warranty of fitness in the lease of a house that it will not fall upon the tenant.

b) The Hire of Chattels

Yet another area of the law prompted the United States Court of Appeals to find an implied warranty of habitability in Javins;[38] that relating to the hire of chattels where the

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33. Supra 143
34. Supra 204
35. Supra 200-201
36. L.C.B. Gower, 19 M.L.R. 544 (1956). He describes the contrasting attitude of the courts towards rules of real and personal property as "one of the most conspicuous features of our jurisprudence".
37. Godley v. Perry [1960] 1 A.E.R. 36.
38. (1970) 428 F. 2d. 1071, 1075.

courts had found implied warranties of quality.[39] This was another line of cases rejected by the English courts in the 1840s[40] and in later cases on leases of houses. In Francis v. Cockrell, it was said, "there is really no analogy at all between the case of a lessor and lessee of a house, and the case of one who contracts to supply a carriage".[41] The supposed factor which distinguished the two cases was the ability of the tenant to extract an express warranty as to repairs. More recently, the Supreme Court of New South Wales has likewise rejected arguments based on the hire of chattels.[42]

c) Sale of Houses

The recent trend of some American States to imply warranties of fitness into the sale of houses provided another relevant example for the law of leases to follow. Traditionally, caveat emptor applied to the sale of houses with the same rigidity as in the case of leases.[43] This rigidity was first

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39. e.g. Cintrone v. Hertz Truck Leasing (1965) 45 N.J. 434, 212 A.2d. 769. Farnsworth, "Implied Warranties of Quality in Non-Sales Cases". 57 Columbia L.R. 653 (1957).

40. Although not finding a warranty of fitness, Lord Abinger referred with approval in Sutton v. Temple to the law on the hire of chattels, "If a carriage be let for hire and it breaks down on the journey, the letter of it is liable, and not the party who hires it. So, if a party who hire anything else of the nature of goods and chattels." (1843) 12 M & W 52, 60; 152 ER 1108.

41. (1870) L.R. 5 Q.B. 500, 506.

42. Pampas v. Thanas [1968] 1 N.S.W.R. 56. For two leading cases on the hire of chattels, Yeoman Credit v. Apps. [1962] 2 Q.B. 508. Charterhouse Credit v. Tolly [1963] 2 Q.B. 683.

43. Cases collected: C.S. Patrinelis, 8 A.L.R. 2d. 218 (1949).

breached in the case of sales of uncompleted dwellings by builder-vendors.[44] It was argued that the doctrine should not apply as the purchaser had no opportunity to inspect before the sale. In more recent years, this exception has been extended to cover all sales by builder-vendors of new houses.[45] The Supreme Court of Colorado led the way with Carpenter v. Donohoe, "We hold that the implied warranty doctrine is extended to include agreements between builder-vendors and purchases for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in a workmanlike manner and is suitable for habitation."[46] The

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44. Cases collected, Annot, 25 A.L.R. 3d. 383, 415-419 (1969) e.g. Glison v. Smolenske (1963) 153 Colo. 274, 387 P.2d.260.

45. There are a great many articles on this point, the following are a selection. Bearman, "Caveat Emptor in Sales of Realty - Recent Assaults Upon the Rule", 14 Vand. L.R. 541 (1968). Dean, Case Note, 49 J. of Urban Law 195 (1971). Haskell, "The Case for an Implied Warranty of Quality in Sales of Real Property", 53 Geo. L.J. 633 (1965). Nielson, "Caveat Emptor in Sales of Real Property - Times for a Reappraisal", 10 Ariz. L.R. 484 (1968). Roberts, "The Case of the Unwary Buyer: The Housing Merchant Did It", 52 Cornell L.Q. 835 (1967). Studebaker, "Extension of Strict Liability to the Construction and Sale of Buildings in Oregan, 48 Ore L.R. 411 (1969). Young and Harper, "Quare: Caveat Emptor or Caveat Venditor", 24 Arkansas L.R. 245 (1970). See also Annot 25 A.L.R. 3d. 383 (1969).

46. (1964) 154 Colo. 78, 388 P.2d. 399 Noted Scheinblum, 45 Boston U.L.R. 289 (1965). cf. Schipper v. Levitt (1965) 44 N.J.70, 207 A.2d. 314. Waggoner v. Midwestern Dev. Inc.(1967) 154 N.W. 2d. 803 (S.D.). Humber v. Morton (1968) 426 S.W.2d. 554 (Tex). Kreigler v. Eichler Home Inc. (1969) 269 Cal. App. 2d. 224, 74 Cal. Rptr. 749. House v. Thornton (1969) 76 Wash.2d. 428, 457 P.2d. 199. Wawak v. Stewart (1970) 247 Ark. 1093, 449 S.W.2d. 922. Rothberg v. Olenik (1970) 262 A.2d. 461 (Vt) Weeks v. Slavick Buildings Inc. (1970) 384 Mich 257, 181 N.W. 2d. 271. Cochran v. Keeton (1971)252 So.2d. 313 (Ala.).

justification advanced for the new rule is that purchasers of houses are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in a bill of sale.[47] These cases on the sale of houses have been approved and relied upon by courts implying warranties of habitability. The Supreme Court of Hawaii observed in Lemle v. Breeden, "the same reasoning is equally persuasive in leases of real property".[48]

Though English courts have not gone so far as to imply a warranty of fitness in the sale of a newly completed house,[49] they have implied such a warranty in the sale of a house in the course of erection.[50] More importantly,[51] there is an old

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47. e.g. Schipper v. Levitt (1965) 207 A.2d. 314, 325-326.

48. (1969) 462 P.2d. 470, 474. cf. Javins v. First National Realty Corp. (1970) 428 F.2d. 1071, 1076. The analogy of the sale of an uncompleted house was early applied to leases: Hunter v. Porter (1904) 10 Idaho 72, 77 P.434. Hardman Estate v. McNair (1910) 61 Wash. 74, 111 P.1059. Woolford v. Electric Appliances (1938) 24 Cal. App. 2d. 385, 75 P.2d. 112. See Comment, 44 Harv. L.R. 132 (1930); Harkrider, 26 Mich. L.R. 260, 264 (1928); Josephson, 12 Wm. & Mary L.R. 580, 584-5 (1971); King, 11 Boston U.L.R. 119 (1931).

49. Hoskins v. Woodham [1938] 1 A.E.R. 692.

50. Lawrence v. Cassell [1930] 2 K.B. 83. Miller v. Canon Hill Estates Ltd. [1931] 2 K.B. 113. Perry v. Sharon Development Co. [1937] 4 A.E.R. 390. cf. Lynch v. Thorne [1956] 1 A.E.R. 744. Note, 182 L.T. 445 (1936). Gower, 19 M.L.R.544 (1956). See generally, Dworkin, 28 Conv. (N.S.) 276, 385, 478 (1964).

51. Woodfall cites Perry v. Sharon Developments and Hoskins v. Woodham as authority for the proposition that "in a lease of a dwelling house entered into while the house is in the course of erection, there is to be implied an undertaking that the house when completed shall be fit for human habitation." Woodfall, "Law of Landlord and Tenant" 27th ed. 1968, p. 657. See also Blundall, 5 Conv. 171 (1941). But both these cases concern a sale and there is no mention in the judgements of the position with respect to leases: North, 29 Conv. 207, 220 n.95 (1965).

decision which suggests that such a warranty is implied in the lease of an uncompleted house.[52] The tenant in Tildesley v. Clarkson[53] had agreed to take the lease of an unfinished house. The lease contained covenants on the part of the tenant to keep the premises in repair. Only one week after the tenant moved in, part of the ceiling fell down and other structural defects were soon observed rendering the house uninhabitable. The tenant abandoned the premises and the landlord brought an action to compel specific performance. Declining to compel the tenant to perform his obligations under the lease, Sir John Romilly M.R. said he was of the opinion that there was in such a case, "implied in the contract to finish and deliver a house to an incoming tenant, an undertaking to deliver it in complete tenantable repair, proper for houses of the character demised."[54] The decision of the Supreme Court of Alberta in Torrobain v. Ferring[55] provides additional support; that case held that a landlord who agrees to construct for the tenant's occupancy a building is bound to construct a building suitable for the purposes for which he knows the tenant intends to use it.[56]

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52. See Note, 80 Sol. J. 714 (1936).
53. (1862) 30 Beau. 419, 54 E.R. 951.
54. Ibid 426, 954.
55. [1917] 35 D.L.R. 632.
56. American cases were cited with approval.

Against these two decisions must be placed two others[57] which concerned a newly built house and a recently converted flat respectively. In these cases the courts declined to find an implied warranty of fitness though it should be noted that in neither of them was the recent construction and conversion referred to the court.

d) Housing Codes and Statutes

Those courts implying a warranty of habitability have drawn strength from the enactment of housing codes imposing a duty to repair on the landlord.[58] The Supreme Court of Wisconsin said in Pines v. Perssion that "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."[59] In Javins,[60] the United States Court of Appeals thought that the District of Columbia's Housing Code required that a warranty of habitability be implied in the leases of all housing that it covered. By signing the lease, the landlord had undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.

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57. Chappell v. Gregory (1863) 34 Beau. 250, 55 E.R. 631. Cruse v. Mount [1933] 1 Ch. 278.

58. The use of housing codes as the basis of an implied warranty of habitability has been suggested by many commentators; Allen, 20 South Carolina L.R. 282, 290 (1968). Comment, 54 Iowa L.R. 580, 589 (1969). Greiner, 12 Vill. L.R. 631, 637 (1967). Lipsky and Neumann, 44 Tulane L.R. 36, 46 (1969). Schoshinksi, 54 Geo. L.J. 519, 523-527 (1965).

59. (1961) 111 N.W. 2d. 409. Quoted with approval in Buckner v. Azulai (1967) 59 Cal. Rptr. 806. In Reste Realty v. Cooper (1969) 251 A.2d. 268, the Supreme Court of New Jersey found the argument "persuasive".

60. (1970) 428 F.2d. 1071.

This holding was also required by the purposes and the structure of the code itself.[61] It appeared to the Supreme Court of New Hampshire in Kline v. Burns that one of the factors to be considered in the appraisal of the legal principles to be applied to the present day relationship of landlord and tenant was the recognition by the legislature in the Housing Code of the need that dwellings be in a safe condition and fit for habitation.[62]

The argument has not found favour with other courts. A later decision of the Supreme Court of Wisconsin, Posnanski v. Hood,[63] must be set against the decision in Pines. In Posnanski, the tenant defended his landlord's action for rent on the basis that the housing ordinances of the City of Milwaukee were to be implied into the tenancy agreement and so imposed a warranty of habitability on the landlord. The court found for the landlord on the grounds that the statute was not intended to alter the basic landlord-tenant relationship, "the common council has indicated an intent that the housing code be enforced administratively and not by terms implied in a lease."[64]

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61. Ibid 1080-1082
reversing Saunders v. First National Realty Corp. (1968) 245 A.2d. 836 which held that "nothing in the Housing Regulations expressly or necessarily (implies) that a contractual duty is imposed on the landlord to comply with the Regulations." Tutt v. Doby (1970) 265 A.2d. 304: "there is no contractual duty on the landlord, enforceable by the tenant, to maintain the premises in compliance with the Housing Regulations." cf. Jack Spring Inc. v. Little (1972) 280 N.E.2d. 208, 217.

62. (1971) 276 A.2d. 248, 251.

63. (1970) 174 N.W. 2d. 528. Noted Hux, 1972 Urban L.Annual 245.

64. Ibid 533.

The Supreme Court of Pennsylvania held in Kearse v. Spaulding[65] that, although breach of a housing code imposing statutory duties upon the landlord might give rise to a right of action in trespass, it could not be said to be a breach of the terms and conditions of the lease.

The question whether statutes implied liability on the landlord for disrepair and general unfitness for habitation arose first in the case of those statutes passed to abolish the common law destruction of premises rule.[66] The first such statute was passed in New York in 1860.[67] It provided that where any building was "destroyed or so injured by the elements or any other cause as to be untenantable or unfit for occupancy" the tenant could surrender possession and be released from liability for future rent. By 1927, seventeen other states had passed similar statutes.[68] It was held that such statutes applied to certain unhealthy conditions; for example, noxious odours[69] and bad health conditions caused by smoke and gas[70] or continual overflowing of a toilet.[71] But they were held not to

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65. (1962) 176 A.2d. 450. cf. Thompson v. Shoemaker (1970) 7 N.C. App. 687, 173 S.E.2d. 627. N.Y. City Housing Authority v. Medlin (1968) 291 N.Y.S. 2d. 672.

66. Comment, 13 Iowa L.R. 328 (1927). Palmer and Polnaszek, 1948 Wisc. L.R. 573.

67. Ch.345 Laws of 1860, slightly modified in ch. 547 s.197 Laws of 1896. See now N.Y. Real Property Law s.227. (McKinney 1968) cf. Minn Stat. s.504.05 (1969), Ariz. Rev. Stat. Ann. s.33-343 (1956) Conn. Gen. Stat. Rev. 547-24 (1958).

68. Comment, 13 Iowa L.R. 328, 329-330 (1927).

69. Lathers v. Coates (1896) 18 Misc. 231, 41 N.Y. Supp. 373.

70. Tallman v. Murphy (1890) 120 N.Y. 345, 24 N.E. 716.

71. Van v. Rouse (1884) 94 N.Y. 401.

cover disrepair caused by wear and tear and general failure to maintain as opposed to some sudden and unexpected calamity,

> "It is claimed that the statute -- changes the common law and throws the burden of making all repairs upon the landlord. -- This statute manifestly has no reference to ordinary repairs such as the lessee at common law is bound to make. It applies only to cases where the building becomes untenantable by reason of some sudden and unexpected calamity; as where it is wholly or partially destroyed by fire, water, or by a mob or other like cause."[72]

Nor did these statutes apply to inadequate drainage,[73] dampness,[74] disease[75] or the cracking of walls.[76]

Another early type of statute which raised the question of whether an implied covenant to repair arose thereby was the "repair and deduct" statutes[77] of California,[78] Montana,[79] North Dakota,[80] Oklahoma[81] and South Dakota.[82] The California statute, first enacted in 1872, is typical,

> "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable."

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72. (1875) 42 Conn. 28, 29-30 followed in Gulliver v. Fowler (1894) 64 Conn. 556, 30 A. 852; Lessor v. Kline (1925) 101 Conn. 746, 127 A. 279; and see Suydan v. Jackson (1873) 54 N.Y. 450; Huber v. Ryan (1899) 56 N.Y. Supp. 135.

73. Bonn v. Watson (1889) 4 N.Y. Supp. 872.

74. Truesdall v. Booth (1875) 4 Han. 100.

75. Edwards v. McLean (1890) 25 N.E. 483.

76. Oakley v. Loening (1894) 28 N.Y. Supp. 735. See generally Annot, 4 A.L.R. 1453, 1465 (1919).

77. Infra 523

78. Cal. Civil Code Ann. s.1942.

79. Mont. Revised Code Ann. ss42-201, 42-202 (1947).

80. N.D. Century Code ss.47-16-12, 47-16-13.

81. Okla. Stat. Ann. tit. 41 ss.31, 32 (1954).

82. S.D. Code ss. 38.0409, 38. 0410.

It was held that the section did not imply a covenant to repair[83] nor an implied warranty of habitable condition.[84] The recent decision of the Supreme Court of California in Buckner v. Azulai[85] that the common law rule of no implied warranty was inconsistent with legislative policy would seem to have overruled the early cases in that state.

The question has arisen in English law whether the Rent Acts can be said to have implied a duty to repair upon the landlord. Section 2(1) of the Increase of Rent etc. (Restrictions) Act 1920 provided that the landlord could recover a higher rent if he was responsible for repairs and section 2(5) stated "the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability". If a landlord did increase the rent to that which he could legally recover only if he was responsible for repairs, did this mean he had covenanted to repair? The Court of Appeal divided on this issue in Morgan v. Liverpool Corp.,[86] the majority[87] deciding there was no such

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83. Van Every v. Ogg (1881) 59 Cal. 563; Green v. Redding (1891) 92 Cal. 548, 28 P. 599. Cf. Bush v. Baker (1915) 51 Mont. 326, 152 P.750.

84. Angevine v. Knox Goodrich (1892) 31 P. 539 (Cal.) Cf. Ewing v. Cadwell (1925) 121 Okla. 115, 247 P.665.

85. (1967) 59 Cal. Rptr. 806 supra
A lower court in a 1968 decision is reported to have "apparently accepted plaintiff's contention that the landlord's duty to repair is contractual as well as statutory": Silas v. Smith (1968) 15 Welfare Law Bulletin 18.

86. [1927] 2 K.B. 131.

87. Lord Hansworth M.R. and Lord Justice Atkin. Lord Justice Lawrence dissented: ibid 153.

covenant,

> "I cannot think that the Act of Parliament in those terms, for the first time in 1920, was doing something to the effect of imposing a statutory obligation in excess of the existing obligation or existing contracts of tenancy upon a landlord towards the tenant."[88]

Though, as noted by one of the judges in the majority,[89] this conclusion was obiter and could not be said to be authoritative. But it was followed a few years later by Lord Goddard in the King's Bench Division in Wilchick v. Marks & Silverstone[90] and again by the King's Bench Division in Johnson v. London & Westcliffe Properties Ltd.[91] Obiter dicta and two High Court decisions are perhaps not sufficient to say that the law is beyond doubt[92] but, in any event, the point is academic because the relevant wording does not re-appear in the Rent Act 1968.[93]

The Irish case of Hildige v. O'Farrell[94] raised the question whether the provision in the Public Health Act allowing an individual to make complaint that premises are in such a state as

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88. [1927] 2 K.B. 131, 149. Cf. Lord Hansworth M.R. ibid 139-140.

89. Lord Justice Atkin ibid 144.

90. (1934) 50 T.L.R. 281, Lord Goddard noted that the opinions expressed in Morgan were not technically binding on him though he thought it was clearly his duty to follow them.

91. [1954] J.P.L. 360.

92. But see Woodfall (27th ed.) Vol. 1, p.656.

93. Though Schedule 9, para. 1 clearly assumes that the landlord will be responsible for repairs other than internal decorative repairs unless the tenant is responsible. Magnus, "The Rent Act 1968", p. 183.

94. (1880) 6 L.R. Ir. 493.

to constitute a statutory nuisance[95] implied any covenant of fitness upon the landlord. It was held that the effect of the section was not to impose a statutory duty on the owner of the premises to keep them in a sanitary condition or so as not to be a nuisance. The section merely provided a remedy for the abatement of the nuisance and so did not enable the tenant to counterclaim damages for breach of such duty in an action for rent.

The Canadian case of Karasevich v. Birboim decided by the Manitoba Court of Appeals in 1957 rejected a similar argument,

> "It was further argued that -- the Winnipeg Charter -- and the by-laws and regulations passed pursuant to (it) applied in this case. I find the said section and the by-laws and regulations published pursuant to it were intended for the benefit of the public at large, and not for a particular class. Such section and by-law confer no rights enforceable by an action against a party committing a breach of it."[96]

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95. See now Public Health Act 1936 s.99, infra 651
96.

4) Practical Reasons

Practical reasons were said to justify the common law rule relating to destruction of premises. The Maryland Court of Appeal expressed the view in 1819 that "it is better -- every lessee should be made to feel it his interest to preserve the premises entrusted to his care, than the landlords (who being out of possession, and not in a situation to protect their property) should be at the mercy of their tenants."[1] Chancellor Kent agreed with this view, "there is much weight in the observation -- that these losses by fire may often proceed from the carelessness of tenants, and if they can escape from the rent, which they may deem inconvenient, by leaving the property carelessly exposed, it might very much lessen the inducements to a reasonable and necessary vigilance on their part."[2] It was said in Baker v. Holtpzaffell[3] that the defendant might have rebuilt at any period of time whereas the landlord would have been a trespasser if he had entered for that purpose.

Practical difficulties were also relied upon to justify the refusal of the courts to imply warranties of fitness and repair. During argument in Arden v. Pullen, Baron Alderson asked counsel for the tenant,"If you take a house in one of the hundreds of Essex, where the country is very damp and marshy, may you go away

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1. Wagnar v. White (1819) 4 Harris & Johnson 564, 566.
2. 3 Kent Commentaries 467. cf. Harkrider, 26 Mich. L.R. 260, 383 (1928).
3. (1811) 4 Taunt 45, 128 E.R. 244. cf. Graves v. Berdan (1863) 26 N.Y. 498, 500.

and quit the house if you have the ague? and yet that would seem to follow from this argument."[4] In his judgement in Sutton v. Temple, Baron Rolfe gave three examples of the "inconvenience" of the implied condition doctrine,

> "Suppose, for instance a new sort of manure was used, which, although it might be beneficial for a time, and under certain circumstances, was afterwards found to be injurious and to render the grass harsh and unwholesome ---
>
> --- if a man took on a building lease, and it were long afterwards discovered that there was a running sand underneath, which could not be removed but at ruinous expense, it is nevertheless to be presumed in such a case, according to the argument, that there was to be an implied warranty that there was no running sand at that particular place, and the lessor must be held responsible.
>
> Another case may be supposed, where the party takes a house for the purpose of converting it into a hospital, if it should turn out to be in such an unwholesome situation as to render it unfit for that purpose, could it be said that the premises were let to him under an implied warranty that it should be fit to be converted into a hospital, and could this be any justification for his refusing to fulfil his contract by payment of rent?"[5]

Baron Parke was especially concerned about the effect of any implied warranties of fitness and repair on the letting of farms. He painted an alarming picture in Sutton v. Temple,

> "If (a demise) included any such contract as is now contended for, then, in every farming lease, at a fixed rent there would be an implied condition that the premises were fit for the purpose for which the tenant took them, and it is difficult to see where such a doctrine would stop. --- No doubt it is a hard case on the defendant, but we must not allow considerations of that kind to pursuade us to introduce into the law an alteration of which we cannot foresee the consequences, by which the mere demise of a farm would carry with it an implied condition that the land was fit for the purpose for which the tenant took it."[6]

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4. (1842) 10 M. & W. 322, 325-326, 152 E.R. 492, 494.

5. (1843) 12 M. & W. 52, 66-67, 152 E.R. 1108, 1113-1114.

6. Ibid 65, 1113.

And in Hart v. Windsor he said,

> "Though in the case of a dwelling house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes - for building upon, or for cultivation and there would be no limit to the inconvenience which would ensue."[7]

Other cases have added to the supposed practical difficulties of implying covenants of fitness. Counsel for the landlord argued in Gott v. Gandy, "the law cannot imply any such duty, as the lessor cannot enter on the demised premises during the term without being a trespasser."[8] Counsel for the landlord in Hart v. Windsor had advanced another argument, "it is notorious that ruinous and untenantable houses are constantly let to tenants at reduced rents, in order that they themselves may repair them, and re-edify them for their own profit and advantage."[9] This view was taken up by Maughan J. in Cruse v. Mount,

> "In regard to an unfurnished house, for the reasons given in the case of Hart v. Windsor including[10] the obvious reason that unfurnished houses are constantly let in a very bad state (the state of repair being one which is reflected in the rent), it has been held that there is no such condition or warranty."[11]

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7. (1844) 12 M. & W. 69, 88, 152 E.R. 1114, 1122.
8. (1853) 2 EC & Bl. 845, 118 E.R. 984. Lord Cambell C.J. replied, "If the law obliged him to repair, probably it would give him a right to enter for that purpose." Though this case concerned a business tenant, the argument is equally relevant for residential tenants. But see Suydom v. Jackson (1873) 54 N.Y. 450, 454 Supporting "trespasser" rationale.
9. (1844) 12 M. & W. 69, 82, 152 E.R. 1114, 1120.
10. It should be noted that the court itself is not reported as having advanced this argument.
11. [1933] 1 Ch. 278, 282.

It has been said that because of the tenant's close contact with the premises he should know what and when repairs were needed, and in cases of emergency slight effort on his part could frequently save the landlord from great loss.[12]

One of the reasons advanced by courts implying a warranty of habitability is that it is no longer practical to expect the tenant to do repairs. The court noted in Javins that the old common law rules were "perhaps well suited to an agrian economy -- the tenant farmer was fully capable of making repairs himself.[13] But these historical facts had changed,

> "Today's city dweller usually has a single, specialised skill unrelated to maintenance work; he is unable to make repairs like the 'jack of all trades' farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property."[14]

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12. Felix v. Griffiths (1897) 45 N.E. 1092. Harkrider, 26 Mich. L.R. 260, 383 (1928).

13. (1970) 428 F. 2d. 1071, 1077. It has also been observed that the necessary materials for repair would be simple and at hand: 1 Am. Law of Property p. 347.

14. Ibid 1078. cf. Lemle v. Breedon (1969) 462 P. 2d. 470, 473. Kline v. Burns (1971) 276 A. 2d. 248, 250-251.

As one commentator has written, the common law rule seems completely out of harmony with the facts when applied to urban dwellings occupied by persons on salary or weekly wages; "Common experience indicates that the tenant in such cases seldom makes or is expected to make repairs."[15]

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15. 1 American Law of Property 347-348. cf. American Bar Foundation; "Model Residential Landlord-Tenant Code" p.6: "The urban dweller cannot work on his own electrical system beyond replacing fuses and light bulbs; he cannot repair his own furnace; he can hardly work on his own plumbing. Specialists are needed for these functions."

5) Considerations of Justice

The destruction of premises rule has been explained on the grounds either that it accords with the demands of Justice or that, in any event, there is no more Justice that the loss be borne by the landlord rather than the tenant. The view was taken in the English case of Paradine v. Jane decided over three centuries ago and the American case of Pollard v. Shaaffer decided almost two hundred years ago that since the tenant "was to have the advantage of casual profits, he ought to run the hazard of casual losses during the term."[1] In rejecting relief to the tenant under the law of Equity, Chief Baron Macdonald said in Hare v. Groves,

> "By the misfortune which has happened, both these parties are damnified. The lessee is owner of the house during the lease, the lessor after its expiration; by the fire each loses his interest in it, what equity is there to throw the whole of the burden upon one of the parties, whose equity is certainly equal to that of the other? --- the equity of the parties is equal, and the rule of law must prevail."[2]

The Maryland Court of Appeals in Wagner v. White went further and suggested that "it would be a greater hardship on lessors if the law were otherwise."[3] Pleas by counsel that "it is unjust that the tenant should pay rent for a house which does not exist"[4] fell on barren ground.[5]

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1. (1647) Aleyn 26,
   (1787) 1 Dallas (Pa) 210, 215.
2. (1796) 3 Anst. 687, 699, 145 E.R. 1007, 1010-1012.
3. (1819) 4 Harris & Johnson 564, 566.
4. Hare v. Groves supra at 692, 1009.
5. See also plea by tenant's counsel in Mark v. Cooper (1727) 2 Ld. Raym 1477, 92 E.R. 460, "it would be extremely hard to make him pay rent for the time he could have no enjoyment, nor use, nor benefit of them".

This view of Justice was by no means universal and even some of the judges applying the rule expressed their doubt.[6] "All thought it was good equity and reason to apportion the rent" in Taverner's case.[7] The common law has sometimes been applied with apologies, as in this early American case,

> "This is a hard case upon the defendant, and if the court could, consistently with settled and established principles, relieve him against the payment of the rent in question, we would most willingly do it. But it cannot be done, without overturning a series of decisions to which this court is bound to conform."[8]

Another early American case suggested that it appeared to be a principle of natural law that the tenant should not be liable.[9] At one time, it seemed that the English Courts of Equity would be prepared to give relief.[10] In Brown v. Quilter, Lord Northington declared, "the justice of the case is so clear that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am much surprised it should be looked upon as so clear a thing that there should be no defence to such an action at law."[11]

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6. Comment, 11 Va. L.R. 56, 59 (1926).
7. (1544) 1 Dyer 56a, 73 E.R. 123.
8. Hallet v. Wylie (1808) 3 Johns (N.Y.) 44.
9. Gates v. Green (1834) 4 Paige Ch. (N.Y.) 355.
10. Williston, 9 Harv. L.R. 106, 125 (1895).
11. (1764) Amb. 619, 621, 27 E.R. 402. See also Harrison v. North (1667) 1 Ch. Cas. 83, 22 E.R. 706; Cambden v. Morton cited (1787) 1 T.R. 705, 99 E.R. 1332; Steele v. Wright (1773) cited ibid. These cases were later distinguished, Hare v. Groves supra. Leeds v. Chatham (1827) 1 Sin 146, 150 57 E.R. 533 cf. U.S. cases: Redding v. Hall (1809) 1 Bibb (Ky) 536; Hicks v. Parham (1817) 3 Haywood (Ten) 224.

The rules relating to implied fitness have usually been seen as a necessary hardship on the tenant. This is clear from these words of Lord Abinger C.B. in Sutton v. Temple,

> "It is no doubt a case of considerable hardship on the defendant but we must decide with reference to general principles of law and not upon the hardship of any particular case."[12]

Baron Parke agreed,

> "No doubt it is a hard case on the defendant but we must not allow considerations of that kind to persuade us to introduce into the law an alteration of which we cannot foresee the consequences."[13]

Though by Hart v. Windsor, his sympathy had slightly diminished; he was only prepared to say that "there is no apparent injustice" in inferring an implied warranty of fitness in residential lettings.[14] When Maugham J. extended the rules to lettings of flats in Cruse v. Mount,[15] he did so without any enthusiasm for their justice.[16] This belief in the rules as unavoidable although causing hardship was recently repeated by Lord Evershed M.R. in Penn v. Gatenex,

> "The result is no doubt a hard one for the plaintiffs and I reach with some regret a conclusion which may be said in modern conditions to reflect a blemish in the law of landlord and tenant. But sympathy for the plaintiffs is, I fear, no safe guide to legal conclusions, particularly for conclusions in the long established law relating to landlord and tenant."[17]

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12. (1843) 12 M. & W. 52, 63, 152 E.R. 1108, 1112.
13. Ibid 65, 1113.
14. (1844) 12 M. & W. 69, 88, 152 E.R. 1114, 1122.
15. [1933] 1 Ch. 278.
16. Ibid 283.
17. [1958] 1 A.E.R. 712, 717. cf. St. George Mansions v. Hetherington [1918] 41 D.C.R. 614, 616 in which Ontario Supreme Court observed that the land was "not entirely free from fault" whilst tenant was not at fault. In Smith v. Gallin [1956] 3 D.L.R. (2d) 302, 305, the Ontario Court of Appeals dismissed the landlord's plea for costs.

The view taken by the recent American cases imposing a duty to repair on the landlord is that such a duty is more in accord with the requirements of Justice. It has been pointed out that he is more likely to have knowledge of the conditions of the premises than the tenant.[18] Furthermore housing code requirements and violations are usually known or made known to the landlord,

> "It follows that the landlord is in a better position to know of latent defects -- which might go unnoticed by the tenant who rarely has sufficient knowledge or expertise to see or discover defects in wiring, fusing, or venting of gas appliances or furnaces."[19]

Another suggested reason for the justice of the new rule is that it is the landlord who will retain ownership of the premises and enjoy the benefit of any permanent improvements. Therefore, he should be the one to bear the cost of such improvements.[20] Again, it has been suggested that the new rule corresponds with what the parties, "as fair and reasonable men, presumably would have agreed on."[21] In reviewing such factors, the Supreme Court of New Jersey has said,

> "It is eminently fair and just to charge a landlord with the duty of warranting that a building or part thereof rented for residential purposes is fit for that purpose at the inception of the term, and will remain so during the entire term."[22]

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18. Reste Realty Corp. v. Cooper (1969) 251 A.2d. 268, 272. Kline v. Burns (1971) 276 A. 2d. 248, 251.

19. Kline v. Burns op. cit. n.18 at 251.

20. Javins v. First National Realty Corp. (1970) 428 F. 2d. 1071, 1078-9. Kline v. Burns op. cit. n.18 at 251.

21. Marini v. Ireland (1970) 265 A. 2d. 526, 533.

22. Ibid 534.

1) Furnished Premises.

Origin of the Rule

The rule that in the letting of a furnished house there is an implied warranty that the house is reasonably fit for habitation has a rather complex origin.

Much of the development of the rule regarding furnished houses shows a tendency on the part of the judges to restrict the scope of this exception to caveat emptor, this tendency can be seen in the early development of the rule. Edwards v. Etherington[1] (1825), Salisbury v. Marshal[2] (1829) and Collins v. Burrows[3] (1831) were authorities for the proposition that in the letting of any house, furnished or unfurnished, the landlord impliedly covenanted that they were fit for human habitation both at the commencement and during the term.[4] The case of Smith v. Marrable[5] can be seen as another case on the same lines.

In Smith v. Marrable, a tenant had entered into occupation of a furnished house let for a period of five weeks. Finding that the house and furnishings were infested with bugs, he left at the end of one week and refused to pay rent for the rest of the term. The Court of Exchequer rejected the landlord's action for the balance of the rent. Giving a judgement in which Barons Alderson and Gurney concurred, Parke B. referred to Edwards v. Etherington and Collins v. Barrow and continued,

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1. (1825) Ry. & M. 268, 171 E.R. 1016.
2. (1829) 4 Car. & P. 65, 172 E.R. 609.
3. (1831) 1 M. & Rob. 113, 174 E.R. 38.
4. Supra 106-107
5. (1843) 11 M. & W. 5, 152 E.R. 693.

"These authorities appear to me fully to warrant the position, that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises are free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state."[6]

It will be seen that Parke B.'s words are wide enough to cover both furnished and unfurnished premises. Lord Abinger C.B. did, however, refer to the fact that the particular demised premises in question were a furnished house,

"A man who lets a ready furnished house surely does so under the implied condition or obligation - call it what you will - that the house is in a fit state to be inhabited."[7]

Yet it does not appear that he was restricting the doctrine of implied warranties to furnished premises alone. He made no express reference to unfurnished premises but was glad that authorities could be found to support his view.[8] These authorities are presumably those given by Parke B. and these concerned not furnished but unfurnished houses.

The origins of the rule for furnished premises are to be found in the attempt by later courts to restrict the decision in Smith v. Marrable (which was applicable to both furnished and unfurnished premises) to furnished premises alone. Sutton v. Temple,[9] decided by the Court of Exchequer also in 1843, commenced this process of erosion. Lord Abinger C.B. began his judgement with praise of Smith v. Marrable, "I entirely approve of the decision to which we came in that case", and then proceeded to restrict its scope by confining it to furnished

6. Ibid 8, 694.
7. Ibid 9, 694.
8. Ibid.
9. (1843) 12 M. & W. 52, 152 E.R. 1108.

lettings alone and even then he wondered if it would apply where the tenant could have inspected the house. Baron Parke likewise distinguished the case. Gurney B. had more doubt and felt some difficulty, it was not easy to distinguish the case before him from Smith v. Marrable, but, reluctantly, he concluded that, "it may admit of some distinction".[10] Barone Rolfe also felt a certain difficulty but he was less hesitant,

> "I think it is very probable that the two cases may be so distinguished; but, if not, I should prefer at once to overrule (Smith v. Marrable), than to follow it in the present case."[11]

In Hart v. Windsor, Baron Parke, giving the judgement of the court, felt under no necessity to decide whether Smith V. Marrable was still law or not and continued,

> "It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself but more fully in that of Sutton v. Temple; for it was the case of a demise of a ready furnished house for a temporary residence at a watering place. It was not a lease of real estate merely."[12]

The rule relating to furnished houses can thus be said to have rather unhappy origins. It is, in fact, all that remains of a much wider common law rule which was demolished by the Court of Exchequer in Sutton v. Temple and Hart v. Windsor.[13]

The Development of the Law

In Hart v. Windsor Barone Parke had left open the question whether Smith v. Marrable was good law or not but later cases have affirmed that

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10. Ibid 66, 1113.
11. Ibid 67, 1114.
12. (1843) 12 M. & W. 69, 87, 152 E.R. 1114, 1122.
13. See further, supra 110-111.

decision in its application to furnished houses. Lord Cockburn C.J. was of opinion in Campbell v. Lord Wenlock,[14]

> "that, upon principles of law, there was an implied contract that a furnished house let for present occupation, should be fit for such occupation."[15]

and gave judgement for the tenant in an action by the landlord for rent, the tenant having been forced to abandon the premises owing to the presence of bugs. But even as late as 1877, in Wilson v. Finch Hatton,[16] counsel for the landlord contended that Smith v. Marrable was not good law and had been overruled by Hart v. Windsor. The Court of Exchequer rejected this contention and held, in the words of Kelly C.B.,

> "that, both on the authority of Smith v. Marrable and on the general principles of law, there is an implied condition that a furnished house shall be in a good and tenantable condition, and reasonably fit for human occupation from the very day on which the tenancy is dated to begin."[17]

Therefore, in this action by the landlord for rent, the court gave judgement for the tenant.

Since Wilson v. Finch Hatton, it has not been seriously doubted that, in the case of a furnished house, the tenant is entitled to repudiate the tenancy agreement if, at the commencement of the lease, the premises are unfit for human habitation. The Queen's Bench Division applied this rule in 1884 in deciding Bird v. Lord Greville,[18] where the tenant had repudiated the contract on account of the presence of measles. The following year, the Chancery Division in Chester v.

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14. (1866) 4 F. & F. 716, 176 E.R. 760.
15. Ibid 734, 768.
16. (1877) 46 L.J.Q.B. 489, 2 EX. D. 336.
17. (1877) 2 EX. D. 336, 343.
18. (1884) Cab. & E. 317.

Powell was prepared to accept the general rule though it imposed a severe restriction as regards fitness during the term.[19]

Collins v. Hopkins[20] was decided by McCardie J. in 1923. The rule was regarded as well-established and just. The tenant had repudiated the agreement when he discovered that the house was infected by pulmonary consumption. Although the tenant contended that there was an express warranty of fitness, the learned judge did not even consider the point fully but decided on the basis of breach of an implied term of fitness. Having reviewed the authorities, he concluded,

> "The result of the decisions as a whole seem to be that there is an absolute contractual warranty in the nature of a condition by the person who lets a furnished house or lodging to the effect that the premises and furniture are fit for habitation."[21]

He was much in favour of such a warranty,

> "Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted."[22]

The doctrine in Smith v. Marrable was again approved in a dictum in Cruse v. Mount[23] decided by the Chancery Division in 1933.

It has also been held that the tenant may sue in the event of breach of the implied covenant. The tenant in Charsley v. Jones[24] contended that, as a result of the defective drains in the furnished

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19. (1885) 52 L.T. 722, on restriction see infra 243
20. [1923] 2 K.B. 617.
21. Ibid, 620.
22. Ibid.
23. [1933] 1 Ch. 278 per Maughan J. at p. 281-282.
24. (1889) 5 T.L.R. 412.

house rented by him from the defendant, his family and servants had suffered from typhoid. Summing up to the jury, Mainstry J. said that if the defendant had breached his implied warranty as to fitness, the plaintiff was entitled to a verdict for the rent and such other expenses as he was put to. In Vincent-Baxendale v. Kinber,[25] the tenant was awarded £60 damages for breach of the implied warranty on his counter-claim to the landlord's action for rent. Collins v. Hopkins was an example of a tenant successfully both repudiating the agreement and receiving damages. Dicta in Sarson v. Roberts[26] and Harrison v. Malet[27] provide further support for the tenant's right to damages.

The Weight of the Authorities

As in the case of the common law rules relating to unfurnished premises,[27a] authority for the landlord's duty of fitness with respect to furnished premises is not all that strong. Two Exchequer Court decisions,[27b] three first instance decisions[27c] and dicta[27d] support the tenant's right to repudiate the contract on the landlord's breach. Whilst the proposition that the tenant may recover damages for breach rests upon three High Court[27e] decisions and some more dicta.[27f]

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25. "The Times" June 13th 1918.
26. [1895] 2 Q.B. 395 at p. 397 per Kay L.J.
27. (1886) 3 T.L.R. 58 per Stephen J.
27a. Supra 224
27b. Smith v. Marrable, Wilson v. Finch-Hatton supra.
27c. Cambell v. Wenlock, Bird v. Lord Greville, Collins v. Hopkins supra 231-232
27d. Supra 232
27e. Charsley v. Jones, Vincent-Baxendale v. Kinber, Collins v. Hopkins supra.
27f. Supra.

Commonwealth Law

Some additional support for the rule now under discussion can be gained from decisions in Commonwealth Courts and, in particular, from Canadian cases.[28]

The Divisional Court of Ontario applied the rule to the case of Gordon v. Goodwin[28a] decided in 1910. The defendant-tenant resisted the landlord's action for rent on the grounds that the house was insanitary. This defence was accepted by the court which pointed out,

> "There is no doubt as to the law. Upon the letting of a furnished house, there is an implied undertaking that the house is reasonably fit for habitation; and if from any cause this is not the case, the tenant is justified in repudiating the tenancy: Wilson v. Finch Hatton."[29]

Davey v. Christoff[30] came before the Supreme Court of Ontario in 1916. Although it concerns the demise of a cinema it is relevant because the court was only prepared to allow the tenant to repudiate on the basis that the demise resembled in its essential features that of a furnished house. The British Columbia Supreme Court recognised the validity of the rule in Kelpon v. Stewart[31] and Boyd v. Dickinson[32] but did not think it applied to the facts of those cases. A similar conclusion was reached by the Manitoba Court of Appeals in Karosewich v. Birboim[33] in 1957.

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28. Williams, "Notes on the Canadian Law of Landlord and Tenant", 3rd ed. 1957 at 362-364.

28a. (1910) 15 O.W.R. 215, 20 O.L.R. 327. cf. Brymer v. Thompson (1915) 23 D.L.R. 840, aff'd. 25 D.L.R. 831.

29. (1910) 20 O.L.R. 327, 330.

30. (1916) 36 O.L.R. 123, 28 D.L.R. 447.

31. [1929] 1 D.L.R. 480.

32. [1930] 2 D.L.R. 96.

33. [1957] 23 W.W.R. 192, 12 D.L.R. 198.

The Supreme Court of New South Wales considered the rule in the 1967 case of Pampis v. Thanos.[34] The tenant brought an action against the landlord for breach of the implied warranty when his wife was electrocuted by the defective handle of a refrigerator. For reasons which will be discussed later,[35] the court rejected his action. It did, however, note that,

> "In the case of a lease of a furnished dwelling --- it is implied that the premises are reasonably fit for habitation at the commencement of the tenancy; Smith v. Marrable, Wilson v. Finch-Hatton --- The implication is that the premises shall be fit for habitation at the commencement, so that if it is not fulfilled on the day when the lease commences the lessee may rescind."[36]

The United States

Most American courts have either rejected the decision in Smith v. Marrable or have distinguished it.[37] The New Hampshire case of

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34. (1967) 69 S.R. (N.S.W.) 226. (1968) 1 N.S.W.R. 56, 87 W.N.(Pt.2) 161.

35. Infra p247

36. (1967) 69 S.R. (N.S.W.) 226, 229.

37. On the American Law, see
49 Am.Jur. 2d s.770 at p. 710-711. 1 Amer. Law of Property (Casner ed. 1952) s.3.45 at p.268. Annot, 4 A.L.R. 1453, 1456 (1919). Annot, 139 A.L.R. 261 (1942). Becker, 4 Wisc. L.R. 489, 490 (1926). Blowie, 33 Conn. Bar. J. 55 (1959). Chmielinski, 46 Marquette L.R. 630 (1962). Comment, 16 Columbia L.R. 609 (1916). Comment, 17 Columbia L.R. 251 (1917). Comment, 9 Harv. L.R. 289 (1895). Comment, 37 Harv. L.R. 896 (1923), Comment, 35 Indiana L.R. 361 (1959). Comment, 17 Iowa L.R. 543 (1931). Comment, 16 Mich.L.R. 50 (1917). Comment, 22 Mich. L.R. 847 (1923). Comment, 23 St. John's L.R. 357 (1949). Comment, 66 U.Pa. L.R. 83 (1917). Comment, 90 U. Pa. L.R. 859 (1941). Comment, 3 U. Richmond L.R. 322 (1969). 51 C C.J.S. s.305 at p. 778-779. Harkrider, 26 Mich. L.R. 260, 279-284 (1928). Howell, 21 Arkansas L.R. 445 (1968). Josephson, 12 Wm. and Mary L.R. 580, 582-584 (1971). Klinek, 19 De Paul L.R. 619, 623-632 (1970). Krohn, 6 Boston U.L.R. 69 (1925). Stein, 32 Marquette L.R. 292 (1949).

Davis v. George[38] reflects the attitude of many courts,

> "A broad distinction --- is suggested between the lease of a furnished and a lease of an unfurnished house, which on principle is not apparent. --- Want of repair, and structural defects in the house, do not depend upon the furnishings; and there is no more reason why a landlord should bind himself by a warranty against such imperfections in a lease of a furnished house, than there is in a lease of an unfurnished house. To hold that such a warranty is implied in one case and not in the other would introduce an arbitrary distinction not based on any apparent practical reason, and not within the contemplation of the parties to such contracts."

In Murray v. Albertson,[39] the New Jersey Court of Errors and Appeals distinguished Smith v. Marrable on the basis that the defect complained of was not in the furniture but in the house itself.[40] A recent decision of the Supreme Court of Rhode Island[41] also declined to follow the English cases. Such cases have led one American writer to conclude that, "the doctrine of Smith v. Marrable was none too kindly received in this country."[42]

One or two States have long followed the Smith v. Marrable doctrine. The leading case is Ingalls v. Hobbs[43] decided by the Supreme Judicial

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38. (1892) 67 N.H. 393, 39 A. 979.

39. (1888) 50 N.J.L. 167, 13 A. 394 infra
cf. Naumberg v. Young (1882) 44 N.J.L. 345.

40. The decision in Wilson v. Finch-Hatton supra. was disapproved.

41. Zatloff v. Winkleman (1960) 158 A. 2d. 874.

42. Comment, 17 Iowa L.R. 543, 544 (1932). See also Carson v. Godley (1856) 26 Pa. 111, 67 Am. Dec. 404. Fisher v. Lighthall (1885) 4 Mackay (D.C.) 82. Rubens v. Hill (1904) 115 Ill. App. 565. Cases collected 49 Am. Jur. 2d. s.770 at p. 711. Annot, 4 A.L.R. 1453, 1456 (1919). 51C C.J.S. s.305 at p. 778.

43. (1892) 156 Mass. 348, 31 N.E. 286.

Court of Massachusetts in 1892. The tenant had repudiated the lease of a furnished house upon discovering it to be infected with bugs. After a review of the English authorities and supporting dicta in American courts, the court gave judgement for the tenant on the basis "that in a lease of a completely furnished dwelling house for a single session at a summer watering place there is an implied agreement that the house is fit for habitation." This case has been applied in subsequent Massachusetts cases[44] though the courts have been hesitant in extending it. It was said in Hacker v. Nitschke[45] that Ingalls v. Hobbs was a departure from the general rule and "should be confined within narrow limits", and in Boileau v. Traiser[46] the court said that the Ingalls case is "limited very carefully to its particular facts".[47]

The Supreme Judicial Court of Maine approved Ingalls in Young v. Povich[48] and held that in the lease of a furnished house for a short time there is an implied warranty that the dwelling is reasonably suitable for use and occupation.

The decisions of New York courts are in conflict. Howard v. Doolittle[49] decided in 1854 criticised Smith v. Marrable and the

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44. Boileau v. Traiser (1925) 253 Mass. 346, 148 N.E. 809.
Chelefon v. Springfield Inst. (1937) 297 Mass. 236, 8 N.E. 2d 769.
Hacker v. Nitschke (1942) 310 Mass. 754, 39 N.E. 2d 644.
Akarey v. Cabonaro (1946) 320 Mass. 537, 70 N.E. 2d 418.
Davenport v. Squibb (1947) 320 Mass. 629, 70 N.E. 2d 793.
Legere v. Assetta (1961) 342 Mass. 178, 172 N.E. 2d 685.
Horton v. Marston (1967) 225 N.E. 2d 311.

45. Supra n.44.

46. Supra n.44. Comment, 6 Boston U.L.R. 69 (1925).

47. The recent case of Horton v. Marston shows the court taking a more adventurous approach infra 244

48. (1922) 121 Me. 141, 116 A. 26.

49. (1854) 3 Dver. (N.Y.) 464.

English case was distinguished in Franklin v. Brown[50] in a fashion which suggested disapproval. However, in Morgenthau v. Ehrich,[51] the tenant of a furnished house was held entitled to abandon the premises when he found them to be overrun with bugs. The court said it was unable to find New York decisions which repudiated the English rule. This decision was followed soon after in Bartindale v. Adams.[52]

California has held the landlord of a furnished apartment to be under a duty of fitness.[53] The tenant in Fisher v. Pennington[54] was injured by a defective bed provided by the landlord. Finding the landlord liable, the court said that "in the renting of a furnished apartment there is an implied warranty that the furniture is fit for use or occupation."[55] This case was followed in a similar case[56] but later decisions disapproved of the broad language used in the Fisher case on the grounds that it would make the lessor of furnished premises a virtual insurer of the tenant.[57] One commentator was led to the conclusion that because of these later cases, "the use of the

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50. (1889) 118 N.Y. 110, 23 N.E. 126.
51. (1912) 77 Misc. 139, 136 N.Y. Supp. 140.
52. (1912) 136 N.Y. Supp. 142.
53. Annot, 139 A.L.R. 261, 263 (1942).
    Blawie, 33 Conn. Bar. J. 55, 60-61 (1959).
54. (1931) 116 Cal. App. 248, 2 P. 2d 518.
55. (1931) 2 P. 2d 518, 520.
56. Shattuck. v. St. Francis Hotel (1936) 7 Cal. 2d 358, 60 P.2d 855.
57. Forrester v. Hoover Hotel (1948) 87 Cal. App. 2d 226, 196 P. 2d 825.
    Hunter v. Freeman (1951) 105 Cal. App. 2d 129, 233 P. 2d 65.
    Stowe v. Fritzie Hotels Inc. (1955) 28 2 P. 2d 890.

doctrine in a California court as a basis for charging the landlord with liability for injuries to the tenant would be ineffective today."[58]

A 1972 decision of the California Court of Appeal has revived the substance of the old doctrine. The tenant in Fakhoug v. Magner[59] brought an action against his landlord for personal injuries received when a couch in his furnished apartment collapsed. It was held that the landlord was subject to the doctrine of strict liability not as lessor of real property but as lessor of furniture. The court said it was not unrealistic to regard the landlord as coming within both categories. "Furnished apartments are considered quite different from those which are unfurnished. They are frequently advertised separately, and, of course, for a higher rent. In fact, rental of furniture is an enterprise of its own. --- There does not seem to be good reason for holding, as we surely would under existing case law, that the lessor of furniture who supplied it for an empty apartment should be held to strict liability, under appropriate circumstances but holding the landlord exempt just because he is also the owner and lessor of real property."[60] The doctrine of strict liability would not apply under every possible set of circumstances; only where the property was substantial, had been placed in the stream of commerce and was readily traceable to the seller.[61]

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58. Mouber, 38 U.M.K.C. L. Rev. 126, 132 (1969).
59. (1972) 25 Cal. App. 3d 58, 101 Cal. Rptr. 473.
60. (1972) 101 Cal. Rptr. 473, 476.
61. Ibid 476-477.

Recent decisions in Wisconsin[62] and Hawaii[63] which found an implied warranty of habitability involved the lease of furnished premises. But the courts in these cases made it clear that they were not merely applying an exception to the common law rules relating to fitness but were rejecting the rules altogether, the decisions apply to both furnished and unfurnished premises.[64]

Remedies for Breach of the Implied Warranty

It has been seen[65] that the courts have recognised two remedies for breach of the implied warranty; rescission and damages. In several cases the tenant has been held entitled to throw up the lease upon discovering the unfitness[66] and tenants have also recovered damages.[67]

A Canadian case has suggested a severe limitation on the tenant's right to these remedies. The tenant in Boyd v. Dickson[68] sought damages for breach of the implied warranty. The Supreme Court of British Columbia examined Smith v. Marrable and "other cases in line therein" but felt unable to apply the furnished houses rule,

> "My difficulty in applying the principle to the present case is this: that the plaintiff here has, with full knowledge of the condition of the premises, affirmed the contract and remained in possession, while in the cases relied upon by counsel the tenant in each case repudiated and quitted the premises immediately upon obtaining knowledge of their uninhabitable condition, and then sued for damages for breach of contract."[69]

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62. Pines v. Perssion (1961) 14 Wis. 2d 590, 111 N.W. 2d 409.
63. Lemle v. Breeden (1969) 462 P 2d 470
64. Supra 138
65. Supra , See also Note, 78 Sol. J. 426 (1934).
66. Supra 231
67. Supra 232
68. [1930] 2 D.L.R. 96.
69. Ibid.

