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Landlord and Tenant Law - The Implied Warranty of Habitability in Residential Leases

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obtained while the juvenile was under the jurisdiction of the juvenile court to be later used in a criminal trial.

For the above mentioned reasons, the Arizona approach in *Maloney* is to be preferred over that of the Minnesota court in *Loyd*. When this question presents itself in other jurisdictions, *Maloney* is the precedent which should be followed.[27]

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Landlord and Tenant Law—The Implied Warranty of Habitability in Residential Leases—The recent case of *Green v. Sumski*[1] arose when landlord Jack Sumski, seeking possession of leased premises and back rent, commenced an unlawful detainer action in the San Francisco Small Claims Court. The tenant admitted nonpayment of rent and defended the action on the ground that the landlord failed to maintain the premises in a habitable condition. The small claims court awarded the landlord possession of the premises and entered a money judgment for back rent against the tenant. The tenant appealed to the San Francisco Superior Court and a de novo trial was held. The tenant submitted a copy of an inspection report of the San Francisco Department of Public Works disclosing about eighty housing code violations in the building as well as an order of the department scheduling a condemnation hearing. The tenant also submitted a detailed list of serious defects[2] which had not been repaired by the landlord after notice. The landlord

27. As yet, Wisconsin has not been faced with this problem. WIS. STAT. § 48.38(1) (1971), states:

> . . . The disposition of any child's case or any evidence given in the juvenile court shall not be admissable as evidence against the child in any case or proceeding in any other court. . . .

In Banas v. State, 34 Wis. 2d 468, 473, 149 N.W.2d 571, 574 (1966), the court stated:

> . . . Under the prohibitions of sec. 48.38(1) the disposition of the child's case and any evidence given in the juvenile court are not admissable as evidence against the child in any case or proceeding in any other court.

This statement was made with reference to the refusal to allow a juvenile adjudication to be used to impeach a juvenile witness. Whether it would apply in the same manner in a *Loyd* fact situation and what is meant by "evidence given in the juvenile court" remains to be seen.

1. Green v. Sumski, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

2. The supreme court listed some of the more serious defects described by the tenant including (1) the collapse and non-repair of the bathroom ceiling, (2) the continued presence of rats, mice, and cock-roaches on the premises, (3) the lack of any heat in four of the apartment's rooms, (4) plumbing blockages, (5) exposed and faulty wiring, and (6) an illegally installed and dangerous stove. *Id.* at 621, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

did not contest the presence of these defects. The Superior Court found that California's "repair and deduct" statutes[3] constituted the tenant's exclusive remedy and that such defects afforded the tenant no defense in an unlawful detainer action. Judgment was entered for the landlord awarding him possession and back rent.

On appeal to the Supreme Court of California that court adopted an implied warranty of habitability in all residential leases[4] and held that the landlord's breach of this warranty may be raised by a tenant as a defense in an unlawful detainer action.[5] In addition, the court held that the statutory "repair and deduct" provisions of the California Civil Code section 1941 *et seq.*[6] did not preclude this interpretation. The Supreme Court issued a peremptory writ of mandate directing the San Francisco Superior Court to vacate the judgment entered in this case and to proceed with the trial of the unlawful detainer action in accordance with these findings.

The modern trend of the courts to imply a warranty to habitability in residential leases must be considered with reference to the historical landlord-tenant doctrines. At common law the lease of real property was regarded as a conveyance of an interest in land[7] and as such the landlord-tenant relationship was governed by real property law. Under the real property conveyance theory the prin-

3. The pertinent California "repair and deduct" statutes are as follows: CAL. CIV. CODE § 1941 (West 1970).

> 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 . . . .

CAL. CIV. CODE § 1942 (West Supp. 1971)

> Repairs by lessee; rent deduction; limit. (a) If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs . . . does not require an expenditure greater than one month's rent of the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions. This remedy shall not be available to the lessee more than once in any 12-month period. (b) For the purposes of this section, if a lessee acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. . . .

See also CAL. CIV. CODE § 1941.1 (West Supp. 1971) which defines untenantable dwelling and CAL. CIV. CODE § 1942.5 (West Supp. 1971) which prohibits retaliatory eviction.

