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Implied Warranty of Habitability in Leases

Ira O. Kane*

“THE COMMON LAW has often been referred to as a stream and not a stagnant pond, neither a cadaver nor a machine, but a living thing.”¹

An outstanding example of this movement and change is with respect to a tenant's right to withhold rent payments on the grounds that a warranty of habitability, measured by legislative housing standards, and implied by operation of law into leases of urban dwellings, has been breached by a landlord.

This paper will discuss (and take issue with) the position of a significant number of American courts which have held that there is no warranty of habitability implied in a lease. It will demonstrate the failure of many courts in this country to improve the common law rule, which has proven unrealistic in light of current legislative housing standards and building codes.²

To recognize the implied warranty of habitability in all leased premises would grant to the tenant a right of action against a landlord when the premises fall below predetermined legislative standards. Further, it would place the true fault where it belongs, on the landlord who has allowed the premises to become unsanitary or in disrepair. It would, in effect, seek to force the landlord and tenants to look towards the creation of better housing conditions while dissuading the landlord from dilatory behavior.³

At common law the rule that no such warranty existed was well grounded.⁴ The tenant took the premises “as is,” *caveat emptor*.⁵ Un-

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¹ Lambert, *The Jurisprudence of Hope*, 31 A.T.L. Journal 29 set seq. (1965).

² *Pointer v. American Oil Co.*, 295 F. Supp. (D.C. Ind. 1969); *Cameron v. Calhoun-Smith Distributing Co.*, 442 S.W. 2d 815 (Tex. Civ. App. 1969); *Conroy v. 10 Brewster Ave. Corp.*, 97 N.J. Super. 75, 234 A. 2d 415 (1967); *Rotte v. Meierjohan*, 78 Ohio App. 387, 70 N.E. 2d 684 (1947); *Ripple v. Mahoning National Bank*, 143 Ohio St. 614, 56 N.E. 2d 289 (1944).

³ *Levine, The Warranty of Habitability*, 2 Conn. L. Rev. 61 (1969).

⁴ *Daly v. Wise*, 132 N.Y. 306, 30 N.E. 837 (1892); *Hopkins v. Murphy*, 233 Mass. 476, 124 N.E. 252 (1919); *Fader v. Cresswick*, 31 N.J. 234, 156 A. 2d 252 (1959). There were exceptions to this rule at common law. The “furnished house” exception was based on the reasoning that the parties intended immediate occupancy without time for inspection. See, *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961). This reasoning was once hesitantly extended to a modern apartment house. See *Delameter v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931), noted in 16 Minn. L. Rev. 445 (1932).

⁵ A number of jurisdictions dissatisfied with the workings of *caveat emptor* have reversed the rule. See, *Hartford (Conn.) Housing Code* § 7.8 (1956); *Cal. Civ. Code* §§ 1929, 1941 (1954).

less the landlord fraudulently misrepresented the condition of the premises to the lessee, he suffered no liability for conditions causing the leaseability.⁶

The lease, being a conveyance of an interest in land, required the application of the rule of no implied warranties merely for convenience sake:

The principles of the common law do not warrant such a position [that a lease contain an implied warranty of habitability] and though, in the case of a dwelling house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes, for building upon or for cultivation; and there would be no limit to the inconvenience which would ensue.⁷

Traditionally, the failure of the common law courts to find an implied warranty was due mainly to the courts predisposition towards property law. Although the importance of contract law has become a significant primary basis for determining legal relationships, there has persisted a hesitancy to extend this recognition to questions having to do with real property.⁸

For example, historically the landlord's covenant to repair premises and the covenant to pay rent were regarded as independent covenants.⁹ The landlord's failure to perform did not thereby allow the tenant to make repairs and mitigate future rent payments by such cost of repairs.¹⁰ Rather, it gave rise only to a separate cause of action for breach of contract; this effect had as its basis property law rather than the law of contracts.

The assumption during feudal times that a lease conveyed an interest solely in land may have been reasonable for a strictly agrarian and rural society. However, due to the growth of our urban areas and the added complexities of city life, the tenant's interest has shifted from the land to the dwelling, and to whether the dwelling is suitable for habitation.¹¹ This shift in interest has created new problems for lessors and lessees, which have been handled through specific clauses inserted in leases:

⁶ *Anderson Drive-In Theatre, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E. 2d 508. See also 1 *American Law of Property*, § 3.45 at 267 (Casner ed. 1952), and cases cited therein, *Rotte v. Meierjohan*, *supra*, n. 2.