In effect, the court is saying that only if the tenant abandons the premises on discovery of the defect, will he be able to rely upon the implied warranty. Failure to abandon will be seen as affirmation of the contract and a waiver of the breach. No other court has expressly referred to the need to abandon though the facts of English[70] and American cases[71] do provide indirect support; successful tenants had all vacated the premises.[72]

Restrictions and Modifications of the Rule

The rule as to furnished houses is itself an exception to the general rule of the common law that, in the demise of real property, there is no implied warranty of fitness. This exception is only grudgingly recognised and there have been attempts to restrict its scope.

The most important restriction on the rule is that it applies only to defects in existence at the commencement of the term and not to defects arising during the term. Such was the decision of Stephen J. in the case of Maclean v. Currie[73] decided in 1884 and is implied by the decision of Bacon V.C. in Chester v. Powell.[74] In Dawson v. Clementson[75] the court was inclined to that view but it was not necessary for the decision as it was held that the allegedly defective drains did not render the premises unfit. Sarson v. Roberts,[76] a Court

70. e.g. Smith v. Marrable (1843) 11 M. & W. 5, 132 E.R. 693
Campbell v. Lord Wenlock (1866) 4 F. & F. 716, 176 E.R. 760.
Charsley v. Jones (1889) 5 T.L.R. 412.
Collins v. Hopkins [1923] 2 K.B. 617.

71. See Plevan, 50 Boston U.L.R. 24, 45 (1970).

72. See infra 346 for consideration of need to abandon requirement.

73. (1884) Cab. & E. 361.

74. (1885) 52 L.T. 722.

75. (1885) 1 T.L.R. 295.

76. [1895] 2 Q.B. 395.

of Appeal decision of 1895, is, however, the leading case. The defendant-landlord had let to the plaintiff certain furnished apartments. The plaintiff's family later became infected with scarlet fever but it was found by the jury that the house was healthy at the time of letting and entering upon occupation. The tenant was awarded damages by a Commissioner but this was reversed on appeal to the Court of Appeal. In the words of A.L. Smith L.J.,

> "The learned Commissioner went wrong in reading the decision in Wilson v. Finch-Hatton as if it established that the implied warranty was not confined to the fitness of the house for habitation at the commencement of the term. To extend such a warranty to the whole term would be most unreasonable."[77]

This restriction has also found approval in the Massachusetts case of Bolieau v. Traiser[78] where it was said that the implied warranty "is implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later."

The reason for this restriction does not appear very convincing. In Sarson v. Roberts, the only case which seeks to justify the restriction, Kay L.J. said that the warranty could not extend during the term because it would be unreasonable,

> "(The landlord) may be at a distance and know nothing as to the state of the house, or it may become insanitary from causes over which he has had no power or control."[79]

As to the landlord's knowledge, this is no real problem. If the law obliged the landlord to repair, it could also give him the power to

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77. Ibid 398.

78. (1925) 253 Mass. 346, 148 N.E. 809. cf. Legere v. Assetta (1961) 342 Mass. 178, 182 N.E. 2d 685.
For American Law, see 49 Am. Jur. 2d s.771 p. 711. Annot, 4 A.L.R. 1453, 1459 (1919). 36 C.J. p. 48. 51C C.J.S. s.305 p. 778. Maber, 38 U.M.K.C. L. Rev. 126, 132 (1969).

79. (1895) 2 Q.B. 395,

make inspections of the property at reasonable times.[80] The reference to causes over which the landlord "has no power or control" is puzzling. Does it refer to the elements? If so, how do repairs needed during the term differ from those at its commencement? A like consideration applies if the reference is to acts of third parties. If it is a reference to the possible wrongful acts of a tenant or his agents, then the law could refuse an action on the basis that no man can profit from his own wrong-doing.[81]

Modern trends have, indeed, provided a strong argument based on control for placing the burden of repairs during the term on the landlord. In many flats and apartment houses, tenants are no longer in control of essential amenities needed for heating, the supply of water and utilities and so on. These amenities are in the control and possession of the landlord even though often located in the demised premises. Such conditions "unknown to the ancient common law"[82] require that the landlord of both furnished and unfurnished premises should be under a duty of repair and maintenance during the term.

An attempt was made in Chester v. Powell to restrict the rule to short term leases only. Bacon V.C. said, obiter, that it was confined to "furnished apartments at the seaside, or for temporary occupation only."[83] No other English decision appears to have expressly so

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80. cf. Gott v. Gandy (1853) 23 L.J. Q.B. 1 supra 189
Saner v. Bilton (1878) 7 Ch.D. 815.

81. cf. Javins v. First Nat. Realty Corp. (1970) 428 F.2d 1071

82. Barnard Realty Co. v. Bonwit (1913) 155 App. Div. 182, 139 N.Y.S. 1050, 1051.

83. (1885) 52 L.T. 722, 723. It might be asked why should seaside lettings be an exception to the requirement of "temporary occupation" only.

limited the rule though their facts do provide some support.[84] The lease in Smith v. Marrable, for example, was for only five weeks. But this fact was not mentioned by the court in that case nor in Sutton v. Temple which "explained" that decision. Baron Parke's judgement in Hart v. Windsor did, however, refer to Smith v. Marrable as concerned with "temporary residence" though what importance, if any, he attached to that fact is not apparent. Chief Baron Kelly, in justifying the furnished house rule in Wilson v. Finch-Hatton, referred to such houses "whether let for weeks or months or a year" but his formulation of the rule made no reference to the length of the tenancy. Canadian courts do not appear to have been troubled by the supposed restriction; in Davey v. Christoff,[85] the Supreme Court of Ontario held the warranty to apply to a lease of two years.[86]

American cases, on the other hand, do provide support for the restriction.[87] In Davis v. George[88] Smith v. Marrable was expressly distinguished on the basis that it applied only to short leases and could not apply to the five year lease of that case. The restriction again won express approval in Young v. Povich[89] when the Supreme Judicial Court of Maine held that the implied warranty would only extend to a "short term" as opposed to a "long term".[90] Horton v.

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84. Note, 183 L.T. 373 (1937).

85. (1916) 36 Ont. L.R. 123, 28 D.L.R. 447. In Harrison v. Malet (1886) 3 T.L.R. 58, Stephen J. was prepared to hold that the implied warranty applied to a two year lease but there were also express representations in that case.

86. Williams op. cit. n.28 at 362.

87. 49 Am. Jur. 2d s.770 p. 711. Annot, 4 A.L.R. 1453, 1456 (1919) 36 C.J. p.48. 51C C.J.S. s.305 p. 778.

88. (1892) 67 N.H. 393, 39 A.979.

89. (1922) 121 Me. 141, 116 A.26.

90. In that case, the lease was for eight months but the court found an implied warranty.

Marston,[91] decided by the Supreme Judicial Court of Massachusetts in 1967, placed the supposed restriction squarely before the court. The lessee of a summer cottage, let furnished, brought an action for injuries suffered by him when a stove in the cottage exploded. The defendant-landlord sought to evade the implied warranty of fitness established by Ingalls v. Hobbs[92] by saying that it referred only to short term lettings and that the nine month letting in this case was not a "short term" letting. In deciding Ingalls v. Hobbs, the Supreme Court had, indeed, referred to lettings of a "few days or a few months" and restricted its conclusion to lettings "for a single session" at a summer-watering place. With some hesitation, the court in Horton v. Marston decided that, as Ingalls had already been extended beyond its particular facts in other ways, they were able to apply the rule to the lease of a house for nine months.

The temporal restriction sought to be imposed in Chester v. Powell is both illogical and difficult to apply.[93] It is illogical because, given the fact that the warranty applies only to the commencement of the term and not during the term,[94] no more burdens are placed by the furnished house rule on a landlord who lets a house for five years than on one who lets a house for five weeks. Moreover, it seems strange that if a house is found to be unfit for habitation when let for a five week term, the landlord is responsible but that if the same house be let for five years, the landlord is under no liability.

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91. (1967) 225 N.E. 2d 311.

92. (1892) 156 Mass. 348, 31 N.E. 286.

93. cf. Comment, 54 Iowa L.R. 580, 593 (1969).
Comment, 90 U. Pa. L.R. 859, 860 (1942).

94. Supra

The rule is also difficult to apply in practice. There are no commonly accepted definitions of such terms as "short", "long" or "temporary"[95] and, as was held in Young v. Povich, each case must depend upon its own facts. This gives little practical aid to the tenant who is forced to guess the opinion of the court.[96]

The implied warranty of fitness in the demise of furnished premises has strangely come under attack from two completely inconsistent arguments. If either were recognised, the rule would be much weakened; if both were recognised, it would disappear. The first argument was advanced by the Court of Errors and Appeals of New Jersey in Murray v. Albertson in which Depue J. said,

> "The ground on which Smith v. Marrable was sustained by Lord Abinger in Sutton v. Temple - the contract implied that the furniture let with the house shall be fit for the use and occupation of such a house, and suitable in every respect for use - makes the decision inapplicable to the present case. The defect complained of in this instance was not in the furniture, but in the condition of the house itself."[97]

In short, the implied warranty relates only to the furniture and not to the house itself.[98]

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95. Bacon V.C. did not attempt to define "temporary" in Chester v. Powell.

96. cf. the uncertainty in the law relating to constructive eviction infra 347

97. (1887) 50 N.J.L. 167, 13 A. 394, 397.

98. California cases require the defect to be in the furniture. Fisher v. Pennington emphasised that the defect was in a bed which was considered "as personalty, that is, part of the furniture". (1931) 2 P 2d 518, 520. Massachusetts does not impose this restriction: in Ackarey v. Carbonaro, the Supreme Judicial Court noted, "The limitation urged by the defendant that this principle does not extend to 'the structural condition of the house' has not been adopted in our decisions." (1946) 70 N.E. 2d 418, 420. Nor does New Hampshire: in Young v. Povich, there were "dead bugs in the cracks, under the loose wall paper, in places of every description." (1922) 116 A.26, 28. See generally, 49 Am. Jur. 2d s.771 p.711. Annot, 4 A.L.R. 1453, 1457. 51C. C.J.S. s.305, p.779.

Pampis v. Thanos decided eighty years later in 1967 by the Supreme Court of New South Wales,[99] upheld the very opposite contention. The tenant sued for breach of the implied warranty of fitness when his wife suffered injuries owing to the defective nature of a refrigerator. The court rejected his action, saying,

> "The rule as to fitness for habitation being founded on implied contract has not so far been extended to apply to the dangerous condition of appliances or furnishings of a dwelling house."[100]

In short, the implied warranty relates only to the house itself and not to the furnishings.

Neither of these two arguments represent the English law. There have been cases in which the defect complained of was in both the house itself and in the furniture. The bugs in Smith v. Marrable[1] and Campbell v. Wenlock[2] were found in both. Presumably the disease carrying germs in Bird v. Lord Greville[3] and Collins v. Hopkins[4] were also to be found in both. Wilson v. Finch-Hatton[5] expressly held that Smith v. Marrable applied though the cause of complaint was the state of the drains and not the furniture.[6]

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99. (1967) 69 S.R. (N.S.W.) 226.

100. Ibid 229-230.

1. Supra 228

2. Supra 231

3. Supra 231

4. Supra 232

5. Supra 231
   The case was disapproved in Murray v. Albertson.

6. cf. Charsley v. Jones supra (defective drains) and Harrison v. Malet supra (bugs and defective drains).
   See North 29 Conv. 207, 208 (1965).

The Scope of the Rule

In many cases, the furnished houses rule will be clearly applicable as where a fully furnished house is let in a ruinous condition with the roof in danger of collapse. There are, however, bound to be border-line cases and here the law is not very clear at all. Is a house with only a few chairs and some lino on the floor furnished within the rule? Does a defective sash cord render the house unfit for human habitation? It is to such questions to which we now turn our attention.

What are Furnished Premises within the Common Law Rule?

It has been decided that the rule applies to furnished houses, apartments and rooms, but what is furnished as opposed to an unfurnished accommodation? There is not as yet a precise definition of "furnished premises" within the rule but some guidance is given in the one or two cases which have considered the problem. St. George Mansions Ltd. v. Hetherington[7] is the most instructive. The court pointed out,

> "The evidence showed that there was upon the premises and forming a part thereof, a refrigerator with a waste-pipe leading therefrom - the evidence did not show whether securely or permanently attached or not. There were also window-blinds or curtains, but the premises did not purport to be furnished premises, nor were they in fact."[8]

Other cases support the view that a demise of "fixtures and fittings" does not bring the lease within the furnished lettings rule. One of the arguments put forward by the tenant's counsel in Hart v. Windsor

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7. [1918] 42 O.L.R. 10, 13 O.W.N. 367, 41 D.L.R. 614.
8. [1918] 41 D.L.R. 614, 615.

was that, even if the rule was that the implied warranty of fitness in Smith v. Marrable applied only to furnished demises, then the demise in that case came within the rule because "the agreement in this case was that the defendant was to have the use of the fixtures".[9] The court ignored this contention. In Penn v. Gatenex,[10] where the demise contained the words, "with the use of the fixtures and fittings therein belonging to the landlord" and where the defect complained of was in a refrigerator, the Court of Appeal never even considered whether this could be a furnished as opposed to an unfurnished letting.

The Massachusetts case of Boileau v. Traiser[11] held that the implied warranty did not extend to the letting of premises which were only partially furnished. "The evidence goes no further than to justify a finding that some furnishing was leased with the rooms. There is no dispute that a very considerable part was supplied by the tenant. Upon the evidence, the jury could not find the lease of two completely furnished rooms. The judge should have ruled that the cases do not fall within the exception which, under Ingalls,[12] we recognise to the general rule that no warranty of fitness is implied."[13]

As the common law does not offer much more help other than to say that "fixtures and fittings" are not sufficient in themselves to bring

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9. (1843) 12 M. & W. 67, 75, 152 E.R. 1114, 1117.
10. [1958] 1 A.E.R. 712.
11. (1925) 148 N.E. 809.
12. Supra 236
13. (1925) 148 N.E. 809, 810.

premises within the rule;[14] can one, therefore, tap the definition in the Rent Acts as explained by cases thereon? It has been argued by Blundell[15] that the statutory definition is not inapplicable and that "quite a different test" should be applied. The basis for this contention is found in what he considers to be the reason for the furnished houses rule, i.e. that such lettings are for immediate occupancy. The real test, therefore, is "whether the dwelling house is let by the landlord so furnished that the tenant can make it his habitation forthwith from the date it is let to him." Those premises let with insufficient furniture for immediate occupancy would be considered unfurnished. This test, of course, is only valid if one accepts immediate occupancy as the justification for the rule. If this is rejected, then the suggested test is not applicable.[16] Hence the search for another test continues. In the interests of clarity and consistency in the law there is much to be said for the Rent Act definition of a furnished house as one in which the amount of rent "fairly attributable" to the use of furniture "forms a substantial portion of the whole rent."[17] Such a definition may also be said to represent what most people mean by a furnished letting.

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14. In the South African case of Sanders v. Chaperon [1919] App. Div. 191 it was said that "a house in which there are no kitchen utensils and practically no crockery cannot be properly described as furnished." (ibid 192).
15. 5 Conv. 100, 167 at p. 171.
16. Infra p. 264
17. See Rent Act 1968, s.2 and cases thereon especially Goel v. Sagoo [1970] 1 Q.B. 1, Palser v. Grinling [1948] A.C. 291. See also Report of the Committee on the Rent Acts (The Francis Report) 1971 Cmnd. 4609, p. 168.

Two Canadian courts have differed on another aspect of the problem. Does the landlord escape liability under the rule if, instead of leasing the furniture with the house, he sells the furniture to the tenant? In Bowes v. Fec[18] the defendant-tenant leased certain premises and, by a separate agreement executed on the same day, purchased from the plaintiff-lessor the furniture in the house. After he had gone into possession, the defendant discovered that the premises were infested with rats and bugs and he repudiated the tenancy. The Saskatchewan Court of Appeal had to decide if this was a furnished or an unfurnished letting. Giving the judgement of the court, Martin J.A. explained why they had decided in favour of applying the rule as to furnished premises,

> "Had the defendant merely rented the premises with the furniture, there could be no doubt but that there would be an implied condition of fitness and I can see no reason why the condition should not be implied because, instead of renting the furniture, he purchased it."[19]

When the same question of lease of the house but purchase of the furniture arose before the Manitoba Court of Appeal in Karasevich v. Birboim,[20] the court came to a different conclusion. The rule as to furnished premises was held to apply and Bowes v. Fec was distinguished on the basis that there was in that case an express covenant that the premises were clean. It is much to be hoped that, should the question ever arise in an English court, the solution in Bowes v. Fec would be preferred. If the later case were applied, there is a danger that

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18. [1933] 1 W.W.R. 101.

19. [1933] 1 W.W.R. 101, 108.

20. [1957] 23 W.W.R. 192, 12 D.L.R. 198.

some landlords would evade their responsibility of fitness by "selling" the furniture to their tenants on hire purchase.[21]

What Standard of Fitness is Required?

What is meant by the words "fit for human habitation"? The first point to recognise is that this is a short-hand expression used for convenience. In the cases, judges have used a variety of expressions to cover the standard required. A few examples may be of value. In Smith v. Marrable, Parke B spoke of "decent and comfortable habitation";[22] in Wilson v. Finch-Hatton, Kelly C.B. said the house must be in "good and tenantable condition and reasonably fit for human habitation[23] and for comfortable habitation". Cockburn C.J. said in Campbell v. Wenlock that the inhabitants were entitled to "proper rest and comfort" and that the house must be in "a clean and fit state for habitation".[24] In Bird v. Greville, Field J. asked the jury to decide if the house was in "a good and tenantable condition and reasonably fit for human occupation".[25] To satisfy the standard, the house must not only be fit for human occupation, it must be something more but no consistency has been maintained in describing this additional factor. Summarising the varying descriptions, it may be said that the house must be clean, comfortable, decent and tenantable as well as simply fit for human habitation.

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21. cf. "licence" system employed by some landlords to avoid their statutory obligations, see Milner Holland Report Cmnd. 2605 at p. 171-2. Francis Report op. cit. n.17 at p.112.
22. (1843) 11 M & W. 5, 7, 152 E.R. 693, 694.
23. (1877) 46 L.J. Q.B. 489, 494.
24. (1866) 4 F. & F. 716, 734, 176 E.R. 760, 768.
25. (1884) Cab. & E. 317,

Few cases have attempted to provide a fuller definition of the standard required. One thing seems clear, it is not every defect which gives rise to a breach; the courts seem instead to apply the traditional test of the common law, what would the "reasonable man" think? For example, in Cambell v. Wenlock, Cockburn C.J. said,

> "A tenant, of course, could not be entitled to throw up a house merely because there were a few bugs in it, which might easily be got rid of. On the other hand, if it was infested in an extraordinary degree, he was not bound to take any extraordinary means for their extermination. The question, then, was one of degree for practical men to deal with."[26]

As was pointed out by McCardie J. in Collin v. Hopkins the meaning of "unfit for human habitation" must vary with the circumstances to which it is applied for it is a question of fact.[27] On the other hand, problems have occurred which seem to raise issues of law and it is to such matters that we now turn. It will be seen that, broadly speaking, three types of factual situations have given rise to dispute: lack of repair, the presence of vermin and infection by disease.

Is it possible for a defect easily remedied to render premises unfit for habitation? In Gordon v. Goodwin the Division Court of Ontario thought so; giving judgement, Riddell J. expressed the view that,

> "Supposing, all the defects to be slight, the case for the plaintiff (landlord) is not bettered. For --- it is not the extent of the defect which is material, but the result of such defect in producing an unsanitary condition."[28]

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26. (1866) 4 F. & F. 716, 733, 176 E.R. 760, 768.
    Cf. Gordon v. Goodwin, "There is no need for the tenement to answer every whim of a finical tenant, but common sense should be applied in determining whether it does fulfil the required condition." (1910) 20 O.L.R. 327, 330.
27. [1923] 2 K.B. 617, 620-621.
28. [1910] 20 O.L.R. 327, 330-331.

But in Kelpan v. Stewart,[29] the Supreme Court of British Columbia came to a different conclusion. The wife of the plaintiff-tenant had been seriously injured when a railing, upon which she had been resting her hand, gave way by reason of a nail having rusted. The court referred to the cases on vermin, infection, disease, unsanitary drainage and the like but considered the present case to be materially different,

> "The present is a case of an ordinary defect of repair which could be easily remedied and the existence of such defect would not, as I understand the law, give rise to a right in the tenant either to repudiate or to sue for damages."[30]

Support for this second line of argument can be found in the judgement given by Lord Justice Willmer in Sleafer v. Lambeth B.C.[31] Having said that there might be a common law obligation to repair on the landlord by implication from the express terms of the lease, he continued,

> If that view be right, the obligation would not, in my judgement, extend to cover the type of repairs which we have to consider in this case. All that was wrong in this case was that the door was faulty, partly because one of its sides was binding at the bottom against the jamb, and partly because the weather board at the foot of the door was binding on the floor underneath. As I understand it, it would be the simplest possible operation to put a door which is out of adjustment in that way into proper repair, and it could not be regarded as other than a very trivial repair.
>
> Wherever the line is drawn - that line must be drawn, I should have thought, well short of including responsibility for such a trivial repair as the unsticking of this door."[32]

Although Willmer L.J. was dealing with a possible implied covenant of repair in a lease of an unfurnished house, the considerations expressed would apply equally to furnished leases especially as the learned judge had pinned tenant's counsel down to saying that the implied covenant

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29. [1929] 1 D.L.R. 480.

30. Ibid.

31. [1960] 1 Q.B. 43.

32. Ibid 63.

sought should only cover such repairs as were necessary to make the house reasonably fit for habitation.[33]

It is submitted that the view expressed in Gordon v. Goodwin represents the law. There seem to be no other cases on the common law implied duty of fitness but the House of Lords has authoritatively settled the matter as regards the statutory implied warranty of fitness. Before discussing that case, reference must be made to a decision of the Court of Appeals on the statutory warranty. In Morgan v. Liverpool Corp.[34] the plaintiff tenant had been injured when a defective sash-cord caused the window he was opening to crush his hand. The case was decided on the basis of lack of notice but the judges passed a number of dicta on the standard of fitness which reveal a striking divergence as to the statutory standard. In the opinion of Lord Hansworth M.R. the breaking of a sash-cord was so ordinary an incident that the defect could not make the house not reasonably fit for human habitation. Lawrence L.J. dealt very shortly with the matter but he wanted to express his "emphatic opinion" that the defective condition of the sash-cords did not render the house unfit for human habitation,

> "to say that the house was in some respects unfit for human habitation is somewhat fantastic. Such a slight want of repair as a defective window cord or defective window cords, does not, in my opinion, constitute a breach of the undertaking."[35]

The majority was thus in favour of the proposition that a defect which could be easily remedied does not render a house unfit for habitation. But Atkin L.J. dissented on this point and preferred to accept the test

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33. Ibid 53.
34. [1927] 2 K.B. 131.
35. Ibid 152.

suggested by counsel,

> "that if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation."[36]

In Summers v. Salford Corp.[37] the problem came before the House of Lords. The plaintiff tenant in this case had also been injured by a defective sash-cord. In the Court of Appeal, the majority had rejected the tenant's case; again, there had been a vigorous dissent - this time by Luxmoor L.J. The House of Lords, on the other hand, were unanimous. Lord Atkin, in an opinion with which Lord Thankerton concurred, said that unfitness could not be measured by the magnitude of the repairs required,

> "A burst or leaking pipe, a displaced slate or tile, a stopped drain, a rotten stair tread, each of them may until repair make a house unfit to live in, though each of them may be quickly and cheaply repaired."[38]

He then repeated the test which he had approved fifteen years earlier in Morgan v. Liverpool Corp. That test was also quoted with approval by Lord Russell of Killowen and by Lord Wright. The latter aptly summed up the effect of the case by saying,

> "It is not the amount, but the consequence, of the disrepair which determines whether a room is fit for human habitation."[39]

It is submitted that the test of Summers v. Salford Corp. should apply to the furnished houses implied warranty of fitness. True, in that case, the House of Lords were concerned with the task of statutory interpretation and not with the common law. But, it is submitted, the

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36. Ibid 145.

37. [1943] A.C. 283.

38. Ibid 288.

39. Ibid 293.

decision represents the view of the "practical" man. Can it be seriously suggested that a house which cannot be lived in without risk of serious injury in the course of normal use is fit for human habitation? The fact that the defect can be easily repaired or replaced is all the more reason to require the landlord to do so.[40]

In addition to lack of repair, tenants of substandard housing may have to suffer the uninvited attentions of cockroaches, mice and rats and a host of other vermin.[41] Bugs have appeared frequently in the reports since Smith v. Marrable outlawed them from furnished premises.[42] Fleas[43] have likewise been prescribed along with rats.[44] It is clear that such pests may constitute a breach of the implied warranty.[45]

The third problem concerns houses rendered unfit by the presence of disease. At some time, every family suffers the misfortune of measles or chicken-pox and some may be a great deal more unfortunate.

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40. See also Bordou v. Thornton-Smith, a decision by the Court of Appeal respecting damage to business premises under the Landlord and Tenant (War Damages) Act 1939. It was held that the premises were unfit even though they could be made suitable for their purpose by the expenditure of a comparatively small sum. (1941) 57 T.L.R. 387.

41. Supra 16

42. Smith v. Marrable (1843) 11 M.& W. 6, 152 E.R.693
Campbell v. Wenlock (1866) 4 F. & F. 716, 176 E.R. 760.
Vincent-Baxendale v. Kimber (1918) Times 13th June.
Bowes v. Fec [1933] 1 W.W.R. 101.
Ingalls v. Hobbs (1892) 156 Mass. 348, 31 N.E. 286.
Morgenthau v. Ehrich (1912) 136 N.Y. Supp. 140.
Young v. Povich (1922) 121 Me. 141, 116 A 26.

43. H.D.B. & A. Coventry v. Walker (1946) 90 Sol. J. 525.

44. Bowes v. Fec [1933] 1 W.W.R. 101.

45. cf. Stanton v. Southwick [1920] 2 K.B. 642 in which the Divisional Court held that the presence of rats would only breach the statutory warranty of fitness if "they bred there, were regularly there and, as it were, formed part of the house." Lord Wright cast doubt upon the correctness of this decision in Summers v. Salford Corp. [1943] A.C. 283, 295. It is an extraordinary decision, why should rats breeding on the premises be more objectionable than those that eat food stored there? Thompson v. Arkell, a county court decision, held that fleas which viciously attacked the tenant did constitute a breach of the statutory warranty. (1949) 99 L.J. 597.

If the house is subsequently relet, what degree of infection renders the house unfit? The Canadian case of Gordon v. Goodwin stressed that no conclusive cause and effect sequence must be established by the tenant,

> "Much was made of the fact that it was not proved that the sickness resulted from the condition of the house --- It is not necessary to prove that the condition of the house was such that it did cause sickness; it is abundantly sufficient to prove, as was done in this case, that it might have such effect, that is (to repeat) that the house was unsanitary."[46]

In Collins v. Hopkins, McCardie J. laid down a sensible test. Having said that the eye and the nostril are of no aval in detecting the seriousness of unfitness by infectious disease, he continued,

> "In my view, the question in such a case as the present is this: was there an actual and appreciable risk to the tenant, his family or household, by entering and occupying the house in which the infectious disorder had occurred?"[47]

Such a test would clearly guide the reasonable man in his task. Applying this test, premises infected with measles[48] and pulmonary tuberculosis[49] have been declared unfit.

Most of these cases concern pests or disease but there seems no reason not to apply the rule to anything which renders premises unfit.[50]

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46. (1910) 20 O.L.R. 327, 331.
47. [1923] 2 K.B. 617, 621.
48. Bird v. Lord Grenville (1884) Cal. & E. 317.
49. Collins v. Hopkins [1923] 2 K.B. 617.
50. But see Note, 90 Sol. J. 567 (1946).
One interpretation of Maclean v. Currie (1884) Cal. & E. 361 decided by Stephen J. is that repairs are not included in the implied warranty. Plastering had fallen from a ceiling. In a four line judgement, Stephen J. rejected claim on basis that warranty was confined only to commencement of term. He also said, "Further, I do not think the principles of the cases cited apply to the case of the defects complained of here." He may have meant that repairs are not included in the warranty. If so, the distinction is arbitrary. On the other hand, he may have only meant that the repairs in this specific case were not serious enough to constitute unfitness for habitation.

It was held in a war-time case that lack of black-out could have this effect[51] and the warranty has been held to cover defective drains and gutters.[52] The only case which appears to have expressly said that a particular type of defect will not count is H.D.B. and A. Coventry v. Walker,[53] a county court decision, in which the judge said that a defective central heating system did not render premises unfit.

Who Is Covered By The Implied Warranty?

Most of the cases have concerned defects which affect the tenant directly. In Campbell v. Wenlock,[54] however, it was held that such defects need not be in the rooms occupied by the tenant himself. In that case, bugs were found in the servants's quarters but the tenant was still held entitled to repudiate the lease because servants "are as much entitled as any others to proper rest and comfort".[55]

Rationale of Furnished Houses Rule

a) Implied Warranty Based On Contractual Analysis

In a leading English case, Wilson v. Finch-Hatton,[56] it is clear that the court based the implied warranty on principles of contract law. The concept of the lease as a conveyance of an estate in land only was held not applicable,[57] "the rent paid for a furnished house such as this is not merely rent for the use of the realty but a sum paid for the accommodation afforded by the use of the house, with all its

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51. Note, 90 Sol. J. 567 (1946).

52. Wilson v. Finch-Hatton (1877) 46 L.J.Q. B.489, Harrison v. Malet (1886) 3 T.L.R. 58, Charsley v. Jones (1889) 5 T.L.R. 412.

53. 90 Sol. J. 525 (1946).

54. (1866) 4 F. & F. 716, 176 E.R. 760.

55. Ibid 732, 768.

56. (1877) 2 EX.D. 336.

57. cf. Supra 168

appurtenancies and contents, during the particular period of three months for which it is taken."[58] All through the judgements, we see the court speaking of what the parties to the lease intended rather than of technical questions of real property law.[59] "The very foundation of this case is that the lady had not that for which she contracted. If she had only the occupation for the agreed term, less nineteen days, she had not that for which she bargained."[60] With these words, the court showed its recognition of the lease as a contract for shelter and not as a transfer of ownership for the term.[61] Another English case, Collins v. Hopkins,[62] also shows the influence of contract law; McCardie J. referred to the agreement between the parties as "a contract" and described the implied warranty as "an absolute contractual warranty in the nature of a condition".[63]

b) Caveat Emptor Not Applicable

The doctrine of caveat emptor has been said to have no application to the lease of furnished premises because of the limited opportunity

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58. (1877) 2 EX. D. 336, 343-344.

59. Comment, 42 U. of Pa. L.R. 114 (1894). Note, 183 L.T. 373 (1937).

60. (1877) 46 L.J.Q.B. 489, 494 (emphasis in original). This reasoning was criticised by the New Jersey Court of Errors and Appeals in Murray v. Albertson (1888) 13 A. 394, 398 as being inconsistent with earlier cases denying an implied warranty in the letting of unfurnished premises, "In Sutton v. Temple (supra), the lessee expected to have the eatage of the grass he bargained for; and in Hart v. Windsor (supra), the tenant expected to have the use of the house he rented for comfortable occupation as a dwelling." See also Davis v. George (1892) 67 N.H. 393, 39 Ath.979.

61. cf. supra 180

62. [1923] 2 K.B. 617.

63. Ibid 620.

for an inspection of such premises. The Supreme Judicial Court of Massachusetts observed in Ingalls v. Hobbs, "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 of caveat emptor, which is ordinarily applicable to a lessee of real estate would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time."[64] Indeed, in Sutton v. Temple, Lord Abinger C.B. left open the question whether the warranty would apply if the tenant had an opportunity of personally inspecting the house.[65]

This justification is not very convincing.[66] There is no reason to think that inspection is so difficult in the case of a furnished house as to justify an entirely different rule as to liability.[67] The mere presence of furniture would not seem to be important. The problems of inspection are common to both furnished and unfurnished tenants; structural defects unrecognised by the untrained, latent defects, bad plumbing and wiring hidden out of view.[68] In addition, the facts of some of the cases refute difficulty of inspection as a

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64. (1892) 156 Mass. 348, 31 N.E. 286.

65. (1843) 12 M. & W. 52, 61, 152 E.R. 1108, 1111-1112.

66. But see North, 29 Conv. 207, 218 (1965) who finds this reason "fairly cogent".

67. cf. Comment, 37 Harv. L.R. 896, 898 (1923). Comment, 17 Iowa L.R. 543, 544 (1932). Harkrider, 26 Mich. L.R. 260, 282 (1928). North, 29 Conv. 207, 217-218 (1965). West, 25 Conv. 184, 194 (1961). Williams 5 M.L.R. 194, 198-9 (1942).

68. Supra 207

justification. As one commentator has observed of Wilson v. Finch-Hatton, "when one considers that it was an unpleasant smell, noticed as soon as she (the tenant) entered, that put her on her inquiry, one cannot resist the conclusion that the tenant in these cases is given a right to rely on the house being fit for habitation whether he has or has not any opportunity of inspecting it."[69]

c) Letting Is Also A Hire of Chattels.

The major reason for the distinction made by the common law between furnished and unfurnished premises seems to have been based on the fact that the letting of the former relates to both real and personal property. Although there was no implied warranty of fitness in the letting of land, such a warranty did exist in the case of the furniture.[70] The "explanation" of Smith v. Marrable in subsequent cases shows this. Parke B. said, in Sutton v. Temple, that in the case of a furnished letting "the bargain is not so much for the house as the furniture"[71] and in Hart v. Windsor he emphasised that "it was not a lease of real estate merely".[72] These early cases, in accordance with this view, restricted the warranty of fitness to the furniture only. Lord Abinger C.B. referred to defective beds and chairs in Sutton and continued,

> "The letting of the goods and chattels, as well as the house implies that the party who lets it so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house."[73]

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69. Note, 90 Sol. J. 567, 568 (1946).
70. Supra 200
71. (1843) 12 M. & W. 52, 65, 152 E.R. 1108, 1113.
72. (1844) 12 M. & W. 69, 87, 152 E.R. 1114, 1122.
73. (1843) 12 M. & W. 52, 61, 152 E.R. 1108, 1111.

Baron Parke seems likewise to limit the warranty, "the house is to be supplied with fit and proper furniture and --- if it be defective, the landlord is bound to replace it."[74] If the house itself was not fit, it would appear that the warranty would not be broken for as the learned Baron explained in Hart v. Windsor, a lease simply transfers ownership and, apart from a covenant of quiet enjoyment required by this transfer, no other obligations attach to the lessor.[75]

This justification is persuasive so long as the implied warranty is restricted to the hire of the furniture, of chattels. But it breaks down in those cases in which the warranty has been applied to defects in the house itself.[76] And the decision in Pampis v. Thanos,[77] which held the warranty to apply only to defects in the house and not those in the appliances, must be the reductio ad absurdum of conceptual rigidity.

d) Immediate Occupation

The furnished houses rule has been justified on the grounds that leases for such houses are made on the assumption that the tenant requires immediate occupation. Lord Abinger C.B. decided in Sutton v. Temple, "if a party contract for the lease of a house ready furnished, it is to be furnished in a proper manner and so as to be fit for immediate occupation."[78] The Supreme Judicial Court of Massachusetts

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74. Ibid 65, 1113.

75. Supra 174

76. Cases supra
cf. Nedovic and Stewart, 7 M.U.L.R. 258, 259 (1969) North op. cit. n.67 at 218. West op. cit. n.67 at 194. Williams op. cit. n. 67 at 198. Murray v. Albertson supra

77. (1967) 69 S.R. (N.S.W.) 226 supra

78. (1843) 12 M. & W. 52, 61, 152 E.R. 1108, 1111.

explained in Ingalls, "an important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use."[79]

Once again, it is difficult to see why this justification should apply only to furnished premises. If an unfurnished house is let for immediate occupation then an implied warranty of fitness should also apply in that case.[80]

c) Public Health Grounds

A justification advanced by McCardie J. in Collins v. Hopkins in support of the implied warranty was that it tended "in the most striking fashion to the public good and the preservation of public health."[81] This was also a justification suggested by Lord Abinger in Smith v. Marrable[82] and by Bacon V-C in Chester v. Powell,

> "It may though be taken to be the law that if you find a house which is unfit to live in an account of its being infested with bugs or that the drains are so bad that you cannot safely live in it or that scarlet fever has been raging in it, in such cases as those, it would be unlawful to insist upon a man performing his contract to take such a house. The person so contracting is released from his liability to take that which may expose him to the danger of perhaps losing his life."[83]

In Wilson v. Finch-Hatton, Kelly C.B. referred to "these days of sanitary regulations."[84]

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79. (1892) 156 Mass. 348, 31 N.E. 286.
    cf. Boileau v. Traiser (1925) 253 Mass. 346, 148 N.E. 809.

80. See further, infra 277

81. [1923] 2 K.B. 617, 620. See North, 29 Conv. 207, 217 (1965).

82. (1843) 11 M. & W. 5, 9. 152 E.R. 693, 694.

83. (1885) 52 L.T. 722, 723.

84. (1877) 46 L.J.Q.B. 489, 494.

2) Implied Warranty Based on Express Terms in the Contract

In a number of cases, counsel for the tenant has sought the implication of a warranty of fitness or repair on the basis of express terms in the contract. Whilst such arguments are necessarily tied very closely to specific agreements, the phenomenon of standard form contracts[1] and hence the frequency of such terms justifies a discussion of such cases.

Many contracts expressly forbid the tenant from using the premises for purposes other than residency. It has been argued that such a term, because it confines use of the premises to one purpose only, carries with it an implied term that the landlord will ensure that the premises are, in fact, suitable for such a purpose. Failure to imply such a term would, it is argued, render the agreement quite meaningless from the tenant's point of view. He cannot use the house for residency because it is unfit and he cannot use it for other purposes such as a warehouse because he is forbidden by the express term. This argument has been successful in some American cases. The Supreme Court of Pennsylvania said in Wolfe v. Arrott, "the lease is in writing. It stipulates the lessee shall not use the premises otherwise than as a dwelling-house. It therefore fairly represents and declares the house to be in all respects fit and suitable for that purpose."[2] In a similar case, Hyland v. Parkside Investment Co., the Supreme Court of New Jersey observed, "In this lease,

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1. Supra 190

2. (1885) 109 Pa. 473, 477. See also Showaker v. Boyer (1887) 3 Pa. Co. Ct. 271, 4 A.L.R. 1455.

the landlord specifically restricted the use to one purpose, and we think that this was an express guaranty of the fitness of the premises for that particular purpose. To hold otherwise would be an absurdity. A lease for a single purpose is void if that purpose is unlawful. Such is the situation here."[3]

On the other hand, other courts have denied that such a restriction raises any implied warranty of fitness. In the New Zealand case of Balcairn Guest House Ltd. v. Weir, the lease contained express covenants stating that the house was to be for use as a guest house only and forbidding its use for any other purpose without the consent of the landlord. The Supreme Court of New Zealand rejected the contention that such covenants carried with them an implication that the premises were fit for use as a guest house.[4]

A similar argument was considered in Sleafer v. Lambeth B.C.[5] Here the tenant expressly covenanted to "reside in the dwelling" and, furthermore, that he, "should not do or allow to be done any decorative or other work to any part of the dwelling without consent in writing". The tenant argued that as he was required to live in the premises, they must be fit for habitation and furthermore, that as he was forbidden to do

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3. (1932) 162 A. 521. See also Young v. Collett (1886) 63 Mich. 331; Waterbury v. Riss & Co. (1930) 169 Kan. 271 219 P. 2d. 673.

4. [1963] N.Z.L.R. 301. See also Richard Paul Inc. v. Union Improvement Co. (1945), 59 F. Supp. 252. Osterling v. Sturgeon (1968) 156 N.W. 2d. 344 (Iowa) Greiner, 12 Vill. L.R. 631, 633.

5. [1960] 1 Q.B. 43.

repairs, there must be an implied term that the landlord would keep the demised premises fit for this purpose. The court was divided in its approach to this argument. Lord Justice Willmer saw a certain merit in the argument but did not think it applied to the facts of that case,

> "For myself, without wishing to express any concluded view, I have a great deal of sympathy with the general proposition put forward by (counsel for the tenant). I think that there is much to be said for the view that clause 2 of the agreement, which requires the tenant to reside in the dwelling house, does by implication require the landlord to do such repairs as may make it possible for the tenant to carry out that obligation. At least it seems to me that that is a possible view. But if that view be right, the obligation would not, in my judgement, extend to cover the type of repairs which we have to consider in this case."[6]

The other two members of the court, Lord Justice Omerod and Lord Justice Morris, rested their decision not on clause 2 as to residency but clause 9 concerning the tenant's right to do work to the premises. Their view is summarised by Lord Justice Omerod,

> "I take the view, which has been taken by my Lord, that this clause does not amount to a prohibition but is merely a restriction."[7]

Sleafer also considered another argument based upon an express term in the tenancy agreement. One of these terms gave the Council power to enter the dwelling to inspect the state of repairs and also to execute repairs. The contention that this right of entry to do repairs imposed a duty to repair was

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6. Ibid 63.

7. Ibid 61.

rejected. The term was explicable on grounds other than that based upon an implied duty to repair.[8] But alongside Sleafer's case must be considered another Court of Appeal decision, Greene v. Chelsea B.C.[9] In that case, the local authority had requisitioned a house and agreed that the plaintiff should live in it. One clause in the agreement gave the authority the right to enter and inspect the premises and to make any repairs considered necessary. There was no clause which specifically conferred a duty on them to repair. Yet Lord Justice Singleton described this as a case in which "the defendants had retained the right to do, and the duty of doing, repairs on the premises."[10] Although this was not a case on landlord and tenant law as it was held that the agreement did not constitute a tenancy, it is clear that the same implication could be made in the tenancy agreement.

In those cases where the tenant expressly covenants to repair certain defects but is exempted from liability for other matters, does this mean that the landlord has impliedly undertaken liability for the latter? For instance, "fair wear and tear" is often excluded from the tenant's repair covenant. Is the landlord liable for defects so caused? The case of Arden v. Pullen[11] decided in 1842 held that he was not and later cases have followed this decision.[12] The same result would seem to

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8. Ibid 54. See also Gulliver v. Fowler (1894) 30 Atl. 852, 49 Am. Jur. 2d. s.775, p. 718.

9. [1954] 2 Q.B. 127.

10. Ibid 132.

11. (1842) 10 M & W 322, 152 E.R. 492.

12. Gott v. Gandy (1853) 2 El & B 845, 118 E.R. 984. Kensley v. Thomson [1947] N.Z.L.R. 392.

be inevitable in those cases where parts of the premises are outside the tenant's repair covenant, for example, the roof.[13] The wording of the tenant's covenant has been used as the basis for other arguments. Counsel for the tenant maintained in Hart v. Windsor[14] that the words "to preserve in tenantable repair" necessarily imported that the premises were in tenantable repair at the commencement of the lease. "The word 'preserve' can only mean that the tenant is to keep the premises in the same condition as they are given to him."[15] The court failed to consider this point.

The words of the agreement in Penn v. Gatenex[16] gave the tenant "the use of the fixtures and fittings therein belonging to the landlord". It was contended that these words implied that the landlord undertook to maintain the fixtures and fittings in order that the tenant could have use of them. Lord Justice Sellers, dissenting, was of the opinion that the words went further than merely giving rise to an implied obligation and imposed an express duty to repair. The majority, however, rejected the contention and held that neither express nor implied obligations could be imposed on the landlord.

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13. See Note, 75 Sol. J. 808 (1931). Jersey Silk and Lace Stores Ltd. v. Best Silk Shops Ltd. (1929) 134 Misc. 315, 235 N.Y.S. 277; Plate Glass Underwriters Mutual Ins. Co. v. Ridgewood Realty Corp. (1925) 219 Mo. App. 186, 269 S.W.659. Ferro v. Ferrante (1968) 240 A. 2d. 722.

14. (1844) 12 M & W 69, 152 E.R. 1114.

15. Ibid 77, 1118.

16. [1958] 1 A.E.R. 712.

The plaintiff in Johnson v. London & Westcliff Properties Ltd.[17] was a weekly tenant. She brought an action in respect of injuries suffered as the result of the collapse of defective floor boards. The action was based on the grounds, inter alia, that the landlords had impliedly covenanted to repair by expressly stating on the front of the rent book that all requests for repairs should be made to the landlords in writing. Hilberry J. dismissed the action. The word "request" in the statement in the rent book indicated supplication and not the exercise of a right. It did not mean that the landlords were liable to do the repairs but was merely intended to provide for them to be informed if damage were caused to the premises.

In summary, it can be said that the courts have shown a marked reluctance to modify the common law rules so as to satisfy the arguments presented above. The English judges have tended to be less sympathetic than their American counterparts to such arguments[18] though the minority judgements of Willmer L.J. in Sleafer and Sellers L.J. in Penn v. Gatenex deserve note.

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17. [1954] J.P.L. 360.

18. Supra
    See also Heissenbuttal v. Comnos (1958) 177 N.Y.S. 2d. 850 implying covenant of habitability from size of rental.

3) Custom

It is a matter of common experience that, in practice, certain repairs are carried out by landlords and others by tenants. Does this distribution of de facto responsibility affect their legal obligations? It is suggested that the answer to this question depends upon a distinction between responsibility taken on in response to a local custom and responsibility assumed as between particular parties.

Local Custom

The City of Lancaster provides an example of the type of local custom which is relevant in this context. Discussing the effects of the Rent Acts, Cullingworth says,

> "Sometimes the landlord and tenant reached agreements on the responsibility for repairs and decorations quite unrelated to the legal position - tenants would undertake all 'running repairs' and improvements whereas landlords would only carry out 'major items'. --- For example, roof repair involving the use of a ladder and a few tiles was a 'major repair' which tenants (without exception) regarded as the landlord's responsibility. But the replacement of an old kitchen range by a modern fireplace was a tenant's responsibility. These are two clear cases where the allocation of responsibility was general."[1]

Much of the law of landlord and tenant is based on the influence of such local custom. Baron Parke gave a most enlightening account of its role and the underlying rationale in the case of Hutton v. Warren[2] decided in 1836. In this case,

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1. J.B. Cullingworth, "Housing in Transition" (1963) at p. 102-103
2. (1836) 1 M & W 466.

it was proved that, by a local custom, a tenant was bound to farm according to a certain course of husbandry and that, at quitting his tenancy, he was entitled to a fair allowance for seed and labour on the arrable land. The Court of Exchequer held that the lease made by the parties must be construed in the light of this custom. In his judgement, Parke B. said,

> "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages. --- The relations between landlord and tenant have been long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force."[3]

A few years after Hutton v. Warren, Baron Parke was confronted with an argument based upon such considerations in Hart v. Windsor.[4] Counsel for the tenant referred to two cases in Brooke's Abridgement[5] in which tenants had pleaded that by the custom of London, the landlord was bound to repair and uphold the house sufficiently for habitation. Rather surprisingly, Baron Parke ignored this contention in his judgement. Unless we are to take it that he was recanting Hutton v. Warren,[6] it must be assumed that this failure to

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3. Ibid 475-6
4. (1844) 12 M & W 69, 152 E.R. 1114
5. "Dette" Folio 220 pl. 18 and 72.
6. In addition to Hart v. Windsor, see supra

deal with counsel's argument was because of his failure to show a "known usage" rather than a lack of merit in the argument itself.[7]

There is dicta in the Court of Appeal decision of Broggi v. Robins[8] in favour of an implied obligation to repair based upon local custom. The plaintiff had taken a weekly tenancy of two rooms in Soho; his child was badly burned when a defective floor-board gave way causing her to fall into the fire. Judgement was given for the defendant on the grounds that no notice of the defect had been given.[9] Hence what was said by the court as to the implied obligation was obiter. Lord Russell of Killowen referred to "the evidence of one of the defendants and their agent, to the effect that, though they never actually agreed to keep the premises in repair, yet in fact they always did whatever repairs were necessary." He said that "this seemed to him to be an admission that in the usual course of things landlords did repairs in tenancies of that kind."[10] This was sufficient, he held, to uphold the trial judge's reasoning and decision on this point in making the usage a term of the tenancy.

The American cases are in conflict on this point. It was held in the Massachusetts case of Shute v. Bills[11] that a tenant

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7. West, 25 Conv. 184 (1961) at p. 186 n.13 has checked but has found no other mention of this custom, nor any case in which it has been relied upon. He feels that such a custom must have lapsed by now.

8. [1899] 15 T.L.R. 224.

9. See infra

10. [1899] 15 T.L.R. 224, 225.

11. (1906) 191 Mass. 433, 78 N.E. 96. 49 Am. Jur. 2d. s.829, p. 797.

holding under an oral lease may prove a known usage or custom in the community by which when houses are let without any written lease, the owner is to do outside repairs, such as the roof or gutters. But in Healy v. Taylor,[12] decided in Iowa, the tenant was not permitted to prove a local custom that the landlord was to make extraordinary repairs and the Texas case of Weinsteine v. Harrison[13] decided that a local custom could not be shown in order to render the landlord liable in the absence of an express covenant.

It is upon the basis of custom that Scottish law imposes a duty to repair on landlords of urban houses.[14] Lord Robertson said in Cameroun v. Young, "this is the customary arrangement in Scottish towns, and therefore, when nothing is said to the contrary, parties are taken to have agreed to it."[15]

Landlord's Custom

In certain tenancies, landlords have as a matter of fact done repairs irrespective of any term in the agreement or local custom. The courts have not been sympathetic to the contention that such a custom imposes a legal obligation.

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12. (1911) 150 Iowa 169, 129 N.W. 802. cf. Larson v. Eldredge (1929) 153 Wash. 23, 279 P.120. Clark v. Matlock (1934) 189 Ark. 1081, 76 S.W. 2d. 104. 49 Am. Jur. 2d. s.829, p.797. Annot, 25 A.L.R. 787, 803, 88 A.L.R. 1380, 1385-6, 151 A.L.R. 279, 284.

13. (1886) 1 S.W. 626, 66 Tex. 546, 36 C.J. p. 127, n.79, 51C C.J.S. s.366, p. 929.

14. See generally, supra 27

15. [1906] A.C. 176,

The leading English[16] case in Sleafer v. Lambeth B.C.[17] Lord Justice Morris said in that case,

> "I have no doubt that in fact, and in practice, the borough council intended to do the necessary repairs, but the question arises whether they had obliged themselves to do such repairs. I can find nothing in these conditions which shows that they had."[18]

Hilberry J. came to a similar decision in Johnson v. London and Westcliffe Properties Ltd.[19] The tenant had based her claim for breach of an implied term to do necessary repairs on the grounds, inter alia, that on ten previous occasions the landlords had carried out repairs. Though, on eight of these occasions, this was as a result of a notice served by the local authority. Dismissing the action, the learned judge held that the mere fact that landlord chose to do repairs in order to prevent his property from depreciating, or in response to a notice served by the local authority, could not give rise to an implication that he had contracted to do repairs. In First National Housing Trust Ltd. v. Chesterfield U.D.C.,[20] where landlordshad habitually provided their tenants with new dustbins when required, the court was not prepared to infer from such conduct that there was a contractual obligation on the landlords to do so.