4. 10 Cal. 3d at 629, 517 P.2d at 1176, 111 Cal. Rptr. at 712

5. *Id.* at 636, 517 P.2d at 1178, 111 Cal. Rptr. at 718.

6. CAL. CIV. CODE § 1941 (West 1970); CAL. CIV. CODE §§ 1941.1, 1941.2, 1942, 1942.1, 1942.5 (West Supp. 1971).

7. *See* Callahan v. Martin, 3 Cal. 2d 110, 118, 43 P.2d 788, 792, 101 A.L.R. 871, 877 (1935) and cases cited therein; Minnis v. Newbro-Gallogly Co., 174 Mich. 635, 639, 140 N.W. 980, 982 (1913).

ciple of caveat emptor applied.[8] The tenant took the premises as he found them and assumed all risks as to the condition of the premises. The landlord made no warranties that the premises were in a tenantable condition or adapted to the purpose for which they were leased.[9] The general rule was that the landlord was not liable either to a tenant or to others for defective conditions in the demised premises whether the conditions existed at the time of the lease or developed thereafter.[10] The caveat emptor doctrine applied because the lessee was presumed to have inspected the premises prior to occupancy. To alleviate the harsh effects of the caveat emptor doctrine the courts developed several exceptions: The landlord could expressly covenant to put the premises in a tenantable condition and maintain them.[11] If the landlord knew of the defects and such defects would not be disclosed to the lessee upon reasonable inspection, the lessee would be justified in abandoning the premises and be relieved from any further obligations under the lease grounded upon the landlord's fraudulent concealment of the defect.[12] In the case of a furnished dwelling leased for a short period of time, some courts have recognized an implied warranty of habitability finding that the parties anticipate immediate occupancy without alteration and that it is difficult to inspect a furnished dwelling before renting.[13] Where the premises had not been fully constructed at the time the lease was made so as to allow the tenant an opportunity to inspect, the lessee was held not to be bound by the lease.[14]

The landlord had the primary obligation under the conveyancing theory to put the tenant in exclusive possession of the premises and refrain from disturbing him.[15] The tenant maintained complete control of the premises to the exclusion of the landlord.[16] The right

8. 2 R. POWELL, REAL PROPERTY, ¶ 233, 300 (Rohan ed. 1971).

9. Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888) and cases cited therein; Auer v. Vahl, 129 Wis. 635, 109 N.W. 529 (1906).

10. Del Pino v. Gualtieri, 265 Cal. App. 2d 912, 919, 71 Cal. Rptr. 716, 721 (1968).

11. *See, e.g.*, Johnson v. Prange-Geussenhainer Co., 240 Wis. 363, 2 N.W.2d 723 (1942).

12. Hinsdale v. McCune, 135 Iowa 682, 113 N.W. 478 (1907).

13. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470, 40 A.L.R. 3d 637 (1969), the court pointed out that this exception is artificial and the general rule of caveat emptor must be re-examined.

14. J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930).

15. *See* Quinn and Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, (1969) (Hereinafter cited as Quinn & Phillips).

16. *Id.* at 228.

of entry and control of the premises were denied to the landlord, and it followed that he was not held responsible for defects arising after the tenant was in possession.[17] The landlord was, therefore, under no duty to enter the land to make repairs unless such duty was expressly imposed by the lease.[18] The tenant's primary obligation under the conveyancing theory was to pay rent in consideration for the legal right to possession and use of the premises undisturbed by the landlord.[19]

While the courts viewed the lease between the landlord and tenant as a conveyance the contract concepts of mutually dependent covenants had little effect on the landlord-tenant relationship. The landlord's covenant to put the tenant in possession and quiet enjoyment of the premises and the tenant's promise to pay rent were held to be mutually independent unless the lease agreement expressly declared the covenants to be dependent. Accordingly, nonperformance of the lessor's obligations was held not to affect the lessee's duty to pay rent.[20] When the landlord actually evicted the tenant from the premises, the covenant of quiet enjoyment was breached and the tenant was relieved of the obligation to pay rent.[21] In the cases where the landlord substantially interfered with the tenant's use of the premises but did not actually evict the tenant, the courts developed the doctrine of constructive eviction whereby the tenant could rescind the lease and cease paying rent. Constructive eviction was justified only where the acts or omissions of the landlord substantially interfered with the lessee's beneficial use and enjoyment of the property and the tenant actually vacated the premises.[22] The lease would be rescinded and the rent obligation terminated as of the date of abandonment.[23] If the tenant remained in possession, full rent remained due.

