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Landlord and Tenant: Repairing the Duty to Repair

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LANDLORD AND TENANT: REPAIRING THE DUTY TO REPAIR

The California courts subscribe to the centuries-old rule of the common law[1] that a landlord is not responsible for the condition of a dwelling which he leases.[2] Due to significant differences in the nature of modern housing conditions, this rule has lost its relevance to the modern dwelling lease transaction. The inflexibility of the courts with regard to the duty to repair derives from the historic judicial predilection for uniformity in the law of property. However, the inability of today's courts to frankly admit that the outworn common law rule is wholly inappropriate in modern times has had serious implications for our society. The landlord-tenant relationship today is in a state of turmoil. Of real significance for the members of the legal community, however, is the fact that the archaic law of landlord and tenant is in reality a substantial contributing factor to the problem. The time for courts to adopt a new approach to the duty to repair residential dwellings is overdue. This comment will trace the evolution of California's law concerning the responsibility for the repair of a leased dwelling, demonstrating that the theoretical underpinnings of the existing rules have long disappeared. Additionally, the comment will suggest that the courts depart from prior decisions restricting the landlord's responsibility for repairs, and adopt an implied warranty of habitability consonant with the standards of the recently-added Civil Code section 1941.1.[3]

EVOLUTION OF THE DUTY TO REPAIR

Common Law Background

The rules concerning the duty to repair evolved in an agrarian society where the possession of land was given substantial legal sig-

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1 The concept of the leasehold as an estate in the land of the lessor and not a mere contractual license for the use of the lessor's land was firmly established by 1499. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-17 (5th ed. 1942). The doctrine of *caveat emptor* colored the background of the estate concept of the lease for years. Hence, it was the well-settled rule at common law that, in absence of an agreement to the contrary, the landlord was under no obligation to his tenant to put the demised premises in repair or perform repairs at any time thereafter. *See* 18 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 215-17 (2d ed. 1901) [hereinafter cited as ENCYCLOPEDIA OF LAW]; 2 R. POWELL, REAL PROPERTY ¶¶ 221[1], 233 (1967).

2 Gustin v. Williams, 255 Cal. App. 2d Supp. 929, 62 Cal. Rptr. 839 (1967); Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963); Brett v. Berger 4 Cal. App. 12, 87 P. 222 (1906).

3 CAL. CIV. CODE § 1941.1 (West Supp. 1971). For a discussion, *see* text accompanying note 85 *infra*.

nificance.[4] The lease was considered a sale of a personal interest[5] in realty for a term, conveying to the tenant an estate in the land of the landlord.[6] The tenant was primarily interested in the land for farming.[7] The condition of any buildings on the premises was of secondary importance to the tenant since they were usually simple wooden structures which the tenant could maintain without great difficulty.[8] As with other sales at common law, the doctrine of *caveat emptor* created a presumption that the buyer had conducted a reasonable inspection of his purchase and had assumed all responsibility for defective conditions.[9] Since the tenant could determine whether the property was suited to his intended uses by such an inspection, the landlord was not obligated to give assurances that the leased premises were satisfactory for the tenant's needs.[10] The landlord's sole responsibility was the disclosure of dangerous concealed defects which the tenant could not discover in his inspection.[11]

Once the tenant had possession of the property, the burden of making repairs rested with him.[12] He was required to return the premises to the landlord at the end of the term in substantially the same condition as existed when he went into possession, with allowance being made for ordinary wear and tear.[13] The tenant was not, however, bound to make all repairs, but only those minor repairs required to prevent waste to the reversionary estate, or to remedy any damage caused by his own negligence.[14] Neither party had any duty to make substantial or costly repairs in the absence of some arrangement for these repairs in the lease.[15]

The parties to a lease could alter these basic obligations through lease covenants. If the tenant desired the landlord to repair and

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[4] *See* Quinn & 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].

[5] Because it was personalty, the leasehold estate was called a "chattel real." 31 C.J.S. *Estates* § 12 (1964).

[6] 1 H. TIFFANY, LANDLORD AND TENANT § 12a (1910) [hereinafter cited as TIFFANY]; 2 POWELL, REAL PROPERTY ¶ 221[1] (1967).

[7] *See* Quinn and Phillips, *supra* note 4, at 227. *See also* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 214-15 (5th ed. 1942).

[8] "The tenant . . . was expected to be the omnicompetent man fully prepared to see to his own shelter, heat and light." Quinn & Phillips, *supra* note 4, at 231.

[9] *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95 (3d ed. 1964).

[10] TIFFANY, *supra* note 6, § 86a.

[11] Even this duty was limited. If the defects were just as apparent to the landlord as to the tenant, or if the tenant had actual knowledge of the defect, the landlord had no duty of disclosure. ENCYCLOPEDIA OF LAW, *supra* note 1, at 224-25.

[12] 16 R.C.L. § 603 (1929).

[13] ENCYCLOPEDIA OF LAW, *supra* note 1, at 246.

[14] 51C C.J.S. *Landlord and Tenant* § 366(1) (1968); 16 R.C.L. § 603 (1929).