⁷ *Hart v. Windsor*, 152 Eng. Rep. 1114 (Ex. 1843) as cited by Levine, *supra*, n. 3 at 62.

⁸ *Javins v. First National Realty Corporation*, 428 F. 2d 1071, 1074 (D.C. Cir. 1970).

⁹ *Income Properties Corp. v. Trefethen*, 155 Wash. 493, 284 P. 787 (1930); *Richard Paul, Inc. v. Union Improvement Co.*, 59 F. Supp. 252 (D.C. Del. 1945); *N.G. v. Warren*, 79 Cal. App. 2d 54, 179 P. 2d 41 (1947).

¹⁰ *Duncan Development Co. v. Duncan Hardware, Inc.*, 34 N.J. Super. 293, 298, 112 A. 2d 274 (App. Div. 1955), *cert. den.* 19 N.J. 328, 116 A. 2d 829 (1955).

¹¹ *Supra*, n. 8.

This growth in the number and detail of specific lease covenants has reintroduced into the law of property a predominately contractual ingredient.¹²

A recent case decided in the District of Columbia has sustained the proposition that a lease is unenforceable when the premises do not conform to local building regulations. This case relies on the well established principle of contract law, that a contract whose performance requires the violation of a police ordinance or statute is unenforceable.¹³

The Hawaii Supreme Court in *Lemke v. Breeden*, took notice of the fact that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness.¹⁴ In *Breeden*, Plaintiff leased a dwelling from the defendant for immediate occupation and after taking possession was forced (with his family) to sleep in the living room rather than in proper quarters because of the presence of rats. The court, using the contract theory, found that there was a breach of the implied warranty of habitability and fitness for use.¹⁵

In the absence of contract application, a New York City Civil Court in 1969 held that the fact that a tenant who operated a retail liquor business had no heat in cold weather and no toilet facilities at any time did not constitute a defense to a landlord's return for rent.¹⁶ A similar result was found by a Texas Civil Appellate Court in 1969.¹⁷ There it was held that a tenant could not avoid payment of rent on the theory that the premises became untenable for cafe purposes, for which the premises were leased, because of faulty sewage and drainage facilities which the landlord failed to correct, forcing abandonment of the premises.¹⁸

Why then the failure by some courts to apply contract principles in the landlord tenant area, when they will apply contract theory when dealing with consumer protection cases?¹⁹ Is not the tenant's position akin to the position of the consumer?

The ordinary consumer [tenant] who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles

¹² 2 Powell, Real Property § 221[1] at 179 (1967) as cited by Javins, *supra*, n. 8.

¹³ *Brown v. Southall Realty Co.*, 237 A. 2d 834 (D.C. Cir. 1968). See also, *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922), *Anno.*, 55 A.L.R. 2d 481 (1957).

¹⁴ *Lemle v. Breeden*, 462 P. 2d 470 (S. Ct. of Hawaii 1969).

¹⁵ *Id.* at 474.

¹⁶ *Goldberg Holding Corp. v. Blier*, 303 N.Y.S. 2d 226 (N.Y. City Civ. Ct. 1969).

¹⁷ *Cameron v. Calhoun-Smith Distributing Co.*, 442 S.W. 2d 815 (Tex. Civ. App. 1969).

¹⁸ *Id.* at 816.

¹⁹ *Jaeger*, Warranties of Merchantability and Fitness for Use, 16 Rutgers L. Rev. 493 (1962); *Cintrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 212 A. 2d 769 (1965).

and [apartments] to decide for himself whether they are reasonably fit for the designed purpose.²⁰

Certainly the positions are similar: The unequal bargaining positions of landlords and tenants, the present housing shortages which increase the landlords' bargaining power, the standard form lease which places the landlord in a take-it-or-leave-it situation. All these are problems which exist in light of that "obnoxious cliché *caveat emptor*," and a Uniform Commercial Code which gives a remedy to a vendee for breach of an implied warranty of merchantability and fitness for a particular purpose.²¹