As society has become more urbanized, the frame of reference in which the old conveyancing theories of property law operated

17. *See* Wannamacher v. Baldauf Corp., 262 Wis. 523, 55 N.W.2d 895 (1953).

18. *See, e.g.*, Johnson v. Prange-Geussenhainer Co., 240 Wis. 363, 2 N.W.2d 723 (1942).

19. Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 200-201, 172 N.E. 35, 37 (1930) and cases cited therein.

20. Quinn & Phillips, *supra* note 15, at 234.

21. Quinn & Phillips, *supra* note 15, at 229 n. 5 and 6.

22. Hannan v. Harper, 189 Wis. 588, 208 N.W. 255, 45 A.L.R. 1119 (1926); Bruckner v. Helfaer, 197 Wis. 582, 222 N.W. 790 (1929); Schaaf v. Nortman, 19 Wis. 2d 540, 120 N.W.2d 654 (1963).

23. Bruckner v. Helfaer, 197 Wis. 582, 222 N.W. 790 (1929); Schaaf v. Nortman, 19 Wis. 2d 540, 120 N.W.2d 654 (1963).

has changed. Modern apartment dwellers are no longer concerned with long-term leases of farmland. In *Javins v. First Nat'l Realty Corp.*,[24] Circuit Judge J. Skelly Wright premised his discussion of the need for change in the landlord-tenant laws on the fact that the land is no longer what the urban tenant bargains for. The value of the lease to the modern apartment dweller is that it gives him a place to live.

> When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[25]

Along with the recognition that the common-law conveyancing doctrines governing landlord-tenant relationships are incompatible with contemporary social conditions, some courts have begun to treat the lease as a contractual agreement rather than as a conveyance of land.[26] In applying contract principles to the lease situation some courts have held that the covenants in the lease are mutually dependent such that any substantial failure of the landlord to meet his obligations under the lease constitutes a failure of consideration and would defeat his action for rent as well as entitle the tenant to rescind the lease and abandon the premises.[27] Courts have also invoked the illegal contract theory to declare void leases in which the parties knowingly made a rental agreement in violation of local and state housing laws.[28]

The implication of a warranty of habitability in residential leases illustrates a modern trend in the area of landlord-tenant relationships. "Any realistic analysis of the lessor-lessee relationship leads to the conclusion that the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling."[29] Thus, in those cases where the lease does not expressly

24. 428 F.2d 1071 (D.C. Cir. 1970).

25. *Id.* at 1074.

26. Javins v. First Nat'l Realty Corp., 428 F.2d at 1075; Brown v. Southall Realty Corp., 237 A.2d 834 (D.C. App. 1968); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470, 40 A.L.R.3d 637 (1969); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

27. Reste Realty v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). This court allowed the tenant the election either of remaining in possession and paying a reduced rental rate or abandoning the premises.

28. Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. App. 1968); Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960).

29. Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

require the landlord to provide habitable premises in exchange for rent, or where the landlord undertakes no obligation to maintain or repair, courts have begun to imply warranties of fitness and habitability.[30] The *Javins* court set out three basic reasons to explain why that court was compelled to imply the warranty of habitability into residential leases. First, this warranty reflects the needs of the modern urban tenant who usually does not have the mechanical or financial ability to maintain the premises in a habitable condition[31](or, indeed, even the right to do so).[32] Second, society has come to realize that the consumer is in need of protection.[33] The superior bargaining position of the landlord, his knowledge of any defects on the premises[34] and the standardization of leasing contracts must be considered. Third, the implication would effectuate legislative-policy to eliminate the social problems caused by inadequate and dilapidated housing.[35]