[15] 16 R.C.L. § 603 (1929).

maintain buildings on the leased premises, he could require a covenant for repairs in the lease instrument.[16] However, the existence of a covenant for repairs was no guarantee that the repairs would be performed. If the landlord failed to satisfy his obligations under the covenant, the tenant could sue for his damages resulting from the breach or make the repairs himself and sue for their cost.[17] The landlord's breach did not constitute a defense in an action for rent because the common law considered the rent covenant independent of the covenant to repair.[18] If the tenant remained in control of his estate, he remained liable for the rent, regardless of the defaults of the landlord.[19]

When the courts were faced with the distinctly different circumstances of tenants living in a city, especially in multi-family apartments, they recognized that the old rules of property law were being strained.[20] Nevertheless, even when modifying the common law in order to accommodate the tenement arrangement, the courts steadfastly clung to the old "sale of an estate" concept. For example, by means of the fiction of constructive eviction, judges tried to relieve the tenant of his liability for rent when the comfort of his home had been seriously disrupted.[21] The covenant of quiet enjoyment thereafter protected not only the tenant's possession but also his beneficial enjoyment of the premises. This invention confused a deprivation of possession with a deprivation of services. Nevertheless, the courts refused to accept the simple fact that the tenant was

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16 A covenant for repairs in the lease is adequately supported by consideration, and thus enforceable. However, a subsequent promise to repair not supported by some new consideration is gratuitous, and thus unenforceable. 2 R. POWELL, REAL PROPERTY ¶ 233[1] (1967).

17 TIFFANY, *supra* note 6, § 182r(2). Early courts of equity refused to specifically enforce a covenant to repair since to grant specific relief would require prolonged supervision of the performance by the court. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 62 (2d ed. 1948). The landlord could not be put in default of his duty to repair unless he had notice of the condition of disrepair and had failed to repair within a reasonable time. TIFFANY, *supra* note 6, § 87d(6).

18 1 J. TAYLOR, THE AMERICAN LAW OF LANDLORD AND TENANT § 330 (9th ed. 1904); Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423 (1915). *See also* RESTATEMENT OF CONTRACTS § 290 (1932).

19 Quinn & Phillips, *supra* note 4, at 230.

20 For example, the common law did not require a landlord to rebuild structures on the leased premises which had been destroyed by fire. Since the tenant still had possession of the land, he was liable for the rent. In an urban setting, however, the tenant frequently leased nothing but a room in a building, sometimes in an upper story. Should the tenant's room be destroyed by fire, the common law would not excuse the tenant from his duty to pay rent. Hallett v. Wylie, 3 Johns. (N.Y.) 44, 3 Am. Dec. 457 (1808). Most states have abandoned this rule in light of its hardship on the tenant. *See, e.g.*, Ainsworth v. Pitt, 38 Cal. 89 (1869). *See also* TIFFANY, *supra* note 6, § 182m(2) and cases cited therein.

21 The doctrine of constructive eviction gave the courts an opportunity to infiltrate the more flexible contract doctrine of mutual dependency of covenants into the law of landlord and tenant. 3A A. CORBIN, CONTRACTS § 686 at 242-43 (1960).

buying both a dwelling and the continuing maintenance services of the landlord with his rent.[22] Similarly, the courts felt compelled to rationalize the landlord's duty to repair common stairways with awkward real property concepts. The landlord was held responsible for the safe condition of the stairways in his apartment building because these areas did not pass with the demised premises, but remained under the landlord's control.[23] The landlord, by renting rooms at the top of a stairway, had "induced" the tenants to use the stairway and, consequently, owed them the same duty as any other property owner who induced outsiders to use his land.[24]

Civil Code Sections 1941 and 1942

The common law rules concerning the repair of leased dwellings were altered in California in 1872 with the adoption of Civil Code sections 1941 and 1942. As originally enacted, section 1941 obligated the lessor of a building intended for human occupation to put it into a condition fit for such occupation, and to repair all subsequent dilapidations, except those caused by the tenant's negligence, which rendered the premises untenantable.[25] Section 1942, as originally enacted, allowed a tenant to give the landlord notice of dilapidations which he should repair, and if the landlord failed to repair the premises within a reasonable time, the tenant was permitted to undertake the repairs himself, deducting any costs from the rent money or recovering them in an action against the landlord.[26]

These statutes represented an extreme departure from the common law no-duty rule. On its face, section 1941 established a duty of repair and maintenance for dwellings, office buildings and indeed, any leased building intended for human occupation.[27] The common law permitted a tenant to repair dilapidated conditions when the landlord had breached a covenant to repair and recover his costs in the courts.[28] Section 1942, however, permitted the

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22 *See* Quinn & Phillips, *supra* note 4, at 231-39.

23 *See* Annot., 26 A.L.R.2d 468 (1951) and cases cited therein.

24 ENCYCLOPEDIA OF LAW, *supra* note 1, at 220-21.

25 CAL. CIV. CODE § 1941 (Springer 1872) provided: "The lessor of a building intended for the occupation of human beings must put it into a condition fit for that purpose, and repair all subsequent dilapidations thereof, except such as are [occasioned by the lessee's ordinary negligence]."

26 CAL. CIV. CODE § 1942 (Springer 1872) provided: "If, within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expenses of such repairs from the rent, or otherwise recover it from the lessor."

27 *But cf.* Wall Estate Co. v. Standard Box Co., 20 Cal. App. 311, 128 P. 1020 (1912), which excluded commercial premises from the scope of the duty to repair in Civil Code section 1941.

28 *See* text accompanying note 17 *supra.*

tenant not only to repair without benefit of a covenant in the lease, but also to recover his costs by an interruption of the rent.[29]

In light of the housing conditions in existence in California in 1872, the wisdom of such a novel departure from the common law rule is subject to question. In general, an era of agriculture was opening up for the state.[30] Southern California was witnessing the subdivision of the huge Spanish ranchos into plots better suited to individual cultivation.[31] In Northern California, towns were developing,[32] but farming and agricultural industries were the chief pursuits of the population.[33] The homes of this period were typical of any agrarian society: single family dwellings made largely of wood, most frequently built by the dweller himself. San Francisco was the only California city in that era that could compare in size or population with the urban centers on the East Coast. There is evidence, however, that most of the dwellings in San Francisco, unlike many eastern cities where slums were already spreading,[34] were also simple wooden structures, best suited for occupation by a single family.[35] On the whole, there is little to show that statewide housing conditions in 1872 warranted the substantial changes in the common law no-duty rule set forth in Civil Code sections 1941 and 1942. The common law rules were developed for and functioned most practically in an agrarian society. In the absence of a significant variation from that agrarian setting, the traditional approach to the duty to repair probably represented the more equitable arrange-

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29 The only precedent for such an interruption in rent payments exists in the civil law, *See, e.g.*, Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon Termination of a Lease Should Be Revised*, 54 CALIF. L. REV. 1141, 1148-49 (1966).