In 1961 came the first major disenchantment with certain old doctrines of the common law, to hold that there may be a remedy for a breach of an implied warranty of habitability when the premises fall into a general state of disrepair.²² Some jurisdictions had finally become cognizant of the awesome problems facing tenants occupying low and moderate cost housing. In *Pines v. Perssion*, the Wisconsin Supreme Court in 1961 held that new duties were placed upon landlords due to legislative enactments of health and safety codes:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by the application of *caveat emptor*.²³

The Wisconsin Supreme Court went even further by stating that the covenant to pay rent and the covenants to provide a habitable house were mutually dependent, and thus a breach of the latter would result in a failure of consideration relieving the lessee from any liability under the former. The court reasoned that since the landlord had breached the warranty, there was a failure of consideration which absolved the tenant from liability for the agreed rent. The tenant would be liable, however, for the "reasonable rental value of the premises during the time of actual occupancy."²⁴

Thus, the *Pines* court introduced the implied warranty of habitability to Wisconsin by construing Section 234.17 of the Wisconsin Statutes which allowed a tenant to surrender possession of the premises when the conditions became untenable.

²⁰ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 375, 161 A. 2d 69, 78 (1960) as cited by Javins, *supra*, n. 8.

²¹ Unif. Coml. Code §§ 2-314, 2-315 (1968).

²² *Pines v. Perssion*, *supra*, n. 4.

²³ *Id.* at 412-413.

²⁴ *Id.* at 413; See *Bonner v. Beechem*, CCH Prov. L. Rep. 11,098 (Colo. County Court Denver, 1970) where the court held that because the landlord breached the warrant, there was a failure.

A number of other jurisdictions have provided similar relief to a tenant for his landlord's dilatory behavior through similar legislative enactments.²⁵

Section 47-24 of the Connecticut General Statute reads:

The tenant of any tenement which without his fault or neglect, is so injured as to be unfit for occupancy shall not be liable to pay rent after such injury so long as such tenement is untenable.

New York's Section 143-6 of the Social Welfare Law (Spiegel law) states that a public welfare official shall be empowered to hold any rent when he has knowledge that there exists a violation of a landlord's duty to keep the premises free from dangers that are "hazardous or detrimental to life or health."

Perhaps the most far reaching effort to afford a tenant his proper rights in this area has begun in Michigan. The Michigan law allows the tenant a cause of action against a landlord who has violated the Michigan housing code, provides additional relief through injunctions, provides for the appointment of receivers to make repairs, and legalizes the withholding of rent in an escrow account for the repairs. It also allows the tenant to defend himself in court against evictions which are retaliatory in nature for exercising his legal rights in making complaints to public authorities about the repairs. The law also requires that every lease pledge the premises to be fit for habitation when the tenants move in, and that the landlord will keep the premises in repair.²⁶

Some enlightened jurisdictions have emulated the aforementioned legislative approaches by imposing an implied warranty that the premises are suitable for the leased purposes.

In *Reste Realty Corp. v. Cooper*,²⁷ plaintiff lessor sued defendant lessee to recover rent allegedly due under a written lease. Defendant complained of flooding from rainwater. Conditions became untenable when during one rainstorm five inches of water accumulated in defendant's leased offices. Citing *Pines*, the New Jersey Supreme Court imposed an "implied warranty that the premises be suitable for the leased purpose and conform to local code and zoning laws."²⁸

The court, in finding for defendant lessees, emphasized that the lessee does not have as much knowledge of the condition of the premises as does the lessor and that building code requirements and violations thereof are known only to the lessor and not the lessee. In regard to the withholding of rent payments during the period of inhabitability,

²⁵ Besides Connecticut, note Iowa Code Ann. § 413.05 (Rev. 1969).

²⁶ Mich. Pub. Acts, #267, 286, 295, 297, 344 (1968); cited *supra*, n. 3. For cases emulating this approach see *Brown v. Southall*, *supra*, n. 13.

²⁷ *Neste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A. 2d 268 (1969).