30. The jurisdictions having adopted the implied warranty of habitability in addition to those cited elsewhere in this article are Colorado in Quesenbury v. Patrick, CCH Pov. L. Rep. [transfer binder "New Developments 1972-1974"] ¶ 15,803 (Colo. County Ct. March, 1972); Kansas in Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Louisiana in Reed v. Classified Parking System, 232 So. 2d 103 (La. App. 1970); Michigan in Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Missouri in King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); New Hampshire in Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); New York in Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971); Ohio in Glyco v. Schultz, 289 N.E.2d 919 (Ohio Mun. Ct. 1972). Minn. Stat. § 504.18, sub. 1 (L. 1971, Ch. 219 § 1, subd. 17) reads:

> In every lease or license of residential premises, whether in writing or parol, the lessor or licensor 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 or license, except when the disrepair has been caused by the wilful, malicious or irresponsible conduct of the lessee or licensee or a person under his direction or control; (c) to maintain the premises in compliance with the applicable health and safety laws of the state and of the local units of government where the premises are located during the term of the lease or license.

31. Javins v. First Nat'l Realty Corp., 428 F.2d at 1077.

32. The tenant may not have the right to repair in that doing so may involve ". . . entering areas outside the leasehold and tampering with another man's boiler." Quinn & Phillips, *supra* note 15, at 232.

33. Javins v. First Nat'l Realty Corp., 428 F.2d at 1077.

34. *Id.* at 1079.

35. *Id.* at 1077. The Supreme Court of Wisconsin in Pines v. Perssion, 14 Wis. 2d 590, 595-596, 111 N.W.2d 409, 412-413 (1961) stated:

> Legislation and administrative rules, such as the safe-place statute, building codes, and health regulations, all impose certain duties on the property owner with respect to the conditions of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner. . . . To follow the old rule of no implied warranty of habitability in leases would . . . be inconsistent with the current legislative policy concerning housing standards.

Wis. Stat. § 66.43(2), the Blighted Area Law, states:

An important question that must be answered before the doctrine of implied warranty of habitability can be invoked is by what standard should habitability be measured? The *Green* decision points out that during the past half century comprehensive housing codes have been enacted throughout the country.[36] These codes affirm that under contemporary conditions public policy compels landlords to bear the primary responsibility for maintaining clean, safe and habitable housing in the state of California.[37] The habitability standard recognized by California establishes that residential living quarters "will be maintained in a habitable state for the duration of the lease."[38] The landlord is not required to ensure that the premises are perfect, but the warranty does require that "bare living requirements be maintained."[39] "In most cases, substantial compliance with those applicable building and housing code standards will suffice to meet the landlord obligations under the common law implied warranty of habitability we now recognize."[40]

The *Javins* court held that the old no-duty-to-repair rule cannot co-exist with the obligations imposed on the landlord by the typical modern housing code and in the District of Columbia, the standards of the habitability warranty are set out in the housing regulations and are implied by operation of the law into leases of urban dwelling units covered by these regulations.[41]

The Wisconsin Supreme Court in *Posnanski v. Hood*,[42] however, has determined that neither the legislature nor the common council of Milwaukee intended that the housing code be an implied covenant in a lease mutually dependent with the tenant's covenant to pay rent. The Wisconsin court thereby refused to sanction rent withholding as a means of enforcing the housing code. The court found that to hold that the housing code is implied in a lease would

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It is hereby found and declared that there have existed and continue to exist in cities within the state, substandard, unsanitary, deteriorated, slum and blighted areas which constitute a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents of the state . . . .

36. 10 Cal. 3d at 628, 517 P.2d at 1175, 111 Cal. Rptr. 704.

37. *Id.* at 628, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

38. *Id.* at 638, 517 P.2d at 1182, 111 Cal. Rptr. at 718.

39. *Id.* at 638, 517 P.2d at 1182, 111 Cal. Rptr. at 718.

40. *Id.* at 638, 517 P.2d at 1183, 111 Cal. Rptr. at 719.