30 "[W]ithin the last few years a new and better era has opened up for California. She has become an agricultural State—a country of farmers." C. BRACE, THE NEW WEST (CALIFORNIA IN 1867-1868) 345 (1869).

31 G. DUMKE, THE BOOM OF THE EIGHTIES IN SOUTHERN CALIFORNIA 12 (1944).

32 For example, in 1870 the township of San Jose had 12,525 inhabitants. However, available figures do not suggest that housing was a particular problem. In San Jose at that time there were 2,547 families and 2,661 houses. *See* F. HALL, THE HISTORY OF SAN JOSE 327 (1871).

33 For an illustration of the diversified agricultural industries in California in the 1870's, *see* A. ROLLE, CALIFORNIA: A HISTORY 341-72 (1963).

34 *See The Slums of New York—1857, quoted in* C. GLAAB, THE AMERICAN CITY—A DOCUMENTARY HISTORY 267-78 (1969).

35 "[T]he earthquakes to which the city and the coast are always exposed, and which within a few years have frequently visited them, admonish the citizens to build strong and low, even for business purposes; and, with the greater abundance and less price of lumber as a building material, lead them more to detached and wooden dwellings than is common in large cities. Brick tenement houses are comparatively rare. Most of the houses are separate cottages, large and pretentious with few, small and neat and simple with the many. The wide reach of the sand hills and intervening valleys, that make up the peninsula on which the city is located, encourages this independent, spreading habit of building. . . ." *Samuel Bowles on San Francisco, 1869, quoted in* C. GLAAB, THE AMERICAN CITY—A DOCUMENTARY HISTORY 204 (1969).

ment. The plan encompassed by sections 1941 and 1942 would unjustifiably expose the landlord to the schemes of mischievous tenants who could simply repair themselves into splendid homes, all at the expense of the landlord.

Accordingly, the next session of the Legislature amended both statutes.[36] The parties to a lease were allowed to waive the landlord's duty set forth in section 1941.[37] Moreover, the tenant's repair and deduct remedy in section 1942 was limited to an expenditure not greater than one month's rent of the premises. The clause permitting the tenant to "otherwise recover [repair costs] from the lessor" was replaced with a clause permitting the tenant to vacate the premises without further liability under the lease.[38]

The California Supreme Court, in interpreting these statutes, took notice of the legislative intent to limit the responsibility of the landlord for repairs.[39] Under the narrow construction given statutes which are in derogation of the common law, the court limited the landlord's duty to "the extent of the privilege conferred upon the tenant" in section 1942.[40] If the landlord failed within a reasonable time to repair untenantable conditions of which he had notice, the tenant's only remedies were either to spend one month's rent for repairs, or vacate free of liability under the lease.[41] The landlord's responsibility for injuries remained unaltered by these statutes. In the absence of fraud, concealment, or a covenant to repair in the lease, the landlord had no liability for injuries to the tenant or his guests.[42]

A 1970 amendment to section 1942 has further limited the tenant's repair and deduct remedy by restricting its exercise to once

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36 AMENDMENTS TO THE CALIFORNIA CODES § 205-06 at 245-46 (20th Sess. 1873-74), *amending* CAL. CIV. CODE §§ 1941, 1942 (Springer 1872).

37 As amended, CAL. CIV. CODE § 1941 (West 1954) provides: "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, except as are [occasioned by the lessee's want of ordinary care]."

38 As amended in 1874, CAL. CIV. CODE § 1942 (West 1954) provided: "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 do [*sic*] not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions." A 1970 amendment to this section has restricted the exercise of the repair and deduct remedy to once every twelve-month period. *See* text accompanying note 43 *infra*.

39 Van Every v. Ogg, 59 Cal. 563, 566 (1881).

40 *Id.*

41 Sieber v. Blanc, 76 Cal. 173, 18 P. 260 (1888).

42 Priver v. Young, 62 Cal. App. 405, 216 P. 966 (1923).

in any twelve month period.[43] The repair and deduct remedy, even prior to this amendment, was of little use to the modern tenant in a substandard dwelling because the one-month's-rent limitation precluded him from repairing all but the most minor dilapidations.[44] Fear of retaliation from the landlord for the exercise of this remedy[45] and the presence of broad waivers of rights in standard form leases[46] have also diminished the effectiveness of this remedy. The additional restriction in the 1970 amendment substantially eliminates the repair and deduct remedy as a practical solution for conditions of disrepair in a leased dwelling. The alternative of vacating within a reasonable time provides no relief to those tenants whose efforts to find substitute housing are frustrated by a tight housing market.[47] Consequently, the remedial effect of the rights granted in section 1942 has, in modern times, been nullified.

Housing Codes

With increasing urbanization, the California Legislature was forced to impose some controls on housing construction and certain minimum standards for the maintenance of existing dwellings. These control devices exist today in the form of a State Housing Law[48] and an elaborate system of regulations for its administration[49] by a Department of Housing and Community Development[50] or by local building or housing departments.[51] The common law rule that a

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[43] CAL. CIV. CODE § 1942 (West Supp. 1971) provides:

"(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, and deduct the expenses of such repairs from the rent, or the lessee may vacate 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 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. The presumption established by this subdivision is a presumption affecting the burden of producing evidence."