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16. For Canadian cases, see the following: Gregson v. Henderson Roller Bearing Co. (1910) 20 O.L.R. 584. Trainski v. C.P.R. [1918] 2 W.W.R. 1034, 25 B.C.R. 497. Ingle v. Hanson [1947] 4 D.L.R. 420. Williams, "Canadian Law of Landlord and Tenant" (3rd. ed. 1957) p. 367.
17. [1960] 1 Q.B. 43,
18. Ibid 56.
19. [1954] J.P.L. 360.
20. [1948] 2 A.E.R. 658.

American cases are agreed that the mere fact that a landlord has made repairs does not oblige him to continue to do so. Such evidence alone is not sufficient to make him a covenantor to repair.[21] The trial judge in Moore v. Weber[22] had left it to the jury to infer that there was a covenant by the landlord to repair in view of his acts of previous repair. Reversing this decision, the Supreme Court of Pennsylvania stated, "It is manifest that the fact that a landlord voluntarily, and at the request of a tenant, does certain repairs is no evidence from which an inference can be drawn. --- The landlord may erroneously suppose himself bound, or he may do the repairs for the benefit of the property and that it may not fall into dilapidation."[23] A century later, the District of Columbia Court of Appeals observed in Williams v. Auerbach[24] that "a gratuitous action does not convert a previous nonexistent obligation into a legal duty."

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21. 49 Am. Jur. 2d. s.775, p. 718. Annot, 150 A.L.R. 1373, 1382. 36 C.J. p. 127. 51C C.J.S. s.366(1), p. 928.

22. (1872) 71 Pa. 429, 10 Am. Rep. 708.

23. Ibid 433.

24. (1972) 285 A. 2d. 701. See also Quinn v. Crowe (1899) 88 Ill. App. 191; Llefante v. Pizitz (1918) 169 N.Y.S. 910; Jordan v. Bernstein (1931) 9 N.J. Misc. 669, 155 A. 385; Palimas v. Aress Realty Co. (1944) 130 Conn. 687, 37A. 2d. 243; Shegdon v. Hartford Conn. (1944) 131 Conn. 186, 38A 2d. 668; Bradt v. Yeager (1964) 199 A. 2d. 768 (Del.); Kallison v. Ellison (1968) 430 S.W. 2d. 839 (Tex.).
A fortiori, repairs made after an accident do not indicate a covenant to repair: Hunter v. Cooker (1971) 274, N.E. 2d. 550 (Ind.)

4) Leases for Immediate Occupation

Placing reliance upon a dictum in the case of Bunn v. Harrison,[1] it may be suggested that in the case of a house let for immediate occupation, a warranty of fitness should be implied. Lindley L.J. pointed out in that case that,

> "it was not necessary to decide whether or not the doctrine of Smith v. Marrable and Wilson v. Finch Hatton applied, where it was understood by both parties that the unfurnished house was for immediate habitation."[2]

Courts subsequent to Bunn v. Harrison have also referred to the fact that the point has been expressly left open.[3] It is also relevant to observe that in the leading case on the implied warranty of fitness, Hart v. Windsor, counsel for the tenant stated that the warranty was implied wherever a house is let for immediate occupation and was met with the reply by Baron Parke that the plea did not aver that the house in that case was so let.[4] Thus, that case is no authority against the present contention.

The analogy of cases dealing with furnished premises is also relevant. It is precisely on the grounds that the

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1. (1886) 3 T.L.R. 146.
2. Ibid.
3. Collins v. Hopkins [1923] 2 K.B. 617, 618. McIntosh v. Wilson (1913) 14 D.L.R. 671, 675. Davy v. Christoff (1916) 36 O.L.R. 123, 129, 28 D.L.R. 447, 452. In Cruse v. Mount [1933] 1 Ch. 278, counsel for the tenant urged such an exception upon the court but no reference was made to it in the judgement.
4. (1844) 12 M & W 69, 76, 152 E.R. 1114, 1118.

letting is for immediate occupation that the courts have justified the implied warranty of fitness in such cases.[5] If, as has been argued by one court,[6] the controlling factor in these cases is the letting for immediate occupancy and the furniture is important only insofar as it is evidence of this fact; then surely, providing other clear evidence of the fact can be produced, this factor of immediate occupancy should also control unfurnished lettings.

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5. See supra 263
6. Lemle v. Breeden (1969) 462 P. 2d. 470, 473.

5) Warranty of Fitness at Commencement but not during the Term

Yet another attempt to modify the rigour of the common law rule applied to unfurnished premises is to contend that the warranty of fitness should apply to the condition of the premises at the commencement of the lease but not during the term.

This argument does not seem to have been expressly put before the courts though the present state of the law in England may well justify such a distinction. Without repeating previous material, it is sufficient to point out that, whilst the law on both rules is not as well established as is usually supposed, the rule as to no implied warranty at the commencement of the term has little direct authority whilst the rule as to fitness and repairs during the term is more firmly secured.[1]

Such a modification has several merits. It would tidy up the law and put it on a more logical basis by fusing the law on unfurnished and furnished lettings.[2] Without repeating the discussion on the law of furnished lettings,[3] we can conclude with North that, "many of the suggested justifications for implying a term in the lease of a furnished house are equally valid in the case of an unfurnished house and one can conclude that if the law allows the one, similar policy considerations could justify the other."[4] We have

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1. Supra 118
2. It has been suggested that the law as to both furnished and unfurnished lettings should be put on the same basis. North, 29 Conv. 207, 220 (1965). West, 25 Conv. 184, 194 (1961).
3. Supra 228
4. North, 29 Conv. 207, 220 (1965).

already examined the question of immediate occupancy, another justification for both furnished and unfurnished houses let for residential purposes is that the landlord knows the precise purpose for which it is to be used. Again, inspection by the average tenant before entering into the lease is equally difficult in both cases. Such factors should be persuasive in implying a warranty of fitness at the commencement of the term.

Whilst my own view is that the warranty should extend throughout the term, it is not impossible to find justifications for not so extending it. Speaking of the implied condition in regard to furnished houses, Kay L.J. said,

> "If the condition is extended, so as to apply if the premises became insanitary during the term, the landlord would be in a different position. He may be at a distance and know nothing as to the state of the house, or it may become insanitary from causes over which he has had no power or control."[5]

Moreover, under the common law, the landlord had no right to enter the demised premises to inspect the premises or carry out repairs.

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5. Sarson v. Roberts [1895] 2 Q.B. 395, 397-398, See supra 242

6) Flats and Rooms

Any attempt to set aside flats and rooms from the general common law rule of caveat emptor solely on the basis that the rule was decided in cases concerned with the letting of houses seems artificial. Decided cases tend against giving flats and rooms special treatment per se. The English cases of Cruse v. Mount[1] and Sleafer v. Lambeth B.C.[2] and the Canadian case of St. George Mansions Ltd. v. Hetherington[3] are examples of the common law rule being applied to flats whilst the Supreme Judicial Court of Massachusetts held that there was no implied warranty of fitness in the letting of several rooms in a tenement house in McKean v. Cutter.[4]

There is a more persuasive justification for exemption in the case of many flats and rooms. Barnard Realty Co. v. Bonwitt,[5] a decision of the New York Supreme Court, best presents this justification,

> "Very large numbers of people live in tenement houses, apartment and apartment hotels in this city. Such tenants have, and can have, control only of the inside of their own limited demised premises. Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof."[6]

The remedy applied in that case was that of constructive eviction[7] but the situation could also be argued to warrant an exception

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1. [1933] 1 Ch. 278.
2. [1960] 1 Q.B. 43.
3. (1918) 42 O.L.R. 10, 13 O.W.N. 367, 41 D.L.R. 614.
4. (1892) 156 Mass. 296, 31 N.E. 389.
5. (1913) 139 N.Y.S. 1050.
6. Ibid 1051.
7. Infra 335 See also cases on landlord's liability in tort for parts under his control infra

to the general warranties of fitness and repair. In such a situation, the tenant is not in control of the entire building and cannot, by himself, ensure its fitness for his purposes.

The Supreme Courts of Minnesota and Washington have decided cases in favour of the tenant on these grounds. The Minnesota case was Delamater v. Foreman[8] in which the tenant had complained of bedbugs coming into his apartment through cracks and loose boards in the floor. Giving judgement, the court referred to the general rule and continued,

> "But such rule, like many of the rules of law, is not inflexible, but to some degree elastic, and must be construed to meet conditions unknown at common law. There is much in and about such an apartment building far beyond the control of a tenant in one of the apartments. He cannot interfere with the walls, partitions, floors and ceilings wherein the verminous enemy may propagate, nor can he interfere with the cracks and openings affording an opportunity of access from such walls, partitions, floors and ceilings into the apartment. If the attack is sufficiently serious and comes from this source, it violates the landlord's implied covenant that the premises will be habitable."[9]

In Washington Chocolate Co. v. Kent,[10] the Supreme Court of Washington extended the reasoning of this case to cover tenants of a warehouse who had suffered damage to their products by rats coming from parts of the premises outside their control.

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8. (1931) 184 Minn. 428, 239 N.W. 148.
9. Ibid
10. (1947) 28 W. 2d. 443, 183 P. 2d. 514.

The Canadian case of Rogers v. Sorrell[11] decided that the exemption would not apply. The court said that a tenant who takes part of a building in other parts of which there are defects beyond his control, should examine the premises.[12] If he thinks that the defects may cause harm to him, he should contract for their removal.

Only two English cases appear to have considered the particular argument now under discussion. In Cruse v. Mount,[13] Maughan J. rejected it though with some hesitation. He summarised the case for the tenant,

> "It was argued that the practice is not for intending tenants of flats to send a surveyor to examine the building, since a surveyor could not make a proper examination of the structure in a case where other flats are in the possession of other tenants. Further, it is to be noted that, if the building is structurally in bad repair, the tenant under an ordinary tenancy of a flat has no power to rebuild or reconstruct the premises. To do that he would have to go into flats which belong to other tenants and to attempt to do work on the premises which he had no power to do."[14]

The learned judge said that he would have felt no "serious reluctance" in holding the case of a flat to be one of "a special character" and so subject to an implied warranty of fitness or, at least, of support. But he felt bound by the

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11. (1903) 23 C.L.T. 247, 14 Man. L.R. cf. Cross v. Piggott [1922] 69 D.L.R. 107. In an action for rent, the tenant sought to avoid the doctrine of independence of covenants by pleading that the landlord's failure to heat could be distinguished from his other breach of covenant. In the former case, where the heating plant was in the possession and under the control of the landlord, the tenant was powerless for he could not repair himself. The court found "a good deal of force in that contention" but felt the law was settled to the contrary. See infra 859

12. This ignores the fact that he has no right to carry out such an inspection.

13. [1933] 1 Ch. 278.

14. Ibid 283.

decision in Manchester Bonded Warehouse Co. v. Carr[15] in which the general rule had been applied to the lease of floors in a warehouse.

It is submitted that the Manchester Bonded Warehouse case could have been validly distinguished. The lease of floors in a warehouse is not comparable to the lease of a flat for residential purposes. Factors not applying to residential lettings such as the greater strain on the building and the greater resources of business tenants may be considered sufficient to outweigh the argument based on lack of control. Furthermore, that case was not concerned with the same point as Cruse v. Mount. The Court of Common Pleas declined to extend the furnished houses rule to "ordinary leases of lands, houses or warehouse". The whole point of the argument in Cruse was precisely whether leases of flats differ from the "ordinary leases of -- houses".[16]

The case of Penn v. Gatenex[17] is also highly relevant. As was recognised by all the judges, the refrigerator in this case was not under the complete control of the tenants though located in the demised flat. As Lord Evershed M.R. explained, "it seems to be of a kind the operation of which depends on the supply of the appropriate fuel or motive power from a central apparatus which has always been in the sole control of the landlords."[18] This factor does not seem to have influenced

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15. (1880) 5 C.P.D. 507.
16. See Note, 49 L.Q.R. 312 (1933).
17. [1958] 1 A.E.R. 712. Supra 116
18. Ibid 713, cf. Parker L.J. at 717.

either his or Lord Justice Parker's decision. But Sellers L.J., in his dissenting judgement, based the express obligation which he found on these "new and different circumstances",

> "Fixtures let to a tenant are normally complete in themselves and are capable of being maintained by the tenant --- in serviceable order and suitable for their purpose. It is unusual to have the necessary component parts of a fixture partly in the control of the tenant and partly (and in this case in respect of a vital part) in the control of the landlord. Here an essential part of its functioning is in the hands of the landlords who have contracted to give the use of the refrigerator to the plaintiff. This seems to me to be an express obligation."[19]

He reserved judgement on whether hot water radiators would fall into the same category as the refrigerator but doubted if they would.[20]

Whether the exception to the general rule now contended for could be justified under English law seems something of an open question. Only Cruse v. Mount squarely rejected the argument and this case was, it is submitted, decided on an erroneous view of Manchester Bonded Warehouse v. Carr. Being a High Court decision, it is not binding on other courts. On the other hand, the dissenting opinion of Sellers L.J. in Penn strongly suggests that special weight should be given to this question of inadequate control by the tenant.

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19. Ibid 719-20.
20. Ibid.

Statements Made as to Fitness of Premises

Although low income tenants are unlikely to find an express term in the lease obliging the landlord to do works necessary to keep the premises habitable,[1] it is often the case that the landlord has made a statement agreeing to do repairs or declaring the premises to be fit. He may have done so to induce the tenant to take the premises or to remain there. What is the legal effect of such statements? The answer will depend on how it is classified by the courts.

Express Term of the Lease

The court may consider the statement to be a term of the contract. Its falsity will give the tenant a right to damages and possibly to rescission. Bunn v. Harrison[2] is an example. The landlord's agent had verbally promised the prospective tenant that the premises were in a sanitary condition. Upon discovering that this was not the case, the tenant vacated and refused to pay any more rent. It was held by the Court of Appeal that the verbal assurance was a good defence to the landlord's action for rent. Lord Esher M.R. said that,

> "where a statement is made at the time of a verbal contract and for the purpose of the contract, that statement must be taken to be part of the contract. Therefore what (the agent) said here was part of the contract."[3]

The court further held that the statement amounted to a condition of the tenancy so that the tenant was entitled to

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1. Supra 190
2. (1886) 3 T.L.R. 146.
3. Ibid.

rescind as well as seek damages by a counter-claim. Another example of a statement made at the time of negotiations being construed as an express term was Collins v. Hopkins[4] in which McCardie J. held that an assurance that a former tenant was not the victim of consumption should be treated as a warranty.

It is by no means an easy task to determine whether a statement will be held to be an express warranty or not. In Stokes v. Gillett[5] a letter, written at the time of letting a weekly tenancy and stating that the premises would be "clean and ready for occupation" on a certain date, rendered the landlord liable in damages when drinking water stored in a dirty cistern caused illness to the tenant.[6] This case can be compared with the Canadian decision of Brown v. Delmas[7] in which the owner's daughter informed the prospective tenants that the house was clean. It was held that the statement was too indefinite to be an express warranty. Two American cases are also instructive.[8] In Foster v. Peyser[9] a statement in the lease that the house was "in perfect order" was held by the Massachusetts Court not to constitute a warranty of fitness whilst in Tyler v. Disbrow[10] the words "good order and

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4. [1923] 2 K.B. 617, 628-629.
5. (1909) Unreported. See B.W. Adkin, "The Law of Dilapidations" 6th ed. (1963) p. 54.
6. cf. Bowes v. Fec [1933] 1 W.W.R. 101 in which Martin J.A. with the apparent approval of the other members of the court said that the use of the word "clean" might reasonably be interpreted to include a warranty that the premises were free from rats and bugs. See Williams "Notes on the Canadian Law of Landlord and Tenant" (3rd. ed. 1957) p. 361.
7. (1919) 27 B.C.R. 471.
8. Saunders, 21 Drake L.R. 300, 302 (1972). Annot, 4 A.L.R. 1453, 1459.
9. (1852) 9 Cush (Mass) 242.
10. (1879) 40 Mich. 415.

condition" were held to give rise to such a warranty.

The tenant may face the contention that the statement was not intended to be an express term of the contract but only a representation with no binding contractual force. This was the position in Best v. Edwards[11] in which the tenant sought damages when a statement by the landlord that the drains were in good order turned out to be false. Wills J. directed the jury that there was a good deal of difference between the tenant asking the landlord if she considered the drains to be good and whether the question was seriously intended to be the basis of the contractual relation between the parties. The jury's decision was that the statement was a representation only and not a warranty of fitness.

The essence of the distinction between terms and mere representations is one of intention in every case and the formulation of general rules has proven difficult.[12] Three rules have emerged but none of these can be considered conclusive. If the statement was made early in the negotiations it is likely only to be a representation.[13] A similar presumption arises when the parties reduced the verbal agreement to writing but failed to reduce the statement.[14] On the other hand, if the statement was made by a party with special knowledge or skill then the court will be more willing to construe it as a

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11. (1896) 60 J.P. 9.
12. See Cheshire & Fifoot, "The Law of Contract" 8th ed. (1972) at
13. e.g. Routledge v. McKay [1954] 1 A.E.R. 855.
14. Heilbut v. Buckleton [1913] A.C. 30.

term.[15] This last test will be of special value to the tenant for the landlord will often be in possession of knowledge as to the state of the premises of which the tenant will be unaware.

If the tenancy agreement is in writing, the tenant may be faced with the parol evidence rule excluding oral statements which "add to, vary or contradict a deed or other written instrument."[16] Thus in Crawford v. White City Rink,[17] no evidence could be given that premises were verbally warranted to be fit for dancing as the written agreement was silent on this point. But courts have not always applied the parol evidence rule with such strictness.[18] It has often been modified by a willingness to find that the written agreement was only part of the whole contract or that an oral agreement existed independently of the written agreement.[19] A number of American

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15. In De Lassale v. Guildford [1901] 2 K.B. 215 infra A.L. Smith M.R. said that lessor's greater knowledge was "a decisive test" in determining whether the statement was a warranty or a representation. But in Heilbut v. Buckleton [1913] A.C. 30 Lord Moulton overruled this dictum; the rule was helpful but not decisive.

16. Jacobs v. Batavia and General Plantations Trust [1914] 1 Ch. 287, 295. See generally Cheshire & Fifoot op. cit. n.12 at

17. [1913] 29 T.L.R. 318 cf. Angell v. Duke (1875) 32 L.T. 320. See also Mason v. Scott (1875) 22 Grant Ch. 592 (Con.); Cleves v. Willoughby (1845) 7 Hill (N.Y.) 83; Howard v. Thomas (1861) 12 Ohio St. 201. Annot, 25 A.L.R. 787, 843. Annot, 88 A.L.R. 1380, 1404. Annot 151 A.L.R. 279, 306. 32 Am. Jur. 2d. s. 145.

18. Cheshire & Fifoot op. cit. n.12 at

19. Ibid.

cases[20] illustrate these modifications permitting the introduction of oral evidence concerning repairs although the written lease in question made no reference to the matter. For example, in Creek v. Lebo Inv. Co.,[21] the Supreme Court of Colorado allowed evidence of an oral promise to make the premises fit although the written agreement did not mention this. The court pointed out that "such an oral agreement does not contradict, add to, or vary the terms of the written lease, but is an independent agreement, capable of enforcement." Whether the parol evidence rule will apply is a question that must be left to each court judging the merits of the case in the light of all the circumstances.

The concept of an independent agreement to repair is also relevant in another context; that of consideration. The tenant placing reliance upon a landlord's promise to repair or make fit the premises may be met with the objection that he has not

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20. Contract only partially in writing: e.g. Vandegrift v. Abbott (1883) 75 Ala. 487; Hines v. Wilcox (1896) 96 Tenn. 148, 33 S.W. 914. Cases collected, Annot, 25 A.L.R. 787, 849, Annot, 88 A.L.R. 1380, 1406, Annot 151 A.L.R. 279, 308. Independent agreement: e.g. Graffan v. Pierce (1887) 143 Mass. 386, 9 N.E. 819; Frosh v. Sun Drug Co. (1932) 91 Colo. 440, 16 P. 2d. 428. Cases collected, Annot, 25 A.L.R. 787, 853, Annot 88 A.L.R. 1380, 1407, Annot 151 A.L.R. 279, 310. Raymond, 42 Temple L.Q. 199, 201 n.13 (1969).

21. (1929) 276 P.329. cf. Morgan v. Griffith (1871) L.R. 6 EX. 70. Mann v. Nunn (1874) 43 L.J. C.P. 241.

"bought the promise" i.e. that he gave no consideration for it. If the promise was made during the negotiations, if any, for the premises then the court may be prepared to find consideration by means of a collateral contract. Put briefly, this is "a contract the consideration for which is the making of some other contract."[23] Applied to our purposes, the tenant may argue that the landlord's statement formed the basis of the collateral contract and that the consideration for this promise is to be found in the completion of the main contract of tenancy.

The concept of a collateral contract has long been applied to assist the tenant in this situation. Morgan v. Griffith[24] and Erskine v. Ardeane,[25] both decided in the 1870s, concerned promises by lessons to keep the demised lands free of rabbits. The tenants only having taken the lease on the faith of the promise. In both cases, it was held that the promise was binding on the lessor. In Morgan, counsel for the landlord had argued that there was no consideration but Kelly C.B., replied, "the signature of the lease was a good and sufficient consideration."[26] Mann v. Nunn[27] is another case squarely in point. Whilst the

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23. Heilbut Symons v. Buckleton [1913] A.C. 30, 47 per Lord Moulton. See Note, 79 Sol. J. 472 (1935), Note, 91 Sol. J. 478 (1947). Williams op. cit. n.6 at 361 and generally, K.W. Wedderburn, "Collateral Contracts" 1959 Camb. L.J. 58.
24. (1871) L.R. 6 EX 70.
25. (1873) L.R. 8 Ch. App. 756.
26. (1871) L.R. 6 EX 70, 72.
27. (1874) 43 L.J.C.P. 241.

parties were negotiating for the lease, the defendant promised to put the messuage in a condition fit for habitation. Amongst the things which he undertook to do was to construct a water-closet. In an action by the tenant for breach of this promise, the Court of Common Pleas held the verbal promise to be enforceable as a collateral warranty. A similar decision was reached a year later in Angell v. Duke,[28] where the landlord had promised to repair and to supply additional furniture.

The leading case is De Lassalle v. Guildford.[29] Landlord and tenant had been negotiating for the lease of a house. The terms were arranged, but the plaintiff-tenant refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in good order. The defendent verbally represented that they were so and the counterpart was thereupon handed over. The lease contained no reference to drains. They were not in good order, and an action was brought to recover damages for breach of warranty. The Court of Appeal held the tenant entitled to succeed. The promise was regarded as the basis of a separate contract, the consideration for which was the entering into the main contract of tenancy.

A more recent case was Otto v. Bolton.[30] The plaintiff-buyer had asked the vendor if the house was well constructed and was told that it was. She now sued for breach of the assurance.

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28. (1875) L.R. 10 Q.B. 174. But see decision on another point (1875) 32 L.T. 320.

29. [1901] 2 K.B. 215.

30. [1936] 2 K.B. 46. cf. Collins v. Hopkins [1923] 2 K.B. 617, 628-629.

Atkinson J. held her entitled to recover,

> "I have no doubt here that the statement amounted to a warranty. I am quite satisfied that (the defendant-vendor) intended it to be a contractual promise collateral to the contract of purchase. I am satisfied that he knew the contract was entered into on the basis of the assurance that he had given, and I am sure that Miss Otto believed the assurance, and in her turn accepted it as the basis of the contract, and on the strength of it signed the contract and ultimately completed."[31]

The concept of a collateral contract may thus prove to be of great value to the tenant but its limitations should be noted. It has been said collateral contracts "must from their very nature be rare" and are to be "viewed with suspicion lest contractual force be given to gratuitous promises."[32] This suspicion manifested itself in Kenard v. Ashman[33] in which the tenant relied upon a statement that the drains were in good order. Wills J. expressed the opinion that the cases as to collateral agreements had gone quite far enough and said he was not disposed to carry the doctrine further than it had already gone.

Once again much depends on the willingness of the court, having regard to all the circumstances, to classify a particular statement as being a collateral contract to the tenancy agreement.[34] A positive declaration by the tenant, as in

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31. Ibid.
32. Heilbut v. Buckleton [1913] A.C. 30, 47 per Lord Moulton.
33. (1894) 10 T.L.R. 213.
34. For a case in which the court was unable to agree, see R. v. Croydon Rent Tribunal ex p. Longfield Properties Co. [1947] W.N. 238.

De Lasalle v. Guildford, that the lease will only be taken if an assurance is given as to the condition of the premises is strong evidence of a collateral contract. Whether many tenants have the bargaining strength to make such an ultimatum is very doubtful.[35]

The concept of a collateral contract may come to the aid of a tenant where the promise is made during the negotiations for the tenancy, it is of no value in the case of promises made during the term. A promise made by the landlord during the term must be supported by some new consideration, otherwise it is considered a mere nudam pactum.[36] The Oregan decision of Bickham v. Reynolds[37] provides an illustration. After the tenancy had began, the landlord promised to fix a defective step. The court held that this promise did not constitute a binding contract but was a mere gratuitous statement unsupported by consideration.

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35. Supra 190

36. In Buswell v. Goodwin [1971] 1 W.L.R. 92, 98 Widgery L.J. referred to "the very difficult question from the tenant's point of view of showing that there was any consideration for this kind of promise if the promise was made" but did not feel it necessary to consider the point further. There are many American cases on the point, e.g. Oettinger v. Levy (1855) 4 E.D. Smith (N.Y.) 288; Libbey v. Tolford (1861) 48 Me. 316, 77 Am. Dec. 229; Grace v. Williams (1930) 36 Ohio App. 569, 173 N.E. 448; Forshey v. Johnstone (1971) 271 N.E. 2d. 81 (Ill.) Cases collected: Annot, 43 A.L.R. 1451, 1494 (1926), Annot, 78 A.L.R. 2d. 1238, 1251.

37. (1960) 355 P. 2d. 756.

The requirement of consideration in conjunction with the parol evidence rule may produce considerable hardship. This was pointed out by the Supreme Court of Appeal of West Virginia[38] rejecting tenant's defence to an action for non-payment of rent based upon an alleged oral promise of the landlord to instal a fire escape. If the alleged promise was made prior to or contemporaneously with the making and execution of the written lease agreement, testimony to prove the oral agreement would violate the parol evidence rule and therefore would not be admissible. But if such oral agreement was made after the written lease was executed, it would be rendered unenforceable for the reason that it was not based on valuable consideration.

An agreement to repair made during the term will be enforceable if it is supported by special consideration. For example, in Page v. Ginsberg,[39] the tenants were permitted to rely upon the landlord's promise to make necessary repairs upon proof that they had paid a sum of money to enable him to do such repairs. It seems likely that the landlord's promise to make repairs would also be sufficiently supported by the contemporaneous agreement of the tenant to pay an increased amount of rent.[40] Though a promise by the tenant to perform his existing obligations, for example, to pay rent promptly is no consideration.[41]

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38. Wilkinson v. Searls (1971) 184 S.E. 2d. 735, 741.
39. (1951) 345 Ill. App. 68, 102 N.E. 2d. 165.
40. cf. Donnellan v. Read (1832) 3 B. & Ad. 899, 110 E.R. 330.
41. e.g. Hart v. Coleman (1917) 201 Ala. 345, 78 So. 201.

In Cavalier v. Pope,[42] the House of Lords appears to have recognised that a tenant with a right to quit the premises furnishes good consideration by staying on.

Representations

The court may not feel able to construe the landlord's statement as either a term of the main or of a collateral contract. It will then be classified as a representation. The effect of a representation which turns out to be false depends on two factors: whether it is operative and whether it was made fraudulently, negligently or non-negligently.[43]

Not all statements will have legal consequences. The statement must be made with regard to some existing fact or past event and must be one of the causes that induces the tenant to enter into the tenancy agreement.[44] The first point to note is that it must concern some existing fact or past event hence promises to do a future act must be distinguished. The landlord may have said, "I'll see that the premises are fit by the time you move in." This is a statement of intention and, prima facie, confers no right upon the tenant if it turns out to be false and is not construed as either an express term or part of a collateral contract.[45] The statement must be one of fact

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42. [1906] A.C. 428. See also Routh v. Davenport (1891) 14 N.Y.S. 69; Ehinger v. Bahl (1904) 208 Pa. 250, 57 A. 572; Wiley v. Dow (1958) 107 So. 2d. 166 (Fla.). Cases collected Annot, 43 A.L.R. 1451, 1499 (1926), Taylor, 3 Ala. L.R. 335, 343 (1951).

43. See Cheshire & Fifoot op. cit. n. 12 Chapter

44. Ibid

45. cf. Maddison v. Alderson (1883) 8 A.C. 467; Edgington v. Fitzmaurice (1885) 29 Ch. D. 459.

not opinion. So in Kenard v. Ashman,[46] Wills J. dismissed a claim based on the statement that a house was well built. Such a statement was one of a very general character and was in its nature more like the expression of an opinion than an allegation of fact. In Walsh v. Schmidt,[47] the Supreme Judicial Court of Massachusetts treated a statement that a house was good, safe and fit to live in as mere "dealer's talk" to be disregarded. Finally, the tenant must be able to show that he was induced to enter into the tenancy agreement by the misrepresentation.[48]

Assuming that the representation is held to be operative, the remedies available to the tenant will vary according to whether it is further classified as fraudulent, negligent or innocent. Fraud has been defined as a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false." A negligent misrepresentation is one in respect of which the person making it cannot show "that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true." An innocent representation can therefore be defined as one which made non-fraudulently and non-negligently.

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46. (1894) 10 T.L.R. 213.

47. (1910) 206 Mass. 405, 92 N.E. 496. cf. Lewis v. Clark (1897) 86 Md. 327, 37 A. 1035; Hightower v. Henry (1904) 85 Miss. 476, 37 So. 745; Storell v. Newell (1938) 158 Ore 206, 75 P.2d. 346; Grimes, 2 Val. U.L.R. 189, 204 (1968), Harkrider, 26 Mich. L.R. 260, 271. 51C C.J.S. s.305, p. 777.

48. Jackson v. Odell (1884) 12 Daly (N.Y.) 345.

It is clear that a fraudulent representation made by the landlord or his agent will entitle the tenant to terminate the tenancy agreement and vacate the premises. For example, in Wolfe v. Arnot[49] the Supreme Court of Pennsylvania held proof of fraudulent statements as to the condition of drains to be a defence to the landlord's action for rent. Fraudulent misrepresentation also gives rise to a right of action for the tort of deceit. So in Boyd v. Dickinson,[50] the Supreme Court of British Columbia awarded damages for fraud based upon the landlord's false representation that the premises were free from vermin. So too in Clarke v. Yorke,[51] the tenant was entitled to damages upon showing that he had been fraudulently induced to take a lease by the landlord's claim that the land was well drained. But it was also held in that case that, having once recovered, the tenant could not recover anew.

Whether the representation be seen as fraudulent, negligent or innocent the tenant will have the right of rescission. The common law made no distinction where that remedy was concerned.[52] Thus in Tofield v. Roberts,[53] the tenant was held entitled to be relieved from the lease which he had entered as a result of a misrepresentation as to the

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49. (1885) 109 Pa. 473, 1 A. 333. cf. Jackson v. Odell (1884) 12 Daly (N.Y.) 345; Gamble Robinson v. Buzzard (1933) 65 F. 2d. 950; Rapacz, 4 De Paul L.R. 173, 186 (1954).

50. [1930] 2 D.L.R. 96.

51. (1882) 52 L.J. Ch.32. cf. Burroughs v. Clancey (1869) 53 Ill. 30; Myers v. Fear (1908) 21 Okla. 498, 96P.642. Rubenstein v. Arbeitman (1942) 37 N.Y.S. 2d. 779.

52. But note common law restriction where lease had been executed, Angel v. Jay [1911] 1 K.B. 666. Note, 75 L.J.270 (1933), Note 81 Sol.J. 544 (1937). Now repealed by Misrepresentation Act 1967 s.1.

53. (1894) 10 T.L.R. 437.

nature of the drains. There was no finding of fraud. In addition to rescission, the tenant can recover an indemnity. The position is illustrated by Whittington v. Seale Hayne.[54] The tenants, who were poultry breeders, had been induced to take the lease of certain property by an oral representation that the premises were in a sanitary condition. This representation proved to be false and, in consequence, the manager of the farm became seriously ill and some of the poultry died. The Urban District Council also declared the premises to be unfit for habitation and required the tenants to renew the drains. They were held entitled to rescind the agreement for the falsity of the representation although it was not made fraudulently. The cost of rates and the repairs required by the Council were recovered as an indemnity.

Whittington v. Seale Hayne illustrates the further point that the common law did not allow the recovery of damages for misrepresentation unless made fraudulently.[55] The tenants' claim for medical expenses, loss of profit and stock was classified as one for damages not indemnity and rejected. Statute has now intervened to distinguish between negligent

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54. (1900) 82 L.T. 49.

55. Saunders v. Pawley (1886) 2 T.L.R. 590. Bartum v. Aldous (1886) 2 T.L.R. 237. Butler v. Goundry (1888) 4 T.L.R. 711. Burstal v. Bianchi (1891) 65 L.T. 678. Green v. Symons (1897) 13 T.L.R. 301. The U.S. law is divided on whether non-fraudulent misrepresentation gives rise to an action in damages: cf. York v. Steward (1898) 21 Mont. 515, 55 P.29; Bauer v. Taylor (1904) 4 Neb. (Unoff) 710, 98 N.W. 29.

and innocent misrepresentations and to confer a right of damages for the former. Section 2(1) of the Misrepresentation Act 1967 expressly places negligent misrepresentation on the same basis as fraudulent misrepresentation. It might also be noted that the case of Hedly Byrne v. Heller[56] opens up the possibility of recovering damages in negligence. Damages are not normally recoverable for innocent misrepresentation. The only exception is where the court has exercised its discretion to refuse rescission and gives damages in lieu under section 2(2) of the 1967 Act.

Conclusion

Statements made during the negotiations may thus have varying effects. On the one hand, they may be held to be express terms of the tenancy agreement or of a collateral contract. On the other, they may have no effect at all if they are classified as mere promises or opinions or if the tenant was not induced to enter into the agreement by them. Traditionally the vital distinction has been that between express warranties and innocent representations. Fortunately, the Misrepresentation Act 1967 has done much to modify this distinction though it will still be of importance that the misrepresentation was made innocently. The change is just as well for it is enormously difficult to foresee how the court

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56. [1964] A.C. 465.

will classify a particular statement.[57] The 1967 Act has, however, done nothing to lessen the tenant's burden on another matter. There must not only have been a statement, the tenant must also be able to produce evidence of it.[58] In the absence of written evidence and perhaps of reliable witnesses, the tenant may well be better advised not to confront his landlord on this point.

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57. Cahill, "The Householder's Duties Respecting Repairs", 2nd ed. 1930 at p. 204, "In fact it might also be said (so difficult is it to decide whether a verbal statement be merely an innocent representation or a warranty or condition) that unless the warranty is in writing it goes without saying any action by the tenant will fail."

58. cf. problem of evidence in Buswell v. Goodwin [1971] 1 W.L.R. 92.

Duty of Disclosure?[1]

The general rule of the English common law is that there is no duty of disclosure on the part of contracting parties.[2] Therefore, even if the landlord is aware of a defect at the time of making the lease, he is under no duty to convey this knowledge to the tenant. This rule is subject to an exception where a contracting party reveals partial information, in such a case he is under a duty to disclose other information with a bearing on the matter. So in Gusella v. Lewellen[3] the tenant was held entitled to recover when the landlord disclosed a part of the facts but concealed the true condition of the land which was affected by weeds.

In contrast, the American law imposes a general duty of disclosure of concealed defects and treats failure to do so as fraud.[4] The landlord in Wallace v. Lent[5] had let premises without informing the tenant of its unfit condition, a fact of which he was aware. In consequence, the tenant fell ill and vacated the premises refusing to pay future rent. The landlord brought an action to recover the rent. Rejecting his action, the New York Court of Common Pleas stated, "To let the house to the defendant, concealing so material a

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1. See also infra 624 for liability in tort for non-disclosure.
2. Cheshire & Fifoot op. cit. n. at
   cf. uncertainty shown in Lucas v. James (1849) 7 Hare 410, 68 E.R. 170.
3. [1938] 3 D.L.R. 800, 3 W.W.R. 1.
4. 49 Am. Jur. 2d. s.791, p. 741. 51C C.J.S. s.303, p. 771. Rapacz, 4 De Paul L.R. 173, 186.
5. (1865) 1 Daly (N.Y.) 481. cf. Stein v. Rice (1898) 51 N.Y.S. 320. Scudder v. Marsh (1922) 224, Ill. App. 355. Perkins v. Marsh (1934) 179 Wash. 362, 37 P. 2d. 689.

matter as this, was a fraud. The agent knew that the house was not fit for habitation, but the tenant did not, nor could he have discovered the cause which made it so by any ordinary examination of the premises. No contract is implied that a house is fit for habitation. --- But where the landlord knows that a cause exists which renders the house unfit for habitation, it is a wrongful act on his part to rent it without notice of its condition."[6] Besides rescission, non-disclosure of a latent defect has been held to entitle the tenant to return of a security payment and to damages.[7]

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6. (1865) 1 Daly (N.Y.) 481, 483.

7. Looney v. Smith (1950) 96 N.Y.S. 2d. 607.

Chapter 9

The Doctrines of Illegality and Mistake

Illegality

In recent years, a most interesting development has taken place in the law of the District of Columbia. The courts have used the well-established doctrine of illegality of contracts to advance the cause of the tenant of substandard housing.

As was held in Hartman v. Lubor, "the general rule is that an illegal contract, made in violation of a statutory prohibition designed for police or regulating purposes, is void and confers no right upon the wrongdoer."[1] A party to such a contract will not only be precluded from enforcing it but he will also be denied quasi-contractual recovery for the value of benefits conferred under such contract.[2] The utility of this doctrine to tenants was illustrated by Professor Schoskinski.[3] Noting that there was a statutory prohibition against the occupancy of any habitation in violation of the housing regulations, he suggested,

> "The argument should be made that the lease of premises in violation of these regulations is an illegal contract and as such confers no rights on the landlord. Since such a contract is violative of regulations designed to promote the 'health, safety, welfare and morals of the community' he should be denied use of judicial process to collect rent under such a contract or to recover value for use and occupancy."[4]

Although the modern law post-dates Professor Schoskinski's article, this argument is not a new one.

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1. (1942) 133 F. 2d 44. cf. Ewert v. Bluejacket (1922) 259 U.S. 129. Annot, 55 A.L.R. 2d 488. 51C C.J.S. s.226, p. 565.
2. Infra 316
3. Schoskinski, 54 Geo. L.J. 519 (1966).
4. Ibid 538.

The Supreme Court of Minnesota held in the 1911 case of Leuthold v. Stickney that a landlord, who had breached a statute requiring the provision of a fire escape, could not recover rent from a vacating tenant.[5] Another early case, Hines v. Norcott,[6] came to a different conclusion. In this action by the landlord for rent, the tenant contended that the contract was unlawful and unenforceable as being made in violation of an ordinance forbidding the use of dry or surface privies and requiring owners of lots on streets wherein sewer pipes have been laid to connect with such sewers. Penalties were provided for non-compliance. It was held by the Supreme Court of North Carolina that the contract was not violated by the breach of the ordinance. The decision was explained on the basis of the object of the statute,

> "There is nothing there said, expressly or impliedly, to the effect that leases of such premises should be void: but the ordinance only provides for a penalty of $5 for each day's violation of its provisions...... The town council, in passing this ordinance, surely did not have in mind the prohibition of a lease or sale of the premises, but only the punishment by way of penalty for the violation of its ordinance...... The lease was entirely collateral to and independent of the object for which the ordinance was enacted."[7]

This case emphasises the need to bear in mind that illegality on the basis of statute only operates if the legislative intent in passing the statute was to render void contracts of the particular kind sued upon and not merely to prohibit the act and impose a penalty.[8]

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5. (1911) 116 Minn. 299, 133 N.W. 856.
6. (1918) 96 S.E. 2d 899.
7. Ibid
8. cf. infra 322 for similar test in English law.

The New York courts have also rejected an argument based upon a law which provided that no building was to be occupied or used without a certificate of occupancy.[9] The tenant in Minton v. Schulte[10] contended that the landlord's failure to obtain the certificate constituted an attempt to violate the statute and so rendered the lease illegal. On that basis, he sought to avoid the obligation for present and future rent and also recover rent paid during the past twelve years under the lease. The court found for the landlord on the grounds that the intent behind the statute did not permit the tenant to behave in such a "highly inequitable and unjust" manner. There was no public policy which required the lease between the parties be declared void.

The first of the modern cases to take up Professor Schoshinski's suggestion seems to have been Adams v. Lancaster[11] decided by the District of Columbia Court of General Sessions. A prospective tenant sued to recover a deposit tendered pursuant to a tenancy agreement and argued that he was entitled to recover on the grounds that the tenancy

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9. See now s. C26-183 of the New York City Administrative Code. Infra §§3 for certificates of occupancy generally.

10. (1934) 153 Misc. 195, 174 N.Y.S. 641. See also Solman v. Schulte (1934) 154 Misc. 139, 276 N.Y.S. 535. Euclid Holding v. Schulte (1934) 153 Misc. 832, 276 N.Y.S. 533. 56-70 58th Street Holding Corp. v. Fedders-Quigan Corp. (1959) 5 N.Y. 2d 557, 176 N.Y.S. 2d 583. Herzog v. Thompson (1966) 50 Misc. 2d 488, 270 N.Y.S. 2d 469.

11. (1967) 11 Welfare Law Bulletin 4. Poverty Law Reporter para. 2330.55.

agreement was void being entered into in violation of the Housing Regulations and the Certificate of Occupancy. This argument was upheld by the court which also refused to offset the tenant's recovery by the amount of expenses which the landlord incurred in moving furniture.

The leading case is, however, Brown v. Southall Realty Co.[12] decided by the District of Columbia Court of Appeals in 1968. The landlord had brought a possession action for non-payment of rent and was confronted with the tenant's claim that the tenancy agreement was illegal as being entered into in violation of certain provisions of the District of Columbia Housing Regulations. One of these provisions, section 2304, stated that,

> "No person shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin."

The other provision, section 2501, required that,

> "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighbourhood healthy and safe."

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12. (1968) 237 A. 2d 834. Noted: Comment, 18 Catholic L.R. 80 (1968), Comment, 56 Georgetown L.J. 920 (1968), Comment, 66 Michigan L.R. 1753 (1968), Comment, 21 Vanderbilt L.R. 1117 (1968), Comment, 12 Welfare Law Bulletin 9 (1968). Kaufman, 4 Harv. Civil Rts. - Civil Lib.L.R. 204 (1968), Picadio, 30 U. of Pitts. L.R. 134 (1968), Stognar, 21 Baylor L.R. 372 (1969), Young, 25 Wash. & Lee L.R. 335 (1968).

Quinn J., delivering the court's decision, noted that the lease involved was entered into in violation of these provisions and concluded that it was an illegal agreement because,

> To uphold the validity of this lease agreement, in light of the defects know to be existing on the leasehold prior to the agreement --- would be to flaunt the evident purposes for which sections 2304 and 2501 were enacted."[13]

Judgement was given for the tenant.

Many points were left unresolved by the decision in Brown but later cases have gone some way to clear them up. The defects in that case, an obstructed commode, a broken railing and insufficient ceiling height in the basement, existed at least some months prior to the lease. Would the doctrine of illegality have applied if they had occurred after the tenancy commenced?[14] Saunders v. First National Realty Co.[15] decided by the same court a few months after Brown limited that decision to cases where the housing code violations were alleged and proved to have been in existence at the time of the lease,

> "Our holding in Southall was that where the owner of dwelling property, knowing that Housing Code violations exist on the property which renders its unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced. We did not hold and we now refuse to hold that violations occurring after the tenancy is created void the lease."[16]

Saunders was followed by the Supreme Court of South Carolina in Riley v. Nelson[17] in rejecting contentions on the part of the tenant which had their genesis in Brown. However, in Javins v. First National

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13. Ibid 837.
14. Comment, 56 Geo. L.J. 920, 931 (1968). Leippe, 49 North Carolina L.R. 175, 186 (1970). Picadio, 30 U. of Pitts. L.R. 134, 139 (1968). Young, 25 Wash. & Lee L.R. 335, 340 (1968).
15. (1968) 245 A. 2d. 836.
16. Ibid 837-838.
17. (1971) 183 S.E. 2d. 328.

Realty Co. the United States Court of Appeals for the District of Columbia reversed Saunders and stated the view,

> "Under the Brown holding, serious failure to comply --- (with a housing code) --- before the lease term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after it has been signed."[18]

Though the court left uncertain what the "effect" would be,[19] it is now clear that the doctrine of supervening illegality applies to leases as it does to other contracts.

The tenant in Brown had already moved from the premises at the time of the appeal and did not wish to return to them. The position of the tenant still in possession was not before the court. Taking the rule applied in that case literally might have the harshest consequences for the tenant. If an illegal contract "is void and confers no right on the wrongdoer", it would seem that the landlord could summarily evict the tenant as an intruder or trespasser.[20] The tenant's defence to an action for rent would be, in effect, self-defeating as the landlord could simply amend his complaint to ask for the tenant's removal as a trespasser or because the lease had been rescinded by the illegality.[21]

These contentions were considered by the District of Columbia Court of Appeals in Diamond Housing Corp. v. Robinson,

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18. (1970) 428 F. 2d. 1071, 1081.

19. Leippe, 49 North Carolina L.R. 185, 186 (1970).

20. Kaufman, 4 Harv. Civil Rts. - Civil Lib. L.R. 204, 206 (1968).

21. Young, 25 Wash. & Lee L.R. 335, 339 (1968). cf. Comment, 56 Geo. L.J. 920, 933 (1968), Leippe, 49 North Carolina L.R. 175, 184 (1970), Picadio, 30 U. of Pitts. L.R. 134, 140 (1968), Ray, 16 Harvard L.J. 366, 373 (1971).

"Appellant contends that the determination that a lease is void and unenforceable results in a rescission of the lease agreement, and requires the tenant to return possession of the premises. We do not agree. It is well established that an agreement entered into in violation of the law creates no rights upon the wrongdoer. The defence of illegality does not rescind the illegal agreement but merely prevents a party from using the courts to enforce such an agreement."[22]

Nor was the tenant a mere trespasser but rather a tenant at sufference,

"We hold that appellee, having entered possession under a void and unenforceable lease, was not a trespasser but became a tenant at sufferance. Consequently, appellant was not entitled to relief under its theory that appellee be treated as a trespasser."[23]

But "the tenancy, like any other tenancy at sufferance, may be terminated on thirty days' notice".[24] Indeed, the court went on to say that if the landlord was unwilling or unable to put the property in a habitable condition, he was under a duty to withdraw it from the rental market because the Regulations forbade both the rental and occupancy of unfit premises.[25]

Although successful in this first action, Mrs. Robinson's problems were only just beginning. Her landlord promptly served a thirty day's notice to quit and again brought an action to recover possession. She defended with a claim that the action was retaliatory and therefore illegal since she had prevailed in the earlier action and none of the housing violations had yet been corrected. Diamond Housing Corp. moved for summary judgement supporting the motion with an affidavit of its vice president stating that it was unwilling to make any repairs to

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22. (1969) 257 A. 2d. 492, 495. Affirming decision of D.C. Court of General Sessions (1968) 15 Welfare Law Bulletin 17, Poverty Law Reporter, para. 9417.

23. Ibid 495.

24. Ibid

25. Ibid. The relevant provision is 2301; "No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations."

the property and was not presently desirous of continuing to rent the premises. Mrs. Robinson appealed from the trial court's order granting the motion. The District of Columbia Court of Appeals[26] dismissed the defence of retaliatory eviction and held that the landlords had correctly terminated the tenancy at sufferance. The court expressed its view that,

> "it is unreasonable to permit a tenant to remain in housing which has been determined to be unsafe and uninhabitable and in violation of the Housing Regulations. Moreover, the Regulations prohibit such occupancy."[27]

Mrs. Robinson unsuccessfully sought an interim stay of eviction from the District of Columbia Court pending review by the United States Court of Appeals for the District of Columbia Circuit. She then sought such a stay from the latter court itself, a request denied per curiam.[28] In a separate opinion, concurred in by a majority of the court, it was noted that she had temporarily vacated the premises. Eventually, it was held by the United States Court of Appeals that the retaliatory eviction defence was good and should not have been rejected.[29]

The result of all this litigation was, therefore, that although the tenant placing reliance on illegality is merely a tenant at sufferance and so subject to thirty days' notice to quit, the landlord who serves such notice may be refused recovery by the separate doctrine of retaliatory eviction.[30]

Robinson[31] also made it clear that violations of the Housing Regulations could be used in defence even where there were no official citations from the Department of Licenses and Inspections,

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26. Robinson v. Diamond Housing Corp. (1970) 267 A. 2d. 833.
27. Ibid 835.
28. See (1970) 433 F. 2d 497
29. (1970) 433 F. 2d. 497.
30. For retaliatory eviction, infra 994
31. (1969) 257 A. 2d. 492.

violations that existed at the inception of the lease were not of a kind and quality sufficient to render the premises unsafe and insanitary bearing in mind the age of the structure and its general suitability for housing in the particular area of the city.

Does the tenant's knowledge of the Code violations prevent reliance upon the doctrine? The tenant in Brown was not aware of the violations at the time the lease was signed. The landlord had withheld this information from her.[37] Could he have prevented her recovery by informing her of the violations before the lease was signed? If the violations had occurred after the agreement, would her action in continuing to pay rent to be construed as a waiver of the illegality? The Court of Appeals of North Carolina appears to have thought so in Thompson v. Shoemaker,

> "We have not attempted to decide whether or not a contract for the rent of a dwelling maintained in substantial violation of a municipal housing code is enforceable. Suffice to say, plaintiff's complaint shows that she voluntarily paid the rent with full knowledge of the facts and that she continued to occupy defendant's property throughout the rental period. For these reasons we hold that the demurrers to plaintiff's first cause of action were properly sustained."[38]

The District of Columbia Court of Appeal came to a similar decision in Watson v. Kotler.[39] In that case the landlord was notified of housing code violations by Code officials in June of 1967. In July, before completing the corrections, he rented the premises to the defendant. They were reinspected in September and the violations found corrected. Nearly two years later, in June 1969, the landlord brought an action against the tenant for recovery of possession based

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37. Picadio, 30 U. of Pitts. L.R. 134, 137 (1968).
38. (1970) 173 S.E. 2d. 627, 630. Noted 49 North Carolina L.R.569 (1970).
39. (1970) 264 A.2d. 141.

on non-payment of rent. The defendant asserted the illegality of the lease because of housing code violations in 1967 when the lease was executed. The court found for the landlord. It observed that "only after appellant had fallen behind in her rent payments did she contend that the lease she had been living under for two years was illegal and void."[40]

> "We do not believe that the public interest is served by voiding a lease which a tenant enters into while the landlord is correcting deficiencies on the leased premises and under which she thereafter lives for two years."[41]

The exact weight of each of these factors is not clear. The argument based on the landlord being in the process of correcting the violations seems stronger.[42] The Regulations allow a landlord a reasonable time after he has received notification of violations to correct them[43] and penalising landlords who were seeking to maintain premises would not encourage their aim of securing decent housing. Though there remains the danger that a landlord who makes only minor repairs will avoid the Brown defence. If the court was placing greater weight on the tenant's continued possession after knowledge of the violations then it will certainly deprive many tenants of the defence. It is also contrary to general rule that doctrine of illegality applies even if the other party to contract knows of the illegality.[44]

The Appellate Court of Illinois went the other way in Longenecker v. Hardin.[45] The landlord brought an action to recover arrears of

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40. Ibid 142.