41. Javins v. First Nat'l Realty Corp., 428 F.2d at 1076-77 (1970).

42. 46 Wis. 2d 172, 174 N.W.2d 528 (1970). In this decision the Wisconsin court cites Saunders v. First National Realty Corp., 245 A.2d 836 (D.C. App. 1968) which held that the implied warranty of habitability is not measured by the standard of the housing code. Saunders was reversed in Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (1970).

circumvent the existing housing code enforcement procedures.[43] In addition, the court reasoned that the Milwaukee ordinances contain general terms such as "reasonably good state of repair" which leave a great deal of discretion to those enforcing the code.[44] Further, there are no standards for differentiating between consequential and inconsequential violations set out in the codes.[45] Thus, the court found the common council indicated an intent that the housing code be enforced administratively and judicial definition should not supplant administrative regulation.[46]

Factors to determine whether an implied warranty of habitability has been breached, in addition to violations of housing laws, regulations or ordinances were set out in *Mease v. Fox*.[47] They include: (1) the nature of deficiency or defect; (2) its effect on safety and sanitation; (3) the length of time for which it persisted; (4) the age of the structure; (5) the amount of the rent; (6) whether the tenant voluntarily, knowingly and intelligently waived the defects, or is estopped to raise the question of breach; (7) whether the defects or deficiencies resulted from unusual, abnormal or malicious use by the tenant.[48]

The *Green* court held that breach of the implied warranty of habitability may be used as a defense in an unlawful detainer action. An unlawful detainer action is a statutory action initiated by the landlord to recover leased premises because of nonpayment of rent.[49] The landlord shows that the tenant is in possession under a lease and failed to pay the stipulated rent.[50] The California statute provides for an action of unlawful detainer as a summary proceeding.[51] However, the *Green* court found that nothing in the statutory provisions governing unlawful detainer proceedings prohibits the

43. Posnanski v. Hood, 46 Wis. 2d at 182, 174 N.W.2d at 533.

44. *Id.* at 181, 174 N.W.2d at 532.

45. *Id.* at 181, 174 N.W.2d at 533.

46. *Id.* at 182, 174 N.W.2d at 533. WIS. STAT. § 704.07 (1969) Committee Comment 40E W.S.A. ch. 551-818 at page 651:

> . . . In the absence of a statute the landlord has no duty to keep leased premises in repair, and the tenant has a limited duty to make what are called "tenantable" repairs as necessary to prevent waste. Most leases today contain some kind of provision regarding repairs. Many informal tenancies, however, operate under the common law rule. The purpose of this section is to allocate a duty of repair between the landlord and the tenant in a fair manner . . . .

47. 200 N.W.2d 791 (Iowa 1972).

48. *Id.* at 797.

49. See Leifman v. Percansky, 186 Minn. 427, 429, 243 N.W. 446, 447 (1932).

50. *Id.* at 429, 243 N.W. at 447.

51. CAL. CODE CIV. PROC. ANN. § 1174 (1971).

assertion of any defense.[52] The tenant is not prohibited from interposing a defense which directly relates to the issue of possession such that the tenant would remain in possession of the premises if the defense prevails.[53] Extraneous matters not directly dealing with the issue of possession are precluded from introduction in the unlawful detainer action.[54]

The finding in the *Green* case was that the landlord's breach of implied warranty of habitability is directly relevant to the issue of possession.[55] In arriving at this holding the court reasoned that the tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of his implied warranty of habitability.[56] Where the tenant proves this warranty was breached and therefore his nonpayment of rent was justified, the landlord would not be entitled to possession of the premises because no rent would be due. In addition the court stated that the habitability defense would not frustrate the summary nature of the unlawful detainer action.[57]

The availability of the habitability defense in summary actions for possession has been established recently in several jurisdictions.[58] The decision of the court in *Academy Spires, Inc. v. Brown*[59] sustained the defense of the tenant in a summary dispossession action for nonpayment of rent when the tenant withheld rent and alleged that the landlord had breached the implied warranty. In *Marini v. Ireland*[60] the court permitted the tenant to defend a summary dispossession action for nonpayment of rent where the tenant withheld rent and made repairs alleging that she had offset the cost of those repairs against a portion of the rent. The Supreme Court of Minnesota has held that breach of a statutory covenant of habitability implied in leases of residential premises may be asserted as a defense in an unlawful detainer action for nonpayment of rent.[61] In its decision, the Minnesota court

52. 10 Cal.3d at 633, 517 P.2d at 1178, 111 Cal. Rptr. at 714.