[44] One commentator has described the repair and deduct remedy as "virtually useless." Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HAST. L.J. 287, 293 (1970) [hereinafter cited as Loeb].

[45] *See* Note, *Retaliatory Eviction—Is California Lagging Behind?*, 18 HAST. L.J. 700 (1967). *See* Schweiger v. Superior Court, 3 Cal. 3d 507, 90 Cal. Rptr. 729 (1970). CAL. CIV. CODE § 1942.5 (West Supp. 1971) prohibits retaliatory eviction where the landlord's dominant motive is retaliation against the tenant for exercising his statutory rights. For a good treatment of this statute, *see* Moskovitz, *Retaliatory Eviction—A New Doctrine in California*, 46 CAL. S.B.J. 23 (1971).

[46] Note, *The Duty of Maintenance of Multiple Dwellings in California*, 18 STAN. L. REV. 1397, 1399 (1966).

[47] *See* note 73 *infra*.

[48] CAL. H. & S. CODE §§ 17910-95 (West 1964).

[49] CAL. ADM. CODE tit. 8, §§ 17000-926 (1967).

[50] CAL. H. & S. CODE §§ 17920-21 (West Supp. 1971).

[51] *Id.* §§ 17960-61.

landlord had no duty to repair a leased dwelling has been altered by this housing code in as much as the landlord can be ordered to correct a condition that has become a nuisance[52] according to standards established by the code.[53] Housing code enforcement, however, is an increasingly difficult task because the legislative objective is to maintain an existing housing supply that gets older every year.[54] Thus, whereas the administrative agency charged with code enforcement can effectively regulate new construction through the issuance or denial of building permits, the agency has little control over what has already been built.[55] Detection of violations is hampered by the sheer size of the task and the lack of funds and manpower needed to conduct adequate inspections.[56] Enforcement efforts must necessarily be limited to the most grievous violations.

The enforcement agency is empowered to order compliance with code standards, abate nuisances, or in extreme cases, impose criminal sanctions.[57] Nevertheless, when a defiant landlord wants to circumvent repair orders, he may rely on a time-consuming system of administrative appeals which will allow him to postpone compliance for years.[58] Criminal penalties are slight and seldom imposed.[59] Moreover, the theory of the criminal sanction in housing code enforcement has been criticized as unsound because its immediate objective is the punishment of the landlord, not the improvement of the dwelling.[60]

The California courts have not extended remedial rights to the private tenant for a bare violation of a housing code, reasoning that

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52 *Id.* § 17982 (West 1964).

53 *See, e.g.*, INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM HOUSING CODE (1970 ed.). For other sources of housing code standards, *see* CAL. H. & S. CODE § 17922 (West Supp. 1971). Any standards adopted by a local enforcement agency which vary from those set forth in state law must be at least equivalent to the state standards. CAL. H. & S. CODE § 17951 (West Supp. 1971).

54 Grad, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 2, 3 (National Comm'n on Urban Problems, Research Report No. 14, 1968).

55 *Id.*

56 Loeb, *supra* note 44, at 293-95; Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 804-09 (1965); Joost, *Housing and the Law—An Overview*, 6 NEW ENGLAND L. REV. 1, 13 (1970).

57 CAL. H. & S. CODE §§ 17982, 17995 (West 1964).

58 "Numerous hearings at different levels within the agency are required to gain the owner's compliance. Failure to secure compliance at the administrative level necessitates a reliance on the city attorney or county counsel to bring suit. . . . Finally, the court may grant numerous continuances to the owner in an effort to achieve compliance. Thus an owner can often string out the enforcement process for years." Loeb, *supra* note 44, at 294-95 (footnotes omitted).

59 Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 318-19 (1965).

60 Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1275-81 (1966).

61 Metcalf v. Chiprin, 217 Cal. App. 2d 305, 309, 31 Cal. Rptr. 571, 574 (1963). *But see* Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967)

this would create a new contract between the parties.[61] The courts have eroded this rule where the landlord's violation of a safety ordinance intended for the protection of a class of persons of which the plaintiff is a member has resulted in the type of injury which the statute was intended to prevent. Thus, in *Roxas v. Gogna*[62] a landlord leased a lodging house which violated a local statute requiring such buildings to be equipped with a fire escape. The plaintiff was injured when he was forced to jump from the second story to escape a fire in the building. The court disregarded the landlord's contention that the statute was unenforceable since it failed to designate the person on whom the duty to construct the fire escape rested.[63] The court noted that a fire escape is a permanent addition to a building and held that to relieve the landlord of his duty to provide a fire escape would constitute an evasion of the statute's purpose.[64]

The decisions finding negligence in violations of safety statutes[65] offer little relief to the tenant who wishes to improve the condition of his dwelling. They permit recovery only for injuries caused by the violation of a specific type of statute.[66] The tenant remains powerless to remedy his landlord's non-compliance with general housing codes which, while created for the benefit of the tenant, are not intended to prevent his injury.[67] Thus, California's housing codes, assiduously designed for the repair and maintenance of leased dwellings, remain in a statutory limbo, enforceable only by agencies that are too often incapable of properly enforcing them.

THE MODERN DWELLING LEASE TRANSACTION

The Bargaining Positions of the Parties

The rules concerning the duty to repair, as they have developed, are pitifully out of balance with the facts of the modern

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where the court recognized the policy implicit in housing legislation and permitted a tenant to establish a constructive eviction and recover damages due to a vermin infestation in her apartment.