41. Ibid 143.

42. cf. Picadio 30 U. of Pitts L.R. 134, 138 (1968).

43. Section 1301.4.

44. Restatement, "Contracts" s.598 comment C (1932) 6 Williston, "Contracts" s.1787

45. (1970) 264 N.E. 2d. 878.

rent. The tenant's assertion that the premises violated the city of Chicago's Housing Code was countered by a claim that a provision in the lease agreed to by the tenant expressly said he had accepted their conditions. The Illinois Court held that this provision could not preclude the interposition of the doctrine of the illegality of the lease.[46]

Assuming the tenant can make out a claim of illegality, what remedies are available to him?[47] Brown, Diamond Housing Corp. v. Robinson and Longenecker v. Hardin are authorities showing that he can withheld rent and defend a landlord's action on the basis of the doctrine. Can he do more? Can he recover benefits conferred on the landlord under the illegal contract? The general rule in the law of contract is that the court will not aid a party to an illegal contract but leaves him as it finds him.[48] There is an exception to this rule where the parties are not equally at fault, "in pari delicto". In these cases, the court will help the innocent party but not the guilty.[49] The District of Columbia's Court of General Sessions applied this exception in Adams v. Lancaster[50] to allow the tenant to recover an eighty dollar deposit paid under an illegal contract. In Davis v. Slade,[51] a trial judge awarded a tenant whose lease had been invalidated pursuant to a Brown defence all the past rent paid by him to the

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46. Ibid 880.

47. See Comment, 56 Geo. L.J. 920, 930 (1968), Daniels, 59 Geo. L.J. 909, 935 (1971), Picadio, 30 U. of Pitts. L.R. 134, 144 (1968).

48. Restatement, "Contracts" s.598 (1932).

49. Ibid s.604.

50. Supra 306

51. (1970) 271 A. 2d. 412.

landlord under the lease. The landlord appealed to the District of Columbia Court of Appeals,

> "The basic question raised on this appeal is what, if any, compensation a landlord is entitled to receive from his tenant for the use and occupancy of the premises when the lease is void and illegal. The appellants contend that they are entitled to keep the rent received under the illegal lease since not all contracts which violate a regulation are unenforceable. The appellee contends that the landlord should not be allowed to benefit from his illegal bargain, and, therefore, is not entitled to any compensation. We hold that the landlord is entitled to some compensation."[52]

Taking judicial note of the housing shortage and the great disparity in bargaining position between landlord and tenant,[53] the court decided that the tenant was not in pari delicto. But even if the tenant was in pari delicto, the court would still refuse to apply the general rule denying restitution because public policy would be better served by such a denial.[54]

It was still necessary to consider whether the landlord could set off any amount under a quasi-contractual theory. The court decided not to follow the normal rule denying quasi-contractual recovery.[55] The decision in Diamond Housing Corp. v. Robinson[56] had, in effect, ordered the landlord to award the tenant the status of tenant at sufferance. There were tangible legal benefits received by the tenant from this relationship; he was not subject to a cause of action for trespass and was entitled to a thirty day notice to quit.[57] The court

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52. Ibid 413.

53. Ibid 415. cf. supra 190

54. Ibid 416, citing Rubin v. Douglais (1948) 59 A. 2d. 690, Restatement, "Contracts" s.601, 6 Williston "Contracts" s.1787.

55. e.g. Miller v. Peoples Contractors Ltd. (1969) 257 A. 2d. 476, Restatement "Contracts" s.598 comment C. 6 Williston "Contracts" s.1787.

56. Supra 309

57. (1970) 271 A. 2d. 412, 416.

concluded that,

> "Although the landlord is entitled to nothing for what he gave the tenant under the lease, he is entitled to the reasonable value of the premises in its condition as it was when occupied."[58]

This decision has been criticised on the grounds that there would seem to be no justification for distinguishing between contracts voided by reason of housing code violations and other contracts voided on the ground of illegality. The weight of authority holds that quasi-contractual relief is denied to a wrongdoer. If this well-established contract principle was applied to a lease, the tenant would be able to recover back all past rent.[59] It is suggested that this may be too harsh a remedy and that justice is done by requiring the tenant to pay only the reasonable value of the premises during the period when the illegal condition existed.

Before considering the merits of the doctrine, a word or two must be said about its acceptance by the courts and legislature. It has been seen that the leading cases are from the District of Columbia which has led the United States in this area as in the related areas of the implied warranty of fitness[60] and retaliatory eviction.[61] Brown,[62] the leading case, has had its potential scope cut down by the decisions in Robinson,[63] Reese,[64] Watson[65] and Davis.[66] It is, therefore, of

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58. Ibid.
59. Daniels, 59 Geo. L.J. 909, 936 (1971).
60. Supra 141
61. Infra 995
62. Supra 307
63. Supra 309
64. Supra 312
65. Supra 313
66. Supra 315

interest to note the firm support given to the case by the recently enacted District of Columbia Housing Regulations.[67] Section 2902.1(a) incorporates the Brown rule by voiding a lease where unsafe and unsanitary conditions exist at the inception of the tenancy,

> "(a) Any letting of a habitation which, at the inception of the tenancy, is unsafe or unsanitary by reason of violations of these Regulations with respect to the particular habitation let or the common space of the premises, whether or not such violations are the subject of a notice issued pursuant to these Regulations, of which the owner has knowledge or reasonably should have knowledge, shall render void the lease or rental agreement for such habitation."

This provision makes it clear that the premises must be unsafe or unsanitary thus incorporating also the decision in Reese.[68] It also makes clear the fact that the premises need not be both unsafe and unsanitary, they may be either and, further, that defects in common areas are covered. The reference to notice codifies the decision in Robinson.[69] Section 2902.1(b) extends the application of the doctrine to defects arising during the tenancy,

> "(b) Any letting of a habitation which, following the inception of the tenancy, becomes unsafe or unsanitary by reason of violations of these Regulations with respect to the particular habitation let or the common space of the premises, whether or not such violations are the subject of a notice issued pursuant to these Regulations, which violations have not resulted from the intentional act or negligence of the tenant or his invitees, and which violations are not corrected within the time allowed thereof under a notice issued pursuant to these Regulations, or, if such notice has not been issued, within a reasonable time after the owner has knowledge or reasonably should have knowledge of such violations, shall render void the lease or rental agreement for such habitation."

This provision reverses the decision in Saunders[70] and incorporates the Watson[71] decision by giving the landlord a reasonable time to

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67. See Daniels, 59 Geo. L.J. 909, 933 (1971), Ray, 16 Harvard L.J. 366, 371 (1971).

68. Supra 312

69. Supra 309

70. Supra 308

71. Supra 313

correct violations.

The doctrine of illegality has had a mixed reception outside the District of Columbia. The Appellate Court of Illinois applied Brown in Longenecker v. Hardin[72] whilst in Jensen v. Salisbury,[73] the Connecticut Circuit Court declared itself unable to lend its assistance towards carrying out the terms of a lease, the inherent purpose of which was to violate the law, nor would it enforce any alleged right directly springing from an illegal contract. The Supreme Court of Wisconsin rejected the doctrine when it was advanced by the tenant in Posnanski v. Hood.[74] Noting that the Milwaukee ordinance relied upon left a great deal of discretion to those enforcing the code and there were no standards for differentiating between consequential and inconsequential violations, the court concluded,

> "Neither the legislature nor the common council of Milwaukee has adopted any legislation from which this court can infer an intent that rent withholding under an oral month to month lease agreement be utilised as a means of enforcing the housing code."[75]

The Court of Appeals of North Carolina did not attempt to decide in Thompson v. Shoemaker[76] whether a contract for the rent of a dwelling maintained in substantial violation of a municipal housing code is enforceable. It was sufficient to point out that the tenant voluntarily paid the rent. Although pointing out that the rationale

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72. Supra 314

73. (1968) Poverty Law Reporter para. 2330. 28, 15 Welfare Law Bulletin 17.

74. (1970) 174 N.W. 2d. 528. For critical comment, Hux, 1972 Urban Law Annual 245.

75. Ibid 533.

76. (1970) 173 S.E. 2d. 627 Supra 313

in Brown had been rejected by Posnanski v. Hood, the Supreme Court of South Carolina was able to distinguish the District of Columbia case on its facts in Riley v. Nelson[77] and did not consider the merits of the illegality doctrine.

The Brown doctrine has also received a mixed welcome from commentators. The decision has been praised as "a refreshing example of judicial forthrightness"[78] and even as "a slumfighter's dream".[79] Other commentators have been less enthusiastic. "The value of the decision to the indigent tenant is minimal",[80] "the Brown opinion can hardly be cheered as a great step forward in the development of tenants' rights".[81] "Brown cannot necessarily be interpreted as a total victory for tenants in slum areas."[82] Perhaps the decision is best seen as a bold attempt by the judiciary to adopt landlord-tenant to meet serious social problems which is somewhat restricted by the inherent limitations in the legal technique employed. The basic problem with the illegality concept is to use it in such a way as to distinguish between the defaulting landlord and the innocent tenant. Often this cannot be done; if the lease is illegal then the tenant is at most only a tenant at sufferance and so subject to a thirty day notice to quit.[83] The quite independent doctrine of retaliatory

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77. (1971) 183 S.E. 2d. 328
78. Comment, 21 Vand. L.R. 1117, 1119 (1968).
79. "Washington Post" February 16, 1968 quoted; Young, 25 Wash. & Lee L.R. 335, 336 (1968).
80. Picadio, 30 U. of Pitts. L.R. 134, 145 (1968).
81. Comment, 66 Mich. L.R. 1753, 1761 (1968).
82. Young, 25 Wash. & Lee L.R. 335, 339 (1968).
83. Supra 310

eviction is needed to confer additional protection.[84] To the extent that the Housing Code prohibits both the letting and occupation of substandard housing, then it may be that the tenant is not "innocent" at all.[85] The real importance of the Brown decision would seem to lie in the recognition by the court of rent-withholding as a technique to improve housing conditions[86] and the application of contract principles to the law of leases.[87]

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84. Supra 311

85. Supra 311

86. See generally supra 315

87. cf. Comment, 66 Mich. L.R. 1753, 1761 (1968). See generally supra 168

Statutory Illegality in English Law

The case of Brown v. Southall Realty naturally prompts the question, could a tenant use a similar argument in an English court and succeed? There is no firm answer to this question.

The first barrier to the tenant's action would be the argument that British housing law imposes no direct duties on landlords and so the letting of unfit houses is contrary to no statute. The landlord only commits an offence if the Local Authority requires him to do certain works and he fails to carry them out. In the absence of an order from the Authority, the lessor is committing no illegal act by letting an unfit house - at least as far as illegality by statute is concerned. The only contracts that might possibly be tainted by statutory illegality are those entered into whilst the landlord was in breach of an order made by the Local Authority under a statute. For example, the Authority may have required, under section 12 of the Housing Act 1961, that the owner of a multi-occupied house properly manage his property. If he fails to comply with this management order, will leases entered into in respect of the premises be vitiated by the landlord's criminal conduct? Again, a closing order is made by the Authority under section 17 of the Housing Act 1957 but the landlord continues to let the premises, what effect does the landlord's illegal act have on the validity of the lease?

Whether a contract is vitiated by statutory illegality is a question to be resolved on the basis of the Parliamentary intention; did Parliament intend that this provision should apply so as to render

this contract illegal?[1] A recent case illustrated the application of this test. In Shaw v. Groom,[2] the landlady had failed to provide a rent book properly containing all the information it should have contained and so she was in breach of the Landlord and Tenant Act 1962 section 1 which provides, "it shall be the duty of the landlord to provide a rent book or other similar document for use in respect of the premises." When she claimed arrears of rent, the tenant contended that the contract was illegal as performed and the arrears were, therefore, irrecoverable. The County Court judge upheld this contention but it was reversed when the landlord appealed to the Court of Appeal. The court maintained that where an illegality was performed in the course of performing this contract, the true question was "whether the breach of the provisions --- was intended simply to result in liability to a penalty or did it result in precluding the recovery of rent?"[3] It was held that since Parliament did not by the Landlord and Tenant Act 1962 intend to preclude the landlord from recovering the rent, the landlord was able to enforce the contract although in breach of the Act and so liable to a criminal penalty.

Applying the above test to violations of orders made under the Housing Acts, the question of illegality will depend upon the intention of Parliament as evidenced in each particular section. In many cases it might seem that Parliament intended only to punish an offence and

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1. The Gas Light and Coke Co. v. Turner (1840) 6 Bing (N.C.) 324, 133 E.R. 127. Anderson Ltd. v. Daniel [1924] 1 K.B. 138. cf. Archbolds v. Spanglett [1961] 1 Q.B. 374. St. John Shipping Co. v. Rank [1957: 1 Q.B. 267. cf. Supra p.305 for American law.
2. [1970] 2 W.L.R. 299.
3. [1970] 2 W.L.R. 299 at p. 312 per Sacks L.J.

not to render contracts connected therewith illegal. Such would seem to be the case where the landlord commits an offence under section 12 of the 1961 Act. Other sections might be seen as impliedly forbidding contracts of tenancy. Letting in contravention of a closing order or to persons in excess of the number permitted by an order made under section 90 of the 1957 Act or section 19 of the 1961 Act would seem to be forbidden by the Parliamentary intention. Each section requires to be examined individually and the distinction may by no means be clear.

Public Policy[4]

Courts have refused to enforce many types of agreements on the basis that to do so would be contrary to public policy. The list of such agreements include, inter alia, agreements to commit a crime or tort, to keep a mistress, to buy a public honour, to accept payment for match-making, to defraud the revenue and to act in restraint of trade.[5] These and many other agreements have fallen foul of the common law on the grouds that,

> "Whatever is injurious to the interests of the public is void on the grounds of public policy."[6]

This doctrine of illegality on grounds of public policy naturally leads one to wonder if it is open for the courts to refuse to enforce an agreement to let substandard housing. Can the tenant defend a landlord's action for rent on the basis that no court should allow itself to be a party to the enforcement of a contract by which one man gains a profit

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4. See generally, Lloyd, "Public Policy", W. Knight, "Public Policy in English Law", 38 L.Q.R. 207 (1922), Winfield, "Public Policy in the English Common Law", 32 Harv. L.R. 76 (1928), Treitel, "Contract" (3rd ed. 1970) at pp. 404-407, Lord Wright, "Legal Essays and Addresses" (1933) p. 71.

5. See, Cheshire & Fifoot, "Law of Contract" (7th ed. 1970) at pp. 310-363.

6. Horner v. Graves (1831) 7 Bing 735 at p. 743 per Tindal C.J.

by exploiting another's desperate need for housing and so causing him to live in unfit premises?[7] It is submitted that such an argument is open although confronted with large obstacles.

A formidable obstacle will be the view that the categories of public policy are now forever closed and that the court cannot, if it would, create a new head of public policy to cover substandard housing. In Janson v. Driefontain Mines Ltd. Lord Halsbury L.C. said,

> "I deny that any court can invent a new head of public policy."[8]

Despite the blunt nature of this statement, it is respectfully submitted that the dictum is not consistent with the history of English law nor with many decisions. Public policy has had a long life in the law though at times it has gone under other names. Doubts have been expressed many times as to its scope and indeed its very existence but it has emerged as an accepted, if only reluctantly accepted, doctrine.[9] On many occasions courts have extended the doctrine to cover new situations. Some illustrations were given by McCardie J. in Naylor, Benzan & Co. v. Krainische Industrie Gesellschaft.[10] For example in Wilson v. Carnley,[11] the Court of Appeal held that a promise of marriage made by a man who at the time is already married was void as against public policy.[12] More recent cases are also available. In Initial

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7. cf. Cohn, "Some Comparative Aspects of the Law of Landlord and Tenant", 11 Mod. L.R. 377 at p. 382 (1948).

8. [1902] A.C. 484 at p. 491. cf. Fender v. St.John Mildmay [1938] A.C. 1 at p.40.

9. See Knight, Winfield op. cit. n.4 for the development of public policy.

10. [1918] 1 K.B. 331 at 342.

11. [1908] 1 K.B. 729.

12. Two other examples were given: Neville v. Dominion of Canada News Co. [1915] 3 K.B. 556 and Harwood v. Miller's Timber and Trading Co. [1917] 1 K.B. 305.

Services v. Putterill, it was said that an agreement not to disclose contraventions of the Restrictive Trade Practices Act might be "illegal on the ground that it was clearly contrary to public policy".[13] There is a hint in Nagle v. Feilden[14] that the courts might extend the doctrine to strike down contracts furthering racial discrimination. It was noted in that case that,

> "The law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it."[15]

There are other opinions to like effect.[16] It is submitted on the basis of the above cases and dicta that it is still open to the courts to introduce a new head of public policy to the effect that no court will enforce a contract which obliges a tenant to pay rent for premises which are not fit for human habitation or which are injurious to health or social welfare.

Even if the courts prove reluctant to establish a new head of public policy to cover substandard housing, it can be argued that an existing head is wide enough to include this situation. Lord Mansfield declared in Jones v. Randall[17] that an agreement "contra bonas mores" is illegal and of no effect. The element of moral blame will naturally vary from case to case but there must be few people who deny that it is immoral to exploit those in dire need of housing, to subject the weakest sections of the population to the many individual and social deprivations arising from bad housing.[18]

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13. [1968] 1 Q.B. 396 at p.410.
14. [1966] 2 Q.B. 633 at p. 655.
15. [1966] 2 Q.B. 633 at 650 per Danckwerts L.J.
16. See Lord Sumner in Bowman v. Secular Society Ltd. [1917] A.C. 406 at 467. Lord Haldone in Rodriguez v. Speyer Bros. [1919] A.C. 59 at 77-81. Kennedy L.J. in Wilson v. Carney [1908] 1 K.B. 729 at p.743.
17. (1774) 1 Coup. 37.
18. Supra p. 18

In the past the types of immorality struck down have usually been variations of sexual immorality. A landlord had let premises to a prostitute in Jennings v. Throgmorton,[19] he was prevented from recovering his rent on her plea that the contract was immoral. So in Smith v. White[20] the assignor of a lease could not recover for breach of covenants when he knew the premises were to be used as a brothel. Upfill v. Wright[21] extended the doctrine to refuse the landlord rent when he knew the tenant was "a kept woman". Other cases suggest that immorality may not be confined solely to sexual immorality, thus in Cowan v. Milburn[22] the court refused to enforce a lease of a hall which the lessee intended to use to hold a meeting to give blasphemous lectures. Indeed, there seems no reason why morality should be restricted solely to questions of sex; letting a house which one could reasonably foresee would injure the tenant or his wife or children is morally as blameworthy as keeping a mistress. It has also been suggested that a slumlord is guilty of a tort in subjecting his tenants to "indecent" treatment falling short of the minimum social goals as to housing.[23] There is indeed something indecent or obscene in one man placing his pursuit of profit above the need of another for shelter which is fit for human habitation. The cold economic calculation which deprives a child of the security of a comfortable home is an outrage which no civilised community should tolerate. The indignity imposed upon the tenant by the bad landlord who thereby advances his own

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19. Ry. & Mod. 251.
20. (1866) L.R. 1 Eq. 626.
21. [1911] 1 K.B. 506.
22. (1867) L.R. 2 Ex. 230.
23. Sax and Hiestand, "Slumlordism As A Tort", 65 Mich. L.R. 869 (1967), infra 568

economic gain is in some ways worse than the sexual immorality which has fallen foul of the courts; the social effects of private immorality are debatable,[24] the social effects of bad housing are not seriously in doubt.[24a]

The second objection which is likely to be advanced against the suggestion that leases of substandard housing should not be enforceable is that this is a job not for the courts but for parliament. Parke B. maintained in Egerton v. Brownlow,

> "It is the province of the statesman and not the lawyer to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactment. It is the province of the judge to expound the law only."[25]

We are here on the edge of deep waters; the scope of the judiciary and its relation with the Legislature is too vaste a topic to be even hinted at here. Fortunately, it is not relevant.

Having regard to the present argument, Parke B's words are no real barrier. Parliament has discussed and determined what is best for the public good, it has passed many statutes which show that decent housing is a prime social goal. It has provided for low-cost local authority housing, it has ordered unfit houses to be demolished and it has given powers to local authorities to require landlords to keep their premises in good condition. It has clearly shown its view that the landlord of substandard housing deserves no remuneration by providing that no compensation for the premises is to be paid when land is cleared in

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24. See Hart, "Law, Liberty and Morality" 1963.

24a. Supra p.18

25. 4 H.L.C. 1 at 123. Treitel, Contract (3rd ed. 1970) at p. 405-406.

slum clearance. Parliament has clearly spoken; substandard housing is a social evil for which the landlord deserves no compensation for less profit; a substandard house, like bad meat, has no value. For the courts to refuse to allow a landlord to recover rent for such houses would not be to usurp the role of Parliament, it would only give greater force to Parliament's clearly expressed intention. True, Parliament has not specifically declared its view on the exact point under discussion. But contract law is case law, judge-made law, and must depend for its survival upon the courts. What the courts must not do, and this is Parke B.'s point, is to take it upon themselves to extend the common law by judicial determination of what is or is not in the public good. When Parliament has made that determination, it is quite correct for the courts to apply it to judge-made law. It is quite in order for the courts to apply standards which the Legislature has time and again asserted.

The real barrier to the suggestion now put is more likely to be no more than judicial caution and conservatism. Many times courts have repeated a dictum by Burrough J. that,

> "public policy is a very unruly horse, and, when once you get astride it, you never know where it will carry you."[26]

The attitude of the bench has generally been one of cautious acceptance. Public policy has not been seen as a Pegasus that with one stroke of its mighty hoof would cause the fountain of Justice to flow as swiftly as did the fountain Hippocrene.

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26. (1824) 2 Bing. 229 at 252. Richardson v. Mellish

Whilst the courts have not attempted to develop a far-reaching doctrine of equitable jurisdiction by the use of public policy, it has often been invoked to cover individual situations where the public and social element is very strong.[27] It is suggested that the problem of substandard housing is such a situation. The individual slum dweller certainly suffers a heavy cost in mental and physical suffering but the cost to society is also great. It has been established that the incidence of mental illness is often greater in areas of bad housing, certain forms of physical illness are also more common and the accident risk is greater. These private misfortunes also mean loss of man hours and loss of educational opportunities which are a real if not nicely calculable cost to society at large. The domestic friction caused by cramped conditions where privacy is almost unobtainable may lead to homelessness or families splitting up and children being put into care, all at great financial cost to the rate-payer. Indeed, children are often separated from parents for no better reason than inability to find decent accommodation. Without a doubt, the public have a heavy interest in ensuring that these and other burdens of bad housing are not placed upon them.[28]

The judges have adequate cause to declare the letting of substandard houses as contrary to public policy. To do so would be only to reinforce the policy repeatedly approved by Parliament and go some way to make up for the ways in which past courts have either failed to apply realistic notions of the common law or have frustrated the intention of Parliament in this area of the law.

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27. Supra 325 for some examples.
28. For social and individual burdens of bad housing see Supra 16

Mistake

The tenant who takes an unfit house may exlaim, upon discovering its unfitness, "There's been a mistake. I would never have taken this house if I knew of its real condition. Does this mistake give rise to any legal remedy? Unfortunately for the tenant, it is quite settled that such facts do not bring into operation the doctrine of mistake in law. As Cheshire and Fifoot point out,

> "A layman might well believe thatno force whatever shall be allowed to an agreement based on an obvious misunderstanding. The law, however, does not take the simple line of ruling that a contract is void merely because one or both the parties would not have make it had the true facts been realized." 1

In general, the law only recognises such mistakes as bring about a complete difference in substance between what the mistaken party bargained for and what in fact he will obtain if the contract is fulfilled.[2] Hence where the tenant bargains over a specific house or flat with a specific landlord at a specific rent, the fact that the flat or house is not quite what he expected is no basis for applying the doctrine of mistake providing the above essentials are fulfilled. Lord Atkin expressly referred to the point in Bell v Lever Bros;

> "A agrees to take on lease or to buy from B, an unfurnished dwelling house. The house is in fact unihhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy and

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1 Cheshire & Fifoot, "The Law of Contract" (7th Ed 1968) at p. 193

2 Cheshire & Fifoot op cit n 1 at p. 209 - 210

> and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty. -- All these cases involve hardship on A and benefit to B, as most people would say unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts, ie agree in the same terms on the same subject matter - they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them. 3

In one particular situation the tenant may gain relief by the doctrine of mistake. Where parties have inaccurately expressed their true intentions in a written contract, the Court may exercise its discretion to order rectification of the written agreement so as to remedy their mistake.[4] Hence if the tenant can show that the intention of both parties was clearly that the landlord be responsible for repairs and maintenance but that the lease failed to express this intention, then the Court may order its rectification. By its nature, however, the doctrine can only operate in special situations and even then the plaintiff's onus of proof is heavy.

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3 (1932) A.C. 161 at p. 224

4 Chesire & Fifoot op cit n 1 at p 206-209
See eg Walker v Walker (1947) 177 L.T. 204

Chapter 10

The Covenant of Quiet Enjoyment and the Doctrine of Constructive Eviction

The Covenant of Quiet Enjoyment in the United States

The overwhelming weight of authority in the United States is that, as under English law, there is a covenant of quiet enjoyment implied in every lease.[1] In essence, this is a covenant that the lessee will have peaceful and undisturbed possession of the premises.

American law does not seem to have given much importance to the covenant standing alone. Normally it is coupled with the doctrine of constructive eviction and viewed as only an initial step to that greater goal. The Supreme Court of New Jersey related the two concepts in this way in Reste Realty Corp. v. Cooper.[2] Having noted the inadequacy of the common law which refused to imply a warranty of fitness for habitation, the court continued,

> "To alleviate the tenant's burden, the courts broadened the scope of the long-recognised implied covenant of quiet enjoyment --- to include the right of the tenant to have the beneficial enjoyment and use of the premises for the agreed term. It was but a short step then to the rule that the landlord --- causes a substantial interference with that enjoyment and use, the tenant may claim a constructive eviction."[3]

The requirement of abandonment to show constructive eviction[4] has led to fresh appreciation of the value of the implied covenant of quiet enjoyment. Schoskinski points out that,

> "Notwithstanding the tenant's retention of possession, there is authority for the allowance of damages to the extent that the lessor interferes with possession or enjoyment. Thus obstacles in the way of a plea of constructive eviction may be circumvented and the desired result reached by seeking affirmative relief for interference with possession and enjoyment."[5]

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1. e.g. Johnson v. Arizona Hotel (1930) 37 Ariz. 166, 291 P.1005. 1 American Law of Property s.3.47 (Casner ed. 1952). Annot, 62 A.L.R. 1257. Annot, 41 A.L.R. 2d. 1414.
2. (1969) 251 A. 2d. 268. See Rapacz, 1 Depaul L.R. 69, 73 (1951).
3. Ibid
4. Infra 345
5. 54 Geo. L.J. 519, 533 (1966).

One example is Moe v. Spankle[6] in which the tenant recovered damages caused by a leaking ceiling,

> "There appears to us no reason why a lessee --- should be forced to await eviction by the lessor or surrender the premises, often at great loss, before claiming a breach of the covenant for interference with his use and possession of the premises falling short of total eviction."[7]

But it must be noted that a large number of jurisdictions have held that an action for the covenant cannot be enforced in the absence of an eviction either actual or constructive.[8] Why this should be so is difficult to understand. The covenant protects the tenant's right to peaceful and undisturbed use and enjoyment of the premises and, if he is disturbed in this right, there seems no reason why he should also be required to move out.[9] English law makes no such requirement.[10]

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6. (1948) 32 Tenn. App. 33, 221 S.W. 2d. 712. See cases collected Annot, 62 A.L.R. 1257, 1266, Annot, 41 A.L.R. 2d. 1414, 1418. Plevan, 50 Boston U.L.R. 24, 46 (1970).

7. (1948) 221 S.W. 2d. 712, 715.

8. e.g. Callaghan v. Goldman (1913) 216 Mass.238, 103 N.E. 689; Jackson v. Paterno (1908) 108 N.Y.S. 1073, aff'd. 112 N.Y.S. 924. Clark v. Spiegal (1971) 22 Cal. App. 3d. 74, 99 Cal. Rptr. 86. Annot, 41 A.L.R. 2d. 1414, 1423.

9. 1 American Law of Property s.3.50 (Casner ed. 1952).

10. Infra 359

The Origin and Development of the Doctrine of Constructive Eviction in the United States

It has been observed that the origin and development of constructive eviction are closely intertwined with the early common law doctrines on the landlord's responsibility for the condition of the premises and the tenant's liability to pay the stipulated rent.[1] "Constructive eviction evolved in a continuous tug-of-war between the old and the newer doctrines necessitated by modern life."[2]

The New York decision of Dyett v. Pendleton[3] was the first case to apply the doctrine in 1826. The New York Court of Errors held that the creation of a nuisance by the landlord in bringing "lewd women" onto the premises who made a great noise and disturbance there at night was evidence of an eviction by the landlord entitling the tenant to vacate. Senator Spencer came to his decision by arguing from the analogy of partial eviction which excused the tenant from rent even for the part of the premises retained,

> "Here, then, is a case where actual entry and physical eviction are not necessary to exonerate the tenant from the payment of rent; and if the principle be correct as applied to a part of the premises, why should not the same principle be correct as applied to the whole property demised, where there has been an obstruction to its beneficial enjoyment, and a diminution of the consideration of the contract, by the acts of the landlord, although these acts do not amount to a physical eviction?"[4]

Senator Crary based his opinion upon failure of consideration,

> "The enjoyment of the tenant is the consideration for which he agreed to pay rent. If he is deprived of that enjoyment by the wrongful act of the landlord, the consideration has failed."[5]

The doctrine of constructive eviction had made its appearance.

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1. Rapacz, 1 Depaul L.R. 69, 70 (1951).
2. Ibid
3. (1826) 8 Cow. 727.
4. Ibid 731
5. Ibid 735.

The doctrine was criticised at first[6] and Massachusetts refused to follow Dyett[7] but gradually it spread throughout the country. For the decades prior to the Civil War, it was applied sparingly "but with the rapid development of urban centers after the Civil War and in the present century it received great impetus."[8] The courts became more willing to take note of the great social changes and the injustices of applying the strict common law rules of landlord and tenant amidst modern conditions. It is now an established part of the American common law[9] although its scope is the subject of some doubt.

The Doctrine of Constructive Eviction

A constructive eviction is defined by the Corpus Juris Secundum as,

> "Some act of a permanent character which, although not amounting to an actual eviction, is done by the landlord or someone under his authority with the intention and effect of depriving the tenant of the beneficial enjoyment of the demised premises, or some part thereof, or materially obstructing or interfering with such enjoyment, and to which the tenant yields by abandoning possession within a reasonable time."[10]

We shall discuss each of those elements in turn.

The Act

It is not every act that will justify constructive eviction, only material acts qualify. Courts have used various expressions in this regard.[11] Some say it must be "substantial"[12] whilst others require

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6. Rapacz, 1 Depaul L.R. 69, 71 (1951).
7. Dewitt v. Pierson (1873) 112 Mass. 8.
8. Rapacz, 1 Depaul L.R. 69, 72 (1951).
9. Clevenger, 2 Baylor L.R. 386, 387 (1950).
10. 52 C.J.S. s.445 p. 289.
11. Horn, 7 Baylor L.R. 456 (1955); Jackson, 13 Baylor L.R. 62, 65 (1961); Rapacz, 1 Depaul L.R. 69, 81 (1951).
12. e.g. Merritt v. Togue (1933) 93 Mont. 609, 23 P. 2d. 340. Schoshinski, 54 Geo. L.J. 519, 529.

it to be of a "grave and serious" nature.[13] In the recent case of Parkchester Realty Corp. v. Holley,[14] the tenant's plea of constructive eviction failed when he was unable to show the uninhabitability of the premises. This was an extreme test but it is universally held that the tenant may not escape rent liability by a showing of minor defects easily corrected by him[15] and adequately remedied by an action for damages.[16] One commentator has suggested that so long as there remain four walls and a ceiling reasonably free of cracks, sufficient water for sanitary and personal use, and a minimum form of utility service, the doctrine of constructive eviction usually is not available to the tenant.[17]

The act must also be permanent.[18] Once again, there is some diversity of opinion as to the meaning of this requirement but it does not seem to mean that the act must be of a long duration but only that it must be more than a mere trespass or just a passing act.[19] The Supreme Court of New Jersey gave a liberal interpretation of the requirement in one recent case,

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13. Fleming v. King (1897) 100 Ga. 449, 28 S.E. 239. cf. Johnson v. Snyder (1950) 221 P. 2d. 164 (serious and intolerable).

14. (1970) 235 So. 2d. 608 (la).

15. Clevenger, 2 Baylor L.R. 386, 388 (1950). Rapacz, 1 Depaul L.R. 69, 81 (1951).

16. Comment, 1968 Washington U.L.Q. 461, 467-468.

17. Lyons, 46 Notre Dame Lawyer 801, 802 (1971).

18. Barlott v. Farrington (1876) 120 Mass 284. National Furniture Co. v. Cumberland County (1915) 93 A. 70.

19. Rapacz, 1 Depaul L.R. 69, 81 (1951).

> "Permanent does not signify that water in a basement in a case like this one must be an everlasting and unending condition. If its recurrence follows regularly upon rainstorms and is sufficiently serious in extent to amount to a substantial interference with use and enjoyment of the premises for the purpose of the lease, the test for constructive eviction has been met."[20]

A very important question is whether some omission on the part of the landlord will bring the doctrine into effect. There is division of opinion though the growing tendency is to recognise omissions as sufficient whenever the court can find a duty on the landlord to act.[21] Huber v. Ryan[22] is representative of these cases that deny that omissions can constitute constructive eviction. The New York Supreme Court stated, "the claim that the failure of the landlord to keep the covenant to put in the skylight ventilator and glass floor amounted by common to as eviction is not tenable. The common law doctrine of eviction has reference to affirmative acts of the landlord or of a third person under a title paramount to the landlord's --- Mere breach of covenant to repair, improve or rebuild is no eviction."[23] Cases taking

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20. Reste Realty v. Cooper (1969) 251A 2d. 268.

21. Comment, 26 Harv. L.R. 758 (1912); Comment, 16 U. of Chi. L.R. 243, 252 (1946); Faville, 9 Iowa Law Bulletin 250, 258 (1924); Rapacz, 1 Depaul L.R. 69, 79 (1951); Schoshinski, 54 Geo. L.J. 519, 533; Zeiss, 16 Ill. L.R. 535 (1921).

22. (1899) 26 N.Y. Misc. 428, 56 N.Y.S. 135. See also Wright v. Lattin (1865) 38 Ill. 293; Tudor City Ninth Unit Inc. v. Perkett (1932) 143 N.Y. Misc. 209, 256 N.Y.S. 395.

23. Ibid

the other viewpoint are represented by Dolph v. Barry,[24] "the lessor covenanted in the lease to make repairs to the roof ---. In such cases a constructive eviction may result from the mere omission on the part of the lessor to perform the obligation assumed."

Those courts accepting omissions as sufficient normally extend this ruling to cover omission by the landlord to carry out an obligation to repair.[25] It is generally agreed, however, that the omission must be breach of some duty owed by him.[26] Thus, if the landlord is under no duty to make repairs then his failure to do so will not constitute a constructive eviction even though the premises become uninhabitable. For example, in Boyd v. McCarty,[27] the Tennessee Supreme Court noted the tenant's contention that the failure of the landlord to repair amounted to a constructive eviction and continued, "This could not, however, be true unless the duty of making repairs rested upon the lessor."[28] Despite this logical refusal to throw aside caveat emptor by a side-wind, there are some cases finding a constructive eviction where it is difficult to see any violation of a legal duty by the landlord.[29] In Barnard v. Bonwitt,[30] the defence

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24. (1912) 148 S.W. 196. See also Lewis v. Chisolm (1881) 68 Ga. 40; Bass v. Rollins (1895) 63 Min. 226, 65 N.W. 348; Oakfield v. Nixon (1896) 177 Pa. 76, 35 Atl. 588; Delmar v. Blumenfield (1906) 118 Mo. App. 308, 94 S.W. 823; Gibbons v. Hoefield (1921) 299 Ill. 455, 132 N.E. 425.

25. e.g. Dolph v. Barry (1912) 148 S.W. 196 and other cases cited supra n. 24. But see Schwartz, 47 Mass. L.Q. 267, 276 (1962).

26. 52 C.J.S. s.458, p. 310. Faville, 9 Iowa Law Bulletin 250, 256 (1924). Rapacz, 1 Depaul L.R. 69, 80 (1951).

27. (1920) 142 Tenn. 670, 222 S.W. 528. See also Barrett v. Boddie (1895) 158 Ill. 479, 42 N.E. 143; Taylor v. Finnigan (1905) 189 Mass. 568, 76 N.E. 203; Voss v. Sylvester (1909) 203 Mass. 233 89 N.E. 241.

28. (1920) 222 S.W. 528, 529.

29. Rapacz, 1 Depaul L.R. 69, 80 (1951).

30. (1913) 155 App. Div. 182, 139 N.Y.S. 1050. Noted, 26 Harv. L.R. 758 (1912).

was allowed without any showing of breach of a legal duty owed by the landlord. It has also been suggested that breach of a housing code will suffice.[31]

Failure to carry out an obligation to provide services may also justify a plea of constructive eviction.[32] This has been applied to failure to provide heat,[33] plumbing[34] and hot water.[35] Bad plumbing causing damage has been held to sustain a finding that the tenant was constructively evicted.[36] In Reste Realty v. Cooper[37] it was held by the New Jersey Supreme Court that recurrent flooding was sufficient and in Regency Joint Ventures v. Lynch,[38] the entry of water through the roof led the New York City Civil Court to a like conclusion. On the other hand, the New York Supreme Court rejected the plea when the tenant was able to show that only occasionally did water seep into the premises and cause damage in Gramercy Studios v. Arg Antiques Inc.[39]

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31. Schoshinski, 54 Geo. L.J. 519, 529.

32. See generally, Tallman v. Murphy (1890) 120 N.Y. 345, 352, 24 N.E. 716, 718.

33. Lawrence v. Burell (1885) 17 Abb. N.C. 312; Jackson v. Paterno (1908) 58 Misc. 201, 108 N.Y.S. 1073; Automobile Supply Co. v. Scene In Action Inc. (1930) 340 Ill. 196, 172 N.E. 35; De Bruyn Bros. Realty Co. v. Photo Lith Plate Service Corp. (1971) 31 Mich. App. 487, 188 N.W. 2d. 111. 52 C.J.S. s.458, p. 313.

34. Everson v. Albert (1933) 261 Mich. 182, 246 N.W. 88.

35. Thompson v. Williams (1969) Poverty Law Reporter para. 10,035.

36. e.g. York v. Steward (1898) 21 Mont. 515, 55 P.29. Cases collected Annot, 33 A.L.R. 3d. 1356, 1364 (1970).

37. (1969) 53 N.J. 444, 251 A. 2d. 268.

38. (1969) 162 N.Y.L.J. 60. Poverty Law Reporter para. 10,215. Cases collected Annot, 33 A.L.R. 3d. 1356, 1359 (1970).

39. (1969) Poverty Law Reporter para. 10,312.

Infestation of the premises with vermin has often been held to constitute constructive eviction.[40] Ray Realty Co. v. Holtzman[41] provides an illustration. The Missouri Court of Appeals held the landlord's failure to dispose of rubbish thus causing infestation by rats was sufficient cause for the tenant to vacate and be relieved of liability for rent. A more recent case with similar facts and holding was De Bruyn Bros. Realty Co. v. Photo Lith Plate Service Corp.,[42] a decision of the Michigan Court of Appeals. Filth caused by failure to repair a water closet was classified as constructive eviction in Smith v. Greenstone[43] as were the unpleasant smells caused by defective plumbing in White v. Hannon[44] and McCurdy v. Wycoff.[45]

The recent case of Low v. Clifton Day Properties[46] shows how a combination of defects might add up to warrant a plea of constructive eviction. The Civil Court of the City of New York held that conditions that faced the tenants on the date of their taking possession constituted a major violation of

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40. e.g. Streep v. Simpson (1913) 80 Misc. 666, 141 N.Y.S.863; Leo v. Santagoda (1964) 45 Misc. 2d. 309, 256 N.Y.S. 2d.511; There is a comprehensive collection of cases in Annot, 27 A.L.R. 3d. 924 (1969). See also Notes 13 Mich. L.R. 707 (1914), 18 Mich. L.R. 63 (1919); 52 C.J.S. s.458, p. 311.

41. (1938) 119 S.W. 2d. 981.

42. (1971) 31 Mich. App. 487, 188 N.W. 2d. 111.

43. (1918) 208 S.W. 628 (Mo.).

44. (1888) 11 N.J.L.J. 338.

45. (1906) 73 N.J.L. 368. cf. Bradley v. Di Giocoura (1844) 12 Daly (N.Y.) 393 (sewer gas). Pasqua v. De Marchi (1969) 297 N.Y.S. 2d. 70 (gas fumes).

46. (1970) 310 N.Y.S. 2d. 130, 62 Misc. 2d. 817.

the covenant of quiet enjoyment and represented a constructive eviction at the very inception of the projected occupancy,

> "An apartment without a refrigerator, without a lighting fixture in one of the rooms, with part of the kitchen floor rotted, with the bathroom walls pervasively stained, with numerous and sizable holes in the walls, with a major infestation of rodents, does not measure up to fulfillment of the landlord's covenant of quiet enjoyment."[47]

The Landlord's Intention

The cases disclose a wide diversity of opinion on the matter of the landlord's intention.[48] Some states have demanded a very strict application of the requirement, others are less strict and still others require no intention at all.

At one extreme, it has been stated that "whether the eviction be called actual or constructive, at common law, there must be, in the mind of the landlord, the intention of driving the tenant off the land leased, so that he may take possession of it."[49] The United States Court of Claims thought in Kelly v. United States[50] that this strict requirement of intention was one of the points that distinguished constructive eviction from those acts which are merely a breach of covenant affording a foundation for a suit in damages.

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47. Ibid 132.

48. Comment, 1968 Washington U.L.Q. 461, 467. 52 C.J.S. s.456 p. 306. Jackson, 13 Baylor L.R. 62 (1961), Rapacz, 1 Depaul L.R. 69, 75 (1951), 6 Williston "Contracts" s.891, p. 644 (3rd ed. 1962).

49. Buchanan v. Orange (1916) 118 Va. 511, 88 S.E. 52.

50. (1930) 37 F. 2d. 767.

The strict rule has been modified by application of the presumption that a man intends the natural and probable consequences of his act. This middle position is represented by the Californian case of Pierce v. Nash[51] in which it is observed, "when it is said that in order to constitute a constructive eviction there must be an intent on the part of the landlord to deprive the tenant of the premises it is not meant that there must be an actual subjective intention in the mind of the landlord. It may be inferred from the character of his acts if their natural and probable consequences are such as to deprive the tenant of the use and enjoyment of the leased premises. --- Thus the question of intention is coupled with the presumption that a landlord intends the natural and probable consequences of his acts; and where the acts of the landlord effectively deprive the tenant of the use and enjoyment of the premises, the intent to evict is implied from the character of the acts done."

Cases on the other extreme, denying the need for intent at all, are represented by the decision of the Illinois

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51. (1954) 126 Cal. App. 2d. 606, 272 P. 2d. 938. See also Shalley v. Shute (1882) 132 Mass. 367; Powell v. Merrill (1918) 92 Vt.124, 103, A.259; Tracy v. Long (1936) 295 Mass. 201, 3 N.E. 2d.789; Pierce v. Nash (1954) 126 Cal. App. 2d.606, 272 P.2d. 938; Ackerhalt v. Smith (1958) 141 A.2d. 187.

Appellate Court in Harmony Co. v. Albert Rauch.[52] The court held that an instruction by the trial judge that the landlord's failure to provide heat and power had to be a wilful and intentional act did not correctly state the law. "What would or would not justify an abandonment did not depend upon the wilful intention of the appellee to drive appellant out, but did depend upon what he did or neglected to do, the result of which might or might not justify an abandonment, quite irrespective of appellee's intention or wilfulness. Such acts or neglects, if arising from accident or inability, would as effectively justify abandonment as if they were wilful and intentional."[53]

Locality of the Defect

The liberal attitude of the courts to the doctrine in recent years has been reflected in its extension to those parts of the premises which the landlord has kept in his control.[54] Buckner v. Azulai[55] is an example. Here, the presence of pests in the common parts of the premises was held to justify the tenant's abandonment of the demised part.

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52. (1896) 64 Ill. App. 386. See also Tallman v. Murphy (1890) 120 N.Y. 345, 24 N.E. 716; Hotel Marion Co. v. Waters (1915) 77 Ore 426, 150 P.865; Gibbons v. Hoefield (1921) 299 Ill. 455, 132 N.E. 425; Broomberger v. Empire Flashlight Co. (1930) 138 Misc. 754, 246 N.Y.S. 67; Westland Housing Corp. v. Scott (1942) 312 Mass. 375, 44 N.E. 2d.959; Barker v. Utah Oil Refining Co. (1947) 111 Utah 308, 178 P.2d. 386; Dyett supra did not mention intention.

53. Ibid 388.

54. Comment, 1968 Washington U.L.Q. 461, 470, 52 C.J.S. s.458 p. 314.

55. (1967) 251 Cal. App. 2d.1013, 59 Cal. Rptr. 806. cf. Groh v. Kover's Bull Pen Inc. (1963) 221 Cal. App. 2d.611, 34 Cal. Rptr. 637.

The Requirement of Abandonment

Perhaps the most important element of the doctrine of constructive eviction from the tenant's point of view is the requirement that he vacate the premises within a reasonable time after the act or omission constituting the alleged eviction.

A long series of cases establish the abandonment requirement.[56] An early case was Edgerton v. Page[57] in which the New York Court of Appeal distinguished Dyett v. Pendleton[58] on the basis that in that case the defendant had ceased to occupy the premises. The court could not see on what principle the landlord should be absolutely barred from a recovery of rent when his wrongful act stopped short of depriving the tenant of the possession of any portion of the premises. Twenty three years later, the same court stated in Boreel v. Lawton[59] that it knew of no case sustaining the doctrine of constructive eviction without a surrender of the possession. A 1970 decision of the court, Barash v. Pennsylvania Terminal Real Estate Corp.[60] affirmed the decision in Edgington v. Page that "where the tenant remains in possession of the demised premises there can be no constructive

56. Cases collected Annot, 20 A.L.R. 1369, 1370, 64 A.L.R. 900, 901, 52 C.J.S. s.480(3) p. 395. See e.g. Comment, 14 Mich. L.R. 162 (1915), Comment 19, Mich. L.R. 755 (1920), Faville, 9 Iowa Law Bulletin 150, 157 (1924).

57. (1859) 20 N.Y. 281.

58. Supra 335

59. (1882) 90 N.Y. 293, 43 Am. Rep. 170.

60. (1970) 308 N.Y.S. 2d.649, 256 N.E. 2d.707.

eviction."[61] Decisions from other jurisdictions are to the same effect.[62]

The abandonment requirement has been justified on two grounds. The first is that to claim eviction by uninhabitability whilst remaining in habitation would be a contradiction.[63] It was said in Two Rector Street Corp. v. Bein "a tenant cannot claim uninhabitability and at the same time continue to inhabit."[64] Whilst the Supreme Court of Pennsylvania observed in Chelten Avenue Building Corp. v. Mayer that "the continued use and occupancy of the demised premises by the tenant negatives any inference that the conduct complained of was so serious a character as to amount to a constructive eviction."[65] In Lemle v. Breeden, the Supreme Court of Hawaii described the proposition in the Two Rector Street case as "absurd" and "contrary to modern urban realities".[66] The second justification was advanced by the Court of Appeal of North Carolina in Thompson v. Shoemaker,

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61. Ibid 653.

62. e.g. Pague v. Petrolium Products Inc. (1969) 461 P.2d. 317 (Wash.); Radlinsky v. Weaver (1969) 460 P.2d. 218 (Colo.); Thompson v. Shoemaker (1970) 173 S.E. 2d. 627 (North Carolina)

63. Rapacz, 1 Depaul L.R. 69, 85 (1951). 2 Walsh, "Commentaries on the Law of Real Property" (1947) s.182, p.307.

64. (1929) 234 N.Y.S. 409, 412.

65. (1934) 316 Pa. 228, 172 A.675, 677.

66. (1969) 462 P.2d. 470, 475.

"As was pointed out in 1858 in the case of Edgington v. Page, it would be grossly unfair to permit a tenant to continue in possession of premises and shield himself from payment of rent by reason of the alleged wrongful acts of the landlord."[67]

The New York Court had been concerned about those cases where the loss suffered by the tenant came to a lesser amount than the whole rent.[68]

From the tenant's viewpoint, the requirement has been criticised on two grounds. The first is the uncertainty produced, as was observed by the Hawaii Supreme Court in Lemle,[69]

"Abandonment is always at the risk of establishing sufficient facts to constitute constructive eviction or the tenant will be liable for breach of the rental agreement. Also the tenant is forced to gamble on the time factor as he must abandon within a 'reasonable time' or be deemed to have 'waived' the defect."[70]

The latter gamble is increased by the duty upon the tenant to give the landlord notice of the defect and a chance to remedy it before vacating.[71] One commentator has described the cumulative result of these examples of the forensic lottery; "The problem with constructive eviction has always been that it was, from the standpoint of the tenant, 'damned if you don't,

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67. (1970) 173 S.E.2d. 627, 630.
68. (1859) 20 N.Y. 281, 284.
69. (1969) 462 P.2d. 470, 475.
70. For a comprehensive account of what is a reasonable time, see Annot. 91 A.L.R. 2d.638. On waiver see Annot 4 A.L.R. 1461; 52 C.J.S. s.459, p.317.
71. e.g. Dexter v. King (1890) N.Y.S. 489; California Building Corp. v. Drury (1918) 103 Wash. 577, 175 P.302. cf. Milheim v. Baxter (1909) 46 Colo. 305, 103 P.376. Rapacz, 1 Depaul L.R. 69, 85 (1951).

damned if you do', because if he moves out promptly the court may find, after, say, two years of litigation, that there was insufficient evidence of constructive eviction. Suppose he doesn't move until the conditions become intolerable. Here the court may find that there was, indeed, a constructive eviction but, by failing to move out promptly, the tenant waived it."[72] Another commentator has concluded that to ensure the doctrine's application against a suit by his landlord, the tenant must have "the knowledge of Socrates, the patience of Job, and a very good lawyer."[73]

The other difficulty is simply that there may not be anywhere else for the tenant to go in view of the housing shortage. One writer has expressed the point with much force,

> "Even a very permissive application of constructive eviction will not help the slum dweller. --- To tell the slum tenant he can move if his apartment has no heat, or when the ceiling begins to buckle is to give him nothing at all, for he lives there only because he has nowhere better to go. The right to move out is an empty one for the people in the slums.[74]

Other commentators have agreed that the acute housing shortage in urban areas has rendered the doctrine of no practical value to a large percentage of urban dwellers.[75]

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72. Schwartz, 47 Mass. L.Q. 267, 275 (1962).

73. Cuthrell 2 St. Mary's L.J. 106, 110 (1970). See also Comment, 1968 Washington U.L.Q. 461, 473; Lyons, 46 Notre Dame Lawyer 801, 802 (1971).

74. Fossum, 53 Calif. L.R. 304, 314 (1966).

75. e.g. Comment, 1968 Washington U.L.Q. 461, 474. Lyons, 46 Notre Dame Lawyer 801, 802 (1971), 2 Powell "Real Property" s.230(3) Rohan ed. 1967. Schoshinski, 54 Geo. L.J. 519, 530.