53. *Id.* at 634, 517 P.2d at 1179, 111 Cal. Rptr. at 715.

54. *Id.* at 634, 517 P.2d at 1179, 111 Cal. Rptr. at 715.

55. *Id.* at 635, 517 P.2d at 1181, 111 Cal. Rptr. at 716.

56. *Id.* at 636, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

57. *Id.* at 637, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

58. Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (1970); Academy Spires v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526, 40 A.L.R.3d 1356 (1970); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

59. 111 N.J. Super. 477, 268 A.2d 556 (1970).

60. 56 N.J. 130, 265 A.2d 526, 40 A.L.R.3d 1356 (1970).

61. Fritz v. Warthen, ___ Minn. ___, 213 N.W.2d 339 (1973). In this decision the court found abandonment of the premises to be a prerequisite to the assertion of construc-

concluded that the covenant of habitability is mutual with the covenant to pay rent and the rent, or at least part of it, is not due under the terms of the lease when the landlord has breached the statutory covenants.

In Wisconsin, the specific question as to whether a tenant may assert the defense of breach of implied warranty of habitability in a summary proceeding has not been decided.[62] Wisconsin Statutes section 704.07, in absence of a contrary provision in a lease, delineates the duties of the landlord and the tenant to maintain and repair the leased premises. This section does not provide the tenant with a means of enforcement.

Wisconsin Statutes section 704.17 sets out the notice requirements necessary for a landlord to terminate tenancies for failure to pay rent or other breach by the tenant. Where the tenant fails to pay rent when due and the landlord has given the statutory notice the landlord may, pursuant to Wisconsin Statutes section 710.10, remove the tenant under Wisconsin Statutes chapter 299 or 813.

The new eviction procedure set out in Wisconsin Statutes section 299.40[63] as incorporated in the Small Claims Act, is a departure from the old unlawful detainer procedure of Wisconsin Statutes, chapter 291.[64] Wisconsin Statutes section 299.40 provides

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tive or partial constructive eviction as a defense in an unlawful detainer action for nonpayment of rent, setting out the following at page 343:

> We are aware that pending final determination of the tenant's claim of breach of the statutory covenants, the landlord will be deprived of all or a portion of the rent while the tenant remains in possession. However, during the period the landlord will continue to experience normal operating and overhead expenses. In a building where all or a substantial number of tenants withhold their rent, this could be devastating to a landlord. Because he is deprived of rental income, he may be unable to correct the very conditions that the tenant contends render the premises untenantable.

62. In the case of Malick v. Kellogg, 118 Wis. 405, 95 N.W. 372 (1903), the landlord brought an unlawful entry and detainer action for nonpayment of rent. The tenant defended on the ground that the landlord failed to perform certain agreements or conditions after the tenant took possession and alleged that payment of rent was therefore excused. The court held that such an agreement is not a defense to an action for unlawful detainer for non-payment of rent. The court reasoned that the landlord did not fail to put the tenant in possession nor did he evict the tenant from any part of the premises. In the case of Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970), the landlord brought an unlawful detainer action pursuant to Wisconsin Statute section 291.11. The court permitted the assertion, as a valid defense, the tenant's allegation that the landlord's attempt to terminate the tenancy and evict the tenant was motivated as retaliation for the tenant's complaint to the health authorities of a housing code sanitary violation.