[62] 41 Cal. App. 2d 234, 106 P.2d 227 (1940), *noted in* 14 S. CAL. L. REV. 194 (1941).

[63] Roxas v. Gogna, 41 Cal. App. 2d 234, 238-39, 106 P.2d 227, 229-30 (1940).

[64] *Id.* at 241, 106 P.2d at 231. The landlord's lack of knowledge of the violation did not affect his liability. *Id.* at 240, 106 P.2d at 230.

[65] Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17 (1950); McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); Ewing v. Balan, 168 Cal. App. 2d 619, 336 P.2d 561 (1959); Black v. Partridge, 115 Cal. App. 2d 639, 252 P.2d 760 (1953).

[66] Grant v. Hipsher, 257 Cal. App. 2d 375, 64 Cal. Rptr. 892 (1967).

[67] This position fails to appreciate the fact that the psychic and social effects of substandard housing can be far more devastating than physical injuries. *See generally* Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967); R. HURLEY, POVERTY AND MENTAL RETARDATION (A CAUSAL RELATIONSHIP) (1969); M. HARRINGTON, THE OTHER AMERICA (1962).

dwelling lease transaction. California has become one of the most urbanized states in the nation.[68] A rapidly increasing population[69] has placed great pressure on the existing stock of housing.[70] The disadvantaged segments of the society are most severely affected by the housing shortage.[71] In 1963, the Governor's Advisory Commission on Housing Problems estimated that a family with an annual income below $6,000 was virtually precluded from buying a new home.[72] The market for the low and moderate-income home buyer is necessarily narrowed to older, deteriorating structures which have trickled down through a number of households, each successively less interested in or capable of maintaining the building.[73] The process of urban renewal has also decreased the supply of cheap housing through the destruction of substandard homes in blighted areas.[74] Rather than invest in worn-out skeletons of what were once homes, and faced with the rather stark fact that a family cannot long endure without shelter, these households are seeking apartment accommodations in ever-increasing numbers.[75] Unfortunately, the move to apartment living has improved the housing conditions for far too few families.[76] A constant consumer demand has permitted investors to fix rents approximately according to what the market will bear. The result can be explained as follows:

> [E]xcessive payments for rent are made by a substantial number of California's families. It is generally accepted that a family should not spend more than 25 percent of its income for housing. However, almost

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68 "At the time of the census of 1960, only the District of Columbia, whose population was 100 percent urban, and New Jersey, with 88.6 percent, exceeded Rhode Island and California which were virtually tied at 86.4 percent urban. . . ." CALIF. DEPT. OF FINANCE, CALIFORNIA STATISTICAL ABSTRACT at vii (10th ed. 1969).

69 "California's population has doubled every 20 years since 1860. Since 1965, the increase has been about 909 persons per day. In the last decade, civilian population has increased approximately 454,600 per year on the average. The State's population as of July 1, 1969 was 19,834,000 . . . ." *Id.*

70 Although recent figures were not available at the time of this publication, the Housing Census of 1960 shows that a sizeable portion of the housing in California is substandard. Of the 5,465,870 dwelling units existing in California in 1960, approximately 10 percent (585,540) were classified as deteriorating or dilapidated. U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF HOUSING: 1960, vol. I, *State and Small Areas*, pt. 2: *Alabama—Connecticut* 6-7 (1963).

71 For example, in 1967 52.5 percent of the non-white population of the San Francisco—Oakland metropolitan area resided in poverty areas, whereas the figure for the white population was 8.7 percent. For the Los Angeles—Long Beach area these figures were 55.9 percent and 8.3 percent respectively. U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF THE POPULATION, *Poverty Areas in the 100 Largest Metropolitan Areas* 21-22 (Supp. Rep. No. PC(S1)-54 Nov. 13, 1967).

72 GOVERNOR'S ADVISORY COMM'N ON HOUSING PROBLEMS, REPORT ON HOUSING IN CALIFORNIA 35 (1963).

73 T. Nicholson, *The Great Housing Crisis*, NEWSWEEK, June 22, 1970, at 69.

74 *See* note 72 *supra*, at 46-47.

75 *See* M. NEUTZE, THE SUBURBAN APARTMENT BOOM ch. 2 (1969).

76 Of the 585,540 dwellings in California classified as deteriorating or dilapidated in 1960, 55 percent (322,377) were occupied by renters. U.S. CENSUS OF HOUSING: 1960, note 70 *supra*.

> 400,000 renter households in 10 metropolitan areas paid 35 percent or more of their income for shelter in 1960. Significantly, 95 percent of these earned less than $4,000 a year. Obviously, families who pay this much for shelter must forego adequate food and clothing.[77]

Since rents are uniformly high,[78] a prospective tenant, once he has found an apartment he can afford,[79] is in no position to bargain with the landlord over the maintenance of the dwelling. He must accept the terms of the lease as they are or he will simply have to keep shopping.[80] Residential leases are almost always standard form contracts filled with legal terminology and waivers that are never even read, much less understood by the frustrated tenant.[81] In the eyes of the law, however, the parties to the lease have simply not chosen to impose maintenance responsibilities on the landlord through an appropriate covenant in the lease.[82]

Inaccuracies in the Traditional Approach

Certain other assumptions of the common law which fail to reflect the actual positions and intentions of the parties to a modern dwelling lease should be examined.[83] The farmer tenant of hundreds of years ago was interested in renting land for cultivation, the buildings on the land being of secondary importance to him. The modern tenant rents an apartment solely for its suitability as a dwelling. Unlike the agrarian tenant who desired possession of the land free of the controls of the landlord, the modern apartment dweller is completely dependent on the landlord for supporting

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[77] GOVERNOR'S ADVISORY COMM'N ON HOUSING PROBLEMS, SUMMARY OF HOUSING IN CALIFORNIA, *Existing Conditions, Housing Market* (1963).