Relaxation of the Abandonment Requirement

Although the abandonment requirement is universal, the reports reveal several cases in which courts have modified its application on the facts of particular cases. Tenants have been permitted to continue in possession whilst waiting for the landlord to repair,[76] in reliance upon his promise to do so,[77] whilst recovering from sickness or physical disability[78] and whilst looking for alternative housing.[79] The abandonment rule was also relaxed in one Missouri case when the acts of the landlord prevented a total vacation by the tenant.[80]

The decision of the Supreme Judicial Court of Massachusetts in Burt v. Seven Grand Corporation[81] went some way to providing a solution to the problem of uncertainty. The court was prepared to make a declaration that the tenant was entitled to abandon the premises within a reasonable time and to treat the landlord's conduct as a constructive eviction. Thus, the tenant would know his legal position without having

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76. Nelson v. Eichoff (1916) 59 Okla. 210, 158 P. 370. Sweeting v. Reining (1924) 235 Ill. App. 572. Annot, 91 A.L.R. 2d. 638, 654.

77. Heilbran v. Aaronson (1909) 116 N.Y.S. 1096; Laffey v. Woodhull (1930) 256 Ill.App. 325. Annot, 91 A.L.R. 2d. 638, 655.

78. Hartenbauer v. Brumbough (1920) 220 Ill. App. 326. Annot, 91 A.L.R. 2d. 638, 661.

79. Annot, 91 A.L.R. 2d. 638, 661.

80. Dolph v. Barry (1912) 148 S.W. 196.

81. (1959) 340 Mass. 124, 163 N.E. 2d. 4.

to take a gamble on whether the court would find constructive eviction or not.[82]

An attempt has been made to circumvent the abandonment requirement by use of the doctrine of partial eviction.[83] The common law has long held[84] that a tenant who has been wrongfully evicted by the landlord from a portion of the premises is relieved of liability for the whole rent so long as the partial eviction continues even though he stays in possession of the remainder. The underlying theory is that "the agreement, in a lease, to pay rent is entire, in consideration of the demise of the whole estate; and it cannot be severed or apportioned by an eviction of part of the premises by the tortious act of the landlord."[85] Alabama alone has made the tenant liable for a proportionate share of the rent if he remains in possession.[86]

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82. Abandonment is not required under New York's Real Property and Proceedings Law s.755 (infra 847) which allows tenants to withhold rent on a constructive eviction. Emray Realty Corp. v. Stefano (1957) 5 Misc. 2d. 352, 354, 160 N.Y.S. 2d. 433, 435. Malek v. Perdina (1969) 58 Misc. 2d. 960, 297 N.Y.S. 2d. 14, 16. Buddwest & Saxony Properties Inc. v. Layton (1970), 308 N.Y.S. 2d. 208, 210.

83. On this doctrine, 49 Am. Jur. 2d. s.577, p.554. 1 Amer . Law of Property (Casner ed. 1952) s.3.52 p. 284. Annot, 20 A.L.R. 1369, 1372; Annot 28 A.L.R. 1333, 1334; Annot, 64 A.L.R. 900, 903; 36 C.J. p. 315; 52 C.J.S. s.480(3) p. 394. Comment, 21 Minn. L.R. 753 (1936); Comment, 15 Texas L.R. 516 (1936); Tutching, 1 Cornell L.Q. 304 (1915).

84. For English cases infra 376 See e.g. Watts v. Coffin (1814) 11 Johns (N.Y.) 495; Lewis v. Payn (1830) 4 Wend. (N.Y.) 423.

85. Shumway v. Collins (1856) 6 Gray (Mass) 227, 232. See also Read v. Ward (1853) 22 Pa. St. 144.

86. e.g. Warren v. Wagner (1883) 75 Ala. 188, 51 Am.Rep. 446. Cases collected 20 A.L.R. 1369, 1378, 64 A.L.R. 900, 905.

The first attempt to exploit the doctrine of partial eviction has been to seek to classify failure to repair, supply services etc. as equivalent to a partial actual eviction, i.e. an actual expulsion by the landlord.[87] This argument has normally been rejected. For example, in Jackson v. Paterno[88] the landlord had failed to supply heat as required by his covenant. The tenant did not vacate but argued that the power which the landlord had covenanted to supply was as much a part of the premises as a room, hence termination of this supply was equivalent to a partial actual eviction. The trial judge had accepted this contention but the New York Court of Appeals reversed on the grounds that, although there may have been a constructive eviction if the tenant had vacated, there was no partial actual eviction,

> "in no proper sense can it be said that the tenant was physically expelled from a substantial part of the premises demised. --- It cannot be said that because a tenant was not furnished with as many degrees of heat as his landlord was under a duty to supply the tenant has been physically expelled from a substantial part of the premises demised where he has not abandoned the premises. --- It has never been held that the failure to supply adequate heat constituted an actual partial eviction."[89]

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87. Lebow, 18 Boston U.L.R. 244 (1938).

88. Jackson v. Paterno (1908) 108 N.Y.S. 1073. cf. Self Service Furniture Fair v. 450 Realty Corp. (1952) 114 N.Y.S. 2d.774. James McBean v. Peaster (1960) 207 N.Y.S. 2d. 78. Siegal v. National Bead and Stone Co. (1963) 237 N.Y.S. 2d. 198, 37 Misc. 2d. 897. Goldberg Holding Corp. v. Blier (1969) 303 N.Y.S. 2d. 374, 60 Misc. 2d.374. Barash v. Pennsylvania Terminal Real Estate Corp. (1970) 26 N.Y. 2d. 77, 256 N.E. 2d. 707.

89. Ibid 1076.

It should be noted, however, that there are dicta in cases both old and modern suggesting that such breaches of covenant may be considered a partial actual eviction. In 1912 it was said by the court in Kathereen v. Davenport[90] that where the right to the use of water is a part of the premises demised, a withdrawal of such water would constitute an actual partial eviction provided that such withdrawal was an act of the landlord. A more recent case was Brine v. Bergstrom[91] in which the Court of Appeals of Washington stated,

> "Although --- the above quoted portion of the findings (to effect that roof was leaking and water dripped through) potentially describes a partial actual eviction, there are no findings that plaintiffs had a duty under the lease to repair the leaky roof or the date when the leaky roof first occurred."[92]

On the whole, however, the attempt to apply partial actual eviction directly to uninhabitability has not been successful.

The doctrine of partial eviction has also been used in another way; to support a plea of partial constructive eviction. It has been asked whether a landlord's failure to comply with his statutory duty to keep premises fit and to provide essential services thereby depriving a tenant of complete use of a room or a group of rooms is not just as serious a wrong as an actual partial eviction. "There seems to be no logical reason to differentiate between a wrong committed by a landlord's positive act of interference and one which results from his

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90. (1912) 135 N.Y.S. 730. Cf. Carlson v. Levinson (1923) 228 Ill. App. 104.

91. (1971) 4 Wash. App. 288, 480 P.2d. 783.

92. Ibid (emphasis added).

failure to obey provisions of a quasi-criminal statute or ordinance. Partial constructive eviction would result from an unrepaired roof leaking in one room of an apartment, or an inadequate heating system serving only a portion of the dwelling."[93] Another writer has suggested that the doctrine of partial constructive eviction partakes of the best features of the constructive and partial eviction theories. "The former theory provides broader grounds for justifying abandonment - the latter theory dispenses with the burdensome requirement of abandonment. Since the matrix of this new doctrine is firmly embedded in the common law, its utility as a vehicle for superior remedies should be sufficient cause to command judicial acceptance of partial constructive eviction."[94]

The first case to support the doctrine of partial constructive eviction was Majen Realty Corp. v. Glotzer[95] decided by the Municipal Court of the City of New York in 1946. This was an action by a landlord to recover rent. At the trial

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93. Schoshinski, 54 Geo. L.J. 519, 531. See also East Haven Associates v. Gurian (1970) 313 N.Y.S. 2d. 927, 930.

94. Plevan, 50 Boston U.L.R. 24, 33 (1970).

95. (1946) 61 N.Y.S. 2d. 195. Noted Andereck, 11 Mo.L.R. 440 (1946). Another decision of the Municipal Court of the City of New York is often cited as authority for the doctrine of partial constructive eviction: Johnson v. Pembleton (1950) 97 N.Y.S. 2d. 153, noted Comment 19 U. of Chi. L.R. 53 (1951). In fact, Johnson stands for no such principle. Quinn J. specifically stated the abandonment requirement for constructive eviction. He relieved the tenant of a fire damaged apartment from liability for rent not on the basis of partial constructive eviction but rather on the grounds that the loss of services meant that, by the terms of the Rent Act applicable, the contractual rent was no longer the rent legally recoverable by the landlord. See also Hamler, 49 J. of Urban Law 201, 211 (1971).

the tenant was permitted to raise a claim of constructive eviction. A fire had seriously and extensively damaged his apartment and the court held that "this monthly tenant was deprived for all practical purposes of the entire use of the apartment during the month of February and was able to use it but partially during the month of March."[96] He had not abandoned the entire premises "because of the very critical housing shortage existing in New York City, of which this court will take judicial notice."[97] It was held that it was not necessary for him to have done so,

> "The court finds that because of the non-use and inability to use a portion of the premises, under present existing conditions, that will be considered a surrender of possession of that portion constituting a partial constructive eviction."[98]

The remedy given was not a denial of all rent to the landlord but an abatement to the extent of diminished services and facilities which the court found to be three-fourths of the February rent and one half of the March rent.

In Gambo v. Martise,[99] the Civil Court of the City of New York also applied the doctrine of partial constructive eviction to defeat a landlord's action for rent when the premises were shown to be in a terrible condition. This decision was, however, reversed on appeal and the general requirement of abandonment restored.[100]

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96. Ibid 196.
97. Ibid 197.
98. Ibid.
99. (1964) 246 N.Y.S. 2d. 750, 41 Misc. 2d. 475.
100. (1964) 253 N.Y.S. 2d. 459, 44 Misc. 2d. 293.

A recent decision of the Civil Court of New York City appears to have been decided in ignorance of the decision of the appeal court in Gambo. In East Haven Associates v. Gurian,[1] the central air condition unit of the demised premises emitted an obnoxious fluid onto the terrace rendering it unusable by the tenant and his family. Some seventeen months later the premises were vacated. It was held by Sandler J. that this was too long a period for the abandonment to satisfy the requirements of "complete" constructive eviction. He therefore turned to partial constructive eviction.

> "the question is whether New York law should recognise the doctrine of partial constructive eviction as a counterpart to partial actual eviction precisely as it has recognised for over a century constructive eviction as a counterpart to actual eviction."[2]

His reply was in the affirmative,

> "After a careful review of the authorities I have concluded that the concept of partial constructive eviction is sound in principle, is supported by compelling considerations of social policy and fairness and is no way precluded from controlling precedent."[3]

The remedy given in this case was the right to cease paying rent from the time of the partial eviction.

It must be said that Gurian is quite wrong in saying that no controlling precedent precluded the doctrine of partial constructive eviction. Gambo v. Martise is clearly just such

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1. (1970) 313 N.Y.S. 2d. 927. Noted, Dickey, 32 U. of Pitts. L.R. 228 (1971), Hamlar, 49 J. of Urban Law 201 (1971).
2. Ibid 928.
3. Ibid

a precedent.[4] It should also be noted that much of what Sandler J. said in Gurian was obiter.[5] The tenant had in fact been paying rent for all the time that he was in possession of the apartment subsequent to the alleged partial eviction so his liability if he had not done so was not in issue. A later decision of the Civil Court of the City of New York, Zweighaft v. Remington[6] has refused to follow Gurian. The tenant had been prevented from making use of a terrace by the failure of the landlord to provide proper floor covering. She did not abandon the possession of the demised premises but elected to remain in residence. Leonforte J. said the court had considered Gurian relied upon by her but was "constrained to disagree with the opinion of the learned court in concluding that rent may be suspended where there is a partial constructive eviction."[7] Repeating the abandonment requirement, the court dismissed the defence of partial constructive eviction on its merits.

Two arguments have been advanced to justify partial constructive eviction. The first is one based on logic, why should partial constructive eviction be treated differently from partial actual eviction?[8] The Court in Zweighaft thought

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4. cf. Osias v. 21st Borden Corp. (1961) 211 N.Y.S. 2d. 468.
5. Diamond, 22 Syracuse L.R. 305, 317 n.45 (1971).
6. (1971) 320 N.Y.S. 2d. 151.
7. Ibid 152.
8. Supra 350

that "the fallacy of that argument is quite evident and manifest. Applying 'common sense and common justice', a tenant deprived of the beneficial use and enjoyment of a portion of the demised premises cannot be placed in a better bargaining advantage than a tenant who is deprived of the beneficial use and enjoyment of the entire demised premises. For, if a tenant must abandon the demised premises to claim the benefits of a total constructive eviction, then, certainly a tenant deprived of the beneficial use and enjoyment of a portion of the premises must either vacate the said premises or pay rent if he elects to remain in possession."[9]

The other justification suggested is more convincing; this bases itself on the injustice of abandonment in a situation of housing shortage. Sandler J. said in Gurian,

> "The very idea of requiring families to abandon their homes before they can defend against actions for rent is a baffling one in an era in which decent housing is so hard to get, particularly for those who are poor and without resources. It makes no sense at all to say that if part of an apartment has been rendered uninhabitable, a family must move from the entire dwelling before it can seek justice and fair dealing."[10]

The only reply to this has been that of judicial abstention. The court in Zweighaft thought that relaxing the rules of abandonment because of scarcity of available decent housing would be to assume the role of the Legislation and beyond the jurisdiction of the court.[11] The Court of Appeals of North

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9. (1971) 320 N.Y.S. 2d.151, 153.

10. (1970) 313 N.Y.S. 2d. 927, 931. cf. Majen Realty Corp. v. Glotzer (1946) 61 N.Y.S. 2d. 195, 197.

11. (1971) 320 N.Y.S. 2d. 151, 154.

Carolina was equally opposed to this contention in Thompson v. Shoemaker,

> "Plaintiff insists that the general rule should not apply to her because of her allegation that she 'is of limited means and therefore was unable to move elsewhere'--- The unavoidability of low income housing in Charlotte is undoubtedly subject to debate and in our opinion it is not a factor that can be judicially noted by this court."[12]

It might be thought that such an attitude represents abdication of the judicial function rather than usurpation of the Legislative.

Remedies for Constructive Eviction

The tenant who is constructively evicted will have the right to sue for damages for breach of the covenant of quiet enjoyment.[13] He will also have the right to abandon the premises and be free of liability for future rent.[14] It has been suggested that this holding "involves a recognition of dependency as between the lessee's covenant to pay rent and the lessor's covenant that the lessee shall quietly enjoy the demised premises."[15] It gives the tenant much the same practical relief that he would have if the covenants of the lease had, in fact, been construed as dependent.[16]

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12. (1970) 173 S.E. 2d. 627, 630.
13. 52 C.J.S. ss.460, 461 p. 318, 333. Rapacz, 1 Depaul L.R. 69, 88 (1951). e.g. Radinsky v. Weaver (1964) 460 P.2d. 218.
14. Supra 335
15. 2 Powell, s.231 p.224 (1950).
16. Faville 9 Iowa Law Bulletin 250, 262 (1924). 1 American Law of Property (Casner ed. 1952) s. 3.51 p. 282.

Covenant of Quiet Enjoyment: England

It is settled law that, upon any letting or agreement to let, an undertaking by the lessor for quiet enjoyment is to be implied from the mere relation of landlord and tenant.[1] This covenant seems originally intended to protect the title of the lessee from challenge by a person with title paramount but it has been extended to cover other situations where the tenant's enjoyment of the land has been substantially interfered with. Fry L.J. said in Sanderson v. The Mayor etc. of Berwick Upon Tweed,

> "Where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."[2]

The extension was approved by Lord Esher M.R. in Harrison Ainslie v. Muncaster,

> "Formerly it was thought that a covenant for quiet enjoyment only applied to an interference with the title of the covenantee, but upon more careful consideration it was held that it applied to an interference with the enjoyment of the thing demised; and it seems clear that there may be an interference with the enjoyment of the property without any interruption to or interference with the title to it."[3]

Broadly speaking, the lessor undertakes by this covenant not to substantially interfere with the lessee's enjoyment of the premises. If premises become so neglected that the tenant cannot use them without danger of discomfort to himself and

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1. Budd-Scott v. Daniel [1902] 2 K.B. 351.
2. (1884) 13 Q.B.D. 547.
3. [1891] 2 Q.B. 680.

his family, has the covenant of substantial enjoyment been broken? It is to this question that we now turn.

Some general points need to be noted. It is to be observed that disturbance of enjoyment which is merely temporary, and which does not interfere with the title or possession of the tenant, is not a breach of the covenant. The lessor in Manchester, Sheffield Ryl v. Anderson had caused structural injury to the demised premises but the Court of Appeal denied the tenant a remedy because, inter alia, the act was only temporary. Lord Lindley M.R. said,

> "A temporary inconvenience which does not interfere with the estate or title or possession is not, to my mind, a breach of covenant, nor is there any case that goes anything like the length required to show that it is."[4]

When the disturbance is by someone other than the landlord, he will only be liable if the other person is acting lawfully.[5] So the landlord of an office building was held not liable under the covenant in Rickards v. Lothian[6] when the malicious act of a stranger had caused water to escape from a lavatory and cause damage. Even where the landlord knows that another person is disturbing the tenant's enjoyment, he is not liable for that person's illegal acts by his failure to cause that person to stop the disturbance. So when one of the landlord's tenants was causing a nuisance to another, the landlord was not liable for his failure to take steps to prevent the nuisance from

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4. [1898] 2 Ch. 394. cf. Phelps v. City of London Corp. [1916] 2 Ch. 255.
5. Wallis v. Hands [1893] 2 Ch. 75, 83.
6. [1913] A.C. 263.

continuing. Only active participation on his part would have made him liable: Malzy v. Eichholz.[7] Another point to note is that the covenant does not oblige a lessor to repair damage or destruction caused by fire or tempest: Brown v. Quilter.[8]

Assuming that the above requirements are satisfied, is a failure to maintain a house a breach of the implied covenant? Certainly the consequence of the landlord's bad management and lack of repair is to substantially affect the tenant's enjoyment of the demised premises; physical and mental discomfort are both part of the slum-tenant's lot. Yet on the present state of the authorities, it is unlikely that the tenant could recover under English law. Some of the tenant's discomfort may be caused by what may be termed positive acts of bad management; a door is not properly repaired and gives trouble, a leaking roof is "bodged" by a dab of pitch, dustbins are placed near the windows of a basement flat. Such facts should give rise to a successful action for breach of the implied covenant. But most slum conditions are caused not by acts of commission but by omissions; a refusal to spend money so as to render the tenant's occupation more bearable. Unfortunately, the law places a heavy obstacle in the path of the plaintiff who seeks to show that the landlord's omission constituted a breach of the implied covenant of quiet enjoyment.[9]

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7. [1916] 2 K.B. 308.

8. (1764) Ambl. 619,
cf. Victor v. Lynch [1944] 3 D.L.R. 94, 18 M.P.R. 46.

9. Note, 79 Sol. J. 727 (1935); Note, 84 Sol. J. 640 (1940); Note, 86 Sol. J. 180 (1942).

The early law maintained that an omission was outside the scope of the covenant. In an anonymous case decided in 1577,[10] a rectory was let by the parson to the plaintiff-lessee. Owing to the parson's omission to do certain matters, the rectory passed to another who ousted the lessee. An action was brought against the parson for breach of the covenant of quiet enjoyment but the Court of Common Pleas rejected it,

> "It was the opinion of all the justices that this matter is not a cause of action; for the lessee was not ousted by any act done by the lessor but rather for non-feasance; and so out of the compass of the covenant, as if a man be bound that he shall not do any waste, permissive waste is not within the danger of it."

Ninety years later, in Pomfret v. Ricoft,[11] the Court of Exchequer Chamber accepted the dissent of Twysden J. in the Court below and held that the covenant of quiet enjoyment never obliges the covenantor to do a positive act.

In the last decades of the nineteenth century, the court recognised that some omissions were actionable. There is a dictum by Cotton L.J. in Anderson v. Oppenheimer[12] in which damage was caused by the bursting of a water pipe. He said,

> "I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant; but in the present case there is no act of either commission or omission --- and no negligence --- therefore although the plaintiff's enjoyment was interrupted, there was nothing to make what occurred full within the covenant."[13]

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10. (1577) 4 Leonard 38, 74 E.R. 714.
11. (1669) 1 Wm. Saund 557, 85 E.R. 454. cf. differing views taken in Note, 79 Sol. J. 727, 728 (1935), Note, 84 Sol. J. 640 (1940).
12. [1880] 5 Q.B.D. 602.
13. Ibid

This trend was strengthened by Cohen v. Tannor.[14] The plaintiff was the sub-lessee of premises and the defendant his lessor. The assignees from the head lessor sought possession of the premises for breach of the covenant against sub-letting. The defendant, though he had a good defence to the charge, did not defend the assignees' action and consented to judgement for possession whereby the plaintiff was evicted. The Court of Appeal held the lessor liable for breach of the implied covenant on the grounds that he had actively consented to the judgement for possession. It was pointed out by Vaughan Williams L.J., however, that,

> "If all the defendant had done had been to omit to defend the action, there would have been no breach of the covenant for quiet enjoyment. The reason I say so is this: there may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty and there is no duty cast on the defendant of defending the action."[15]

We see here both the recognition of omission as being a possible ground for an action and the restriction of its potential application to cases where the omission is the breach of some positive duty to act.

Booth v. Thomas[16] is the leading case. The owner of land inclosed a stream which passed through it in a culvert. He later leased part of the land and a building thereon to the plaintiffs. Due to the lessor's failure to repair the culvert, a severe storm caused the stream to break through the sides and wash away slag on which the demised building was erected so that

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14. [1900] 2 Q.B. 609.
15. Ibid
16. [1926] 1 Ch. 109.

a part of it collapsed. Russell J. held the plaintiff tenants entitled to recover for breach of the implied covenant,

> "Assuming that it could be said that the defendant in this case had done no act, I should myself have been prepared to hold that the omission to keep the culvert in a fit condition involved the omission of a duty to the adjoining landowner, and that it was the duty of the owner of this culvert which, if neglected, might cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions."[17]

This decision was upheld by the Court of Appeal. Sargant L.J. said,

> "--- mere omission may, where there is a duty to do something, be sufficient to support an action of this kind."[18]

and Pollock M.R. noted,

> "There seems no logical or other reason for putting an act of omission into a different category from that of an act of commission particularly where you find there was a duty which lay upon the person sought to be made responsible."[19]

He later agreed with the trial judge's finding that the omission was a breach of the duty owed to neighbouring land-owners. It was therefore decided by this case that the old cases holding that omissions were never a breach of the covenant were no longer law. But it was also decided that to be actionable, the omission must also be a breach of some positive duty to act. It is this restrictive condition which will defeat the slum-tenant unless the court rejects it.

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17. Ibid 116.
18. [1926] 1 Ch. 397, 410.
19. Ibid 403.

Later cases show the restrictive nature of the condition that the omission must be a breach of some duty. The lessee in Belbridge Property Trust Ltd. v. Milton[20] had been obliged to leave the premises owing to the presence of considerable numbers of beetles. The lessor now claimed arrears of rent and she counter-claimed for breach of the implied covenant of quiet enjoyment. Roche J. rejected the counter-claim; he was not satisfied that the plaintiffs had done anything they ought not to have done, or had omitted to do anything that they ought to have done. In Penn v. Gatenex,[21] the plaintiff-tenant sought to recover on the covenant when the landlord failed to repair a demised refrigerator but his action was also rejected. Lord Evershod M.R. said,

> "The landlords here have not in fact done anything. They have not, according to the evidence, deliberately disconnected the refrigerator from its motive power. They have merely refrained from taking steps to prevent the mechanism already deficient from becoming altogether inoperative. Their sins, if sins they be, are, therefore, sins of omission only. It is true that omissions may amount to breaches of the ordinary covenant of quiet enjoyment, but it seems that such omissions should be of a character as would amount, or be liable to amount, in themselves to wrongful acts: see Booth v. Thomas."[22]

Lord Justice Parker did not see how the implied covenant would aid the tenant; the landlord would only be liable for his omission if he was already liable for breach of some positive duty. Bowes v. Dublin Corp.,[23] a decision in the Irish High

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20. (1934) 78 Sol. J. 489.
21. [1958] 1 A.E.R. 712.
22. Ibid 715-716.
23. [1965] I.R. 476.

Court, is another case in point. It was held by Davitt P. that, "an omission to perform a duty owed to the tenant (other than the duty under the covenant itself) can be an act constituting a breach."[24] As the lessor was not in breach of any positive duty, there was no breach of the implied covenant.

There seems no good reason why an omission should need to be a breach of some positive duty. The important and sole question should be whether the lessor has interfered with the tenant's enjoyment of the demised premises. There seems no special magic in the requirement that the act be one of a positive nature. There also seems no benefit in giving a tenant a remedy for breach of the implied covenant only when he has a remedy for breach of another duty. Where a tenant has suffered serious interference with his enjoyment in the premises by the landlord's failure to repair, it seems unfair to refuse him a remedy on the basis that he is unable to recover on other grounds. This requirement does not seem to have ever been justified in the courts and, it is submitted, it is time for a change in the law. Effect would then be given to Lord Justice Donovan's view in Kenny v. Preen that,

> "The law in this field is developing and the court should take account of modern conditions including difficulties of accommodation."[25]

It must be conceded that Canadian cases on this point do not support the view here advanced. In the case of Victor v. Lynch, Chisholm C.J. of the Supreme Court of Nova Scotia, said,

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24. Ibid

25. [1963] 1 Q.B. 499,

> "It is agreed by counsel for both parties and it is well established law that there is no obligation upon the landlord to repair unless there is an express covenant to that effect; and that the landlord's covenant for quiet enjoyment does not of itself oblige him to repair or rebuild the demised premises in the event of damage or destruction by fire; it requires an express covenant on his part to cast that duty upon him."[26]

So also in the case of Winbaum v. Zolumuff & Zolumuff[27] where it was held that the covenant of quiet enjoyment did not oblige a lessor to repair a defective oil burner. In Smith v. Gullen,[28] the Ontario Court of Appeals decided that infestation by mice and other vermin was not a breach of the covenant. On the other hand, the tenant in Jackson & Jackson v. Spector[29] was able to recover for breach of the covenant of quiet enjoyment when the lessor had failed to carry out a covenant to repair. It was pointed out by McKercher J.,

> "Under proper circumstances a breach of the covenant to repair on the part of the lessor will constitute a breach of the covenant for quiet enjoyment should the condition of non-repair or defect exist in part of the demised premises and the want of repair cause an interference with the physical enjoyment of the part of the lessees."[30]

The tenant who is able to show breach of the implied covenant may seek damages and an injunction. The recoverable damages will be those actually sustained[31] providing they flow directly and naturally from the breach[32] or may reasonably be

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26. [1944] 3 D.L.R. 94, 18 M.P.R. 46, 61.
27. [1956] O.W.N. 27.
28. [1956] 3 D.L.R. 2d. 302.
29. (1951) 2 W.W.R. (N.S.) 620.
30. Ibid 623.
31. Child v. Stenning (1879) 11 Ch.D. 82.
32. Grosvenor Hotel Co. v. Hamilton [1894] 2 Q.B.D. 836.

supposed to have been within the contemplation of the parties, as the time when the lease was granted, as the probable result of the breach.[33] The tenant was thus able to sue for the actual inconvenience suffered by him as a result of the landlord's breach in Perea v. Vandiyar.[34] In that case and also in Grosvenor Hotel Co. v. Hamilton[35] and Cruse v. Mount[36] he was also able to recover the expense of moving out, living elsewhere until the breach was remedied and then moving back in again. In view of the likelihood that substantial repairs will require the tenant to move out for a period, this is a most valuable head of damages. As the covenant is naturally a contractual obligation its breach does not give rise to exemplary damages[37] and, in the absence of special damage, only nominal damages can be awarded.[38] If the cause of action be continuing, i.e. "a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought",[39] down to the actual date of assessment.[40] The breach of the covenant may be

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33. Hadley v. Baxendale (1854) 9 Exch. 341, cf. John Waterer v. Huggins (1931) 47 T.L.R. 305.
34. [1953] 1 A.E.R. 1109.
35. [1894] 2 Q.B.D. 836.
36. [1933] 1 Ch. 278.
37. Perera v. Vandiyar [1953] 1 A.E.R. 1109. cf. Lavender v. Betts [1942] 2 K.B.D. 72. See now Rookes v. Barnard [1964] A.C. 1129; Cassell v. Broome [1972] 1 A.E.R. 801.
38. Kenny v. Preen [1963] 1 Q.B. 499.
39. Hole v. Chad Union [1894] 1 Ch. 293.
40. Ibid

restrained by injunction[41] though not if there is no likelihood of repetition.[42] The injunction may be in a mandatory form, as in Allport v. The Securities Corporation[43] where a mandatory injunction was awarded against a landlord requiring him to reinstate a staircase which he had wrongfully removed.

To summarise, the implied covenant of quiet enjoyment will be of little value to the bulk of slum tenants when one looks at their ability to better their conditions. In some cases it will be possible to point to some act of commission on the landlord's part and here it will be possible to recover under the covenant if the tenant's enjoyment is substantially disturbed. But in the majority of cases the substandard condition will be attributable to neglect and omissions rather than positive acts. Where an omission is the cause of action, the tenant will only recover, on the present state of the authorities, if he can show a breach of some duty imposed upon the landlord. Hence if the landlord has breached section 32 of the 1961 Housing Act, the implied warranty of fitness in the case of a furnished house or one of the other rare duties which the law places upon a landlord, the tenant can recover for breach of the implied covenant as well as for breach of that duty. In most cases, this doubling of the cause of action will bring little benefit to the tenant. The tenant who was without a cause of action for a landlord's omission independently of the covenant will be unable to sue for breach of the covenant.

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41. Tipping v. Eckersley (1855) 2 K. & J. 264, 69 E.R. 779.
42. Leader v. Moody (1875) 20 Eq. 145.
43. (1895) 64 L.J. Ch. 491.

The Relationship of the Covenant of Quiet Enjoyment To Constructive Eviction; England

Before discussing the possibility of a doctrine of constructive eviction in English law, it is necessary to relate such a doctrine to the covenant of quiet enjoyment which has already been discussed. That relationship is that eviction is a breach of the covenant of quiet enjoyment which causes the tenant to vacate the premises or a part of them. This was illustrated by the Court of Appeal decision in Perera v. Vandiyar.[1] The trial judge had awarded an evicted tenant heavy damages on the basis that it was a case in which punitive damage should be awarded. This decision was reversed on the grounds that eviction was simply an action for breach of the implied covenant and was not a tort in itself. So also in Commissioners of Crown Lands v. Page, Devlin L.J. expressed the view that,

> "It is unfruitful to distinguish between an eviction and a breach that goes to the root of the covenant of quiet enjoyment."[2]

Therefore the restrictions imposed on the covenant of quiet enjoyment will also apply to evictions.[3] In particular, an eviction cannot be caused by the landlord's omission unless it is also a breach of a positive duty.[4]

The reason for discussing eviction separately from other breaches of the implied covenant is that, unlike other breaches, it provides the tenant with a defence to the landlord's action for rent.[5] It thus provides a basis for the remedy of rent-withholding.[6]

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1. [1953] 1 A.E.R. 1109.
2. [1960] 2 Q.B. 274.
3. Supra 360
4. Supra 361
5. Infra 371
6. See infra 815 for evaluation of rent- withholding as a remedy.

Constructive Eviction in English Law

If the landlord allows the premises to fall into such a state of neglect that the tenants are forced to abandon them or a part of them, can the tenants refuse rent on the basis that they have been evicted? In the United States, the doctrine of constructive eviction covers this exact point, is it possible to formulate a similar doctrine from the materials provided by the English law?

Eviction has long been held to be a good defence to the landlord's action for rent. As far back as 1588, the Court of Common Pleas held that where a landlord had wrongfully entered premises and removed some bricks, "the possession is in him sufficient to suspend the rent". So also in the 1699 case of Dalston v. Reeve;[2] eviction acted to suspend the rent. A recent case was London & County Co. v. Wilfred Sportsman in which Buckley, J. said,

> "Therefore in my judgement, the circumstances do exist here which amount to the eviction of Mr. Miah --- and consequently no rent could have been recovered --- from Mr. Miah while that state of affairs existed."[3]

Some cases also suggested that in addition to the suspension of rent, damages could also be recovered for the wrong. So in Morrison v. Chadwick it was said by Cottman, J.,

> "It is to be borne in mind that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction by which, it is to be presumed, he will obtain satisfaction for any inconvenience or loss which he may suffer."[4]

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1. Cibel v. Hills (1588) 1 Leonard 110, 74 E.R. 102.
2. (1699) 1 Ld. Raym. 77, 91 E.R. 948.
3. [1969] 1 W.L.R. 1215. Reversed on another point by the Court of Appeal [1970] 3 W.L.R. 418.
4. (1849) 7 C.B. 266, 137 E.R. 107

But in Perera v. Vandiyar[5] it was held by the Court of Appeal that eviction in itself gave no cause of action though damages might be recovered for any torts such as trespass and the breach of the covenant of quiet enjoyment that accompanied it.

A point in favour of the theory of constructive eviction now being contended for is that no actual ouster of the tenant from the premises is required to constitute an eviction.[6] Until the leading case of Upton v. Townend[7] in 1855 the position was not altogether clear. The older authorities would seem to show that there had to be an actual physical expulsion of the tenant. Littleton said, "Note that disseisin is properly where a man entereth into any lands or tenements where his entry is not congeable and ousteth him which hath the freehold etc."[8] In 1775, Aston J. said in his judgement in Hunt v. Cape,[9] "All the cases in the books suppose the lessee to be put out of possession." But some cases early in the nineteenth century went the other way. The tenant was held to be evicted in Burn v. Phelps[10] when his landlord gave notice to sub-tenants and in Kirkham v. Jervis[11] when the landlord refused to permit the tenant to cook fish on a Sunday.

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5. [1953] 1 A.E.R. 1109.
6. See Note 80 Sol. J. 278 (1936); Note 82 Sol. J. 392, 544 (1937); Foa, "General Law of Landlord and Tenant" 8th ed. (1957) p. 159.
7. (1855) 17 C.B. 30, 139 E.R. 976.
8. Littleton s.279.
9. (1775) 1 Cowp. 242, 98 E.R. 1065. Cf. Hodgskin v. Queensborough (1738) Willes 129,
10. (1815) 1 Stark 94, 171 E.R. 412.
11. (1839) 7 Doul 678,

Upton v. Townend[12] settled the matter. The landlord had demised two neighbouring premises to the defendant-tenants. Fire destroyed the premises and when they were rebuilt the area of one of the tenants was decreased and the area of the other increased. Both tenants were held to be evicted by the change in the demised premises though there was no actual physical ouster in either case. Willes J. was quite clear on the point,

> "I cannot agree with (counsel for the landlord) that there must necessarily be a going upon the land and an actual expulsion of the tenant from the possession. That part of his argument is not supported either by principle or authority."[13]

Later cases have confirmed this decision. It was said by Devlin L.J. in Commissioners of Crown Lands v. Page, "Eviction does not necessarily involve physical expulsion; an act that deprives the tenant of the enjoyment of the premises, or part of them, may be sufficient."[14] In Perera v. Vandiyar the method adopted by the landlord was to cut off the tenant's gas and electricity supply which he did without entry[15] and in London & County Co. v. Wilfred Sportsman the eviction was granting a lease to third parties during the term of the tenant's lease. The law thus clearly recognises that acts other than mere physical ouster can amount to an eviction[16] but, before considering whether permitting premises to decay falls within such "constructive eviction", one other point needs to be noted.

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12. (1855) 17 C.B. 30, 139 E.R. 976.
13. Ibid
14. [1960] 2 Q.B. 274.
15. Cf. Bass v. Julius (1934) 177 L.T. 148 - threat by Water Board to cut off supply because of landlord's non-payment.
16. Notes 81 Sol. J. 392, 544 (1937).

To constitute an eviction it is not necessary that the tenant be deprived of the enjoyment of the whole premises. Eviction from part of the premises is equal to eviction from the whole.[17] Lord Chief Justice Hale pointed out in Hodgkins v. Robson & Thornborow,

> "If the lessor enters into part by wrong, this shall suspend the whole rent, for in such case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue."[18]

Smith v. Raleigh[19] provides an illustration. The tenant had taken the lease of a house and garden. His landlord railed off part of the garden and built a privy upon it for the use of other tenants whereupon the tenant returned the keys to him and refused to pay rent. Lord Ellenborough ruled that this amounted to an eviction from part of the premises and, as the rent was paid for the entire demise, it operated as a complete answer to the landlord's action for rent. In Upton v. Townend, Jervis C.J. noted that, "It is not denied that an eviction of the tenant from a part of the demised premises is for the present purposes the same as an eviction from the whole."[20] There seems only one point of doubt. Dallas J. recognised the general rule in Stokes v. Cooper[21] but said that if the tenant, after the partial eviction, continues in possession of the residue he may be liable on a quantum meruit. This dictum was, however, criticised by Parke B. in Reeve v. Bird[22] as "at variance with the older authorities."

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17. Foa op. cit. n. 6 at p. 251. Williams, "Notes on the Canadian Law of Landlord and Tenant" (3rd ed. 1957) p. 177.
18. (1676) 1 Ventr. 276, 86 E.R. 185.
19. (1814) 3 Comp. 513, 170 E.R. 1465. cf. Cherboum v. Rye (1594) Cro. Eliz. 342, 78 E.R. 590.
20. (1855) 17 C.B. 30, 139 E.R. 976.
21. (1814) 3 Comp. 513 note 170 E.R. 1465 note cf. Tomlinson v. Day (1821) 2 Brod. & B. 680, 129 E.R. 1128.
22. (1834) 1 C.M. & R. 30, 36, 149 E.R. 980.

It has been seen that an eviction by the landlord operates so as to suspend the duty to pay rent. It has been further noted that the law recognises some forms of constructive eviction and that partial eviction will operate as eviction from the entire premises. From such materials it is possible to construct a theory that when the landlord allows parts of the premises to decay to such an extent that the tenant cannot use them then the duty to pay rent is suspended for the entire premises and this is so even when the tenant continues to reside in the residual. So far so good, but the question is now what possible restrictions are there in the way of creating this doctrine of constructive eviction. The modern requirements of eviction were laid down in Upton v. Townend. Jervis C.J. said,

> "I think it may now be taken to mean this - not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."[23]

The other judges also accepted the need for the two requirements of "permanency" and "intention". But Crowder J. added a third, eviction must be a "wrongful act". These three essentials were repeated by Lord Evershad M.R. in Commissioners of Crown Lands v. Page,

> "Apart from any requisite of wrongfulness, the landlord's act must be of a "permanent character" and be done with a particular "intention" namely that of disabling the tenant from continuing to 'hold' the subject of his demise or of depriving him of the 'enjoyment' of the thing demised or some part thereof."[24]

The doctrine of constructive eviction now contended for will be tested against each of these requirements.

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23. (1855) 17 C.B. 30, 139 E.R. 976.

24. [1960] 2 Q.B. 274.
On intention requirement, see also Newby v. Sharpe [1878] 8 Ch. 39.

"Wrongfulness" has been a rather vague requisite. In Upton v. Townend, Crowder J. gave no indication of its meaning and no clarification was provided by the Court of Appeal in Baynton v. Morgan[25] when it repeated the requirement. That same court tended to treat the requirement as one with little substance in Commissioners of Crown Lands v. Page. Lord Evershad M.R. agreed that it did not mean tortious. Lord Justice Omerod did not find it easy to state with precision what constituted the element of wrongfulness but he felt that, if a landlord entered the premises as a trespasser, the entry would be wrongful. Devlin L.J. felt the requirement was no more than that the landlord had breached his obligation "to leave the tenant undisturbed". If the requirement as seen by Omerod and Devlin L.J.J. is simply that there must be a breach of the implied covenant of quiet enjoyment then it is hardly an independent requirement. Every positive act done by the landlord with the intention of depriving the tenant of the enjoyment of the premises is a breach of that covenant.[26] Perhaps "wrongful" means no more than "without lawful excuse" thus in Commissioners of Crown Lands v. Page Lord Evershad said,

> "it is clear that the act of the Crown in requisitioning the house was not sensibly "wrongful" seeing that it was done in pursuance of a statutory power and a statutory duty."[27]

If this is so, the slum landlord's actions are clearly "wrongful" as having no legal support.

"Permanence" will depend on the facts of each case. It does not seem to have been defined in this context and presumably means "not temporary".[28] All the facts are no doubt relevant including the

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25. (1888) 22 Q.B.D. 74.
26. Supra 359
27. [1960] 2 Q.B. 274.
28. cf. Newby v. Sharpe (1878) 8 Ch. 39, 51 per Thesinger L.J.

suffering inflicted upon the tenants.

The biggest hurdle to jump would be the requirement of "intention". Does the landlord who allows his premises to fall into a substandard condition "intend" to deprive his tenant of the enjoyment of the demised premises? The meaning of the term in this context has not been defined by the English courts but in the Canadian case of Cross v. Piggott[29] the court thought it did not cover the situation where premises had a leaking roof and lack of heating which caused the tenant to leave. But the exact scope of the decision needs to be noted. Mathers C.J. quoted the definition given by Jervis C.J. in Upton v. Townend and continued,

> "It appears to be an essential part of this definition that the act complained of as amounting to an action should have been done with that intention. --- There was in this case clearly no eviction within the above definition. On each occasion when complaint was made of insufficient heat the default was properly remedied."[30]

The Ontario Court of Appeal reached a like conclusion in Johnston v. Givens.[31] The lessor had covenanted to heat the premises but was unable to carry out this obligation for a period as a result of foreign matter in the coal which had damaged the heating equipment. The tenant left the apartment and now defended the lessor's action for rent on the grounds that the failure to supply heat constituted an eviction. The court rejected this argument, because there was no evidence of intention on the part of the landlord,

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29. [1922] 32 Man. 362, 69 D.L.R. 107. Williams op. cit. n.17 at p. 186.
30. [1922] 69 D.L.R. 107.
31. [1941] O.R. 281, 4 D.L.R. 634.

"I am unable to find in these occurrences, injurious as they were to the respondent's enjoyment of the demised premises, any evidence of an intention on the part of the landlord that they should have that effect, or indeed, that they should happen at all. They were fortuitous events and it is impossible to find that these were acts of a permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.[32]

These judgements do not cover the situation where the landlord refuses to carry out repairs. In such a situation, it is submitted that the landlord's indifference to the plight of his tenants may constitute an intention to deprive them of the enjoyment of the premises. He may not desire the tenants to lose their enjoyment, his only object may be to maximise his profits by cutting down on the upkeep. He does not want the premises to be in a bad condition but he reluctantly keeps them so in order to realise the best income. On such an analysis of the landlord's mental state it is possible to say that the landlord "intended" to deprive the tenants of their enjoyment of the premises. This results from the rule that "a party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does."[33] The natural consequence of allowing premises to fall into great decay is that the enjoyment thereof by the tenants will be wholly or partly lost, therefore the landlord must be considered to have intended this consequence. Such reasoning has found favour in the American courts[34] and, it is submitted, should be equally applicable here.

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32. [1941] O.R. 281, 285.

33. R. v. Harvey (1823) 2 B. & C. 257, 264, "Winfield on Torts" 8th ed. (1967) p. 16-17.

34. Supra 343

Part III

Statutory Modifications of the Common Law

Chapter 11

The Statutory Covenant Of Fitness

Introduction

The common law rule of caveat emptor applied to leases of land and the limited exception made in the lease of furnished premises have been examined. The conclusions drawn from the examination have not been encouraging; the law is archaic, anomalous and unjust. Has Parliament taken adequate steps to remedy the failings of the common law? It is to this question that the discussion now turns. In the realm of contract, there are only two relevant provisions in English law: section 6 of the Housing Act 1957 and section 32 of the Housing Act 1961. Section 6 has long been part of English law and has been the subject of much judicial attention, it will be discussed first.

1) Origins of The Statutory Covenant of Fitness

It has been seen that intense interest in the housing of the poor during the 1880s led to the setting up of a Royal Commission which confirmed the gravity of the problem.[1] The Commission made various recommendations including the following,

> "In the opinion of Your Majesty's Commissioners there should also be a simple power by civil procedure for the recovery of damages against owners or holders of property by those who have suffered injury or loss by their neglect or default in sanitary matters."[2]

The Government was quick to act upon this recommendation. Clause 13 of the Housing Of The Working Classes Bill 1885 envisaged just such a civil remedy. Introducing it into the Lords, the Marquess of Salisbury described it as "a provision of considerable value, which will put a stop to the somewhat reckless disposal of unfurnished houses, from which so many lamentable evils have arisen".[3] The purpose of the clause was to remove "the anomaly" caused by "a curious peculiarity of the law" which implied a warranty of fitness in the letting of furnished but not unfurnished premises.[4] Much was expected from it: "I look to this clause more than to any other to diminish the death-rate that is caused by insanitary dwellings".[5]

The clause received a mixed reception. Some members gave it a warm acceptance.[6] One warned that he would watch with very great jealousy any attempt to lessen the strength of the clause and would seriously oppose any considerable modification.[7] Another thought it was a mockery and did not go far enough, he urged greater local authority regulation of unfit houses.[8] But other members referred to the "great alarm" among the owners of house property and the opposition organised by the building societies.[9]

The strongest resistance came, predictably, from a judge sitting in the House of Lords. Lord Bramwell[10] said he should rejoice if the clause only applied to the wilful letting of a house not fit to be inhabited

because he would punish the man who knowingly let a house in an unhealthy condition, just as he would punish a man who sold food that was adulterated and not fit for human use.[11] "But the clause, as it stood, would apply equally to a man who might be quite innocent in the matter. It was contrary to the ordinary principle of caveat emptor - that each man should examine and decide for himself. The clause was altogether an unwarranted interference with freedom of contract, and would have an injurious effect even on the working classes, for whose benefit it was intended."[12] The noble and learned Lord foresaw that "men might come into Court with their families dressed in mourning, and the jury would very likely say - 'Oh, there must have been something wrong, the landlord is evidently a rich man; he ought to have done something for his tenant;' and so a verdict would be given for the plaintiff."[13] Even if the house was not in an insanitary condition, that would not prevent claims being made against the landlord; and if he succeeded in resisting the action, in many cases he would not recover his costs. To cover their liability, landlords would act "on ordinary economic principles" and indemnify themselves by raising the rents.[14] Lord Bramwell concluded his protest against "this mischievous, grandmotherly legislation" by urging that "The best thing both for farmers[15] and working men was to teach them to look after themselves. They were quite able to do so."[16]

The clause passed into law as section 12 of the Housing Of The Working Classes Act 1885. This provided that "in any contract made after the passing of this Act for letting for habitation by persons of the working classes a house or part of a house, there should be implied a condition that the house is at the commencement of the holding,in all respects reasonably fit for human habitation."[17] This provision was subsequently re-enacted without material alteration as section 75 of the Housing Of The Working Classes Act 1890.

An important amendment was made in the Housing Of The Working Classes Act 1903 to prevent the parties contracting out of the implied condition. The 1885 Bill had been altered by a Commons amendment stating that the implied undertaking would apply "Notwithstanding any contract or stipulation to the contrary between the landlord and tenant". Lord Bramwell had attached this "foolish", "mischevious" and "objectionable" alteration[18] and the Marquess of Salisbury moved a Lords amendment disagreeing with it on the grounds that even if it did not do more harm than good, then it could be easily evaded and would be productive of a considerable amount of litigation.[19] Reluctantly, the Commons decided not to insist upon the amendment;[20] it being observed by one M.P. that "by striking out the amendment the Lords had rendered the whole provision nugatory."[21] A similar amendment went through in 1903

without any opposition and was not even debated.[22] This became section 12 of the 1903 Act and provided that the implied condition shall "take effect notwithstanding any agreement to the contrary, and any such agreement made after the passing of this Act shall be void."

Further amendments were made six years later by the Housing, Town Planning Etc Act 1909. The most important was the extension of the implied condition to defects arising during the term as well as at the commencement. The statutory covenant had thus outgrown its origin as an attempt to place the landlord of unfurnished premises under the same duty as the common law had imposed on the landlord of furnished premises. Introducing the Bill into the Commons, Mr. Burns explained the object and expected consequence of the statutory expansion, "What we want is to maintain the house in a condition fit for human habitation so long as human beings reside therein. Small though that point is, if vigorously enforced -- that small but necessary point will, I trust, create a revolution in the minor conditions of the house, especially in our large towns and cities."[23] In the Lords, Earl Beauchamp compared the clause with the Old Age Pensions Act and the Employers Liability Act and said it would put upon the bad landlord the same obligation which the good landlord had already cheerfully undertaken.[24] The Act also extended the implied condition to houses of a higher rental value.[25]

Two important modifications were made in the 1909

Act which were mainly to the landlord's advantage. To meet criticism in the Lords,[26] the Government added a proviso that the implied condition would not be applicable when the house was let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for occupation, and the lease could not be determined at the option of either party before the expiration of that term.[27] This modification was opposed in the Commons on the grounds that it opened up a loop-hole through which property owners might evade the provisions of the Bill[28] but it was passed. The second addition was to confer a right of entry upon landlords for the purpose of viewing the condition of the house.[29] This was also opposed in the Commons, Keir Hardie said it was based on the false assumption that working people needed to be compelled by Act of Parliament to admit the landlord to view the property.[30] This amendment was also passed.

A third modification introduced in the Lords was not successful. This would have removed liability from the landlord when the defect was caused by the act or default of the tenant or any person for whom the tenant was responsible. Moving the amendment, Lord Zouche said it was not at all uncommon for a tenant to let a hous go out of such repair as he was supposed to keep it in, to fail to keep it clean, to remove floors or windows, and to play havoc generally with the place either by

a wilful act or by failure to look properly after the premises. The amendment would protect the landlord from responsibility in such cases.[31] It was rejected by the Government spokesman in the Commons on the grounds that the landlord should get rid of such tenants; "if that were not done we should place a premium upon landlords using the misdeeds of some tenants as a reason for not keeping in order houses and rooms which were desirable for better tenants."[32]

The provision has remained substantially unaltered since 1909. The foregoing enactments were re-enacted by section 1 of the Housing Act 1925 in a consolidated form. Verbal amendments were made in 1935 and these were re-enacted in section 2 of the Housing Act 1936. This provision remained unaltered [33] until 1957 when the Rent Act of that year doubled the rental limits within which the Act operated.[34] These changes were consolidated in section 6 of the Housing Act 1957. Section 6 also made one break with the past by referring to a new standard of unfitness.[35] Previously, the provision had stipulated that the premises be "in all respects reasonably fit for human habitation" now certain criteria are given which are to be the sole guide to unfitness.[36]

2) Limitations On The Scope Of The Statutory Covenant

a) The Rent Limits

The original rental limits were £20 for a

house in England and £4 for one in Scotland or Ireland.[1] These figures were based upon the limit for the composition of rates established by the Poor Rate Assessment or Collection Act 1869[2] and were designed to ensure that the implied warranty was restricted to working class houses.[3] The Housing of the Working Classes Act 1890[4] kept the same limits and it was not until 1909 that they were revised. Section 14 of the Housing, Town Planning Etc. Act of that year provided for three limits depending upon locality: in London, the limit was £40, in boroughs or urban districts with a population of fifty thousand or upwards it was £26 and elsewhere £16 was the limit. The Government spokesman in the Lords, Earl Beauchamp explained that the determining factor with regard to the increases "had been a very marked increase in the rents of working-class dwellings, not only in London, but also in the provinces"[5] and he produced figures to show that between 1880 and 1900 the actual increase in rent amounted to twenty-three per cent.[6] The opposition attacked on two fronts. First, it was said that it was very strange that members of the working class should be defined not by something in their occupation but by the valuation of the house in which they lived.[7] The Government's reply was that landlords would find it more convenient to know that houses of a particular rental are treated as working-class houses rather to select houses with a particular class

of inhabitant.[8] The second attack was to say that the proposed limits were too high and would include tenants who were not members of the working class. Viscount St. Aldwyn thought that to say that any person could properly be defined as a member of the working-classes who lived in a house in a country village at a rental of £16 was simply absurd.[9] Lord Alverstone, the Lord Chief Justice, likewise thought that to take £40 in London as the standard of a house for the working-classes was an absurdity.[10] There were thousands of clerks who could not be called working class men who lived in houses rented at £25 or £30 a year. An Opposition amendment to lower the limits was defeated.[11]

These limits were modified by s 10 of the Housing Etc. Act 1923 which provided, in effect, that the limit should be retained at £40 for London but be £26 elsewhere. These limits remained unchanged[12] for some thirty four years until 1957 when the Rent Act of that year doubled them in the case of contracts made after the Act.[13] These new limits were consolidated in the Housing Act of the same year.[14] In order to deal with the new situation created by the reorganisation of Government in London, the London Government Act 1963 preserved the status quo by retaining £52 as the limit for outer London boroughs and £80 for inner London boroughs and the City for contracts made on and after 1st April 1965.[15]

Unless the above limits are met, there is no statutory warranty of fitness. In practice, therefore, the vast majority of tenancies are not within the protection of section 6. To come within the section, tenancies created after 1957 must be let at a weekly rent of £1.10.9d. or less in London or £1.0.0.d. in the rest of the country. To the vast majority of tenants such rents are ridiculously low. Even in 1957, these annual rents of £80 in London and £52 elsewhere only just covered those tenants paying the average annual rents which were then £73 in London and £44 in the country as a whole.[16] Since then uncontrolled rents have risen far above the statutory limits. By 1962, the average rent for uncontrolled premises in the country as a whole was £67.[17] and in 1963, the average rent for the cheapest type of uncontrolled premises in London - part of a house or flat - was £122.4.0d.[18] In areas of severe housing shortage, rents have risen even faster and higher and it is in such areas that landlords are able to put unfit dwellings on the market.[19] The number of London tenants living in unfit premises paying £1.10.9d. or less each week must be very small if controlled tenancies are left aside for the moment, so must the number of tenants paying £1.0.0d. or less each week in the rest of the country. For the remaining tenants, the section is of no value at all.