²⁸ *Id.* at 272.

the court suggested an alternative to the "reasonable rent rule" as noted in *Pines v. Perssion, supra*,²⁹—that the tenant have the defective conditions repaired or remedied himself and offset the cost against the rent fixed in the lease, provided the expenditure involved would not be unreasonable in light of the value of the leasehold.³⁰

Perhaps the most far reaching decision to date was rendered by Judge J. Skelly Wright of the United States Court of Appeals (D. C. Circuit) in *Javins v. First National Realty Corporation*.³¹ Judge Wright stated that, "the old no repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability."³² The court held that "the housing regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing they cover."³³ In *Javins*, the landlord sought possession of the premises on the ground that each of the appellants had defaulted in the payment of rent due for the month of April. Defendant alleged numerous violations of the housing regulations (approximately 1500) as an "equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim."³⁴ In deciding the rent withholding issue, the court's opinion is very vague. The court stated that under contract principles the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligation to maintain the premises in habitable condition.³⁵ From this it was presumed by this writer that upon breach by the landlord, of his duty to meet the conditions of his warranty the tenant's right to withhold rent would be sustained. However, *Javins* did not strictly adhere to this presumption. Rather, it held that the jury must find "what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach."³⁶ We note that the court did not state its rationale for allowing a partial reduction and failed to give any guidelines for determining by how much the rent should be reduced.³⁷

Ohio's judicial response, or lack of it, to the application of an implied warranty of habitability in lease agreements, has been grounded on old dogmas that have no relation to present social realities.

²⁹ *Pines v. Perssion, supra*, n. 4 at 413.

³⁰ *Supra*, n. 27 at 271, n. 1.

³¹ *Supra*, n. 8.

³² *Id.* at 1078.

³³ *Id.* at 1082.

³⁴ *Id.* at 1073.

³⁵ *Id.* at 1082.

³⁶ *Id.* at 1082, 1083.

³⁷ Moskovitz, *Rent Withholding and the Implied Warranty of Habitability—Some New Breakthroughs*, 4 CCH POV. Rep. 66 (1970).

A study of Ohio cases frequently cited for the proposition that there is no warranty on the part of the landlord that the premises are safe or fit for habitation reveal that this doctrine has never been adequately interpreted by the Ohio courts.

The leading Ohio case in this area is *Rotte v. Meierjohan*.³⁸ In *Rotte*, plaintiff tenant sustained injuries in a fall from a window of his third floor apartment, allegedly caused by defendant landlord's negligence in maintaining a guard in front of the window.³⁹ The Court's opinion revolves around the issue as to whether or not the metal iron guard was part of the premises leased to the tenant. If it was not, the defendant retained possession and control over it and thus there existed a duty on his part to exercise ordinary care to keep the premises in a reasonably safe condition,⁴⁰ if the court found that it was part of the premises leased to the plaintiff, defendant was thereby not obligated to repair. The Court would not accept plaintiff's claim. Rather, it held that the metal iron guard was part of the premises, and further stated: that

In the absence of fraud or concealment by the lessor, there is no implied warranty that the premises are tenantable or even reasonably suited for occupation and the rule of *caveat emptor* is therefore applicable.⁴¹

The reasoning behind the "no warranty" statements relies on the fact that where the tenant has exclusive control of an area in a building, the landlord is free of responsibility for that area.

In *Herman v. Albers*⁴² the plaintiff tenant contended that the landlord was negligent in allowing one of the windows in a room occupied by the plaintiff to become in such a dangerous condition that the window would not stay up. While plaintiff was standing by the window, and while it was raised, the catch or stop on the window did not hold, thereby causing the window to fall on and severely damage the plaintiff's hand. The court here also stated that the doctrine of *caveat emptor* applied and that there was no obligation on the part of the lessor to see that the premises which he leased, at the time of the demise, were in a "condition of fitness for use for the purpose for which the lessee may propose to use them."⁴³

A recent Ohio case, *Mitchem v. Johnson*,⁴⁴ rejected the idea that a builder-vendor impliedly warrants that a residence he is constructing

³⁸ 78 Ohio App. 387, 47 Ohio L. Abs. 65, 70 N.E. 2d 684 (1947). See 26 A.L.R. 2d 468.

³⁹ *Id.* at 684.

⁴⁰ *Id.* at 685.

⁴¹ *Id.* at 685 citing 36 C.J.S. 43 § 659-5 (1960) and 24 Ohio Jur. 918 (1932).