[78] The average contract rent in California in 1970 was $113. However, the average rent in several metropolitan areas was substantially higher: San Jose—$143; Anaheim-Santa Ana-Garden Grove—$138; San Francisco-Oakland—$130. U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF HOUSING, *California, General Housing Characteristics* 5 (Advance Rep. No. HC(VI)-6 1971). The population influx in California has permitted landlords to make substantial rent increases in recent years. For example, rents in the San Francisco-Oakland metropolitan area increased at a rate approximately twice that of the nation as a whole for the period of 1963 through 1968. CALIF. DEPT. OF FINANCE, *California Statistical Abstract* 59 (10th ed. 1969).

[79] Large families and landlord racial bigotry place further limitations on the housing opportunities of indigent tenants. Loeb, *supra* note 44, at 287.

[80] *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 521 (1966).

[81] Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 276 (1970).

[82] The lease measures the rights of the parties and, in the absence of an express covenant binding him to do so, the landlord is under no obligation to put the demised premises in repair. Strecker v. Barnard, 109 Cal. App. 2d 149, 152, 240 P.2d 345, 347 (1952).

[83] *See* the opinion of Judge J. Skelley Wright in Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (Nov. 23, 1970), *noted in* 84 HARV. L. REV. 729 (1971); 1970 DUKE L.J. 1040 (1970); 16 VILL. L. REV. 383 (1970).

services such as heat and electricity throughout the life of the lease.[84] If the dwelling becomes dilapidated or fails to function properly, the tenant frequently must endure great physical discomfort. The common law tenant was fully able to determine the condition and potential of his prospective farm by performing a reasonable inspection of the premises. If he did not find the farm suitable for his needs, he could simply find another farm. If the buildings needed repair, he could easily see what needed to be done and perform the repairs himself. This was a reasonable arrangement since the common law tenant was sufficiently intransient to reap the full benefit of his repairs. However, the complexity of modern housing structures not only renders impossible the detection of defects such as faulty plumbing or electrical wiring by a simple inspection, but also precludes the average tenant from performing repairs due to his lack of money and technical skill. Modern tenants are highly mobile and hence, any repairs they perform will primarily benefit the landlord's reversionary interest. The housing shortage requires that many tenants take whatever housing is available, regardless of its condition and without the benefit of covenants for repair from the landlord. Thus, the tenant must depend for repairs and maintenance either on his luck in pestering his landlord or on the cumbersome and frequently ineffective process of housing code enforcement.

Opportunity for a Change

During the 1970 Regular Session, the California Legislature enacted Civil Code section 1941.1, a statute which may permit the courts to re-examine the traditional common law rules concerning the duty to repair a leased dwelling. Section 1941.1 provides:

> A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics:
>
> (a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
>
> (b) Plumbing facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.
>
> (c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
>
> (d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.

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84 Quinn & Phillips, *supra* note 4, at 251.

(e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord being responsible for the clean condition and good repair of such receptacles under his control.

(h) Floors, stairways, and railings maintained in good repair.[85]

The actual impact that this statute will have on the landlord's duty to repair will largely depend on which of three possible interpretations is adopted by the courts.

A court might hold that since section 1941.1 is a definition of a term in section 1941 and, therefore, simply clarifies the landlord's existing duty to repair, the legislature did not intend to impose any new duty with this statute. Section 1941.1 is in derogation of the common law, just as were sections 1941 and 1942. As a general rule of interpretation, such statutes are not held to alter the common law unless they expressly so provide.[86] Since this statute does not expressly establish the landlord's liability for conditions of disrepair, a court might hold that there has been no change in the landlord's duty.[87] Such a narrow construction of section 1941.1 would reaffirm the limitations which the repair and deduct remedy has placed on the landlord's duty since the late 19th century.[88] This construction would, however, ignore the fact that today's housing market and a recent amendment to section 1942[89] have largely diminished the utility of the repair and deduct remedy for modern tenants.

A court may hold that section 1941.1 imposes upon the landlord liability for injuries received by the tenant as a result of the landlord's negligent breach of his statutory duty to repair.[90] This would

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85 CAL. CIV. CODE § 1941.1 (West Supp. 1971).

86 Gustin v. Williams, 255 Cal. App. 2d Supp. 929, 932, 62 Cal. Rptr. 838, 840 (1967); Morris v. Oney, 217 Cal. App. 2d 864, 870, 32 Cal. Rptr. 88, 91 (1963).

87 *But see* CAL. CIV. CODE § 4 (West 1954): "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

88 Van Every v. Ogg, 59 Cal. 563, 566 (1881).

89 *See* note 43 *supra*.

90 *See* Annot., 17 A.L.R.2d 704, 708 (1951) and cases cited therein.

be a major change in the law of California although it has been the law in other jurisdictions for many years.[91] Such a construction of section 1941.1 would permit the tenant to recover damages for injuries where the landlord had notice[92] of the condition of disrepair and had failed to repair within a reasonable time.

There is, however, a trend among the courts in other jurisdictions to protect the tenant not only from injuries but also from the substandard dwelling itself.[93] This is accomplished by implying a warranty of habitability in all dwelling leases. The trend has resulted from the frank recognition that a modern lease more closely resembles a sale of a product (shelter) and services (maintenance) than a transfer of an estate in land.[94] In light of modern housing conditions, the device of implied warranty is easily justifiable. The parties to a lease are undeniably bargaining with reference to a dwelling. The landlord, by offering his product on the open market, represents that minimum standards of habitability exist on the leased premises. Were it not for his inferior bargaining position, the tenant might well demand a covenant of habitability in the lease. Since the tenant is unable to protect himself in this situation, and because the landlord is in a better position to ascertain the condition of the leased premises, courts have adopted the implied warranty of habitability in an effort to more accurately reflect the reasonable expectations of the parties.