63. WIS. STAT. § 299.40 as created by Wis. Laws 1969, ch. 284 § 24, eff. July 1, 1971.

64. Chapter 291, WIS. STAT. as it existed after the partial repeal by Wis. Laws 1969,

that an eviction action may be commenced by the person entitled to possession of the property to remove any person who is not entitled either to possession or occupancy of that property. It is the policy of the Small Claims Act to provide as summary a procedure as possible. Section 299.43, however, authorizes the defendant in an eviction proceeding, within the limitation of section 299.02, to counterclaim provided that the claim related to the rented property shall be considered as arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim. Whether the tenant may assert by way of counterclaim that the landlord breached the implied warranty of habitability is not determined. Despite the fact that the Wisconsin Supreme Court in *Pines v. Perssion*[65] afforded the tenant relief under the implied warranty of habitability theory, it seems, in light of *Posnanski* and the above noted statutes, that a tenant who withholds rent in an attempt to force a landlord to repair and maintain the leased premises puts himself in the position of possibly being evicted. In addition to the eviction remedy the landlord may look to sections 704.23, 704.27 or 704.29 for recovery of damages suffered. The landlord may also elect to remove the tenant under the newly created Wisconsin Statutes chapter 813[66] effective July 1, 1974, which provides under section 813.01 that a person claiming an interest in real property and the right to possession of that property may bring an action for possession. Under section 813.02 the plaintiff may demand damages. Under section 813.15 a person who withholds possession of the land from the person adjudged to be entitled to the land may be punished for contempt.

California Civil Code sections 1941 through 1942.1, in effect, authorize a tenant, after giving reasonable notice of dilapidations to the landlord, either to vacate the premises without further liability for rent or to make the repairs and deduct the cost of such repairs—if not greater than one month's rent—from his rent. The tenant may utilize the "repair and deduct" option no more than once in any twelve-month period. The *Green* court held that this statutory repair and deduct remedy was not designed as an exclusive remedy for tenants requiring maintenance and repair of the leased premises.[67] In arriving at this conclusion, the court points

ch. 87 was repealed by Wis. Laws 1969, ch. 284, § 7, effective July 1, 1971. See also, Boden, *1971 Revision of Eviction Practice in Wisconsin*, 54 MARQ. L. REV. 298 (1971).

65. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

66. Laws of 1973, ch. 189 § 16, effective July 1, 1974.

67. 10 Cal. 3d at 630, 517 P.2d at 1177, 111 Cal. Rptr. at 712.

out that the scope of the statute is limited in that the legislature framed the section only to encompass relatively minor dilapidations in leased premises. The *Green* court determined that the statutory remedies have been viewed as additional to and complimentary of the tenant's common law rights. Thus, the implication of the warranty of habitability is not precluded by the statutory remedy.[68]

The *Green* court instructed the trial court to determine whether the tenant's allegations of a breach of implied warranty were substantiated and, if so, then to determine the extent of the damages flowing from this breach.[69] The court recognized that the ascertainment of appropriate damages cannot be computed with complete certainty but the ". . . trial courts must do the best they can and use all available facts to approximate the fair and reasonable damages under all of the circumstances."[70]

A major advantage to the tenant in the implication of warranties of habitability into the lease contract is the number of remedies available upon breach of the warranty in addition to the constructive eviction remedy.[71] Under the implied warranty theory, the tenant has available the contractual remedies of damages, rescission or reformation of the lease, without the necessity of abandoning the premises.[72] The scarcity of adequate housing accommodations[73] means that the historic constructive eviction remedy is of

68. *Id.* at 631, 517 P.2d at 1177, 111 Cal. Rptr. at 713.

69. *Id.* at 639, 517 P.2d at 1183, 111 Cal. Rptr. at 714.

70. *Id.* at 640, 517 P.2d at 1183, 111 Cal. Rptr. at 717.

71. For example, in Schaaf v. Nortman, 19 Wis. 2d 540, 120 N.W.2d 654 (1963) the court held that the landlord was entitled to unpaid rent where the tenant claimed deficiencies in the apartment and entitlement to constructive eviction. The Wisconsin court citing 32 AM. JUR. *Landlord and Tenant* § 246 (1948) applied the following general principles:

> . . . It is now well established that any disturbance of the tenants' possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises, causing him to abandon them, amounts to a constructive eviction, provided the tenant abandons the premises within a reasonable time. 19 Wis. 2d at 543, 120 N.W.2d at 656.