A large number of controlled tenancies are also

outside the protection of the statutory implied warranty of fitness. Broadly speaking, a controlled tenancy is an unfurnished tenancy, which commenced before 6th July, 1957 in respect of a dwelling with a rateable value on 7th November 1956 of not more than £40 in London or £30 elsewhere in England and Wales.[20] Because, by definition, a controlled tenancy is one that commenced before 6th July, 1957 the rental limits applicable to see if section 6 of the Housing Act is relevant are £40 in London and £26 elsewhere (unless the tenancy began before 1923 when the limit may be as low as £16). Even in 1957 many controlled tenants paid higher rents than these. Under the 1957 Rent Act, the lowest multiple by which the landlord was entitled to fix the rent was 1⅓ rd times the 1956 gross annual value for rating, the highest multiple was 2⅓ rd time that value. As the Act retained in control those premises with a rateable value of £40 or under in London and £30 or under elsewhere, the landlord would be entitled to at least £53. 6. 8d. in London and £40 elsewhere and, if the highest multiple applied, he could get up to £93. 6. 8d. in London and £70. elsewhere. Of course, not all controlled tenancies had rateable values as high as £40 in London and £30 elsewhere. But, depending upon the multiple permitted, many tenancies with lower rateable values were likewise excluded from the implied warranty of fitness. Taking the highest multiple permitted, for example, the statutory implied warranty would not extend to a house

situated in London with a rateable value as low as £17. 3. 0. because that sum multiplied by 2⅓ exceeds £40. In short, whether a house came within the statutory warranty depended on two variables - its rateable value and the multiple by which that rateable value could be multiplied. When these variables were employed to fix specific rents, the resulting figure would often take the tenancy clean outside the protection of Section 6.

Even supposing a tenant is able to show that his net rent is within the statutory limits, a further trap awaits him. In Rousou v Photi,[21] the Court of Appeal decided that the rental limits in the section refer to the actual rent payable to the landlord without any deduction therefrom of any sum in respect of rates or other outgoings which the landlord may have agreed to pay. In that case the defendant was a weekly tenant and the plaintiff a lodger who was injured by the fall of the ceiling. When sued, the defendant joined his landlords contending that his tenancy came within section 2 of the Housing Act 1936 and that the landlords had failed to keep the premises fit for habitation. The tenant paid rent of £45.10.0d. a year but over £5.10.0d. of that was to pay the rates on the premises. The tenant contended that the rates should be deducted before assessing whether the premises came within the limit of £40. - the premises being in London. The Court of Appeal rejected this contention

and held that no deduction could be made in respect of the sum paid to cover the rates. Therefore the section did not apply and the landlords were not liable.

The lucky tenant who can just squeeze his tenancy under this hurdle may face yet another. It has been decided by an Irish case[22] that a rent of 10s.0d. a week exceeds £26 a year by 1s.5d. as the multiplier of the weekly rent should be 52 1/7 and not 52![23] In Whitcomb v Pollock,[24] on the other hand, the Liverpool Court of Passage came to another and, it is submitted, a more common-sense conclusion. It was held by G. Glyn Blackledge Q.C. that the proper method of ascertaining the annual rent was to multiply the weekly rent by 52 and not to make detailed calculations based on the number of days in a calender year.

In view of the extremely low rental limits, section 6 is largely a dead-letter and has little, if any, role to play in the rehabilitation of substandard houses. As the Government's policy of decontrolling the remaining controlled tenancies[25] is put into effect, its importance will diminish absolutely unless fresh rental limits are set or unless the limits are removed.

In view of the limited effect of section 6, some justification is needed for continuing to discuss it. That justification is found in three factors; first some tenants may yet be able to seek its protection,[26]

second, the removal of the limits or increases therein may give it fresh life. The most important justification, however, is to trace the fate of this section in the Courts so that the fortunes of its younger brother in the 1961 Housing Act may be foreseen; to gauge the attitude of the judges to a Parliamentary innovation required by their own refusal to abandon archaic concepts and an unjust social philosophy.

b) Only The Tenant Can Sue

The Courts have seen the statutory implied warranty of fitness purely as a contractual term, therefore only the tenant could sue for its breach as only the tenant was a party to the contract with the landlord. The tenant's family could not sue because they were strangers to the contract. So, it was held in Middleton v Hall[1] that the tenant's wife had no cause of action against the landlord and in Ryall v Kidwell[2] that the tenant's daughter was not protected. The practical effect of these judgements has been nullified by the provisions of the Occupier's Liability Act 1957[3] but they remain of interest as examples of the restrictive interpretation to which the section has been subject.

From an early time, non-lawyers have criticised the exclusion of strangers to the protection of the statute as an anomaly[4] but it has been pointed out

that lawyers "will find it difficult to recognise anything anomalous in the law as it stands. -- Anyone who is not a party to the contract of tenancy is a stranger to it and cannot sue upon it."[5] But it has also been observed that the inconvenience of too rigid adherence to the principle of privity of contract has been recognised and to some extent remedied by modern developments in the law of tort, of contract, and even in the law of landlord and tenant. "The extension of the principle of privity of contract to the statutory warranty of fitness could therefore scarcely be justified, least of all by any necessity to protect the interests of landlords."[6] Further, "an increase of the responsibilities of the landlord would have assisted in the achievement of the policy of the Housing Acts by adding a stronger incentive for the observance of the required standard of fitness, instead of permitting the landlord to take advantage of the accidental selection of the person to suffer from the landlord's admitted breach of duty."[7] The judicial construction on this point clearly frustrates the aims of the Government which introduced the original provision in 1885. Introducing it into the Lords, the Marquess of Salisbury said it would make those letting unhealthy houses liable "for the illness or death of <u>any person</u> living in it."[8]

c) The Requirement Of Notice

(i) The Section As Enacted

The original provision, section 12 of the Housing Of The Working Classes Act 1885, contained neither a requirement of notice from the tenant of defects nor the right of inspection on the part of the landlord. This was the cause of one of Lord Bramwell's objections to the clause during the debate in the Lords,

> "Then again, the tenant was likely to be the first to find out whether there was anything wrong. From indolence and indifference he took no notice; somebody might fall ill and die, and the first knowledge the landlord might have of anything being wrong in the sanitary arrangements of the house would be a claim by the tenant who could come and say - 'You were bound by law to let me the house in a sanitary condition'." 1

Lord Denman replied that, being the owner of several small houses, he thought it was the duty of every landlord to know the condition of his houses.[2]

The Housing, Town Planning, Etc. Act 1909 did not impose a duty on the tenant to give notice but it did give the landlord the right of inspection. This modification was the result of an amendment moved in the Lords by Viscount St. Aldwyn.[3] It was justified in the Commons against Labour opposition[4] on the grounds that,

> "By the medium of this Bill we impose upon the landlord certain responsibility, and if he does not exercise that responsibility we put upon him severe penalties for failing to keep the house in order. It is impossible for him to fully and freely exercise both his responsibility to the tenants from whom he receives rents, and to the local authority to whom he is under liability

> for keeping the houses in a sanitary condition unless he has the right of access to see that the repairs are carried out by the contractor to whom he often sub-lets the work of keeping the houses in order. It is in the interests of the working classes that the landlord should have the right of entry to see that the houses are in a sanitary condition. If he has not that right, I really believe that three-fourths of the liability and responsibility for a certain class of property put on the landlord would not be carried out, because if he were brought before a court of law he would only have to plead as an excuse for not carrying out the work that he was menaced by a sturdy tenant who declined to allow him to enter." 5

Later statutes re-enacted the right of inspection[6] but none of them required the tenant to give notice of the defect.

Nothing in section 6 of the Housing Act 1957 makes any reference to the need for tenants to inform their landlord of any defects in the premises. On the other hand, the section expressly gives a landlord power of inspection. By sub-section (3),

> "the landlord, or any person authorised by him in writing may at reasonable times of the day, on giving twenty four hours' notice in writing to the tenant or occupier, enter any premises to which this section applies for the purpose of viewing the state and condition thereof."

The same wording confers a similar right of inspection upon the landlord in the case of Section32 of the Housing Act 1961[6a] and the following discussion will relate to both sections. Despite the wording of these sections, the Courts have concluded that a tenant cannot recover damages in respect of injuries caused by disrepair unless the landlord has received notice of

the defect. It is to this judicial development that the discussion now turns.

(ii) The Notice Requirement In The Courts

The first case to consider the requirement of notice in the case of a statutory duty to repair was Fisher v Walters,[7] decided by the Divisional Court in 1926. Owing to a latent defect, the ceiling of a house fell and damaged the tenant's furniture. The Court held that absence of notice did not preclude the tenant from recovering. In the words of Finlay, J,

> "This being a latent defect, no notice could be given by the tenant because he had not discovered and could not with reasonable diligence have discovered it." 8

In the same year, the Court of Appeal decided Morgan v Liverpool Corporation.[9] The tenant was injured by a defective sash-cord. He had given no notice to the landlord of its condition before the accident. The members of the Court were unanimous in rejecting his claim but discovering the ratio of the case is no easy task. There was agreement only on the point that absence of notice was fatal to the plaintiff's case. Although Lord Morris said in O'Brien v Robinson[10] that Morgan's case must be regarded as a case in which the defect was latent, it is respectfully submitted that the judgements in the case defy such an attempt to find certainty. It is true that counsel for the

tenant admitted the defect to be latent[11] but Lord Wandsworth expressed much doubt whether the breaking of a window cord could be treated as a latent defect.[12] Atkin L.J. thought it possible that a very careful inspection of the window cords might have revealed the state in which they were.[13] His concern was more with the suddenness of the defect rather than its latency.[14] Lawrence L.J. thought the notice requirement applied to latent as well as patent defects and certainly to the defect existing in the case before him but he did not say which it was.[15] The most that can be said of this case is that notice was required in the particular circumstances and its absence was fatal to the tenant's claim.[16]

In Summers v Salford Coporation[17] the tenant had given notice to the landlord of the defect and so the question of notice was not before their Lordships. Every member of the Court, however, expressly referred to it as open to the Court to decide in a later case whether Morgan was correctly decided. Lord Atkin, for example, pointed out that,

> "In the present case the point on which the Court of Appeal in Morgan's case decided for the defendant does not arise, namely, that notice ofthe lack of repair complained of must be given to the landlord before his statutory obligation arises. I can see that different considerations may arise in the case of an obligation to repair imposed in the public interest and I think that this question must be left open, and I reserve to myself the right to reconsider my former decision if the necessity arises." 18

The second case on the warranty decided by the House of Lords was McCarrick v Liverpool Corporation.[19] This case clearly decided that, in the case of patent defects occurring during the term, notice must be given to the landlord. The tenant's wife fractured her leg by falling on two stone steps leading to a back kitchen and the tenant sued in respect of her incapacity. Their Lordships dismissed the action and approved Morgan's case on the grounds of absence of notice.

O'Brien v Robinson[20] completes a trio of House of Lords decisions. This was decided on section 32 of the Housing Act 1961. In 1965 the tenants occupying the rooms above the plaintiffs had had frequent parties with music, dancing, noise and banging on the floors. No defects in the ceiling were or became visible. Three years later the ceiling fell. It was considered by the trial judge that it was probable, though difficult to prove conclusively, that it was the nuisance rather than old age alone which brought down the ceiling. But once this nuisance ceased in 1965 there was nothing to suggest that either the lessor or lessee thought there was need to take any action about the ceiling, or evidence of any apprehension about its condition. In 1965, the tenants had complained to the landlord about the stamping on the ceiling but the judge found that the complaints the tenants then made were not that the structure of the ceiling might al-

ready be defective, but that if the stamping continued it would one day bring down the ceiling. The tenants' action for damages was dismissed by Mr. Justice Bristow on the grounds that no notice of the defect had been given to the landlord. The House of Lords upheld this judgement.

(iii) Evaluation Of The Rationale For The Notice Requirement

In both McCarrick and O'Brien, their Lordships failed to advance any new foundation for the notice requirement and were content to rely upon that in Morgan and cases relating to express covenants to repair. Lord Justice Atkin had said in that case,

> "The landlord has given the tenant exclusive occupation of the house. The landlord, therefore, is not in a position to know whether the house is in repair or out of repair, and it is held that it would be quite contrary to justice to impose an obligation of this kind upon a landlord in respect of matters of which he has in fact no knowledge." 21

Did the landlord's right under the statute to inspect the premises make any difference? The learned judge thought not,

> "I think the power of access that is given, extensive though it may be, does not take the case away from the principle from which the Courts have inferred liability is not to arise except on notice." 22

The requirement of notice had its origins in Makin v Watkinson[23] decided by the Court of Exchequer in 1870.

The landlord had covenanted to repair a mill but had failed to do so. To the tenant's action for damages, he pleaded that no notice of want of repair had been given. To this plea, a demurrer was entered thus raising the issue squarely before the Court, Baron Channell was persuaded by principles of common sense that liability to repair depended upon knowledge. Baron Martin energetically dissented arguing that the Court could not change a bargain freely made between the parties. It was Baron Bramwell, stalwart defender of laissez faire and later champion of the Property Defence League,[24] who provided the most detailed justification for imposing a duty to give notice upon the tenant. He had the "strongest objection to interpolate words into a contract" and felt justified in doing so only if "some cogent and almost irresistible reason" existed. But such a reason did exist here,

> "The lessee is in possession, he can say to the lessor; 'You shall not come on the premises without lawful cause; and to come for the purpose of looking at the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed. --- This is -- preposterous." 25

The rationale for the decision was thus the landlord's inability to inspect the premises.

Later cases have also justified the notice requirement on the grounds that the landlord had no right of access to the premises. In Tredway v Machin, Collins

M. R. explained the requirement as resting upon the principle,

> "that the landlord is not the occupier of the premises and has no means of knowing what is the condition of the premises unless he is told because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair." 26

This statement was quoted with approval by Lord Atkinson and Lord Parmoor in Murphy v Hurley.[27] Lord Sumner said in that case,

> "The tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time." 28

Though there is much truth in the observation by Lord Diplock in O'Brien that the cases on the notice requirement "do not show a continuing logical development in the law nor any great consistency in reasoning",[29] there appear to be only two cases on express covenants which deny that right of access is equivalent to notice. They are Torrens v Walker[30] and Hugall v McLean.[31] Two other cases cited by Lord Porter in McCarrick[32] are not really on the point; in Broggi v Robins[33] there is no mention in the report of any right to enter, express or implied, on the part of the landlord and London and S.W. Railway Co. v Flower[34] concerns not the common law of landlord and tenant but construction of a private Act of Parliament. But Torrens and Hugall are true exceptions. In both cases notice was required from the tenant although the landlord had the means to

discover the defect. Indeed, Hugall went so far as to say that the requirement applied even where the tenant had no means of knowing of the defect but the landlord did have such ability. It is doubtful how far Hugall and Torrens which followed it can be reconciled with the decision of the House of Lords in Murphy v Hurley in which Lord Sumner pointed out that the Court in Hugall felt that it was carrying the rule to its extreme limit.[35] The Murphy decision repudiated the absolute rule of notice enunciated in the earlier case by holding that the rule was not inherent in the landlord-tenant relationship and depended upon the facts existing in every case.[36] One relevant fact would, of course, be the landlord's right to inspect the premises.

As the rationale of these cases on express covenants by the landlord to repair rested upon his inability to gain access to the premises and his status as a trespasser if he should do so without the tenant's consent, it seems clear that they are not applicable to the statutory covenants of fitness and repair. Since 1909, the landlord liable under such covenants has had the right to go upon the premises to see their condition. Entry for this purpose does not make him a trespasser. Therefore, the requirement of notice should not apply even as a matter of pure analysis.

There are persuasive reasons why the requirement of notice should not extend to the statutory covenants.

In the first place, the covenant of fitness first enacted in 1885 was designed in the letting of furnished and unfurnished premises.[37] Since the tenant of a furnished house does not seem to be under a duty to give notice,[38] it may be argued that nor should those protected by the Statutory covenants. Second, there is no requirement of notice in the case of defects in those parts of the premises retained by the landlord under his control such as common stairs and, it is submitted, shared w.c.s and bathrooms in multi-occupied houses.[39] Some American cases suggest that the landlord's right to inspect the premises carries with it sufficient control to render the notice requirement inapplicable.[40]

Even if we accept that the notice requirement is justified by well-established cases where the defect is within the knowledge of the tenant, it does not follow that such cases justify the extension of the requirement to latent defects <u>ie</u> "of such a nature that the tenant did not know and could not have discovered by reasonable examination that the premises were out of repair."[41] Of the cases on express covenants, only <u>Hugall</u> seems to go so far. With regard to cases on the statutory warranty, <u>Fisher</u> v <u>Walters</u> expressly decided that notice need not be given of latent defects. As already observed, it is not clear whether the Court of Appeal regarded the defect as latent in <u>Morgan's</u> case. In <u>McCarrick</u>, the defect

was a patent one of which the tenant had knowledge but of which the landlord was unaware. It was not necessary, therefore, for their Lordships to decide whether the requirement would apply to latent defects and both Lord Porter and Lord Uthwatt were careful to note that their judgements did not cover this point though Lord Simmonds criticised but did not overrule Fisher's case. In the light of this analysis, it is respectfully submitted that Lord Diplock was wrong in thinking in O'Brien v Robinson that Morgan and McCarrick had already applied the notice requirement to latent defects.[42] By so extending it, the House of Lords was breaking new ground.

(iv) The Justice Of The Rule

Although Lord Morris expressed sympathy for the tenants in O'Brien, Lord Diplock said he was not persuaded that the requirement of notice led to unjust results.[43]

It is suggested that reference to relevant social studies would have revealed the injustice to tenants of the rule requiring notice of defects. A survey carried out for the Milner Holland Committee investigating London's housing problem in 1963 contains this revealing passage,

> "Where repairs and decorations were needed and were the landlord's responsibility, although he had not been asked to do them, the

> tenant was asked why he had not asked the landlord. Half of the tenants said that they did not consider the repair or decoration was needed sufficiently urgently to inform the landlord, the other half did not believe that asking for it to be done would have any effect." 44

A further survey carried out in 1970 for the Francis Committee investigating the working of the Rent Acts revealed that some 12 to 15% of tenants, while saying work needed attention, had not asked their landlord to do it. Of these, one in four (ie. 3 to 4% of all tenants) in the London stress areas but rather less in the conurbation as a whole said it would be a waste of time to ask because the landlord would refuse.[45]

It seems unjust that tenants should have to bear the consequences of accidents caused by disrepair because their opinions as to the seriousness of the work needed turns out to be wrong. Research by Ken Coates and Richard Silburn into a poverty area of Nottingham suggests that poor tenants do not complain over apparently trivial matters. Quite the reverse,

> "We did not find that -- complaints were unduly pernickety. Rather the contrary : people were wont to accept conditions which we would have judged intolerable, as if they were perfectly normal. When they did complain, it was for cause."46

Only exceptional damp, unusual cold, excessive rot, and decrepitude to the point of collapse were felt to be legitimate causes of complaint. They suggest that continual subjection to sub-standard housing leads to tenants regarding such conditions as "normal".[47] If

this be so, one can only conclude that it is most unjust that such forbearance is rewarded by loss of the protection of the statutory covenants.

The second reason given in the surveys also casts doubt upon the justice of the requirement. If the landlord has refused to carry out repairs requested in the past, is the tenant to be penalised because he has given up an apparently fruitless ritual? In addition, the type of landlord who refuses to do repairs may also be the type who would not be unwilling to serve notice to quit or resort to harrassment or unlawful eviction in order to remove a troublesome tenant insisting on his rights.[48]

In the case of latent defects, it seems plainly inequitable to take away statutory rights from the tenant who has failed to give notice. Where the defect is obvious, at least one can say the tenant should have brought it to the landlord's notice. He has only himself to blame if he did not. But where the defect is latent, no such blame attaches. He cannot give notice of defects which he cannot know about.

But the interests of tenants have also been seen to be protected by the notice requirement. Lord Atkin said in Morgan that he could not imagine a set of circumstances which "would be more intolerable to a tenant, to say nothing of the landlord, if the landlord had repeatedly day by day and so on, in order to protect himself, to survey all his houses for the

purpose of seeing whether there was any little defect which might result and cause injury."[49] Whilst in McCarrick, Lord Uthwatt said that the tenant was entitled to remain inert and could hardly have intended that whenever a defect appeared, however, trivial, he should be disturbed by the work of reparation whether he wished it or not.[50] Without dismissing the possibility of vexatious inspections or repairs, it may be suggested that the remedy need not be as drastic as the requirement of notice. The landlord could be expected to exercise his powers in a reasonable fashion and, in extreme cases, an action forbreach of the implied covenant of quiet enjoyment or prosecution for harassment may be an answer.

What of the landlord's viewpoint? Clearly one must feel sympathy for a landlord who is held responsible for defects of which he was not given notice. Yet there is much in the argument advanced by Lord Denman during the debate on the 1885 Act that it is the duty of every landlord to know the condition of his houses.[51] If the renting of private accommodation was seen not merely in terms of rent-collecting but also as a service involving property management,[52] then imposing a duty as well as a right of inspection would not seem harsh. The tenant will often not be in a position to employ an architect or a surveyor to see whether walls, ceilings, lighting and plumbing have remained in proper repair.[53] The landlord as a

property manager should be in a position to offer such services. Even in the case of latent defects which defy the skills of such experts, the landlord would normally be in a stronger economic position to bear the loss.[54]

The expectations of both landlords and tenants was seen as the decisive factor in favour of the rule by Lord Diplock in O'Brien,

> "McCarrick's case has stood for 25 years; Morgan's case for 45 years. Landlords and tenants and their insurers have entered into leases and contracts and Parliament has passed statutes on the basis that the law is as stated in these judgements. This House would not be justified in altering it now." 55

These words recall Lord Simonds' observation in McCarrick that conveyancing practices have grown up on the faith of such decided cases.[56] Though this may be undoubtedly true in the case of many landlords and tenants having the benefit of professional advice, it is most unlikely to be true for those tenants who need the protection of the law most, those who live in sub-standard housing. Such tenants do not enter into tenancy agreements on the basis of the established law.[57] Indeed, even if they knew what the law was, they would be in no position to bargain.[58] Abandoning the notice requirement would not shatter the expectations of such tenants except to the extent that they now feel the law is always stacked against them.

It seems unlikely that the legislative intent has been fulfilled by the judicial interpolation of the notice requirement. The statutory covenants of fitness and repair were designed to remedy the common law which had refused to imply such covenants and had preferred caveat emptor to protection of the weak.[59] They were also designed to ensure in the interests of society generally that responsibility for the repair of premises was placed on some party who could carry it.[60] By absolving the landlord on a technical point, this legislative policy has been frustrated by the Courts. If notice is not given, then nobody is liable for the premises.

(v) Unanswered Questions

Is it necessary for notice to come directly from the tenant or can it can aliunde? Dicta in Hugall v McLean[61] by Brett M.R. and in Torrens v Walker[62] by Warrington J. suggest that notice must actually come from the tenant. In Griffin v Pillet,[63] on the other hand, it was said obiter by Wright J. that if the landlord has actual notice from some other source then notice by the tenant is dispensed with. Lord Porter expressly left the point open in McCarrick. Subject to the reliability of the information, there seems no good reason why knowledge from sources other than the tenant should be excluded. For example, if

the landlord saw the defect whilst collecting rent or even whilst inspecting the premises for the purpose, can he avoid liability by saying that the tenant had failed to inform him of the defect?[64]

What if the defect existed at the time of the letting? In such a case, it is submitted that the tenant should be under no duty to give notice. The landlord is in a better position than his tenant to know of the defect. In the case of the common law implied warranty of fitness at the commencement of the lease of a furnished house, the tenant is under no duty to give notice[65] and, it is submitted, a similar rule should apply as regards the statutory warranty. Only Uniproducts (Manchester) v Rose Furnishers Ltd,[66] a High Court decision on an express covenant to repair, seems against this proposition. The tenant had been injured when the floor of the premises collapsed owing to dry rot which must have existed at the commencement of the term. Glyn Jones J. held that the landlord was not liable as no notice of the defect was given. It is submitted that Uniproducts was wrongly decided and that the rule as to furnished premises should apply.[67]

(d) Parts Retained in Landlord's Possession

Judges have further whittled down the protection of the Act in cases where parts of the premises are retained in the landlord's possession. Being viewed

as a contractual obligation, the statutory implied term can only apply to the subject-matter of the contract ie only to defects in the demised premises. For instance, in Dunster v Hollis[1] it was held that the section does not impose an obligation upon the landlord to keep in repair the common staircase which is kept in his control. In multi-occupied dwellings,[2] this rule removes large parts of the premises from the scope of the section. Common staircases, steps from the pavement, rain-water gutters and roofs have all been held to be retained in the landlord's possession.[3] If shared toilets, bathrooms, kitchens and gardens[4] are likewise held to be in the landlord's possession, as it seems they must be,[5] then a very large hole is made in the protection afforded by the statute. Fortunately the common law imposes certain liabilities upon the landlord for such common parts[6] though these obligations are not so extensive as those imposed by the statute.

(e) Statutory Covenant Restricted to Works Requiring Only Reasonable Expense

It might be thought that judicial limitation was a thing of the past and that, in the rare cases where tenants can now rely on section 6, modern courts will be more sympathetic. But in the recent case of Buswell v Goodwin,[1] the Court of Appeal dashed such hopes. A Local Authority had made a closing order in respect of

a cottage let for a weekly rent of 7s.9d. The landlord then gained possession of the cottage in the County Court. The tenant appealed against this decision and contended, inter alia, that the implied covenant of section 6 had been breached. This contention did not find favour in the Court of Appeal and it was rejected by a novel piece of judicial legislation. Widgery L.J. quoted the section and continued,

> "Provision on these lines has appeared in Housing Acts for a number of years, to my recollection back to 1925 if not before and on its face it appears to impose a very wide obligation on the Landlord. In literal terms it would seem that a landlord must keep a ruinous house fit for habitation at whatever the cost. But (Counsel for the tenant) concedes, and I think he is entirely right in so conceding, that the obligation under section 6 is not as extensive as that, and it is restricted, as is the landlord's obligation under other provisions, of the same Act, to cases where the house is capable of being made fit for human habitation at reasonable expense.
>
> That at once produces this situation, that if the house was not capable of being rendered fit in that way, which was the Local Authority's view, one cannot point to the deficiency and say the landlord must be responsible for it. If it is not capable of being rendered fit at reasonable expense, the landlord was not liable to have it kept so under section 6." 2

Karminski and Davies L.J.J. concurred in this judgement.

It is submitted, with respect, that Buswell v Goodwin was wrongly decided. As Lord Justice Widgery pointed out, there is absolutely no reference to the cost of repairs in the section which is absolute in character. Nor can this decision be justified, as could the insertion of the requirement of notice into the statute,[3] by the Common law. There appears to be

no case in which an express covenant to keep premises fit for human habitation has been construed to mean to keep premises fit for human habitation providing the cost is not unreasonable. No case on the implied warranty of fitness relating to furnished premises is authority for this view. Not even a dictum was cited by Widgery L.J. and nor can any support be found in any of the leading textbooks on landlord and tenant law. The Common law gives no support whatever to this startling innovation.

Previous cases on the statutory warranty do not support this view. In John Waterer Sons & Crisp Ltd. v Huggins[4] the Court of Appeal was faced with the same situation as faced the Court in Buswell v Goodwin. The landlord had allowed his property to decay to such an extent that the Local Authority made a closing order and his action for possession brought forth a counter-claim for damages made under the statutory covenant. The Court rejected the tenant's action on the basis that the type of damages sought were not recoverable but at no time was it suggested that the making of a closing order, (and therefore the determination by the Local Authority that the premises could not be made habitable by reasonable expense) was a defence to the action. At no time in this or in any other case on the section has it been suggested that the cost of the works required was a factor to be taken into consider-ation.

The history of the section itself throws serious

doubt on the correctness of the decision in Buswell v Goodwin. It is clear that the legislature intended to impose an absolute obligation on the landlord, so much so that even deliberate damage done by a tenant would be within the section.[5] More recently, the Housing Repairs and Rents Act 1954 actually removed the word "reasonably" from the section. Before 1954, the landlord had to keep the house "in all respects reasonably fit for habitation". In 1954, Parliament repealed the words "in all respects reasonably".[6] Judicial interpolation of words into statutes is always evidence of daring but re-introducing words which Parliament has cast aside might be thought foolhardy.

The only possible justification for this judicial amendment to the Act is to draw an analogy from other sections and, indeed, this is the only ground on which Widgery L.J. relied. Section 9 of the Act, for example, provides that a Local Authority may require the repair of unfit houses,

> "unless they are satisfied that it is not capable at a reasonable expense of being rendered as fit." 7

But this argument is totally unconvincing. If Parliament intended the restriction to apply to section 6 why was the restriction not expressly enacted in that section? If Parliament put the restriction into some sections but not others, are we not forced to conclude that Parliament only intended the restriction to apply

where it said it was to apply and that it was not to apply where Parliament purposely omitted the restriction? In addition, the analogy drawn from other sections is not apt. Section 6 is a section designed to give damages to a tenant forced to live in substandard conditions. Section 9 is designed to confer powers on Local Authorities in the interests of public health. The restriction is to ensure that the public interest is adequately safeguarded by requiring a closing or demolition order to be made when conditions are extremely bad. There is no reason to apply it so as to defeat the tenant's action for compensation. The intention of the two sections is quite different and there is no reason for implying in one a restriction which Parliament has expressly enacted in another.[8]

The confusion between public law and private law is responsible for another confusion: who is to determine whether the premises can be repaired at reasonable expense? In Buswell v Goodwin, Widgery L.J. assumed that this was to be the Local Authority: the only way the tenant could defeat the restriction would be to challenge the basis of the closing order made by them. It is not clear why an administrative body should be permitted to so decide the rights of two private persons without any statutory authorisation. Is their decision appealable on this point? Must the authority use the same criteria for deciding the question when it decides the rights between the parties and whether

to make a closing order or not?[9] Are the parties required to seek the determination of the Authority before taking action under the statutory covenant? Is it necessary for a tenant to get a certificate from the Authority that the premises are capable of repair at reasonable expense before he commences his action? Or, is the onus of proof the other way? Is the Authority the sole arbiter of this question? These and many other questions remain unanswered by this decision.

Busworth v Goodwin deprives the worst off tenants of their statutory protection. If the landlord has neglected to do repairs and has allowed the premises to fall into such a terrible state that a closing order is necessary, the tenant loses his house and with it the security of tenure which he has enjoyed as a protected tenant. His furniture and possessions may also have been damaged by the condition of the house, he may have been seriously injured. The risks are greater where the degree of neglect is so great. Yet that tenant is to be refused his statutory protection precisely because he is the victim of the most substandard of substandard housing.[10] Where the need for protection is greatest, there it will be taken away. Without citing any authority and relying only upon an inapt analogy, the slender protection of the Act is denied to those who most need its protection. It is almost as if the Court wanted to deliver one last body blow

to a dying man; an Act which is fast being overtaken by rising rents must yet have its protection further limited.

(f) Are Statutory Tenancies Within The Covenant?

Statutory tenancies are those tenancies which have ceased to be contractual and yet which continue because the Rent Act prevents the landlord removing the tenant.[1] Normally, they will have ceased to be contractual because the landlord has served notice to quit and so terminated the tenancy, the tenant's right to stay on will then depend solely upon statute. It will be seen that all the majority of landlords need do to convert a contractual tenancy into a statutory one is to serve the necessary four weeks' notice.

Dicta in Strood Estates Co. v Gregory,[3] which states that the implied warranty of fitness does not extend to statutory tenancies, therefore assume enormous importance. The question in that case was the amount of rent which the landlord of a statutory tenancy could legally recover and it became necessary to decide whether the statutory warranty applied. Sir F. Boyd Merriman P. said it did not because the "statutory tenancy" was not, properly speaking, a tenancy at all; it merely conferred "a status of irremovability" on the tenant.[4] Just why this should exclude the statutory

warranty is not clear and there are no other cases on the point. It has been submitted that the warranty applies to statutory tenancies in the same way as an express covenant by the landlord to repair;[5] it is one of "the terms and conditions of the original contract of tenancy" within the relevant statutory definition of a statutory tenancy.[6]

(g) The Standard Of Fitness

The standard envisaged by the Government spokesman introducing the 1885 Bill into the Lords was that the house must be healthy. He referred, in particular, to the habit of some speculative builders who conducted all the drains into the centre of the kitchen and left them there causing typhoid fever. This evil would be met by the provisions of the Bill, "any person building a house and letting it, and not taking proper and reasonable precautions that it shall be healthy, will be held to have broken the contract."[1] All those contributing to the debate on the clause appear to have seen it as a public health or sanitary provision.[2] Unsuccessful attempts were made during the debate to make the standard more specific by restricting it to structural defects[3] and adding a proviso that the term "reasonably fit for human habitation" should include a convenient and sufficient supply of water.[4] The first modification was suggested on the grounds

that "it was not intended that the clause should apply because a house was small, or had a slate off; but that it was in such a condition as to be likely to breed disease amongst those who occupied it, especially from unseen and unknown causes".[5] The proposed restriction was not implemented and the second modification was withdrawn when the Government spokesman said that the provision of water supply fell within the clause as it stood.

From 1885 to 1954, the landlord's obligation was to keep the house "in all respects reasonably fit for habitation"; the only statutory guidance as to the scope of this obligation was found in Section 188 of the Housing Act 1936, which provided that "regard shall be had" to the general standard of housing accommodation for the working classes in the district and the extent by which the house fell below the local by-law standards.[6] This section was repealed and replaced in 1954 by the Housing Repairs and Rent Act of that year.

Section 9 of which provided certain criteria by which unfitness was to be judged. This new standard of fitness is now embodied in Section 4 of the Housing Act 1957 as amended by Section 71 of the Housing Act 1969.[7]

By virtue of Section 4 of the 1957 Act it is provided that,

> "In determining for any of the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters, that is to say:
>
> (a) repair

(b) stability
(c) freedom from damp
(cc) internal arrangement
(d) natural lighting
(e) ventilation
(f) water supply
(g) drainage and sanitary conveniences
(h) facilities for preparation and cooking of food and for the disposal of waste water.

and the house shall be deemed to be unfit for human habitation if and only if it is so defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition."

Section 4 is the sole guide to the type of defects covered section 6. Thus certain defects which have been held to render premises unfit in the past will no longer do so within the section. Infestation by rats, fleas and bugs are no longer in the section.[8] Other defects which might be thought to have this effect are excluded eg inadequate artificial light, heating facilities, inadequate number and positioning of power points, inadequate facilities for storing food.[9]

Some of the old law will, however, still remain of value. As has been pointed out by the editors of Woodfall, "the function of Section 4 of the 1957 Act is to define and limit the field of inquiry and not to alter the basic standard required."[10] One still needs to know what standard of repair, stability, freedom from damp, etc. is required. This question came before the Divisional Court in Jones v Green[11] where the Court held that the statutory standard was less than that required by a covenant to keep premises in "good and tenantable repair".

Salter J. expressed his view thus,

> "The Housing Acts are directed against slums, overcrowding and buildings in which people are herded together in conditions unsuitable for human habitation; and the standard of repair required by those Acts is naturally for those purposes a humble standard. It is only required that the place must be decently fit for human beings to live in." 12

However, in Summers v Salford Corporation,[13] Lord Atkin considered it difficult to draw a distinction between the expression "in all respects reasonably fit for human habitation" and those of "habitable repair" as defined by Alderson B. in Belcher v McIntosh[14] and "tenantable repair" as defined by Lord Esher M.R. in Proudfoot v Hart. Lord Esher had treated both "habitable repair" and "tenantable repair" as equally meaning,

> "such a state of repair that the premises might be used and dwelt in not only with safety but with reasonable comfort, by the class of persons by whom and for the sort of purposes for which they were to be occupied." 15

Lord Atkin found the standard offered by Lord Esher to be a "useful test" of the statutory warranty but added a caution that a "reasonable view of the meaning of 'comfort' should be taken."

The statements of Lord Atkin were obiter whilst the standard applied in Jones v Green was part of the actual decision but, it is submitted, the comments of such an eminent judge cannot be lightly disregarded. Moreover, Jones v Green seems open to the objection

that it misunderstood the intention of Parliament in passing the section under discussion. As was pointed out by Lord Romer in Summers, the true scope and effect of the phrase "unfit for human habitation" must depend upon its context; defects justifying the award of damages may not justify the demolition of the house in slum clearance. Section 6 "is not an enactment designed for the purpose of clearing slum areas but is -- a provision designed for the purpose of compelling landlords of small dwellings such as are normally inhabited by the working classes to see that their tenants are properly and decently housed."[16]

It is to be hoped that the standard applied under section 6 will be somewhat above that proposed by Salter J. in Jones v Green. Those persons fortunate enough to be covered by the Act deserve more than the "humble" standard there proposed; there is no reason why only the worst abuses should be corrected. Lord Wright put the point very well when he said in Summers,

> " 'Human habitation' is in contrast with habitation by pigs, horses or other animals or with use as warehouses and the like but I think it also imports some reference to what we call humanity or humaneless." 17

Cases on the statutory warranty of fitness have also differed on another aspect of the question; must the defect be substantial to render the house unfit for human habitation? These cases were discussed in the

context of the implied warranty of fitness in the lease of furnished premises[18] and it was seen that "it is not the amount, but the consequence, of the disrepair which determines whether a house is fit for human habitation."[19] Thus, in Summers, a broken sash-cord was held to give rise to an action under the Section.[20]

A third question is whether the availability of alternative but less convenient facilities can make up for the loss of an amenity which would otherwise render the house unfit. The tenant in Daly v Elstree R.D.C.[21] had the use of a hot water system. During a severe frost, the system burst and became useless but was never repaired. The cottage still had running water and other facilities for heating it. The local authority served a notice requiring the landlord to repair the hot water system, the absence of which was alleged to render the house unfit for human habitation. The Court of Appeal rejected this contention, Lord Justice Scott saying,

> "I think myself that, as the cottage had one existing means of heating water in the kitchen and potential means by gas and electricity being laid on, the Judge was obviously right in coming to the conclusion that the cottage, if in other respects it was fit for human habitation, had not fallen short of the standard required by the Act." 22

If the principle of this case was widely extended; it could have most unfortunate consequences, thus if a bedroom had a leaking roof, the fact that the tenant could sleep elsewhere may be advanced to show

that the premises were not unfit.[23]

Although unfitness is a question of fact[24] and so each case must turn on its own facts, some indication of what has been held to come within the section may be useful. The ceilings in Walker v Hobbs fell and injured the plaintiff. It was admitted that they "were in a dangerous condition and therefore that the rooms were not, speaking in a broad sense, fit for humam habitation."[25] Fisher v Walters concerned similar facts; Finlay J. remarked, "Was this house during the whole term kept by the landlord reasonably fit for human habitation? The ceiling fell down. Res Ipsa Loquiter".[26] Premises were held to be unfit in the County Court case of Horrex v Pidwell[27] on the ground of serious dampness due to defects in the roof and valley gutters. The most recent case to refer to the standard of fitness suggests that the many thousands of dwellings still without the standard amenities would be unfit within the section. Widgery L.J. said, obiter in Buswell v Goodwin,

> "At all material times, the house was not fit for human habitation by modern standards. It is not necessary to go into details but, inter alia, there was no indoor sanitation, no fixed bath, no running water either hot or cold within the confines of the house and the situation had prevailed for very many years." 28

Stanton v Southwick[29] is now no longer strictly relevant in view of the exclusion from the new statu-

tory definition of unfitness of infestation by vermin. But it remains of interest as an example of the restrictive interpretation to which the standard has been subjected. The Divisional Court held that sewer rats which invaded the premises from an old drain beneath the premises would not render them unfit unless "they bred there, were regularly there and, as it were, formed part of the house."[30] The test would seem both impossible and arbitrary. Why are tenants expected to become pestologists able to recognise the reproductive process in the tiniest of mites? Only the most prudish would find the sexual activities of vermin more repellent than their feeding habits, it is the latter which causes concern to most tenants. On the other hand, in the County Court Case of Thompson v Arkell,[31] the tenants recovered for breach of the statutory warranty when they were viciously attacked by fleas.

3) Tenant's Remedies

One remedy clearly available to the tenant who can show a breach of the statutory condition is the right to sue for damages. In Walker v Hobbs[1] the tenant was injured by the defective state of the ceiling. It was contended that the breach gave him no right to damages, Lord Coleridge C.J. swept this contention aside,

> "The reasonable interpretation of the Act is that it imports a promise by the landlord to the tenant that the dwelling is reasonably fit for habitation, upon which promise, if it is broken, the tenant can sue." 2

Damages may be recovered for personal injury as in Summers v Salford Corp.,[3] for damages to property and for inconvenience and discomfort as in Horrex v Pidwell.[4] Damages may also include compensaton in respect of a closing order made as a result of the landlord's failure to keep the house fit for human habitation: John Waterer Crisp v Huggins.[5] But in the last named case, a tenant whose tenancy had commenced prior to the Rent Acts could not recover damage for loss of security of tenure conferred under those Acts.

It does not seem to have been expressly decided whether the statutory warranty of fitness confers the same right as the common law warranty in leases of furnished premises of allowing the tenant to rescind the tenancy agreement.[6] Woodfall states that, "the effect of this enactment is that the tenant

of a house falling within the section may quit without paying rent if the condition be broken."[7] No authority is given. There is a dictum possibly providing support to be found in Walker v Hobbs. Lord Coleridge C.J. said,

> "It would not afford much protection to the tenant if his only remedy was to give up his tenancy and turn out after he had been injured by the improper condition of the dwelling." 8

It is not clear if the learned Lord Chief Justice was referring to the case of a tenant repudiating his contract or the situation in which the tenant gives notice.

Although there appears to be no case expressly deciding the matter, it is submitted that, upon the wording of the section, a distinction must be made between repudiating the tenancy for defects existing at the commencement of the tenancy and repudiation for defects arising during the term. The section provides, "there shall -- be implied a condition that the house is at the commencement of the tenancy and an undertaking that the house will be kept by the landlord during the tenancy, fit for human habitation."[9] In the law of landlord and tenant, a sharp distinction is drawn between a condition, on breach of which the tenancy is determinable without any express proviso for re-entry, and a mere covenant, which only becomes a condition on the addition of such a proviso. Only

if the premises are unfit at the commencement of the tenancy is the tenant entitled to repudiate; otherwise, he is confined to the remedy of damages.[10]

4) Criticism Of The Section

The nature and extent of the statutory covenant of fitness has been discussed in the preceding pages. It is now proposed to analyse the merits of the section as it has been enacted by Parliament and interpreted by the Courts.

a) The Section As Enacted

The purpose of Parliament is enacting section 6 and its prototypes was obviously highly commendable. The Courts had shown a blatent refusal to modify caveat emptor so as to protect even the poorest tenant who took an unfurnished house. In 1885 Parliament hesitantly but surely took steps to remedy this appalling situation. This was done by implying a statutory term in unfurnished premises to the like effect as that which the Courts had implied in the letting of furnished premises <u>ie</u> that it was fit for habitation at the commencement of the term.[1] Parliament grew bolder in later years; the parties were not permitted to contract out of the section except in limited circumstances and the warranty was to extend throughout the term.[2] The judges had

acted upon the impulse of laissez faire and a belief in the need to allow free and equal bargaining partners to strike their own agreement. Parliament was not so firmly attacked to such mythology, it recognised the relative weakness of the tenant and came to his aid with a statutory warranty which the parties were not to exclude.[3] As enacted, the section has been of great benefit to those tenants within its protection.

But Parliament sowed within the Section the seeds of its own destruction. The limitation of the Act's protection to those within a narrow rental range was bound to render its protection less and less as time passed and rents rose. In 1946, a writer noted that the limits then in force rendered the protection of the Act "largely illusory".[4] The 1957 increases did little to halt the diminishing importance of the section, within four or five years they were overtaken by the average rent, now they are derisory.[5] One wonders why the protection should be confined within any limits such as these . Clearly Parliament intended it to cover only the poorer and weaker sections of the population, the "working classes" as the earlier legislation described them. The rental limits were to ensure that whilst a house in Spitalfields was covered, a house in Grosvenor Square was not.[6] The device of assessing means and need by reference to rent paid seems an old one; the Victorians assumed that a prudent man took a house at a rental of one-tenth of his income.[7] It is

highly doubtful whether the device has any validity in modern times. In housing as in commercial transactions in general, the poor pay more.[8] Often over a third or more of a household's income goes towards rent. If only the poor are to be protected by the legislation, the use of rental limits will be a bad guide. So would be a reference to the frequency of payment of rent as in the Landlord and Tenant Act 1962 requiring landlords of tenants who pay a weekly rent to provide a rent book. Such a device is all too easily eluded by requiring rent to be paid every ten days or similar interval. A discretion whether to apply the section or not could be left to the Court but this would be placing a high premium on the forensic lottery.

Perhaps the best guide to exclusion of all but the poor, if exclusion there must be, is already contained in the Act. If the rental limits (ie. subsection (1)) was scrapped, sub-section (2) would still contain this limitation,

> "Provided that the condition and undertaking should not be implied when a house is let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for human habitation, and the lease is not determinable at the option of either party before the expiration of three years."

Few poor people are tenants for a term of years so, unless landlords seek to grant long leases to avoid the provision (which is unlikely because insecurity of tenure is one of their greatest weapons), the

provision covers those whom it is intended to cover. No doubt many better-off tenants would also be protected but even the most enthusiastic believer in "selectivity" cannot hope to exclude all such persons.[9]

Parliament is also to be criticised for not having taken steps to ensure the survival of the provision in the Courts. Parliament intended the obligation to be absolute, this is seen by the prohibition on excluding the warranty, it was also expressed in the House of Commons debate on the 1909 Bill when a Government spokesman rejected a proposal to exempt a landlord from having to put right deliberate damage done by a tenant.[10] The Government seems to have intended placing a statutory duty on landlords akin to that on the factory owner under the Factories Act.[11] But it has not expressed this intention sufficiently in the words of the statute. Perhaps this arose because of the history of the Act. In 1885, Parliament seems to have intended little more than to extend to unfurnished premises the protection enjoyed under the common law by furnished premises.[12] Therefore the statute uses the words "there shall be implied a condition". Later, Parliament grew bolder and sought to impose an absolute liability on the landlord but it failed to alter the above wording so as to make this clear. As enacted, the provision seems to refer only to a contractual and not to a general duty to ensure the fitness of the house. This failure of

Parliament to change the wording of the section was used by the House of Lords to justify their judicial legislation in McCarrick v Liverpool Corp. which decided that notice had to be given to the landlord.[13] Lord Simmonds expressed his view that,

> "any doubt that I might have had on this case would be removed by the fact that Morgan's case, having been decided in 1927 on the Housing Act 1925, the relevant provisions of that Act were without amendment re-enacted in the Act of 1936 on which this action was founded. It is not easy to believe that the Legislative intended the provisions to have any other meaning than that which has been judicially assigned to them." 14

If the section is to be of value in the future, certain legislative reforms are urgently required.[15] Amendment is required to remove the harm done by the retention of archaic rental limits and to reverse the decision in Roussou v Photi.[16] It should be enacted that the protection applies notwithstanding the failure by the tenant to inform the landlord of the defect, that all parts of the premises are covered and not only those demised to individual tenants and that there be no limitation on the cost of repairs. In view of the history of the section, express enactments to this effect are probably necessary but the sought after results should also flow from a simple statement that "the landlord shall keep his premises fit for human habitation".

The standard of fitness is also in need of amendment. The present standard is inadequate in two ways.

First, it no longer covers defects which have traditionally rendered premises unfit. Infestation by vermin and infection by disease are no longer covered.[17] Second, it does not cover defects which should become increasingly important as the general living standard continues to rise eg inadequate electrical points, inadequate artificial lighting, lack of heating facilities, etc.[18] Perhaps at fault is the attempt in the 1957 Act to provide an all-purpose standard of unfitness, a standard to apply equally to demolition in slum clearance and to the landlord's liability in damages to his tenant. Private and public action to deal with substandard housing are essentially different. The enforcement agencies are different, the sanctions differ, the aims and effects are different. One criteria cannot be used to cover both types of action.[19] Legislation is needed to extend the criteria to cover the above defects at present excluded and to recognise the above differences.

b) The Statutory Covenant In The Courts

The fate of the Statutory Covenants in the Courts has not been a happy one. With only one or two exceptions,[1] the effect of judicial interpretation has been to confine the warranty of fitness to the narrowest possible limits. It was held not to extend to third parties,[2] nor to defects in common parts,[3] the rental limits were lowered by judicial decision,[4]

the standard of fitness restrictively defined[5] and a judicial limitation on cost of repairs imposed.[6] The requirement of notice and its extension to latent defects[7] are further additions to this dreary list.

The reason for this restrictive attitude is not difficult to see, the Courts have seen the statutory covenants as similar to ordinary covenants and so to be applied according to the general principles of landlord-tenant law. <u>McCarrick's</u> case is a clear example. Lord Simons, for instance, said,

> "I conclude -- that the provision imported by statute into the contractual tenancy must be construed in the same way as any other term of the tenancy." 8

These words were quoted with approval by Lord Diplock in <u>O'Brien's</u> case.[9] Allied with this traditional theory of construction, there has been the concept of fault liability. This is revealed by the judgement of Lord Justice Atkin in <u>Morgan</u>'s case whilst discussing the requirement of notice.

> "If in fact the tenant is not able to ascertain the defect, there seems to be no reason why the landlord should be exposed to repair a defect of which he does not know, which seems to me to be the real reason for the rule." 10

The social purpose of the covenants is completely ignored.

By contrast, <u>Summers</u> v <u>Salford Corporation</u> shows the House of Lords willing to throw off the restrictions imposed by these traditional common law theories.