California has found an implied warranty of suitability for intended uses in a commercial lease where there was no opportunity for the tenant to inspect the premises because they were not yet

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91 *See, e.g.*, Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922).

92 The requirement of notice from the tenant is based on the traditional rule that a landlord has no right to enter the leased premises without the tenant's consent. Where the landlord is under a statutory or contractual duty to repair, the tenant is obligated to inform the landlord of defects arising after the commencement of the lease. Even in modern times, a periodic inspection by the landlord would disturb the peace of the tenant to some degree. However, it has been suggested that the benefits of such an inspection for latent defects by the landlord would outweigh the inconveniences. It could be conducted at the same time the landlord is fulfilling his common law duty to inspect common areas and stairways. The tenant would retain responsibility for informing the landlord of obvious defects. Feuerstein & Shestack, *Landlord and Tenant—The Statutory Duty to Repair*, 45 ILL. L. REV. 205, 214-15 (1950).

93 Javins v. First National Realty Corp., *supra* note 83; Lemle v. Breeden, 51 Ha. 451, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) *noted in* 16 VILL. L. REV. 395 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

94 *See* Note, *Products Liability at the Threshold of the Landlord-Lessor*, 18 HAST. L.J. 458 (1970). For a development of the law of implied warranty with respect to the sale of chattels, see Jaeger, *The Warranty of Habitability (Part I)*, 46 CHI.-KENT L. REV. 123 (1969).

built.[95] However, the California courts have refused to imply a warranty of habitability in dwelling leases, reasoning that the tenant has an opportunity to inspect the premises before he enters the lease.[96] Legal commentators have been highly critical of this assumption.[97] In truth, the tenant inspection required by the rule of *caveat emptor* is a fiction. Most tenants, if ever they examine their prospective dwelling, do not possess the considerable expertise required to detect faulty construction or defective heating, electrical, or plumbing facilities. Judicial adherence to the rule of *caveat emptor* has also restricted the tenant to his common law remedies: misrepresentation, mistake, or constructive eviction. These provide dubious relief in modern times since they terminate the lease and force the tenant to vacate into a restricted housing market, without allowing the tenant to recover his moving expenses.[98]

The California courts might well construe section 1941.1 as statutory authorization for implying a warranty of habitability in residential leases. The characteristics in section 1941.1, which the legislature has chosen to describe as "affirmative,"[99] represent the legislature's first attempt to set forth housing standards in connection with the duty to repair owed to the tenant.[100] The statute speaks in terms of minimum standards of repair and maintenance; it does not speak in terms of proper or improper behavior. It is

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[95] Woolford v. Electrical Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938).

[96] "[T]he doctrine of implied warranty of fitness developed as an integral part of the law of sales, has not been extended to the landlord-tenant relationship . . . .

. . . .

[T]he most important distinction lies in the opportunity to make a meaningful inspection of the retailed product as contrasted with inspection of a building before using it. Liability in the landlord-tenant relationship appears to be largely grounded upon the opportunity to make an effective inspection of the premises . . . ." Halliday v. Greene, 244 Cal. App. 2d 482, 485, 487, 53 Cal. Rptr. 267, 270, 271 (1966) (footnotes omitted). *But cf.* Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967) where the court refused to follow the doctrine of *caveat emptor* and permitted a tenant to vacate when her apartment became infested with vermin. *Buckner* is California's only case approving an implied warranty of habitability and has not been followed to date. *Buckner* is noted in 13 N.Y.L.F. 383 (1967). *See also* Annot., 27 A.L.R.3d 920 (1967).

[97] *See* Loeb, *supra* note 44, at 305-06; Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENV. L.J. 387, 398 (1967); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 522 (1966).

[98] Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENV. L.J. 387, 397 (1967).

[99] "Affirmative" is commonly defined as "assertive" or "positive." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 36 (1966).

[100] The State Housing Law, while created for the benefit of the tenant, is enforceable only by an appropriate administrative agency. The housing codes create no duty of repair owed to the tenant. *See* text accompanying note 61 *supra*. The term "untenantable" mentioned in Civil Code section 1941 is too vague to be fairly described as a meaningful housing standard.

reasonable to conclude that the legislature is attempting to delineate minimum conditions of habitability rather than tortious acts or omissions of the landlord. Under a warranty of habitability, "[t]he actor is liable if he created a certain condition regardless of factors such as negligence or the economic feasibility of improving the substandard condition."[101] Without exception, the standards of section 1941.1 require only those repairs which are of primary benefit to the landlord's interest in the property. Thus, a court might well decide that the landlord should assume a greater responsibility for the condition of his buildings.

Two statutes passed in connection with section 1941.1 indicate that the legislature is attempting to enhance the landlord's responsibility for repairs.[102] Civil Code section 1941.2 lists those obligations which the tenant must satisfy before the landlord's duty to repair arises.[103] The obligations include reasonable use and cleanliness, but make no mention of repairs by the tenant. Civil Code section 1942.1 rather forcefully prohibits any waiver or modification of rights under sections 1941 and 1942.[104] Since section 1942.1 forbids, as a matter of public policy, any attempt to shift the burden of repairs to

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101 Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61, 84 (1969).