72. Lemle v. Breeden, 51 Hawaii 426, 436, 462 P.2d 470, 475, 40 A.L.R.3d 637, 645 (1969).

73. The report of the NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) at page 257 points out that during the decade of the 1960's the trend of the country as a whole was toward less substantial housing particularly in the cities where the situation continues to deteriorate. At page 259 the Commission states:

> Thousands of landlords in disadvantaged neighborhoods openly violate building codes with impunity . . . Yet in most cities, few building code violations . . . are ever corrected, even when tenants complain directly to municipal building departments. There are economic reasons why these codes are not rigorously enforced.

little solace to a lessee who may be unable to find another dwelling of any kind. The Wisconsin Court in *Pines*[74] implied a warranty of habitability in the lease of a furnished house, disregarding the constructive eviction doctrine, holding that the tenants were absolved from any liability for rent under the lease and their only liability was for the reasonable rental value of the premises during the time of actual occupancy. Among the jurisdictions recognizing the implied warranty of habitability in leased residential property recent decisions have indicated that where breach of the warranty is established, the "tenant's damages shall be measured by the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary conditon."[75]

Although courts and legislatures have recognized that the needs of the modern, urban tenant differ radically from his agrarian predecessor, the old landlord-tenant conveyance principles continue to play a role in judicial construction of leases for residential premises. The trend, however, is now toward judicial and legislative abrogation of the antiquated common law doctrines.

As the doctrine of implied warranty of habitability develops, courts and legislators have encountered and solved some of the problems involved in recognition of a new legal doctrine. In *Jack Spring, Inc. v. Little*,[76] the Illinois court considered the argument that any change in the long established rules of landlord and tenant law should be effected by the legislature. The court admitted that the rules are a product of judicial decision, and the court has a duty to change the law when circumstances so require.

One problem in the application of the implied warranty of habitability that the *Green* court and other courts have attempted to solve is defining the scope of the warranty. The question in essence is to what extent should the landlord be held to impliedly

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Bringing many old structures up to code standards and maintaining them at that level would often require owners to raise rents far above the ability of local residents to pay. In New York City, rigorous code enforcement has already caused owners to board up and abandon over 2,500 buildings rather than incur the expense of repairing them.

74. 14 Wis. 2d 590, 597, 111 N.W.2d 409, 413 (1961).

75. 10 Cal. 3d at 638, 517 P.2d at 1183, 111 Cal. Rptr. at 719 citing, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413, 417 (1970); Boston Housing Authority v. Hemmingway, 293 N.E.2d 831, 845 (Mass. 1973).

76. 50 Ill. 2d 351, 366-367, 280 N.E.2d 208, 217 (1972).

warrant that the premises are habitable? The *Green* court found that "bare living requirements must be maintained" which, in most cases, means substantial compliance with applicable building and housing code standards. The *Posnanski* court refused to imply that the housing codes of Milwaukee are incorporated into the lease of residential premises. The New Jersey court in *Samuelson v. Quinones*[77] perhaps extended the public policy reasoning behind the *Posnanski* decision and set out a possible handicap to the development of the implied warranty doctrine when the court stated:

> We take judicial notice of the fact that there is an acute shortage of low-income housing in the City of Newark, and that such housing which exists is frequently not in full compliance with the city's housing ordinances and building codes. We must also recognize the hard practical facts of life that if the landlords, under existing conditions, were to be deprived of all rents because of noncompliance with such ordinances and building codes, there would be far fewer available low income housing units—landlords would either abandon their properties, or if they spent the money needed to comply with the ordinances and codes, the amount of rent they would have to charge would price low income tenants out of the market. The problem seems to be almost insoluble. [sic].[78]

The doctrine of implied warranty of habitability and fitness in residential leases appears to be a progressive dual function doctrine: first, it provides optional remedies to the tenant where the demised premises are unfit for habitability, and secondly, it serves to pressure landlords into maintaining the premises they lease. Where the tenant is able to invoke the implied warranty remedies—paying only the reasonable value of the premises while they are in the uninhabitable condition, withholding rent and making repairs, or withholding rent to force the landlord to make repairs—the courts and legislatures must also weigh the economic impact of this theory on the landlord. The landlord may find the only economic options feasible are to abandon the property or to raise rent to cover the cost of repairs. The tenant's housing situation would, therefore, be little aided by the implied warranty of habitability doctrine.

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77. 119 N.J. Super. 338, 291 A.2d 580 (1972).
78. *Id.* at ____, 291 A.2d at 583.