In that case, Lord Atkin (as he was by then) regarded the statutory covenant as "an obligation to repair imposed in the public interest" and thought that, with regard to the notice requirement, different considerations might arise for that reason.[11] Lord Wright declared,

> "The subsection must, I think, be construed with due regard to its apparent object, and to the character of the legislation to which it belongs. --- Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object." 12

His conclusion was,

> "Nor -- must the condition be construed in the same way as conditions in ordinary cases in the law of landlord and tenant." 12

The social purpose of the legislation was uppermost in his mind.

It is submitted that the Summers decision shows a more sympathetic approach to social legislation.[14] The statutory covenants are alien to the very essence of the traditional theory of contract as a bargain, an agreement between consenting minds. They are implied even where the parties have attempted to exclude them, they override their express and declared intentions. Lord Romer said in Summers that the implied warranty of fitness was enacted "for the purpose of compelling landlords of small dwellings -- to see that their tenants are properly and decently housed."[15] Compulsion strikes at the very roots of common law

contracts. Fault liability is also out of place in this context, Social legislation involves "the sacrifice of liability based on individual fault so as to place loss in accordance with social justice and economic expediency."[16] The guilt of an individual landlord is quite irrelevant in this context.

Prior to O'Brien, the highest Court in this country had delivered two decisions in fundamental conflict. In McCarrick, the House of Lords applied the traditional common law principles of construction and fault liability and ignored the social purpose of the statutory covenants. In Summers, these traditional concepts were rejected in favour of implementing the legislative aim of social amelioration. The House of Lords had a clear choice in O'Brien. It can only be profoundly regretted that the opportunity was not taken by English judges to join in the fight for better living conditions.

The Statutory Covenant Of Fitness

1) Origins Of The Statutory Covenant Of Fitness

1 Supra 48

2 P.P. 1884-5 Vol XXX p. 56

3 Hansard 3 Series 1885 Vol 299 col. 892

4 Ibid

5 Ibid

6 Mr A.J. Balfour "entirely approved the proposal in the Bill that the owner of the house should be liable (for injury to health caused by bad sanitary arrangements) whether the house was furnished or unfurnished." Ibid col.1619.

7 Mr. Broadhurst ibid col 1608 - 1609

8 Mr. Monckton ibid col 1606

9 Mr. Lylph Stanley ibid 1597
Mr. Shaw Lefevre ibid 1615

10 Lord Bramwell succeeded Baron Parke in the Court of Exchequer in 1856. After his retirement from the Bench, he devoted much of his energy to attacks upon socialism and defences of laissez faire economics: See Liberty and Property Defence League, "Lord Bramwell on Liberty and Other Speeches" (1883); Lord Bramwell; "Economics v Socialism: an address to the British Association" (1888); ibid "Laissez faire" (1884). He was a champion of the League which organised opposition to the housing legislation of the time, see its pamphlet; "The State and The Slums" (1884). For a biography; Charles Fairfield, "Some Account of George William Wiltshire, Baron Bramwell of Hever and His Opinions", (1898). Some of his judgements reflect his philosophy, see K.W. Wedderburn; "The Worker and The Law" (1965) at 220.

11 Hansard 3 Series (1885) Vol 301 Col 5

12 Ibid

13 Ibid Col 6

14 Ibid

15 This was an allusion to the Agricultural Holdings Bill 1882 which contained a similar clause.

16 Hansard 3 Series (1885) Vol 301 col 6.

17 The Section went on the define "letting for habitation by persons of the working classes" by reference to rent named as the limit for the composition of rates by s.3 of the Poor Rate Assessment or Collection Act 1869 or, in Scotland or Ireland, four pound.

18 Hansard 3 Ser. (1885) Vol 301 col 4-5

19 Ibid col 6 - 7

20 The Home Secretary, Sir R. Assheton Cross, said he was sorry that the Lords had disagreed with the amendment and that, "Another Bill would have to be introduced next year, and it must necessarily include a clause providing that no house should be let in an unfit state."
Hansard 3 Ser (1885) Vol 301 Col 26.

21 Sir Henry James. Ibid.

22 In introducing the Bill, the President of the Local Government Board made no express mention of the clause. Presumably, it was included in "various other minor matters which it is hoped will remove the practical difficulties which have been found to exist."
Hansard 4 Ser (1903) Vol 126 Col 91.

23 Parliamentary Debates H of C 1909 Vol 3 Col 735

24 Ibid H of L 1909 Vol 2 Col 1145 - 1146

25 Infra

26 Parliamentary Debates H of L 1909 Vol 3 Col 97 - 100

27 Ibid H of C 1909 Vol 12 Col 1485-1489

28 Mr. W. H. Dickinson Ibid 1487-1488

29 Moved by Earl of Dartmouth in the Lords. Ibid H of L. 1909 Vol 3 Col 123-126

30 Ibid H of C 1909 Vol 12 Col 1493 - 1497

31 Ibid H of L 1909 Vol 3 Col 117-122
Cf. Mr. George Cave H of C 1909 Vol 3 Col 781-782

32 Ibid H of C 1909 Vol 12 Col 1489 - 1490

33 But it should be observed that there is some doubt whether s 9 of the Housing Repairs and Rents Act 1954 altered the statutory definition of unfitness for the purposes of this section.

34 6th Schedule para 22.

35 But see n 33 Supra

36 Supra

2) Limitations On The Scope Of The Statutory Covenant

a) The Rent Limits

1 Housing Of The Working Classes Act 1885 s 12. Note that this section does not specify the period of payment - a curious oversight by the legislature which has continued down to the present section - section 6 of the Housing Act 1957. It has been argued that this must refer

to yearly payment. Blundell, 4 Conv. 435 (1940) and West observes that it would be a bold man who tried to persuade a Court otherwise. "Concise Law of Housing" (1965) p.3.

2 Section 3

3 See the Home Secretary, Sir R. Assheton Cross. Hansard 3 Ser (1885) Vol 300 Col 1590. M.P.s criticised the reference in the clause to the 1869 Act as needlessly sending practitioners from Act to Act. Ibid col 1828 - 1829.

4 Section 75

5 Parl. Debates H of L 1909 Vol 3 Col 104

6 Ibid

7 The Earl of Comperdown Ibid col 100 - 101

8 The Earl of Crewe Ibid col 107-108

9 Ibid col 102

10 Ibid col 105

11 Ibid col 110 - 112

12 See Housing Act 1925 s 1.
Housing Act 1936 s 2.

13 Section 26, 6th Sch. para 22

14 Section 6

15 Section 21, 8th Sch.

16 Christine Cockburn, "Rented Housing In Central London". Occassional Papers on Social Administration No. 9 at p. 20.

17 D.V. Donnison, "The Changing Pattern of Housing" Ibid p. 25.

18 "Report of the Committee on Housing in Greater London" (1965) Cmnd 2605 p. 351.
For summary of results of a Government Social Survey in 1963 of London rents and another in 1964 of rents in the rest of England and Wales, see Report of Committee on The Rent Act (1971) Cmnd 4609 p. 75 and table 35 p. 77; See also pp. 251-252, 291

19 Centre for Urban Studies, "Housing in Camden" (1968) Vol II at p. 58.

20 Rent Act 1968 s. 7(1), Sch 2 Part I.

21 (1940) 2 KB 379, overruling dictum of Lewis J. in Jones and Jones v Nelson (1938) 2 AER 171.

Noted: Blundell, 4 Conv. 435, (1940)
Note, 84 Sol. J. 56, 300 (1940)

22 Kirkpatrick v Watson (1943) Ir Jur. R. 4.

23 In a leap year, presumably the correct multiple would be 52 2/7! See West op cit n 1 p.3.

24 (1956) 106 L.J. 554. It seems that Kirkpatrick v Watson was not cited and so West op cit n 1 considers the point to be open. He submits that the decision is wrong and that simple arithmetic demands the addition of the fraction: 26 Conv. 132, 136 (1962).

25 Housing Finance Act 1972 ss 35 - 38, Part III

26 See eg recent decision in Buswell v Goodwin (1971) 1 WLR 92 Infra where low rent was result of friendship between landlord and tenant.

b) Only The Tenant Can Sue

1 (1913) 108 L.T. 804
Cf. Thompson v Arkell (1949) 99 L.J. 597

2 (1914) 3 KB 135

3 Section 4 Infra 645

4 Note, 82 J.. . 300 (1918)

5 Ibid

6 J. Unger, 5 M.L.R. 266, 269 (1942)
In Middleton v Hall, Bankes J. refused to allow the action on the ground that to do so "would be throwing an enormous responsibility upon the landlord".

7 Ibid 270

8 Hansard 3 Series 1885 Vol 299 Col 892 emphasis added.

c) <u>The Requirement Of Notice</u>

1 Hansard 3 Ser (1885) Vol 301 Col 5 - 6

2 Ibid Col 6

3 Parl. Debates 1909, H of L, Vol 3 Col 123-126

4 Supra 385

5 Mr. Burns Ibid H of C Vol 12 Col 1494

6 Housing Act 1925 s 1 (2)
Housing Act 1936 s 2 (2)

6a Section 32 (4)
Mr Page moved an amendment to specifically give the landlord the right of entry for carrying out repairs as opposed to viewing the condition of the premises and their state of repair. But it was withdrawn when Mr. Brooke pointed out that it was not necessary as the Courts have held that a covenant to repair carries with it an implied licence to the lessor to enter upon the premises and occupy them for a reasonable time for the purpose of doing repairs. (See Saner v Bilton

(1878) 7 Ch. D 815). Moreover, the amendment might throw doubt on the meaning of S 6 (3) of the Housing Act 1957.
Parl. Debates H of C 1961 Standing Committee Reports Vol 2 Col 969 - 972.

7 (1926) 2 KB 315

8 Ibid 318

9 (1927) 2 KB 131

10 (1973) 1 AER 583, 587, see also Lord Diplock Ibid 592.

11 (1927) 2 KB 131, 135

12 Ibid 143-144

13 Ibid 150

14 Ibid

15 Ibid 153

16 It is significant that the House of Lords did not refer to Morgan as a case on latent defects in McCarrick infra. For example, Lord Porter observed in that case, "No question of the latency of the defect comes in issue as it did in Fisher v Walters. If it did the decision in that case would require to be carefully scrutinized. "The lack of specific reference to Morgan leads one to think that it was not considered relevant to latent defects.

17 (1943) AC 283

18 Ibid 290

19 (1947) AC 219
Followed in O'Neill v Cork Corporation (1947) Ir 103 See Notes 82 Ir. L.T. 23, 83 (1948)

20 (1973) 1 AER 583

21 (1927) 2 KB 131, 150

22 Ibid

23 (1870) L.R. 6 Ex 25
See also Moore v Clark (1813) 5 Taunt 90
128 E.R. 620
Vyse v Wakefield (1840) 6 M & W 442
151 E.R. 485

24 Supra 438 n 10

25 (1870) L.R. 6 Ex 25, 28-29

26 (1904) 91 L.T. 310, 311

27 (1922) 1 AC 369, 383, 395

28 Ibid 388.
See also Canadian case of Hett v Jensen (1892)
22 O.R. 414 and Note, 43 L.Q.R. 433 (1927)

29 (1973) 1 W.E.R. 583, 592

30 (1906) 2 Ch. 166

31 (1885) 53 L.T. 94

32 (1947) A.C. 219, 225

33 (1899) 15 T.L.R. 224

34 (1875) 1 C.P.D. 77

35 (1922) 1 A.C. 368, 389

36 Ibid 375

37 Supra 381

38 Sarson v Roberts (1895) 2 QB 395. It should be noted that the implied warranty of fitness in such cases only applies to defects existing at the commencement of the lease.

39 Murphy v Hurly (1922) 1 AC 369
Bishop v Consolidated London Properties (1933) 102 L.J. K.B. 251
Hollies v Holmes (1918) 2 KB 100

40 Thack v Montefiore Hospital (1943) 289 NY 387
46 NE (2d) 333
Weiner v Leroco Realty Corp. (1938) 279 NY 127
17 NE 2d 796

41 O'Brien v Robinson (1973) 1 All.E.R. 583, 592
per Lord Diplock.

42 Ibid 593

43 Ibid 590, 593

44 Report Of The Committee on Housing in Greater London (1965) Cmnd 2605 at p. 326

45 Report Of The Committee On The Rent Acts" (1971) Cmnd 4609 p. 274

46 Ken Coates and Richard Silburn; "Poverty: The Forgotten Englishmen" (1970) p. 68.
Further support is provided by the results of the survey carried out for the Francis Committee: 80 to 90% of all landlords giving replies thought requests made by tenants for repairs were, on the whole, reasonable for both controlled and registered unfurnished tenancies. Requests by tenants of furnished properties were considered reasonable by 93% of individual landlords.
Op cit n 45 at 335, 340.

47 Op cit n 46 at pp. 81-82

48 The statutory protection of the Rent Act 1965 s 30 is far from adequate. See infra.

49 (1927) 2 KB 131, 151

50 (1947) AC 219, 232

51 Parl. Debates, 3 Ser 1885 Vol 301 Col 6.

52 "If the tenant is no longer required to serve notice of disrepair or bring pressure on his landlord, the latter must undertake routine inspection of his property, in other words become an efficient estate manager."

Glanville Williams (ed); "Law Reform Now" (1951) p. 124.
The Rowntree Trust Housing Survey of 1958 revealed that in the country as a whole, only 11% of private tenants reported that landlords organised regular inspection of the property "specially to see if any repairs or decoration should be done" and only 1% of tenants reported such inspections in the County of London. Milner Holland Report op cit n 44 at p. 115.

53 Although he need only give notice in general terms (eg "steps need attention" - Griffin v Pillet (1926) 1 KB 17, see also Sheldon v West Bromwich Corp, The Times, March 28, 1973) expecting the tenant to decide without such expert advice would often be demanding too much. See for example, the following account of the problems caused by the requirement that the tenant specify the defect to obtain a certificate of disrepair under the Rent Act 1957 - Infra.

See also Note 63 L.Q.R. 141, 142 (1947)
" 91 Sol.J. 52 (1947)
" 43 L.Q.R. 433, 434 (1927)

54 Supra 32

55 (1973) 1 AER 583, 593

56 (1947) AC 219, 228

57 On the failure of legal services to meet the need of low income tenants, see Abel-Smith, Brooke and Zander, "Legal Problems And The Citizen" (1973) p. 219.

58 On the practice of standard form agreements in private tenancies, see Supra.

59 Supra 381

60 Supra 380

61 (1885) 53 L.T. 94

62 (1966) 2 Ch. 166, 172

63 (1926) 1 KB 17.
Cf. Uniproducts (Manchester) v Rose Furnishers Ltd. (1956) 1 AER 146, 148 per Glyn Jones J, Obiter,
"Counsel says that notice must be given by the tenant. This, I think, goes too far."

64 Cf. Blundell, 5 Conv. 160, 166 (1941)
Note, 91 Sol. J. 52 (1947)
" 97 L.J. 102 (1947)
" 106 L.J. 294 (1956)
American cases hold that actual notice is not necessary where the landlord has knowledge:
Ware v Dunlop (1911) 159 Mo.App. 388
141 S.W. 21
Woodbury Co. v William Tockaberry Co.
(1914) 166 Iowa 642
148 N W 639
Annot, 28 A.L.R. 1525, 1529 (1924)

65 Sarson v Roberts (1895) 2 QB 395

66 (1956) 1 AER 146

67 Cf. West, 26 Conv. 132. 146-148 (1962)

d) <u>Parts Retained In Landlord's Possession</u>

1 (1918) 2 KB 795

2 Infra 680

3 Infra 689

4 Query effect of definition in section 189 (1) of the Housing Act 1957 which extends definition of "house" to include "any yard, garden, outhouses, and appurtenancies belonging thereto or usually enjoyed therewith".

5 Infra 690

6 Infra 680
Apart from general Housing and Public Health Act provisions, it should be noted that where a house in multiple occupation is subject to a management order the landlord is under a duty to ensure that common staircases and halls etc. are maintained in a proper state of repair, clean, in good order and kept reasonably free from obstruction: Housing Act 1961 s 13 (1) (d); Housing (Management of Houses in Multiple Occupation) Regulations 1962. S.I. 1962 No. 668 reg 7 (1).

e) <u>Statutory Covenant Restricted To Works Requiring Only Reasonable Expense</u>

1 (1971) 1 WLR 92
Noted, 87 L.Q.R. 152, 471 (1971)

2 Ibid 96 - 97

3 Supra 395

4 (1931) 47 T.L.R. 305

5 Supra 386
Cf. J.R. West 87 L.Q.R. 471, 472-473 (1971)

6 Section 54, Fifth Schedule

7 See generally infra

8 See also J.R. West op cit n 5 at 472.

9 See Housing Act 1957 s. 39 (1)

10 To tell the tenant that he should exercise his claim before the house becomes unfit - see Note, 87 L.Q.R. 152, 153 (1971) is both unhelpful and misleading. The house must be unfit before any claim can be made under the Section. Apparently what the tenant must now do is take action after the house is unfit but before the cost of repairs

becomes unreasonable. This is a judgement which few tenants could make without expert advice which, of course, most cannot afford.

f) Are Statutory Tenancies Within The Covenant?

1 See Rent Act 1968 s 3.
R.E. Megarry, "The Rent Acts" 10th ed (1967) Chap. 6.

2 Rent Act 1957 s 16.

3 (1936) 2 KB 605.
Decision affirmed on another point by House of Lords: (1938) A C 118.

4 Ibid 623 - 624

5 J.A. West, 26 Conv. 132, 148 (1962)
Cf. Hill and Redman, "The Law of Landlord And Tenant" 15th ed (1970) p. 217
Megarry op cit n 1 at 205.

6 Rent Act 1968 s 12 (1).

g) The Standard Of Fitness

1 Hansard 3 Ser (1885) Vol 299 Col 892 (The Marquess of Salisbury)

2 Ibid vol 300 col 1590 (Sir R. Assheton Cross), Col. 1606 (Mr. Monckton), Col 1619 (Mr. A.J. Balfour) Vol 301 Col. 5 - 6 (Lord Bramwell).

3 Ibid Vol 300 col 1825 (Mr. Hopwood)

4 Ibid col 1829 - 30 (Mr. Jesse Collings)

5 Ibid col 1825 (Mr. Hopwood)

6 See Daly v Elstree R.D.C. (1948) 2 AER 13
For comments on this standard,

Da Smith, 11 M.L.R. 476 (1948)
Note, 75 Sol J. 758 (1931)
" 82 Sol J. 773 (1938)
" 85 Sol. J. 238 (1941)
Unger, 5 M.L.R. 266 (1942)

7 For comments on this new standard,
Note, 108 L.J. 163 (1958)
J.F. Garner, (1954) J.P.L. 833
Ibid (1958) J.P.L. 699
and S. Swift & F. Shaw, "Swift's Housing Administration" (1958) Chap. 5.

See also Min of Housing and Local Government; Circulars 55/54 and 69/67

This new standard was said to be based on the recommendations contained in para 17 of the Report by the sub-committee of the Central Housing Advisory Committee (Chairman Sir Miles E.Mitchell) on standards of fitness for habitation, dated Oct. 1 1946 and issued by the Ministry of Health. But in the Committee stage of the Housing Repairs and Rents Bill in 1953 opposition speakers argued that the wording of the clause failed to implement these recommendations. West, 26 Conv. 132, 138 (1962).

Cf. definition of "unfit for human habitation" in Philadelphia Housing Code - see De Paul v Kauffman (1971) 272 A 2d 500, 504, rejecting claim that it was void for vagueness.

8 Infra 425

9 This was a requirement until repealed by section 71 of the Housing Act 1969.

10 Woodfall, "Landlord and Tenant" 27th ed (1968) Vol. II at p. 662

11 (1925) 1 KB 659

12 Ibid 668

13 (1943) AC 283, 289-290

14 (1839) 2 M & R 186
174 E.R. 257

15 (1890) 25 Q.B.D. 42, 51

16 (1943) AC 283, 297

17 Ibid 293

18 Supra 255

19 Summers v Salford Corp. (1943) A.C. 283, 293 (Lord Wright)

20 Cf. the conflicting views expressed in Morgan v Liverpool Corp. (1927) 2 KB 131

21 (1948) 2 A.E.R. 13
De Smith, 11 M.L.R. 476 (1948)

22 Ibid 15

23 Note that a defect in any part of the house may render the entire premises unfit: Summers v Salford Corp. op cit n14 where defective window in one room of a two-bedroomed house rendered it unfit.
Cf. Campbell v Wenlock (1866) 4 F & F 716, 176 ER 760 - a case on the implied warranty in lease of a furnished house.

24 Hall v Manchester Corp (1915) 84 L.J. Ch. 732,740.
Fletcher v Ilkeston Corp. (1931) The Times 30th Oct.

25 (1889) 23 Q.B.D. 458, 459

26 (1926) 2 KB 315
See also Fletcher v Ilkeston Corp. (1931) The Times 30th Oct.

27 (1958) C.L.Y. 1461
109 L.J. 634

28 (1971) 1 W.L.R. 92, 94

29 (1920) 2 KB 642

30 Ibid 646

31 (1949) 99 L.J. 597

c) Tenant's Remedies

1 (1889) 23 Q.B.D. 458

2 Ibid 460

3 (1943) AC 283

4 (1958) C.L.Y. 1461
109 L.J. 634
See also Thompson v Arkell (1949) 99 L.J. 597 Another County Court decision

5 (1931) 47 T.L.R. 305

6 It should be noted that the clause in the 1885 Bill, as originally drafted, specifically stated that the tenant protected by the new statutory warranty was to have the same remedies as the furnished tenant: Hansard 3 Ser. 1885 Vol 300 Col. 1590 (Sir R. Assheton Cross). See also ibid col.1824 - 1829. The preamble to this effect was dropped.

7 Woodfall, "Landlord and Tenant" Vol II, 27th ed. 1968 p. 661

8 (1889) 23 QBD 458, 460.
This case is given as authority in "Encyclopedia of Housing Law And Practice" (ed. Bramell and Cross) at 2 - 775.

9 Section 6 (2) emphasis added.

10 Cf. A. N. Schofield and J.F. Garner, "Housing Law And Practice" (1950) p. 29.

4) Criticism Of The Section

a) The Section As Enacted

1 Supra 383

2 Supra 384

3 Parl. Debates 1909 H of L Vol 3 col 116.

4 . Plummer, 9 M.L.R. 42, 45 (1946)

5 Supra 389

6 See Payne v Haine (1847) 16 M & W 541, 153 ER 1304.

7 Note, 82 Sol. J. 773 (1938)
Though Marx observed in 1867 that "the dearness of dwellings is in inverse ratio to their excellence". 'Capital' Chap. XXV, Section 5 (b).

8 Coates and Silburn; "Poverty: The Forgotten Englishmen" (1970) at 82 - 83

9 West, 26 Conv. 132, 137 (1962) suggests that "it would be far more appropriate for the section to apply within certain limits of rateable value rather than rent." If the rateable values specified in s 1 of the Rent Act 1968 were used, the suggestion would have the advantage of bringing some uniformity into the law.

10 Supra 386

11 Supra 384

12 Supra 381
Note, 108 L.J. 163, 164 (1958)

13 Supra 399

14 (1947) A.C. 219, 230

15 Cf. Plummer, 9 MLR 42. 47 (1946)

16 (1940) 2 KB 379 Supra

17 Supra 425

18 See generally on housing standards; Ministry of Housing and Local Government;Central Housing Advisory Committee, "Our Older Homes - a call for Action" - report of the sub-committee on standards of housing fitness (1966).

19 See Summers v Salford Corp. (1943) AC 283, 297 per Lord Romer.

b) The Statutory Covenant In The Courts

1 In particular, Summers v Salford Corp. infra. See also Walker v Hobbs (1889) 23 QBD 458 recognising that statute gave the tenant the right to damages and Fisher v Walters (1926) 2 KB 315 supra.

2 Supra 393

3 Supra 411

4 Supra 391

5 Supra 421

6 Supra 412

7 Supra 397

8 (1947) AC 219.
Lord Thankerton and Lord MacMillan expressly concurred. See also Lord Thankerton at p. 233, Lord Reading C.J. in Ryall v Kidwell (1914) 3 KB 135.

9 (1973) 1 AER 583, 593.
He also said, "But although created by statute the legal nature of this obligation was contractual. Its characteristics were the same as those of an obligation created by a repairing covenant in a lease." Ibid 591.

10 (1927) 2 KB 131, 151.
See also Bankes J. in Middleton v Hall (1913) 108 L.T. 804.

11 (1943) AC 283, 290

12 Ibid 293

13 Ibid 295

14 See the excellent note by J. Unger, "Statutory Warranty Of Fitness in The Courts" 5 M.L.R. 266 (1942) and the study by Ivor Jennings of the judicial response to housing law generally, "Courts and Administrative Law - The Experience of English Housing Legislation" 49 Harvard L.R 426 (1936)

15 (1943) A.C. 283, 297

16 Unger op cit n 14 at 269

Statutory Covenant To Repair

Introduction

Section 32 of the 1961 Housing Act is the only protection which most tenants have if their landlords fail to do repairs. Unfortunately, the last decade has given little indication of the scope of that protection. Although the section seems riddled with vague terms and uncertainties, there are only a few reported cases on it. The discussion which follows proceeds therefore, from the words of the statute and the way in which the common law has interpreted those words in other contexts.

An important point to remember is that the implied covenant extends to all residential tenancies for a period of less than seven years. Since the bulk of poor tenants hold weekly, or other tenancies for a short period, they are within the section.

1) The Origins Of The Statutory Covenant To Repair

The Queen's speeach on 1st November 1960 declared,

> "A Bill will be introduced to amend the law relating to the respective responsibility for repairs as between landlords and tenants on short-term tenancies." 1

Clauses 29 and 30 of the Housing Bill 1961 were designed to implement this promise. Introducing them into the Commons, Mr. Brooke, the Minister of Housing and Local Government, explained,

> "These Clauses are to put a stop to the practice of a few unscrupulous landlords in attempting to impose unreasonable repairing obligations on their tenants." 2

He thought there were two points to be considered, equity and public policy. As a matter of equity, any fair-minded person would say that it is unreasonable to require a tenant to undertake major repairs unless he is given sufficient security of tenure to enable him to enjoy the results of the momey that he has spent. The majority of landlords would agree but there were some very bad cases; "I have heard even of weekly tenants being asked to take on responsibility for all repairs outdoors and indoors when the house is not at all in a satisfactory state at the start of the tenancy. That would mean, of course, that a tenant could be called upon to do repairs costing hundreds of pounds and then be given a month's notice to quit. The law must stop this; no tenant should be asked to accept terms like that." Reasons of public policy demanded that necessary repairs be done and the Government, therefore, decided, "that the right policy is not only to relieve short term tenants of unreasonable obligations, but, in the case of short-term tenancies, to put definite obligations on the landlord."[3]

The official Opposition welcomed the clauses[4] though it blamed the Government for creating the situation in which the need for them arose.[5] The Rent Act 1957

which deprived many tenants of security of tenure was seen as one of the causes of the tenant's weak bargaining position and hence of the landlord's ability to impose onerous repair covenants.[6] The new statutory repair covenant was seen as "a move in favour of restoring the bargaining position of the tenant."[7] But Mr. Silverman thought the provision did not even begin to repair the evil of the Rent Act. "It is all very well to say that by Clauses 29 and 30 the landlord is under a repairing obligation, but what will happen if he does not undertake these repairs? If the tenant does not like it, he is given a month's notice, and has no remedy at all. This landlord's failure to repair happened even when the houses were controlled, and now that they are decontrolled this provision will have very little effect."[8]

The only opposition to the clauses in principle came from the Government's own supporters. Mr. Page thought that the clauses went too far and that the landlord should have the choice between keeping the house in repair or accepting a lower rent instead.[9] The Minister rejected this amendment on the grounds that such a choice might defeat the aim of housing legislation which was the proper upkeep of property.[10] Later, Mr. Page signified that he was not in support of the clauses.[11] In the Lords, Lord Meston described the subject as a painful one and pointed out that, "Some people take the view that there should be no implied covenant on the part of the landlord, which

would result only in many landlords asking high rents in order to cover the risk of having litigious tenants. It should be sufficient to give power to a tenant to apply to a court to terminate the tenancy and to be relieved of the obligation to pay rent under the lease if the house became uninhabitable."[12]

The two sides differed on the extent of the changes made in the clauses during their passage through the House.[13] The Opposition spokesman said they amounted to "no more than this, that they spell out rather more precisely what was clearly implied, though in less precise language, in the original wording of Clause 29."[14] The Government disagreed; "there was a substantial recasting of Clause 29. --- This Clause has been considerably recast and it is hoped that the obscurities from which it suffered and for which it was criticised have disappeared."[15] The actual changes made related to two points; it was made clear that the landlord would be responsible for appliances for space or water heating and that wash-basins, sinks and baths were included in the statutory covenant.[16]

2) <u>What Parts of the Premises Are Included In the Statutory Covenant to Repair</u>?

Section 32 of the 1961 Housing Act does not oblige the lessor to do repairs to all parts of the house in which the tenant lives. The covenant to repair extends

only to certain parts of the premises. The Act, unfortunately, describes these parts in extremely vague terms and, until we have more judicial guidance, the exact scope of the covenant is a matter of great doubt. We are told only that the lessor impliedly covenants to keep in repair "the structure and exterior of the dwelling house (including drains, gutters and external pipes)"; and "to keep in repair and proper working order" certain installations.

a) <u>Repairs to the Structure and Exterior</u>

By virtue of section 32 (1) (a) the lessor impliedly covenants "to keep in repair the structure and exterior of the dwelling house (including drains, gutters and external pipes;"

What is the scope of this paragraph? It will be convenient to deal separately with "the structure" and "exterior" though always bearing in mind that they overlap.

What are repairs to the structure?[1] Is a floorboard part of the structure? Are skirting boards, plaster, doors, windows, tiles, etc? The landlord may contend that only the foundations, main walls and main timbers are parts of the structure. The tenant may argue that everything which goes to make up the unfurnished, undecorated house is part of the structure. Perhaps the problem is best illustrated by a brief description of the normal course of building a brick

and tiled dwelling house.[2] The concrete foundations are laid; the site of the house is covered with concrete, the external walls are erected with the necessary damp-proof course; the internal walls with fireplaces and chimneys are erected, the floor joists and partitions are put in, and the roof timbers are placed in position. If one saw a house at this stage, could one say that the structure was complete? Certainly, those parts necessary to stability have been completed. But the house-building process goes on; the roof is boarded or battened; the tiles are fixed; gutters, rain-water pipes and drains are constructed; the floor-boards are laid; the ceilings, walls and partitions are plastered; and the doors, windows and other furnishings are done. Are these latter processes part of the construction of "the structure"? At what stage does one have the structure?

The cases do not provide much help in defining the meaning of structure for our purposes.[3] Most of the cases have been concerned with prohibitions against the erection of "a structure" without planning permission. These cases are not really in point because there is clearly a distinction between "<u>a</u> structure" and "<u>the</u> structure". No one would deny that a house complete with radios, televisions, chairs, tables, etc. is still "<u>a</u> structure" but equally surely no one would deny that radios, televisions etc. are not part of "<u>the</u> structure". Hence definitions such as that given

by Lord Goddard C.J. in Mills & Rockleys Ltd. v Leicester City Council[4] that "every building is a structure" are not very useful. There is, however, one definition of "a structure" which is of some value. In South Wales Aluminium Co. v Neath Assessment Committee, Atkinson J. said,

> "There is nothing to suggest here that the word "structure" is not to be used in its ordinary sense. As usual in its ordinary sense, I suppose it means something which is constructed in the way of being built up as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but, roughly, I think that must be the main guide: how has it got there? Is it something which you can fairly say has been built up?"[5]

Applying this test to a dwelling house, the foundations, walls, and roof timbers are part of "the structure" - they are part of the "building up" which goes to make "a structure". But what of floor-boards, plaster and doors? They do not seem to continue the "building up" process but constitute additions to a "built-up" framework.

Cases on "structural" alterations, repairs, etc. have cast little light on the meaning of "the structure". Under the Licensing Act 1902 section 11, magistrates could require certain structural alterations to be made to public houses. The Court of Appeal in Bushell v Hamond[6] was prepared to assume that an order that a door be kept closed was a structural alteration within

the section but two years later in Smith v Portsmouth Justices[7] the same Court held that it was not. In Pickmore v Dimmer[8] that Court had defined "structural alterations" as "permanent alterations which affect the structure of the premises". This definition will not get us very far.

Despite the frequency with which the term has been used for many years, "structural repairs" has only recently been defined.[9] In Granada Theatres v Freehold Investment, Vaisey J. had to decide the meaning of "structural repairs of a substantial nature". He noted the lack of authority on the point and continued.

> "I would myself say that 'structural repairs' means repairs of, or to, a structure. It is sometimes said that repairs must always be either structural or decorative and if that is the simple criterion we are in this case certainly not dealing with decorative repairs." 10

He therefore held that the repair of cement rendering which had come away from the brickwork of the main walls was "a structural repair": On appeal Jenkins L.J. adopted the above tests and continued,

> "We are dealing here with (1) the roof and (2) one of the main walls of a cinema and surely these are parts of the structure of a building." 11

The first test: "repairs of, or to, a structure" is not very helpful. If we accept the usual definition of "a structure" as a building, then any stage of the construction of a house can be said to produce "a structure". In Brown v Liverpool Corporation,

Danckwerts L.J. described some steps as an outside structure."[12] The question is not what parts of the premises form part of "a structure" but what constitute part of "the structure". The second test, repairs other than decorative, is easier to apply but perhaps goes too far. Can the repair of a broken door-handle or window pane really be described as a structural repair? It should nonetheless be noted that in Boswell v Crucible Steel Co,[13] large plate-glass windows in a business premises were said to be part of the structure of the building.

What then, is the meaning of repairs to "the structure"? What repairs does it cover? This is of enormous importance, a duty on the landlord to repair all parts of the premises other than decorative repair is something much more valuable to the tenant, than a duty to repair only the shell of the building; the foundations, main walls, roof timbers. The only case directly on the point comes down in favour of the wider duty and from the tenant's viewpoint and the practical consequences, it is to be greatly welcomed.[14] From the viewpoint of legal interpretation it seems arbitrary. But then definition is always arbitrary - words mean only what each person wants them to mean.[15] In view of this, it can only be hoped that Parliament will avoid vague words and seek to achieve the maximum possible clarity. By using such a term as "the structure" this has not been done. A list of parts of the premises included may have been inelegant but

clarity should never be sacrificed for conciseness.

The lessor also impliedly covenants "to keep in repair the -- exterior of the dwelling-house (including drains, gutters and external pipes)"[16]. In Green v Eales, Lord Denman C.J. defined "external parts of premises" as

> "those which form the inclosure of them, and beyond which no part of them extends: and it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let." 17

Therefore it was held in that case that where the local authority pulled down an adjoining house causing the dividing wall to be without support and so sink, the landlord was liable, under his covenant to do external repairs, for the tenant's expenses in rebuilding the wall. The above definition was quoted with approval by Luxmore L.J. in Pemberry v Lamdin[18]. The Court of Appeal decided in Ball v Plummer[19] that the mending of windows of a public house came under the covenant to do "outside repairs".[20] In Brown v Liverpool Corp.[21], apparently the only reported case on section 32, the Court of Appeal decided that four steps leading up to the house were part of "the exterior" within the section. The substantial question in that case was whether the steps could be said to be part of the dwelling-house within the section but, with respect, it is submitted that the Court was also correct in treating the steps as part of the exterior. Although,

in that case, there was a seven feet concrete path behind the steps up to the house and therefore the steps did not form the horizontal inclosure of the premises, no part of the premises extended vertically directly above the steps.

Even so common a word as "drains" may be the cause of dispute. During the debate on the Bill, Mrs Butler suggested that "there are some dubious landlords who when they see the word "drains" wonder whether it means only pipes or the whole drainage system, whether it includes manholes and gulleys, and an infinite number of permutations with regard to drains."[22]

b) Installations

The Section imposes a duty upon the landlord to keep in repair and working order the installations "for the supply of water, gas and electricity, and for sanitation."[23] Certain amenities are expressly included within this expression: basins, sinks, baths[24] and sanitary conveniences.[25] Apart from these, the following would also seem to be included: cisterns and water pipes,[26] gas pipes[27] and meters, electrical wiring[28] and power points.[29] "Fixtures, fittings and appliances for making use of the supply of water, gas or electricity" are excluded from the implied covenant.[30] Earl Jellicoe gave the following ex-

amples in the Lords:[31] cookers,[32] fridges, washing machines, radios, deep freezers, lampshades and "the ubiquitous 'telly'." The question of the taps of a bath was put to him[33] and he admitted that "their position under the present wording is possibly a little obscure. Taps are important things, and I think we should put them in their proper place. I suggest that they would be on the landlord's side of the fence, with washers coming on the other side of the fence. Taps are quite expensive items, and when complete replacement is necessary it would seem right that the landlord should undertake the cost."[34]

The landlord also impliedly covenants to keep in repair and proper working order the installations "for space heating or heating water".[35] The Minister, Mr. Brooke, thought these would include domestic boilers, geyeers and "other fixed - I emphasise the word "fixed' - gas or electric water heaters, radiators and built-in electric fires."[36] Mr. Page wondered why the Minister limited installations for space heating to fixed fires. He thought "installation" could just as well refer to moveable electric and gas fires which one can plug in. "They are installations for space heating, and might well be included, even though they are not fixtures."[37] The Minister said that he would examine the point but he very much doubted that a moveable electric fire could be described as an installation.[38] Paraffin heaters,

the cause of many accidents in overcrowded dwellings, would not seem to be "installations" within the section.[39]

c) "Building or Part of a Building"

It is to be noted that the covenant is restricted to "the dwelling house". "Dwelling house" is defined in sub-section (5) as "a building or part of a building -- let wholly or mainly as a private dwelling." The reference to dominant use may cause problems in those cases where business or trade is carried on in a house also used as a private dwelling[40] but the type of tenant with whom we are concerned is unlikely to be affected. The real question is how far does "a building or part of a building" extend? Brown v Liverpool Corp. posed this problem squarely before the Court of Appeal for as was said by Lord Justice Sachs,

> "The question -- is whether, in this particular case, the 7 feet appraoch with the steps at the end of it was really part of the exterior of the terrace building or whether that 7 feet pathway and the steps down into it were simply part of a means of traversing a garden." 41

He was quite sure that,

> "the definition given to 'the dwelling house' was intended to and does exclude from the ambit of the landlord's liability those parts of the demise that are not part of the building itself. In particular, to my mind, there would normally be excluded from the ambit of those liabilities a garden or a pond, and likewise the fences round or a gate leading

> to such a garden or pond. Similarly, there would normally be excluded the steps leading into a garden from a road." 42

Having admitted to "considerable hesitation" he felt that on the evidence it was correct to say that in all the circumstances the steps formed part of the building. Lord Justice Dunckwerts and Lord Justice Salmon agreed on the grounds that, to quote the latter, "the path and steps must be an integral part of the building, otherwise it would be impossible for the building to be used as a dwelling house for it would have no access."[43] This case shows the type of problem that may occur and also that the conclusion must be one of fact and of degree.

The inclusion of "part of a building" as a dwelling-house is of importance in view of the multi-occupation which characterises a great deal of sub-standard housing. Where a household has only one or two rooms then, even if "structure" is not wide enough to cover those doors and internal partitioning walls that limit the area of the demise, "external" repairs should cover such parts of the premises.

d) "A Lease Whereby a Building or Part Of a Building is Let"

Multi-occupation raises another question in an acute form. Does the covenant extend to those parts of the premises which are used in common and which,

therefore, are legally seen as being retained in the landlord's control and possession? It has been held that section 6 of the 1957 Act does not extend to defects in those parts of the premises retained in the control and possession of the landlord.[44] Can a landlord escape liability under section 31 of the 1961 Act for shared stairways, toilets, bathrooms, steps and passages by saying that the only part of the dwelling let to any individual is that over which the tenant has exclusive possession? One writer certainly thinks so. He points out that,

> "Whilst it is not possible to contract out of the 1961 Act provision, it would seem that it is possible to avoid it in whole or in part by excepting from the demise the whole or part of the structure and exterior." 45

In the case of a multi-occupied house, there would seem no reason to expressly exclude the parts used in common, the common law already does that.[46] Houses in single occupancy may need such express exceptions as the writer suggests though, here again, the common law excludes parts such as the roof from the demise unless expressly included. If the view taken here be correct then some of the worst defects to be found in substandard housing may not be within the statutory covenant of repair. Defects are often much greater in those parts of the premises for which no tenant assumes responsibility and which the landlord allows to fall into disrepair and neglect.[47] This would be a large gap in the statutory protection.

3) The Standard Of Repair

Section 32 contains in sub-section (3) a definition of the standard of repair required,

> "In determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling house and the locality in which it is situated."

The legislature has here largely followed the standard laid down in Proudfoot v Hart[1] for express covenants to repair. In view of this and in view of the tendency of the Courts to regard the statutory covenant imposed by section 6 of the 1957 Act as similar to any other covenant between the parties,[2] it is necessary to refer tothe relevant law on express covenants to repair in order to evaluate the scope of the statutory implied covenant under section 32.[3]

a) Construction of the Covenant

The legislature has only broadly defined the standard required, elaboration and application thereof falls to the judiciary. In order to foresee the detailed standard likely to result, it is necessary to refer to the principles of construction which have previously influenced the Courts whilst dealing with express covenants to repair.

The Courts have traditionally favoured broad construction of repairing covenants and demanded only

substantial repair and not attention to every defect in the premises.[4] This approach was much favoured by Tindall C.J. in the early 19th century. The lessee in Harris v Jones[5] had covenanted to "well and sufficiently repair". Directing the jury, the Chief Justice said that the question was whether the covenant had been substantially complied with, "for in cases of this nature, it was hardly to be expected that a strict and literal performance of so general a covenant -- could be proved."[6] Later cases further illustrate this approach in practice. In Scales v Lawrence,[7] Willes J. directed the jury in a case on the lessee's covenant to repair,

> "The landlord is not to claim for every crack in the glass or every scratch in the pane. A reasonable rule probably would be not to charge for a pane of glass merely with one crack in it and so forth. Such covenants must not be strained but reasonably construed on the principle of give and take."

Mr. Justice Cave gave a classic illustration of the application of the rule in Perry v Chotzner,[8]

> "I should not hold a house to be out of repair because a dozen cracks appeared in the plastering which did not interfere with the stability of the structure. It would be a monstrous thing to say that because a person puts nails into the walls of his house he must take them out and fill up the holes or commit a breach of the covenants of a repairing lease."

It is uncertain whether the rule of substantial performance should apply to the lessor's statutory covenant to repair. The cases on the rule all seem to

have regard to the construction of the lessee's and not the lessor's covenant. In another context, <u>Torrens v Walker</u>,[9] a High Court decision, held that a lessor's covenants were subject to the same rules of construction as a lessee's. This decision was impliedly accepted by the Court of Appeal in <u>Pembery</u> v <u>Lamdin</u>[10] but otherwise this rule of equal construction is without support. Furthermore, the lessor's obligations under section 32 are not contractual in the true sense of that word but statutory, they are imposed not voluntarily undertaken.[11] Courts have usually been very hesitant to read qualifications into the clear and unqualified words of a statute. If Parliament has seen fit to impose a duty upon the landlord "to keep in repair", there seems no reason to replace for those clear words the phrase "to keep in substantial repair."[12] Some cases[13] have held that in the case of lessor's covenants, the rule of contra proferentem should apply but, in view of the enforced nature of the covenant under discussion, this rule seems to have no application.

b) <u>Painting and Redecorating</u>

The lessor impliedly covenants to "to keep in repair" the structure and exterior aid "to keep in repair and proper working order" certain installations. No mention is here made of any requirement on the part of the lessor to do any painting or any types of

decorating to the premises. On the other hand, sub-section (1) includes covenants by the lessee to "paint" as having no effect so far as it relates to the covenant of repair imposed upon the lessor. Unless Parliament saw the lessor's covenant as imposing some liability to paint, this invalidation of lessee's covenant to paint would have no meaning. It can, therefore, be argued that Parliament intended to impose a duty to paint on the landlord though this is not expressly stated.[14] Cases on express repairing covenants support this interpretation and give some indication of the limits of the duty imposed.[15]

In the case of express repairing covenants, it has long been decided that some degree of repainting is necessary. In Monk v Noyes[16] it was ruled by Abbot C.J. that a covenant obliging the tenant to "substantially repair, uphold and maintain the said house" also obliged him to keep up the painting of inner doors and shutters. A similar decision was reached in the later case of Hopkinson v Viand[17] and later cases have accepted the rule though they have also sought to ascertain its exact limits. An early case on these limits was Johnson v Gooch[18] in which Parke B held that a covenant to repair might render it necessary to repaint the inside of walls so stained and blemished that they could not be put into fair and proper repair short of general painting. But, held the learned Baron,

> "if there were only a few stains and spots and blemishes on the walls in ordinary wear and tear and which a skilful artist might well repair and repaint in detail and set to rights, then the defendant was not bound to paint generally."

In short, if re-touching was sufficient to cover up the blemishes then no duty to paint the entire walls was imposed.

Crawford v Newton[19] imposed strict limits on the right of lessors to expect substantial repainting and re-papering under a general covenant to repair. The lessee had covenanted to keep the premises in "tenantable repair". It appeared that he had not painted nor papered the house throughout his seventeen years of occupation. The lessors now sued for breach of covenant contending that they were entitled to have the house papered and painted so that it should be in the same condition as when the tenant took it. The Court of Appeal rejected this contention, the Master of the Rolls is reported as saying,

> "It was sufficient to decide this case to say that decorative painting which was not wanted for the preservation of the building but for ornamentation could not come within the terms of this provision or covenant. The same remark applied to papering which of necessity was mere ornamentation." 20

If this were followed, the tenant was not be entitled to repapering of "the structure" nor to repainting of "the structure and èxterior" under section 32.

But in the later case of Proudfoot v Hart,[21] the same Court modified the wide proposition laid down

in Crawford v Newton. It was said by Lord Esher M.R.,

> "I do not agree with the view that under a covenant to keep a house in tenantable repair the tenant can never be required to put up new paper -- Suppose that the damp has caused the paper to peel off the walls and is lying on the floor so that (the reasonably minded tenant of the class who would take property in this area) would think it a disgrace, I should say then that the tenant was bound under his covenant to put up new paper. He need not put up paper of a similar kind - which I take to mean of equal value - to the paper which was on the walls when his tenancy began. He need not put up paper of a richer character than would satisfy a reasonable man within the definition.
>
> The same applies to painting. If the paint is in such a state that the woodwork will decay unless it is repainted it is obvious that the tenant must repaint, but I think that his obligations go further than this. -- He must paint it in such a way as would satisfy a reasonable tenant taking a house (in the locality)." 22

In Proudfoot v Hart the whole question of the standard of repair required was carefully examined and the resulting definition forms the basis of the standard required by the statute.

It is submitted that the position there taken as to repainting and repapering is to be preferred to that taken in Crawford v Newton.[23] The continued pschological strain brought about by peeling wallpaper, flaking paint on rotten window frames and greying ceilings is by no means slight. Every time the slum tenant looks up, his poverty and squalor is thrust before him; his awareness of his powerlessness and insignificance finds proof in the denial of even the barestminimum of the creations of civilisation: an

aboue which is more than simply a protection from the elements - an abode which has the peace of a home.

c) How Far "Keep In Repair" Includes Renewal

When the clauses were debated in Parliament, attention was drawn to the problem of such things as dry rot which would require the landlord to rebuild or reinstate part of the premises. Speakers drew attention to the absolute liability on the landlord to repair in such circumstances and amendments were moved to exempt such decay requiring rebuilding from the landlord's covenant.[24] The Government rejected these amendments. It was pointed out that, in the case where the landlord has virtually to rebuild the house, the local authority would be normally able to declare it unfit for human habitation and close or demolish it.[25] In any event, liability could not be placed elsewhere than on the landlord; "It cannot be fair for it to be with the tenant. If the landlord is not in a position to make good damage caused by dry rot, a fortiori the tenant will not be in a position to do it. -- The practical result of making the Amendment would be that neither party would do anything, neither the landlord nor the tenant, and the house would just decay."[25] In the Lords, Earl Jellicoe suggested that the landlord's liability for decay was on a par with his liability for repairs to

the structure and exterior of the house.[27] The intention of the Government seems clear; the landlord's responsibility should extend to such factors as dry rot even if they could only be cured by some amount of rebuilding though extreme cases could be dealt with by means of local authority powers over unfit houses. It remains to be seen how far the words of the section can be said to embody that intention. How far does the statutory obligation "to keep in repair" require re-building?

The legal distinction between repair of premises and their renewal or replacement is difficult.[28] In words later approved by the Privy Council,[24] Buckley L.J. said in Lurcott v Wakely and Wheeler,

> "'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal, renewal of a part, of a subordinate part. -- Repair is restoration by renewal or replacement of subsiduary parts of a whole. Renewal as distinguished from repair is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion." 30

Clearly the distinction is one of degree and therefore not easy to apply in practice. But it is only on the basis of such a distinction that the many cases dealing with repairs to old buildings can be reconciled. Lord Justice Phillimore underlined the value of the distinction when he said in Brew Bros. v Snax (Ross) Ltd.,

> "the vital question in each case is whether

> the total work to be done can properly be described as repair since it involves no more than renewal or replacement of defective parts or whether it is in effect renewal or replacement of substantially the whole. It is -- a question of degree in each case. It is well established that a tenant is not liable to produce a different thing from what he took when he entered into the lease or to remedy the results of bad design." 31

Where replacement of substantially the whole of the demise is required, the lessor would not be liable under section 32. In the old case of Ferguson v Anon, Lord Kenyon said,

> "In the present case the plaintiff has claimed a sum for putting a new roof on an old worn-out house. This, I think, the tenant is not bound to do, and the plaintiff has no right to recover it." 32

Lister v Lane[33] is a leading case, the lessee had covenanted to repair and was sued for breach. He was awarded the judgement when it was shown that the defect would require underpinning of the entire premises. So too in Torrens v Walker[34] where two walls had got into such a state that they required to be completely rebuilt, the landlord-covenantor was held not liable. Pembury v Lamdin[35] was another case which concerned a lessor's covenant to keep in repair. The demised premises were old and had been constructed without a damp course, the tenant claimed that the lessor was obliged under his covenant to put in such waterproofing. The Court of Appeal rejected this contention to accept it would have meant giving to the tenant a different thing from that which she took

when she entered into the lease. In Brew Bros. Ltd. v Snax (Ross) Ltd.,[36] the Court of Appeal by a majority reached a like decision as regards a lessee's covenant to keep in repair the premises. A flank wall of the premises had been a nuisance to neighbours who successfully brought this action. The Court, however, rejected the lessor's claim for an indemmity from the lessee's under the latter's covenant. Sachs and Phillimore L.J.J. felt that the work required to abate the nuisance fell more on the renewal side of the line but Harmen L.J. felt that such works were repairs rather than renewal. This case reveals the difficulty in applying the test.

It has also been held that a covenant to repair does not cover inherent defects in the premises.[37] Sotheby v Grundy is a case in point, it was there said by Lynskey J.,

> "The premises demised here were premises with insecure foundations. What the tenant would have had to do would be to put in a new foundation which would alter the nature and extent of the property demised, turning a building which, as originally constructed, would not last more than some 80 odd years into a building that would last for probably another 100 years. -- In my view that does not come within the purview of the repairing covenant in question here." 38

This case can be said to concern inherent defect in substantially the whole of the demise. In Collins v Flyn,[39] the Official Referee was confronted with the problem of an inherent defect which affected only a subsidiary part of the demise.[40] He decided that,

> "this doctrine of subsidiary parts does not throw on the lessee an obligation to provide an improvement to eliminate an inherent defect through affecting only a part of the building."[41]

Thus we can formulate the following proposition; the lessor is not liable to do works which would mean that substantially the whole of the demise must be renewed or replaced or that inherent defects in the demise must be corrected.