102 Section 1941.1 was part of Assembly Bill No. 2033, an act which amended Civil Code section 1942 and added Civil Code sections 1941.1, 1941.2, 1942.1 and 1942.5. Cal. Stats. 1970, ch. 1280, at 2458 (West Cal. Leg. Serv. 1970).

103 CAL. CIV. CODE § 1941.2 (West Supp. 1971) provides:

"(a) No duty on the part of the lessor shall arise under Section 1941 or 1942 if the lessee is in substantial violation of any of the following affirmative obligations:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the lessor has expressly agreed in writing to perform the act or acts mentioned therein."

A similar list of tenant obligations is set forth in J. LEVI, P. HABLUTZEL, L. ROSENBERG, J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-303 (tent. draft 1967).

104 CAL. CIV. CODE § 1942.1 (West Supp. 1971) provides: "Any agreement by a lessee of a dwelling waiving or modifying his rights under Section 1941 or 1942 shall be void as contrary to public policy with respect to any condition which renders the premises untenantable, except that the lessor and the lessee may agree that the lessee shall undertake to improve, repair, or maintain all or stipulated portions of the dwelling as part of the consideration for rental. . . ."

the tenant,[105] a strong argument can be made that the legislature has deemed it necessary that the landlord assume the responsibility for major repairs.

A key advantage of the implied warranty of habitability is the number of remedies available upon breach. We have seen that an old line of cases has limited the landlord's statutory duty to repair to the extent of the tenant's remedy in the repair and deduct statute, Civil Code section 1942.[106] Since that remedy has been rendered ineffective by limitations as to the amount that can be deducted for repairs and the frequency with which this remedy may be exercised,[107] the landlord today has a duty to repair that exists only for readers of statutes. The implied warranty of habitability would provide the tenant with truly meaningful alternatives to the landlord's breach: damages, reformation, and rescission of the lease.[108] Thus, the tenant could demand decent housing conditions without being forced to abandon his dwelling. One suggested measure of damages would be "the difference between the value of the premises with and without the landlord's breach or the reasonable cost of repairing the premises."[109] These limited contract damages would not be oppressive to the landlord and, yet, they would provide an economic sanction for a failure to maintain a rented dwelling according to minimum standards of habitability.

The device of implied warranty would permit the tenant, through private enforcement of housing standards, to improve his living conditions without dependence upon an unresponsive and overburdened administrative agency. The principal argument against widespread enforcement of housing standards, either by public agencies or private tenants, is that this would drive private capital

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105 The exception mentioned in the body of the statute permitting the parties to shift the duty to repair to the tenant "as part of the consideration for rental" represents the legislature's attempt to permit the parties to engage in bona fide bargaining concerning the responsibility for repairs while avoiding the adhesion contract waiver of rights. A model landlord-tenant statute published by the American Bar Foundation permits the parties to a lease to shift the repair duty to the tenant, but offers this warning: "Since the landlord usually occupies an impregnable bargaining position, it may be assumed that any responsibility placed on the landlord which can be waived, will be waived." J. LEVI, P. HABLUTZEL, L. ROSENBERG, J. WHITE, MODEL RESIDENTIAL LANDLORD—TENANT CODE 46 (tent. draft 1967). Any provision, especially in a standard form lease, modifying the tenant's rights should, in absence of clear proof of an actual bargain, be ignored.

106 Van Every v. Ogg, 59 Cal. 563 (1881); Sieber v. Blanc, 76 Cal. 173, 18 P. 260 (1888); Farber v. Greenburg, 98 Cal. App. 675, 277 P. 534 (1929).

107 *See* text accompanying note 44 *supra*.

108 Lemle v. Breeden, 51 Ha. 451, 456, 462 P.2d 470, 475 (1969).

109 Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61, 89 (1969). *See also* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 566 (1970) where the court allowed a diminution in rent when the landlord's breach of an implied warranty of habitability rendered a leased dwelling unliveable.

out of the housing market, a result that is counterproductive of improved housing for renters.[110] However, as two commentators have indicated,[111] the predicted strain on the housing market would, in all likelihood, be short-run. Improved tenant remedies would eliminate much of the exploitation in the critical rental housing market. Moreover, private enforcement of housing standards would encourage the legislature to take up the slack if private investment is unable to meet the demand for decent housing.

CONCLUSION

In modern times, the burden of repairing a leased dwelling should rest with the landlord. However appropriate the common law no-duty rule may have been in the agrarian society of yesteryear, it is repugnant to the best interests of today's urban society. The California Legislature has recognized the need for a forthright re-evaluation of the rules concerning the repair of leased dwellings. The standards of Civil Code section 1941.1, in reasonably specific terms, require certain physical conditions to exist in a leased dwelling at the commencement of a lease, and call for continuing maintenance of the facilities throughout the life of the lease. Nevertheless, the salutary legislative intent behind section 1941.1 may be defeated unless the courts re-examine the limited remedial rights of the tenant. California courts have limited the landlord's duty to repair to the extent of the tenant's repair and deduct remedy in Civil Code section 1942. The courts, especially in light of drastic changes in modern housing conditions, can abandon that limitation. An implied warranty of habitability as measured by the standards in section 1941.1 would permit both parties and the courts to treat the residential lease as a contract for habitable living space. This approach would obligate the landlord to repair and maintain the leased dwelling and, more importantly, would provide the tenant with a number of efficient remedies should the landlord breach the implied warranty. Although this device is certainly not a final solution for the problem of substandard housing, its adoption would represent a significant improvement over the outdated approach of the common law.

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110 Note, 84 HARV. L. REV. 729, 732-33 (1971).

111 Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61, 89-93 (1969); Joost, *Housing and the Law—An Overview*, 6 NEW ENGLAND L. REV. 1, 20 (1970).