To summarise the above comments. The lessor may escape liability by showing that the works needed to remedy the defects would mean renewal of substantially the whole of the demise or the correction of an inherent defect. If this view be right, then tenants of those houses which are in the worst condition may receive no protection from the section because those houses require not repairs but substantial renewal. Moreover, all tenants are subject to a vague distinction between the closely related concepts of renewal and repair. Such defects in the statutory protection could have been eliminated by imposing a duty "to repair and renew" but, unfortunately, this was not done.

d) "Age"

The Act requires that regard shall be had, inter alia, "to the age -- of the dwelling house". As was said by Lord Esher M.R. in Proudfoot v Hart,

> "The age of the house must be taken into account because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built." 42

Yet the question is not this easy because there are also many cases showing that the covenantor must keep the premises in the same condition as when the demise was made and, indeed, he may be required to put the premises in a better condition than when they were demised. These cases concern the meaning of the term "keep in repair" which is used in the Act. It is, therefore, necessary to briefly refer to the common law position in order to assess the importance and inter-relation of the requirement upon the lessor "to keep in repair" and the requirement that regard be had to the age of the dwelling house in evaluating the standard of repair.

A covenant "to keep in repair" has been held to mean that the premises must be maintained in repair at all times during the term. In Luxmore v Robson[43] it was held that an undertaking to keep in repair creates a continuing obligation which is in force during the whole of the letting, from beginning to end, and if at any time during this period the premises are in disrepair the tenant is liable for breach of covenant. It is not open to the tenant to say that since the term commenced the premises have decayed by the process of time - his duty is to keep in repair throughout the term. A similar rule should apply to the landlord's covenant under section 32. The first

point is, then, that the passage of time during the term is no defence to an action under the implied covenant.

If premises are out of repair at the commencement of the term, can the lessor do nothing and plead that one cannot "keep in repair" that which was never in repair in the first place? Some old cases suggested that such an argument was possible. Harris v Jones,[44] decided by the Court of Common Pleas in 1832, held that the lessee was only bound to keep up the house as an old house and not to give the plaintiff the benefit of new work. This was followed in Gutteridge v Munyard where Tindal C.J. said,

> "Where a very old house is demised and the lessee enters into a covenant to repair, it is not meant that the old building is to be restroed in a renewed form at the end of the term, or of greater value than it was at the commencement of the term." 45

But these old cases must be treated with caution in view of the more recent interpretation given to the term "keep in repair". The defendant-tenant in Payne v Haine[46] had covenanted to keep certain premises in repair. Upon being sued for breach, he maintained that the premises had not been in good repair at the commencement of the term. The Court of Exchequer rejected this argument, in the words of Parke B.,

> "If, at the time of the demise, the premises were old and in bad repair, the lessee was bound to put them in good repairs as old premises; for he cannot "keep" them in good repair without putting them into it. -- This is a contract to keep the premises in good repair, as old premises, but that cannot justify the

> keeping them in bad repair because they happened to be in that state when the defendant took them." 47

This approach was approved by the Court of Appeal in Proudfoot v Hart[48] and, more recently by the same court in Brew Bros. v Snax (Ross) Ltd.[49]

We can conclude this aspect of the discussion by formulating another proposition; the lessor is, prima facie, under a duty to repair the premises if they are out of repair and he cannot avoid this liability merely by saying, "They are old and were old at the time of the demise". But he is entitled to take their age into account when putting them into repair and keeping them so; he is only obliged to keep old premises in repair as old premises. The landlord is not obliged to give the tenant new premises when the demise is of old premises: keeping old premises in repair stops short when the degree of repair is so great as to change the character of the premises demised. In short, the lessor's obligation is to repair the demised premises not to replace them.

E) "Character -- of the dwelling-house"

Sub-section (3) requires that regard must be had, inter alia, to "the character -- of the dwelling-house". In Proudfoot v Hart, Lord Esher M.R. explained that,

> "the character of the house must be taken into account, because the same class of repairs

> as would be necessary to a palace would be wholly unnecessary to a cottage." 50

The requirement is so vague that, in the absence of decided cases, no purpose is served by speculating as to its effect. There is, however, a clear danger in the requirement when applied to the type of premises with which we are concerned - those which are substandard. An unsympathetic Court could say; these premises are substandard in character, therefore the repairs required are not to be such as would bring them up to the general standard of repair.

f) "The Prospective Life of the Dwelling-House"

The requirement that regard shall be had to the prospective life of the dwelling house is one that did not appear in the definition laid down in Proudfoot v Hart. It is perhaps strange that Parliament felt it necessary to include this as a separate factor, it could nearly always be incorporated in the age requirement. The few exceptions are where premises not old have yet only a few years to survive. Presumably this includes proposed compulsory acquisition for road widening or slum clearance.[51] Thus some houses which are in most need of repair will not receive it because they are subject to future slum clearance. The requirement will also be relevant when considering prefabricated houses which, whilst not old, also have only a few years to survive

g) "The Locality In Which It is Situated"

Regard must be had to the locality in which the house is situated. Lord Esher explained this in Proudfoot v Hart by saying,

> "the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields." 52

For slum tenants, "the Spitalfields tenants", the requirement is, of course, a danger. Once again, an unsympathetic Court could say: this is a slum area, therefore the standard required cannot be such as would bring any house above that general standard. Those in the worst housing conditions are again at the greatest disadvantage.

4) Limits Upon Landlord's Covenant

The landlord's covenant is limited by the Act in three situations,

a) where the defect is due to a breach by the tenant of his duty to act in a tenant-like manner,

b) where the defect resulted from fire, tempest, flood , etc.

c) where the defect is in something which the tenant is entitled to remove.

It is proposed to discuss each of these express limitations in turn and then turn to the possibility of excluding the covenant completely.

a) Tenant-Like User

Sub-section (2) provides that the lessor's repairing covenant shall not be construed as requiring the lessor -

> "(a) to carry out any works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable apart from any express covenant on his part." 1

What type of "works or repairs" is the tenant of a house liable to do by virtue of his duty to use the premises in a tenant-like manner?[2] The answer to this question depends to some extent on the nature of the tenancy concerned; the liability of a tenant for years is greater than those of a weekly tenant. In view of the fact that the vast majority of poor tenants are either weekly tenants or have some other short periodic tenancy, the following discussion is confined to such tenancies only.

Courts have traditionally referred to the duty of the tenant as not to commit waste or allow waste to happen. Waste is defined as "a spoil or destruction to houses, gardens, trees or other corporeal hereditaments, to the injury of the reversion of the inherit-

ance."[3] There are two major types of waste: voluntary waste and permissive waste. Voluntary waste is said to be "actual or commissive, as by pulling down houses, or altering their structure. -- Permissive waste is a matter of negligence and omission only, as by suffering buildings to fall or rot for want of necessary reparations."[4] Alongside references to waste, there has grown an inter-related doctrine of tenant-like or husband-like user, the exact definition of such a duty and its relation to waste is not too clear. To avoid semantic difficulties, it is proposed to discuss the duties of the tenant by reference to classes of action or omissions which can lead to premises being out of repair or good condition. First, the tenant can do wilful damage - he can knock the premises about. Second, he can do negligent things which harm the premises, for example, he can leave a fire burning unguarded. Third, the tenant can fail to do things which may not constitute negligence; he can fail to clean windows and so on, Finally, the damage may be caused by natural wear and tear which the tenant fails to remedy. Where does one draw the line between liability for these various causes of harm to the premises? Fortunately, the recent case of Warren v Keen[5] provides useful guidance in our task and provides a good starting point to our inquiry.

Warren v Keen was decided by the Court of Appeal in 1953. The plaintiff landlord demised certain prem-

ises to the defendant on a weekly tenancy. The local authority served notice on the plaintiff to remedy certain damp and decaying walls which rendered the premises unfit for human habitation. Having carried out the repairs, the landlord brought this action to recover the cost contending that it was an implied term of the tenancy that the defendant would use the premises in a tenant-like manner, would keep them wind and water tight, and would make fair and tenantable repairs thereto. The County Court judge held that there was an implied covenant that the tenant would keep the premises in a good and tenantable condition and do such repairs as were necessary to that end. He therefore gave judgement for the landlord. The Court of Appeal reversed this decision and cleared up some of the doubts which had accumulated in this branch of the law.

Prior to Warren v Keen the exact scope of the tenant's liability for keeping premises in good condition was none too clear. Early cases imposed quite extensive burdens on the tenant. In Cheethams v Hampson[6] decided in 1791, Lord Kenyon Ch. J. maintained that a duty existed upon the tenant to repair fences on the demised property. A few years later, he held that a tenant from year to year was found "to make fair and tenantable repairs".[7] But in Horsefall v Mather,[8] it was held that no such general duty to repair existed and the plaintiff's declaration was rejected as being

too widely framed. Lord Tenterden C.J. accepted this limitation in Auworth v Johnson[9] but then declared that the tenant was obliged to keep the house "wind and water-tight", a vague duty repeated in Leach v Thomas[10] and the 1916 case of Wedd v Porter.[11]

This duty and the further duty to keep the premises in tenantable repair were rejected in Warren v Keen. Somervell L.J. doubted whether any duty to keep premises "wind and water-tight existed, but, assuming that it existed, then it did not apply to weekly tenancies and, further, the defects complained of were not within the duty. Denning L.J. said bluntly,

> "Apart from express contract, a tenant owes no duty to the landlord to keep premises in repair." 12

and thought that the expression "wind and water right" was of doubtful value and should be avoided. Lord Justice Romer had difficulty in accepting the duty but felt it unnecessary to express a final opinion because the defects concerned were not within the expression. As regards the duty to keep premises in tenantable repair, counsel for the landlord did not even press the point and all the judges categorically rejected any such duty. Somervell L.J. pointed to the lack of authority, Denning L.J. thought the supposed duty to be based on a mis-reading of Ferguson v Anon which, in any event, was reported by Espinasse "who was notoriously defective" and Romer L.J. felt

that the duty of a weekly tenant could not extend to repair due to fair wear and tear or failure to paint.[13] Warren v Keen decided that the tenant is not liable for any vague general duty to repair, but when is a tenant liable?

The tenant is certainly in breach of his duty to use the premises in a tenant-like manner if he does wilful damage. He cannot lay about him with a hatchet and expect the landlord to be held responsible for the repairs.[14] The prohibition on wilful damage or voluntary waste is an old one. In Onslow v Anon,[15] the tenant was restrained from cutting and damaging the hedge-rows etc. of the demised farm, in Lord Grey de Wilton v Saxon,[16] the tenant was prevented from breaking up ancient meadow land.[17] The Court of Appeal applied the doctrine in Marsden v Edward Heyes Ltd.[18] to a tenant who carried out extensive structural alteration to the premises without the permission of the landlord. The report is not very clear but the doctrine seems also to have been applied in Goodman v Rollinson[19] where a tenant was held liable for breach of the implied duty to use premises in a tenant-like manner when he left various rubbish in the flat he had vacated. The point was not before the Court in Warren v Keen, because, as Somervell L.J. noted, "there is no suggestion that the tenant started knocking the walls about or anything of that sort".[20] Lord Justice Denning did, however, point out that the tenant must

not damage the house wilfully.[21]

There is some doubt whether a negligent tenant is in breach of his duty to use premises in a tenant-like manner. Some old cases established that the lessor may bring an action against his tenant for negligently keeping his fire whereby the premises were destroyed.[22] But there appear to be no recent cases of the lessor suing in negligence. Whether such a duty of care exists caused some doubt to members of the House of Lords in their resolution of Regis Property v Dudley.[23] The question arose in that case whether the tenant's liability for repairs occasioned by his wilful or negligent acts was a factor to be taken into account when fixing the rent under the Rent Act 1957. Viscount Simmonds and Lord Morton did not expressly say whether the tenant would be liable for negligent acts. Lord Tucker doubted whether such an action would lie at common law,

> "Neither Counsel was able to cite any case in which any such action had even been brought. Negligence involves a breach of duty and I should have supposed that the measure of that duty arising out of the relationship of landlord and tenant was to be found in the express terms of the contract between the parties or in the covenants which the law over the years has implied from that relationship in certain types of tenancy eg the letting of furnished premises, weekly tenancies and yearly tenancies." 24

Lord Keith of Avanholm and Lord Denning had no doubt that an action would lie for negligence. Lord Denning quoted his dictum in Warren v Keen,

> "He must, of course, not damage the house, wilfully or negligently and he must see that his family and guests do not damage it: and if they do, he must repair it." 25

He was quite sure that the liability should extend to acts of negligence committed by the tenant's family or guests,

> "After all, if they do damage to the premises, wilfully or negligently, the tenant can recover the full damages from them." 26

But Lord Tucker was equally sure that no such action existed,

> "In such an action the tenant clearly would not be responsible for the negligent acts of his children or his guests." 27

These dicta apart, there seems no authority on the point.

Applying the general principles formulated in Donoghue v Stevenson,[28] there seems no reason why the negligent tenant should not be liable. On the other hand, it has been held that these principles do not impose liability for negligence on the landlord[29] and fair treatment demands that the tenant be equally immune. Lord Denning's attempt to impose vicarious liability on the tenant for the acts of his family and guests is without authority.[30]

In addition to refraining from intentional and possibly begligent damage, the tenant is obliged by

the duty to use premises in a tenant-like manner to take care over certain minor jobs around the house. Breach of this last duty is not necessary sufficiently serious to give rise to an action for negligence. In _Warren_ v _Keen_, Lord Justice Denning gave a few examples of what kind of jobs are included,[31]

> "The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler.[32] He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do." 33

This duty of tenant-like user can be seen as the urban descendant of the old common law requirement that the tenant must cultivate his land according to the custom of the region.[34]

Summarising the above, it can be said that, despite dicta to the contrary, the weekly tenant (and presumably other tenants for short periods) is not liable for repairs caused by wear and tear. Such repairs are the liability of the landlord under section 32. But where the tenant has intentionally damaged the premises and, perhaps, where he has been negligent, the landlord will not be held responsible. The landlord is also not responsible for certain trivial repairs around the house which a reasonable tenant could be expected to do. Whether the acts of the tenant's family and guests are to be regarded as the acts of the

tenant is open but, it is submitted, the better view is that there is no vicarious liability on the tenant and the landlord remains liable.

One other point remains to be mentioned. Section 32 (2) (a) refers to the tenant's liability for tenant-like user "apart from any express covenant on his part." Presumably this is intended to close a possible loop-hole opened up by the decision in Standen v Christmas[35] that there is no implied covenant to use premises in a tenant-like manner where the tenant has expressly covenanted to repair.

For purposes of comparison,[36] it is interesting to observe that, in recent years, certain Canadian provinces have embodied the duty of tenant-like user in statutory form. This Ontario provision is typical, "The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him."[37] The British Colombia statute is slightly wider as the tenant is also responsible "for maintaining ordinary health, cleanliness and sanitary standards throughout the premises."[38] It is also relevant to note that certain obligations are imposed by the Public Health Act 1936 upon occupiers of premises. For example, under s 51 of that Act, "The occupier of every building in, or in connection with, which a watercloset -- is provided shall -- cause the flushing apparatus

thereof to be kept supplied with water sufficient for flushing and where necessary to be properly protected against frost."[40]

b) Fire, Tempest, Flood or Other Inevitable Accident

Section 32 (2) (b) provides that the landlord's repairing covenant shall not be held to require him,

> "to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident."

During the parliamentary debate, Mr. Silverman was doubtful about including damage by flood because, although that damage might amount to a great disaster, it might also mean something very much smaller. He asked, "Will it take away the obligation of the landlord to do repairs in the case of minor damage which does not affect the structure of the house? If it will, it seems to be going far in relieving the landlord of his responsibility."[41] Sir K. Joseph, the Government spokesman, replied that it would be a matter for the Courts but he could not imagine minor damage would be exempt from the landlord's responsibility. "Reinstate"was "not suitable simply for the repairs of some minor or even serious damage. 'Reinstate' implies something near destruction." He took the opportunity to state the Government's intention,

> "This is obviously a no-man's land or

> or area of some doubt, but what this is meant to put beyond doubt is that where the house is largely ruined as a result of one of these causes the landlord shall not be obliged to reinstate or rebuild. Where the damage is minor the landlord's obligation remains. I am afraid that we must leave this to the Courts. It is impossible to define every case." 42

From the other position, it was doubted by Mr. Page that the words "inevitable accident" gave the landlord sufficient protection. He thought there were accidents which are not inevitable and which cause damage to a house and for which the landlord would still be responsible under the clause. He was concerned about the case of a house collapsing through no fault of the landlord. As he understood it, "inevitable accident" did not cover an aircraft dropping on a house. It did not cover a lorry running over the pavement and into the front room. It meant only an act of God.[43] Sir E. Errington asked the Minister just what was visualised by the words "or other inevitable accident." Would that include the case of a thunderbolt which broke the side of a house or was it intended to deal merely with tempest or flood?[44] Sir K. Joseph replied,

> "It covers acts of God. -- As to the example of the lorry or plane falling, I imagine that the landlord in that case might have a claim against the offending party, but without further advice I should not like to say whether the landlord in that case would be exempt from his obligation to rebuild." 45

Other questions might be asked. Is "rebuild"

confined to replacement of substantially the whole of the premises or would it include that element of re-building comprised in any covenant to repair?[46] What is meant by "damage", is it to be contrasted with "destruction"? As the Minister emphasised, "this is obviously a no-man's land or area of some doubt" and we must wait for the Courts to settle these and other questions raised by this limitation on the landlord's covenant.

We may, however, ask whether the limitation can be justified. There was general agreement in Parliament on its merit though Mr. MacColl was a little worried that the result might be circumstances in which no one is responsible for doing anything about the house.[47] At first sight, it may seem harsh to place liability on the landlord where the premises are destroyed or damaged by some act which is outside his control. But it may be answered that, harsh or not, the Common law made the tenant liable for such acts under an express covenant to repair.[48] More importantly, should the landlord be under a duty to keep the premises insured against such disasters? In the case of agricultural tenancies, the landlord must "keep the farmhouses, cottages and farm buildings insured to their full value against loss or damage by fire."[49] And, taking a labour law analogy, the employer must insure against liability or bodily injury or disease sustained by his employees arising

out of and in the course of their employment.[50] A duty upon the landlord to insure against injury to his tenants would seem to be in line with modern social legislation which seeks to move away from liability based on fault and place liability where it can most easily be borne.

c) Lessee's Property

By virtue of s 32 (2) (c), the lessor is not liable

> "to keep in repair or maintain anything which the lessee is entitled toremove from the dwelling-house."

Thus, tenant's fixtures which might have been considered as part of the structure of the dwelling or as coming within the installations provision are excluded from the landlord's covenant. This seems only fair.[51]

d) Contracting Out

Section 33 (7) provides,

> " -- any covenant or agreement, whether contained in a lease to which the said section thirty-two applies or in any agreement collateral to such a lease, shall be void so far as it purports to exclude or limit the obligations of the lessor or the immunities of the lessee under that section, or to authorise any forfeiture or impose on the lessee any penalty, disability or obligation, in the event of his enforcing or relying upon those obligations or immunities."

This broadly framed provision would seem to catch any attempt to transfer the burden of repair to the tenant.[52] Section 33 (6), however, provides that a County Court may modify or exclude the statutory covenant by order made with the consent of both parties if it is reasonable to do so. This power was described by the Minister as designed to cover exceptional cases. The great majority of privately rented houses and flats were let as an investment and to produce income. The clauses imposing repair covenants on the landlord were based on the broad assumption that investment owners not only ought to look after their property but were better equipped to do so than most short-term tenants. This assumption was not true in all cases. "The Service man or the professional man may be posted elsewhere for a year or two and may want to let his house while he is away. The sort of tenant he will want will be the same kind of person as himself, just as capable of looking after a house as he is. Two people like that will usually have no difficulty in striking a reasonable bargain which will make the tenant responsible for the house while the owner is away. (The provision) allows the County Court to Sanction Contracting out in cases like that."[53]

This sub-section clearly places considerable discretion and power in the hands of judges. It is to be hoped that they will not permit the landlord of

sub-standard premises to escape the repair covenant after extracting "consent" from a tenant who may not be in a position to refuse.[54] Perhaps the real danger lies not in the exclusion of the covenant but its avoidance. One commentator has observed, "Whilst it is not possible to contract out of the 1961 Act provision, it would seem that it is possible to avoid it in whole or in part by excepting from the demise the whole or parts of the structure and exterior." He warns those thinking of following up this point, " an attempt of this kind which is not precise in its description of the parts excluded from the demise would cause as many difficulties as it is intended to cure. It would seem to be impracticable to exclude the floors of the premises from the demise!"[55]

5) Criticism of the Section

In the absence of evidence showing the practical effects of the section, it is not really possible to assess its ability to help those living in substandard premises. So much will depend on how the Courts treat the section.

One or two comments can, however, be made on its likely impact. It is to be noted that the implied warranty is to keep premises in repair not to keep them fit for habitation. Whilst the most important cause of unfitness is often lack of repairs, other

factors may play a critical role and tenants suffering from such factors get no relief from this section. Severe overcrowding both within a given unit of accommodation and within multi-occupied premises is clearly not struck at by the Act. The landlord may sub-divide premises again and again with resulting annoyance to the tenant in the shape of noise, lack of facilities and loss of privacy yet the section gives no aid. Nor is failure to provide adequate amenities within the section. The landlord may be liable if he fails to repair certain installations, no liability attaches to failure to provide even the most basic amenities. A house may be without adequate lighting, sanitary conveniences and cooking facilities and no breach occurs. It may also be overrun with rats, mice and other vermin but the tenant still lacks a right of action. Also, Parliament has done nothing to protect the section from emasculation by the requirement of notice, a requirement which must severely restrict its effectiveness.

Leaving aside the inherent inadequacies in the section, its power to aid the slum tenant must depend to an enormous extent on the attitude of the judges. Two lines of interpretation are possible: the Courts might seek to extend the protection and to give it strength; equally, the Courts could restrict its growth, confine it to the narrowest possible limits and so render it impotent. On the one hand, the section might

be held to apply to almost all work but substantial rebuilding; painting and papering could be included, floors, doors and windows might be viewed as part of the structure, cookers might be within the section. Negligence might be held as not excluding the warranty thus placing liability not on the basis of crude fault liability but according to ability to bear the loss. On the other hand, the Court might exclude repairs to all but the very shell of the building from the section, it might reject decorative work, and apply very strictly the age, character and locality restrictions upon the obligation to repair. Constracting out might be freely permitted.

The Statute is vague in so many ways that it is little more than a framework upon which the Courts must build if they wish. One hopes that the destructive tendencies shown in the judicial treatment of the old warranty of fitness will not find expression in the handling of the warranty of repair. Social legislation cannot be left entirely to the Legislature, the Courts must participate in the fight for social justice. The question remains whether the present Bench can show itself worthy of that role.

1) The Origins Of The Statutory Covenant To Repair

1 Parl Debates H of C 1961 Vol 643 Col 467

2 Ibid Vol 637 col 974
On this practice, see also Ibid col 1035 (Mr. Skeet), Ibid Standing Committee Reports 1961 Vol 2, col 981 (Mr. Evans)
Audrey Harvey, "Tenants In Danger" (1964) p.69

3 Parl Debates H of C 1961 Vol 637 col 974 - 975
See also Earl Jellico in H of L Ibid H of L 1961 Vol 33 Col 98.

4 Ibid Vol col 993 - 994 (Mr. Stewart)

5 Ibid Standing Committee Reports 1961 Vol 2 Col 980 - 981 (Mr Evans)

6 Ibid

7 Ibid 979 (Mr. MacColl)

8 Ibid Vol 637 col 1006-7

9 Ibid Standing Committee Reports 1961 Vol 2 Col 958 - 959

10 Ibid col 960 - 961

11 Ibid col 981

12 Ibid H of L 1961 Vol 33 col 115

13 The real point of dispute was when the provisions should take effect. The Government decided it should be the time of the passing of the Act, on the ground that, as changes had been made during Parliamentary passage, any earlier date would have been unfair. The Opposition argued that so few changes had been made that the Act should take effect from at least the time the Bill was published. See generally Ibid, H of C 1961 Vol 637 col 993; Ibid Standing Committee Reports Vol 2 col 982 - 1002; Ibid Vol 643 col 485 - 488.

14 Ibid Vol.643 col 461 - 462 (Mr Stewart)

15 Ibid col 491 - 492 (Mr. Brooke)

16 Ibid col 394 - 398

2) What Parts Of The Premises Are Included In The Statutory Covenant to Repair?

1 The only reference to "structure" in the parliamentary debate was by Mrs.Butler who referred to an article in the "Estates Gazette" raising the vagueness of the term but who considered that it would be unwise to attempt to describe the parts of the premises covered as this might lead to possible limitation of the landlord's obligation.

Parl. Debates, H of C, Standing Committee Reports 1961 Vol 2, col 970-971

2 Taken from West, 19 Conv. 121, 141 (1955)
See also B.W. Adkin, "The Law of Dilapidations" (6th ed 1963) (West ed) p. 68-69

3 See Note, 2 Conv. 11, 19 (1937)
" 232 L.T. 346, 362 (1961), 233 L.T. 4 (1962)
Odgers, 35 L.Q.R. 333 (1969)
Sexton, Hall, 27 Solicitor 225, 227, (1960)

4 (1946) 1 AER 424, 427
Cf. Lavy v L.C.C. (1895) 2 QB 577
L.C.C. v Illuminated Advertisements Co. (1906) 2 KB 886
Cardiff Rating Authority v Guest (1949) 1 KB 385
L.C.C. v Tann (1954) 1 Q.B.D. 389
Almond v Birmingham Royal Institute For The Blind (1967) 2 AER 317

5 (1943) 2 KB 587, 593

6 (1904) 2 KB 563

7 (1906) 2 KB 229

8 (1963) 1 Ch 158

9 In Blundall v Obsdale "Estates Gazette" April 12, 1958, a first instance decision, it was decided that structural repairs meant "major repairs" but the case seems to have turned on its special facts.

10 (1958) 2 AER 551, 552-553

11 (1959) 2 AER 176, 181
See Bodkin, 26 Solicitor 177 (1959)
Note, 226 L.T. 287 (1958)
227 L.T. 315 (1958)
25 Solicitor 308 (1958)
102 Sol.J. 556 (1958

12 (1969) 3 AER 1345, 1346

13 (1925) 1 KB 119. On liability for windows, see infra n 19 - 20.

14 But see Woodfall, "Landlord And Tenant" 27th ed (1968) para 1486 p. 653

15 See G. Williams, "International Law And The Conversy Concerning The Word 'Law'". (1954) 22 B.Y.J.L. 146.

16 On the meaning of similar repair covenants, see
Note, 75 Sol. J. 808 (1931)
Sexton-Hall, 27 Solicitor 225 (1960)
Woodfall, op cit n 14 para 1486 p. 652

17 (1841) 2 Q.B. 225,
114 E.R. 88

18 (1940) 2 A.E.R. 434, 440

19 (1879) "The Times" June 17
reported also in Boswell v Crucible Steel Co. (1925) 1 KB 119
Noted, 23 Sol. J. 656 (1879)

20 See also Taylor v Webb (1937) 2 K.B. 283
Holiday Fellowship Ltd. v Hereford (1959) 1 WLR 211.

An amendment was put down during the Committee stage of the Bill by Mr. Page to exclude "windows, window frames and fixtures, fittings and appliances for making use of windows" from the definition of structure and exterior. He explained that he thought the intention of the clause was not to place a duty on the landlord to do "minor works such as broken windows, sash cords, fittings and appliances, and so on". The Minister was unable to accept this amendment, "there is no reason why short-term tenants should be held liable for repairs which may have been made necessary for general deterioration of the window frames over a long period."

Parl Debates, H of C, 1961. Standing Committee Report Vol II col. 969 - 973

21 (1969) 3 A.E.R. 1345

22 op cit n 20 col 971

23 Section 32 (1) (b) (1)

24 These were specifically included by a Government amendment to clear up uncertainty.

Parl. Debates H of C 1961 Vol 643 col 394-396

25 During the debate, Mr. Corfield said he was fascinated to know how a w.c. could possibly need repair unless it has been grossly ill-treated by the occupant "or are landlords now to be vicariously responsible for the 20 stone aunts of their tenants".

Ibid Vol 637 col 1001.
The Minister explained that water closets were described as sanitary conveniences purely and simply to conform with the provisions of Sections 33 to 47 of the Public Health Act 1936. Ibid Vol 643 col 396.
See also Ibid Standing Committee Reports 1961 Vol 2 col 970, 973.

26 See Earl Jellicoe, Parl. Debates H of L 1961 Vol 233 col 898.

27 Ibid

28 Ibid

29 Cf Lord Broughshane, ibid col 899

30 Section 32 (1) (b) (i)

31 Parl. Debates H of L 1961 Vol 233 col 898
See also Mr. Brooke Ibid H of C 1961 Vol 643
col 396.

32 But are these installations "for -- heating
water" within s 32 (1) (b) (ii)?

33 Lord Broughshane, Parl Debates H of L 1961 Vol
233 col 897.

34 Ibid col 898

35 Section 32 (1) (b) (ii)

36 Parl. Debates H of C 1961 Vol 643 col 395-396

37 Ibid col 397

38 Ibid col 398.
Cf. his view on radiators; "There are radiators
and radiators. It was certainly the Government's
idea that the readiators which were a permanent
installation in the house should be the landlord's
responsibility."
Ibid Standing Committee Reports 1961 Vol 2 col 973.

39 In the letting of furnished premises, they would
seem to fall within the implied warranty of fit-
ness.

40 For Parliamentary debates on the problem of
mixed premises, see Barl. Debates H of C Standing
Committee Reports 1961 Vol II Col 973-975.
Ibid Vol 643 Col 404-406.

41 (1969) 3 AER 1345, 3147

42 Ibid

43 Ibid 1346

44 Supra 411

45 Wellings, 28 Conv. 6, 12-13 (1964)

46 Infra 682

47 Infra 684

3) <u>The Standard Of Repair</u>

1 (1890) 15 Q.B.D. 42

2 Supra 435

3 See generally,

B.W. Adkin, "The Law Of Dilapidations" (6th ed) (1963) (ed: W.A. West) pp. 57-92.
M.F. C ahill; "The Householder's Duty Respecting Repairs", 2nd ed. (1930) pp. 25-60.

Sir T. Cato Worsfold; "The Law of Repairs and Dilapidations", 2nd ed (1934) pp.16-32.

Blundall, 5 Conv. 100, 163 (1940)
Note , 75 L.J. 178, (1933)
" 113 L.J. 327 (1963)
" 114 L.J. 52 (1964)
" 77 Sol J. 652 (1933)
" 78 Sol J. 499 (1934)
" 80 Sol J. 47 (1936)
" 83 Sol J. 539 (1939)
" 84 Sol J. 341 (1940)
" 104 Sol J. 887 (1960)
West 19 Conv. 121 (1955)

4 Note, 78 Sol. J. 499 (1934)

5 (1832) 1 Moo & Rob 173
174 ER 59

6 See also Stanley v Towgood (1836) 3 Bing (N.C.)3
132 ER 310

continued ......

Gutteridge v Munyard (1834) 1 Moo & Rob 334
174 ER 114

"Tindal C.J. so often came down on the side of the covenanting tenant in the 1830s that it may be thought that the learned chief justice erred on the side of favouring the broad approach and substantial compliance."

Note, 104 Sol. J. 887, 888 (1960)

7 (1860) 2 F & F 289
175 ER 1065

8 (1893) 9 T.L.R. 488

9 (1906) 2 Ch 166

10 (1940) 2 AER 434 infra 480

11 Cf Supra 436

12 But see Buswell v Goodwin (1971) 1 WLR 92 Supra 412

13 Granada Theatres v Freehold Investments Ltd. (1959) 2 AER 176
Dickinson v St. Aubyn (1944) 1 AER 370 per Goddard L.J.
See Note, 102 Sol. J. 556 (1958)

14 But it should be noted that Earl Jellicoe said in the Lords, "I should take this opportunity of making it quite clear that it will still be permissible for the landlord to require the tenant to carry out internal decorations."
Parl Debates, H of L, 1961 Vol 233 Col 97.

15 See generally; Note, 91 Sol. J. 126 (1947)

16 (1825) 1 Car. & P. 265
171 E.R. 1189

17 (1847) 10 L.T. (O.S.) 108

18 (1848) 11 L.T. (O.S.) 315

19 (1886) 2 T.L.R. 877

20 Ibid

21 (1890) 15 Q.B.D. 42

22 Ibid

23 Cf Adkin op cit n 3 at p. 71; "The rule in Proudfoot,v Hart is now generally accepted as governing the matter."

24 Parl Debates H of C Standing Committee Reports 1961 Vol 2 col 962-963 (Sir R. Errington)
Ibid Vol 643 Col 399-404 (Mr Page)
Ibid H of L Vol 233 col 115 (Lord Meston)
Ibid col 899-902 (Lord Broughshare)

25 Ibid H of C Vol 402-403 (Mr. H. Brooke)

26 Ibid col 403

27 Ibid H of L Vol 233 col 900-902 (Earl Jellicoe)

28 See Adkin op cit n at p. 79-86
Note, 113 L.J. 327 (1963)
" 114 L.J. 52 (1964)
" 80 Sol. J. 47 (1936)
" 83 Sol. J. 539 (1939)
" 84 Sol. J. 341 (1940)
West, 19 Conv. 121, 131 (1955)

29 Rhodesia Ryl v Collector of Income Tax (1933) AC 368

30 (1911) 1 KB 905

31 (1970) 1 AER 587

32 (1797) 2 Esp 589
170 ER 465
See also Soward v Leggatt (1836) 7 C & P 613
(new Joists) 173 ER 269

33 (1893) 2 Q.B. 212

34 (1906) 2 Ch 166
Noted 22 L.Q.R. 358 (1906)
See also Wright v Lawson (1903) 19 T.L.R. 510

35 (1940) 2 AER 434
Noted, 84 Sol. J. 341 (1940)

36 (1970) 1 AER 587

37 Note, 113 L.J. 327 (1963)

38 (1947) 2 AER 761
Cf. Wates v Rowland (1952) 1 T.L.R. 488 - a case on the meaning of improvement and structural alterations within the Rent Acts. Noted, 96 Sol. J. 207 (1952)
Vicro Inv. Ltd. v Adams Branch Ltd. (1963)
40 DLR (2d) 523

39 (1963) 2 AER 1068

40 See also Parke Drug Stores v Edwards (1923) J. of Surveyors' Institution Oct. p 200, cited in Adkin op cit n 3 at p. 84.

41 (1963) 2 AER 1068

42 (1890) 15 Q.B.D. 42, 52

43 (1818) 1 B & Ald 584
106 E.R. 215

44 (1832) 1 M. & Robb. 173
174 E.R. 59

45 (1834) 1 M & Robb 334,
174 E.R. 114,
See also Stanley v Towgood (1836) 3 Bing (N.C.) 3
132 E.R. 310
Mantz v Goring (1838) 4 Bing (N.C.) 451
132 E.R. 861

46 (1847) 15 M & W 541
153 E.R. 1304

47 Ibid
See also Woolcock v Dew (1858) 1 F & F 337
175 E.R. 753

48 (1890) 15 Q.B.D. 42, 51

49 (1970) 1 A.E.R. 587

50 (1890) 15 Q.B.D. 42, 52

51 Note, 233 L.T. 4, 19

52 (1890) 15 Q.B.D. 42, 52

4) Limits Upon Landlord's Covenant

1 Introducing the clause, Mr. Brooke, the Minister, said

> "The Clause, in stopping a landlord from being a bad landlord in the matter of repairs, is not an invitation to the tenant to be a bad tenant."

Parl. Debates H of C 1961 Vol 637 Col 975

2 B.W. Adkin, "The Law Of Dilapidations" 6th ed 1963 (ed: W.A. West) pp. 9-34, 44-46.

M.R. Cahill, "The Householder's Duty Respecting Repairs" 2nd ed 1930 pp. 65-74.
Sir T. Cato Worsfold, "The Law of Repairs And Dilapidations" 2nd ed 1934 pp. 1-9

Blundall, 5 Conv. 100, 167 (1941)
Note, 186 L.T. 346 (1938)
" 79 Sol. J. 336 (1935)
" 83 Sol. J. 579 (1939)
Walford, 8 Conv. 74, 82 (1943)
West, 26 Conv. 187, 194-195 (1962)

For American law, see

1 Amer. Law of Property s 3.78 at p. 347 (1952)
51 C C.J.S. s 366 p. 929
Walsh, "Commentaries On The Law of Real Property" (1947) Vol 2 para 161 p. 205

Irish Law;

Note, 83 Ir. L.T. 47 (1949)

Australian law;

Note, 10 Aust. L.J. 357 (1937)
Nedovic and Stewart, 7 M.U.L.R. 258, 261 (1969)

Canadian law; English, 5 U.B.C.L.R. 321, 330 (1970)
Williams, "Notes on The Canadian Law of Landlord And Tenant" 3rd ed 1957 p. 406

and see infra.

3 Woodfall "Landlord And Tenant" 27th ed 1968 at p. 680

4 Ibid

5 (1953) 3 W.L.R. 702

Noted; Megarry, 70 L.Q.R. 9
Mitchell, 17 M.L.R. 81 (1954)
Muir Watt, 17 Conv. 500 (1953)
Wade, 1954 C.L.J. 71

6 (1791) 4 T.R. 318
100 E.R. 1041

7 Ferguson v Anon (1797) 2 Esp. 589
170 E.R. 465
See also Gregory v Mighell (1811) 18 Ves. 328
34 E.R. 341;
"the tenant must without any stipulation -- do necessary repairs."

8 (1815) Holt 7
171 ER 141

9 (1832) 5 Car. & P. 239
172 E.R. 955

10 (1835) 7 Car & P 326
173 E.R. 145
See also Yellowly v Gower (1855) 11 Exch. 273, 156 E.R. 833 holding tenants for a term of years liable for permissive waste.

11 (1916) 2 KB 91

12 (1953) 3 W.L.R. 702, 705

13 It may be observed as a matter of interest that Rolle's Abridgement II 816 art 37 mentions two cases in which tenants were held liable for permitting walls to be in decay "par detault de daubing" as it was described in one case (Newell v Dunning) or "in defectum oblimationis Anglice dawbing" as it was spelt in the other (Corbet v Stonehouse): Note, 79 Sol. J. 336, 337 (1935)

14 Cf. Section 6 of Housing Act 1957, where the landlord's liability is not affected by tenant's misuse of the premises supra.

To a claim that no man may profit by his own wrong, the tenant could plead Buswell v Goodwin (1971) 1 W.L.R. 92 Supra where the landlord was allowed to do just that under the section.

15 (1809) 16 Ves. Jun. 172
33 E:R. 949

16 (1801) 6 Ves 106
31 E.R. 961

17 See also Pratt v Brett (1817) 2 Madd 62
56 E.R. 258
where the tenant threatened to get his revenge on his landlord who had levied distress by ploughing up the ancient meadow land and sowing it with mustard seed.

18 (1927) 2 KB 1

19 (1951) W.N. 118

20 (1953) 3 W.L.R. 702, 705

21 Ibid 706

22 Hicks v Downing (1696) 1 Ld Raym.99
91 E.R. 962
Panton v Isham (1702) 1 Salk 19
91 E.R. 18

23 (1959) A.C. 370
Noted Baker 75 L.Q.R. 28

24 Ibid

25 (1953) 3 W.L.R. 702, 706

26 (1959) A.C. 370

27 Ibid

28 (1932) A.C. 562

29 Otto v Bolton (1936) 2 KB 46, Infra 622

30 But it is only fair to point out that the Government dropped the words "or to make good damage done by the lessee" from the original clause as being too restricted: "They do not cover, for example, damage done by the lessee's family."

Parl. Debates H of C 1961 Vol 643 col 399 (Mr. Brooke)
And see Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1948 Sched Part 1 para 2. SI 1948 No. 184.

31 (1953) 3 W.L.R. 702, 705-706

32 In Michael v McCoard (1913) S.C. 896, a Scottish case, a tenant who left a house unoccupied for a month in winter without turning off the water or informing the landlord of his absence was held liable for damage to the water pipes occasioned by frost. On the duty to give notice of absence, see also

Ryan v Weilgeaz (1913) 4 W.W.R. 982 (Canada)

and on duty to drain pipes so as to prevent frost

Conklin v Dickson (1917) 40 O.L.R. 460
38 DLR 692

But, as West observes, 26 Conv. 187, 195 (1962), weekly tenants who go away for the winter must be something of rarity.

33 In Shaw v Anthony (1939) Estates Gazette Vol 133 p.342 a County Court judge held that the importation of bugs and fleas into the premises in large quantities by a tenant is untenantlike user. This was followed by the Vancouver County Court

continued.........

in Martin v Larsen (1944) 1 DLR 303, 59 B.C.R. 398 holding that permitting the premises to become infected with bedbugs was a breach of the implied duty of tenant-like user. See also infra 496 on later Canadian statutes.
But see Humphries v Miller (1917) 2 KB 122 holding that the tenant of a furnished room does not warrant that he is not carrying infectious disease, (leprosy).

34 Powley v Walker (1793) 5 T.L.R. 373
101 E.R. 208
Wedd v Porter (1916) 2 K B 91
See now Agriculture Act 1947 s 11
Agricultural Holdings Act 1948 s 11.

35 (1847) 10 Q.B. 135
116 E.R. 53

36 See also n 33 Supra

37 R.S.O. 1970 c 236 s 96 (2)
See also S.N.S. 1970 c 13 c 6 (1) (3)
S.M. 1971 c 35 s 10

38 S.B.C. 1970 c 18 s 49 (2)
In this sentence and in the latter part of all the provisions which relate to wilful or negligent conduct what parts are included in the tenant's duty? Just the "rented premises" as in the case of cleanliness or also common passageways, toilets etc? The provisions are not clear on this point though the expression "throughout the premises" in the British Columbia Statute suggests the latter interpretation. The Nova Scotia statute restricts the duty of cleanliness to the interior of the premises.

39 West 26 Conv. 132 (1962) is wrong in saying of the Public Health and Housing Acts, "no obligations are thrown by these Acts upon the tenants."

40 See also SS 45, 52, 78, 83, 93, 157, 158 and generally s 290 (3) (e) (f).

41 Parl. Debates H of C 1961 Standing Committee Reports Vol 2 col 968

42 Ibid

43 Ibid col 965 - 967

44 Ibid col 968 - 969

45 Ibid col 969

46 See Supra 479

47 Parl Debates op cit n 41 col 967

48 Chesterfield v Bolton (1739) Comyn 627
Brecknock v Pritchard (1796) 6 T.R. 750
Jacob v Dawn (1900) 2 Ch. 156
Matthey v Curling (1922) 2 A.C. 180

49 The Agriculture (Maintenance, Repair And Insurance Of Fixed Equipment) Regulations, 1948 S.I. 1948 No. 184 Schedule Part I para 2. These regulations have effect under Agricultural Holdings Act 1948 s 6 (1).

50 Employers' Liability (Compulsory Insurance) Act 1969 s 1.

51 See Parl. Debates H of C, 1961, Vol 643 Col 398, 404 (Mr. Brooke)

52 Cf Parl. Debate H of C 1961 Vol 643 col 398 (Mr. Brooke)

53 Ibid Vol 637 Col 975 - 976
See also Earl Jellicoe in the Lords, Ibid, H of L Vol 233, Col 97.

54 See supra 190

55 Wellings, 28 Conv. 6, 12-13 (1964.

Statutory Duty To Repair In Other Common Law Jurisdictions

1) Australia

There are no Australian parallels to the English statutory covenants of repair and fitness.[1] Queensland and New South Wales do, however, have the following provision in their Landlord and Tenant Acts,

> "A person shall not let any dwelling house which is not at the time of the letting in fair and tenantable repair." 2

It is not clear whether this provision implies a covenant into the lease that the premises are in good repair when let or is merely a public health provision.

2) Canada

It has been seen that the English statutory covenant of fitness was enacted as long ago as 1885[3] and the covenant of repair in 1961.[4] Canadian equivalents are of much more recent origin. The first of these was passed in 1969 by the Ontario Legislature[5] implementing a recommendation proposed by the Ontario Law Reform Commission.[6] The provision stated,

> "A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge

> of the tenant before the tenancy agreement was entered into."

British Columbia[7] and Manitoba[8] enacted identical provisions. Nova Scotia has passed a provision more restrictive in its terms,

> "1. The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing.
>
> 2. Except as required by any statutory enactment or law respecting standards of health, safety or housing, the landlord shall not be required to repair or improve the premises beyond the state of repair that existed at the time the tenant first acquired possession of the premises." 9

This provision resembles the implied warranty of fitness in the letting of furnished premises and the English statutory warranty of fitness as it existed before 1909, in both cases the obligation related only defects in existence of the commencement of the term and not those developing afterwards.[10]

It is useful to compare these provisions with the English ones. The most important distinction is that, in addition to repair and fitness, they impose the additional obligation to see that the premises comply with health, safety or housing law. The English repair covenant simply requires the premises to be kept "in repair", the Canadian provisions require "a good state of repair". There seems to be no meaningful difference

between these two standards.[11] Nor would the omission of the word "human" before "habitation" seem important[12] though it should be remembered that English law provides a comprehensive statutory definition of fitness.[13] Unlike the English covenant to repair which contains certain restrictions on the landlord's duty in respect of damage caused by fire, flood, etc.,[14] or breach of tenant-like user[15] or in respect of things which belong to the tenant,[16] the Canadian provisions are absolute on their face. It should be noted, however, that all these statutes require a duty of cleanliness and care on the part of the tenant[17] and that Manitoba makes the landlord's responsibility expressly subject to the tenant's duty.[18] Like the English statutes, there is no express duty to give notice on the tenant though this may be implied by the Courts.[19] Finally, like the English statutes,[20] the provisions are to apply notwithstanding any agreement or waiver to the contrary.[21]

3) The United States

Several American jurisdictions have cut inroads into the harshness of the common law rule by statutory provisions. Following the civil law, Louisianna requires the landlord to maintain the premises in good condition.[22] The Georgia Code provides that the landlord must keep the premises in repair and that he

is responsible for damages arising from defective construction or caused by his failure to repair.[23] In B.ll v Murray,[24] it was held that when the landlord is notified that premises are in disrepair, he becomes under a duty to inspect them and to make such repairs as are necessary for the safety of his tenants. Furtheremore, the statute has been construed to imply a warranty that the premises are in good repair at the time they are leased.[25] Other States,[26] also influenced by the Civil law, enacted statutes like California's,

> "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof." 27

All these provisions date back many years.[28]

In recent years, a statutory covenant to repair on the landlord has been seen as crucial to the tenant's rights movement.[29] For example, the American Bar Foundation's "Model Residential Landlord-Tenant Code" provides that the landlord shall at all times comply with all relevant housing laws, keep all areas of his building and grounds clean and sanitary, keep the premises in good repair, maintain all electrical, plumbing and other facilities supplied by him in good working order, provide rubbish disposal facilities and supply water and adequate heat.[30]

A recent Michigan Statute provides,

> "In every lease --- of residential premises the lessor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties;
>
> (b) To keep the premises in reasonable repair during the term of the lease -- and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant's wilful or irresponsible conduct or lack of conduct." 31

The statute further declares that these obligations may only be modified where the lease has a current term of at least one year.[32] The rule of caveat emptor is clearly rejected by the provision that the privilege of a prospective lessee to inspect the premises before concluding the lease shall not defeat his right to have the benefit of the statutory covenant.[33] It will be seen that, like the Canadian provisions,[34] this section goes further than the English statutory covenant by imposing a covenant of compliance with applicable laws. On the other, it is easier for the landlord to contract out of the Michigan law.[35]

The District of Columbia has now codified the decision in Javins[36] by amendment to its Housing Regulations providing,

> "There should be deemed to be included in the terms of any lease or rental agreement covering a habitation an implied warranty that the owner will maintain the premises in compliance with these Regulations." 37

1) Australia

1 See Nedovic and Stewart, 7 Melbourne U.L.R. 258, 263 (1969)

2 Queensland Landlord & Tenant Act 1948 s.35. New South Wales Landlord & Tenant (Amendment) Act 1948 s. 39

2) Canada

3 Supra 380

4 Supra 457

5 S.O. 1968-1969 c 58 s 95
See now R.S.O. 1970 c 236 s 96
Jeffrey Jowell; 48 Can. B.R. 323, 330 (1970)
Local Acts sometimes contained such covenants, see Steers Ltd. v Dakin (1950) 1 D.L.R. 58
24 M.P.R. 239

6 Ontario Law Reform Commission; "Report On Landlord And Tenant Law Applicable To Residential Tenancies" (1968)

7 S.B.C. 1970 c 18 s 49
J.T. English, 5 U.B.C. L.R. 321, 329 (1970)

8 S.M. 1970 c 106 s 98

9 S.N.S. 1970 c 13 s 6

10 Supra 383

11 The Courts have not given much weight to slight variations in the wording of express repair covenants: White v Nicholson (1842) 4 Man & G. 95, 98 per Tyndal C.J.
It should be noted, however, that the English provision expressly states a standard of repair based on Proudfoot v Hart (1890) 25 Q.B.D. 42 whereas the Canadian provisions contain no express guidelines. It has been suggested that

continued...

Proudfoot v Hart would apply; J.T. English op cit n 7 at 330.

12 In Summers v Salford Corp (1943) AC 283, 293, Lord Wright did, however, say with regard to the English provision;

> "' Human habitation' is in contrast with habitation by pigs, horses or other animals, or with use as warehouses and the like, but I think it also imports some reference to what we call humanity or humaneness."

13 Supra 420

14 Supra 497

15 Supra 488

16 Supra 500

17 Supra 496

18 S.M. 1970 c 106 s 98 (1)

19 J.T. English op cit n 7 at 331.

20 Supra 500

21 R.S.O. 1970 c 236 s 82 (1)
S.B.C. 1970 c 18 s 34 (1)
S.N.S. 1970 c 13 ss 3 (1), 6 (1) though s 12 (2) provides that in the case of Government housing the provisions of the lease may oust the statutory condition.
S.M. 1970 c 106 s 82

It has been suggested by J.T. English op cit n 7 at 330 that the landlord may contract out of liability in tort since that is not dealt with in the statute.

3) <u>The United States</u>

22 Supra 29

23 Ga. Code Ann. s 61 - 111 (1966)
Allen, 20 South Carolina L.R. 282, 283 (1968)
Mouber, 38 U.M.K.C. L. Rev. 12[illegible], 136 (1969)

24 (1955) 91 Ga. 684
86 S.E. 2d 706

25 Wilson v Elijah A. Brown Co. (1940) 62 Ga.App.898
10 S.E. 2d 219

26 See; 41 Okla. Stat Ann s 31 (1951)
Mont. Rev. Codes Ann. s 42 - 201 (1947)
N.D. Rev. Code s 47 - 1612 (1959)
S.D. Code s 38. 0409 (1939)
These provisions are considered in more detail infra in the discussion on repair and deduct statutes.

27 Civ. Code s 1941 (1954) as amended.

28 See Comment, 1 Calif. L.R. 280 (1912)
" 35 Indiana L.J. 361, 370 (1959)
" 32 Minnesota L.R. 76 (1947)
Fuerstein and Shestack, 45 Ill.L.R. 205 (1950)
Maher, 10 South Carolina L.R. 307, 310 (1957)

29 eg Joost, 6 New England L.R. 1, 28 (1970)

30 s 2 - 203 described as "the most important language in the Code" ibid 46.

31 Mich. Comp. Laws. Ann. s 554 139 (1)
Neal, 15 Wayne L.R 836, 849 (1969)

32 Ibid s 554 139 (2)

33 Ibid s 554. 139 (3)
Schier, 2 Prospectus 227, 233 (1968)

34 Supra 521

35 Cf the comparative ease with which a landlord, especially of a single family residence, may contract out of the statutory covenant imposed by the Model Residential Landlord-Tenant Code.

36 Supra 141

37 Section 2902. 2
Daniels, 59 Geo. L.J. 909, 933 (1971)
Ray, 16 Howard L.J. 366, 375 (1971)