⁴² 22 Ohio Dec. 429, 13 Ohio N.P. (n.s.) 98 (1912).

⁴³ *Id.* at 99.

⁴⁴ 7 Ohio St. 2d 266, 218 N.E. 2d 564 (1966). See also Note, Implied Warranty—Property, Vendor and Purchaser, 18 West Res. L. Rev. 706 (1966-67).

will be fit for its intended use. Though this case does not deal with a landlord-tenant situation, it is illustrative of the failure of the Ohio courts to even consider the use of the implied warranty of fitness for its intended purpose in both apartment dwellings and in the construction of new homes.

In *Mitchem*, the plaintiff alleged the following defects: The building had been constructed on a low portion of the lot without foundation drainage tile to protect it from surface water problems; surface water had accumulated beneath the building causing saturation of the roof supports, roof insulation, and the roof itself; they had used improper roofing, sheeting and insulation; water seepage had caused the roof to warp and pull apart, and heavy rains and soil moisture had impaired the efficiency of the septic tanks, rendering certain toilet facilities unusable.⁴⁵

Judge Schneider, in writing the majority opinion, relied upon the common law theory of *caveat emptor* and emphasized that the builder was not an insurer.⁴⁶ Thus, once again Ohio courts have closed their eyes in failing to disregard that "obnoxious legal cliché" *caveat emptor*.⁴⁷

Perhaps in the old days of *caveat emptor* this result was justified. However, we must realize that as to basic living conditions, the slum tenant (or for that matter the inexperienced house buyer) does not have control over the conditions of the walls, floors, plumbing, heating, water, electricity, etc. during occupancy or before occupancy. Both such parties are inexperienced and have little knowledge of the building or housing codes. How then, as evidenced by the *Mitchem* case, can a state wait any longer before utilization of the implied warranty is effectuated?⁴⁸

The state of Ohio faces a housing crisis of major proportions. Nearly one-half million of Ohio's three million housing units in 1960 were found to be substandard.⁴⁹ In Cleveland the real property inventory of 1968 showed that there are 267,654 dwelling units in which people are living inside the city.⁵⁰ Some 43,743 of those units have not met

⁴⁵ *Mitchem v. Johnson*, *supra*, n. 44 at 565, 566.

⁴⁶ *Id.* at 597, 598.

⁴⁷ Some courts and states that have disregarded *caveat emptor*. See *F & S Construction Co. v. Berude*, 322 F. 2d 782 (10th Cir. 1963); Colorado, Idaho, Illinois, Oklahoma, Washington. See also *supra*, n. 5. For an excellent article on this subject see Skillern, *Implied Warranties in Leases: The Need for Change*, 44 *Denver L. J.* 387 (1967).

⁴⁸ *Supra*, n. 44 at 716.

⁴⁹ Memorandum, *Housing Action Goals*, received from the Cleveland Public Housing Authority (1968).

⁵⁰ Marco and Mancino, *Housing Code Enforcement—A New Approach*, 18 *Clev.-Mar. L. Rev.* 369 (1969).

even the minimal standards for the preservation of their tenants' health, safety and welfare.⁵¹

The inner city tenant cannot act responsibly to change his housing conditions, for the standards established by municipal building codes, even if adequate as to him, remain empty promises. Because of inadequate enforcement, antiquated housing codes, the failure of such codes to properly focus attention on the structure rather than the violator, and the lack of available financing for repairs, housing codes have become "impotent" as a means of assuring that uninhabitable units are taken from the market and that sound but deteriorated properties are upgraded.⁵²

Housing code enforcement has been deplorable. Frequently many housing violators are not prosecuted with due diligence. The law departments in many cities fail to act promptly in prosecuting repeated offenders. Often, when prosecuting offenders, courts are too lenient.⁵³ The average fine imposed in Cleveland in 1968 was about \$70.00,⁵⁴ in New York the average fine per case in 1966 was \$15.00.⁵⁵ It would seem then that it is cheaper to pay a fine in most instances than to make the necessary repairs. Even though our courts have recognized our housing problems,⁵⁶ despite the existence of 43,473 substandard and inadequate dwelling units in the City of Cleveland in 1968, only 234 convictions resulted!⁵⁷

It was suggested in 1968 that a model state housing code should be established.⁵⁸ A state receivership law should be passed whereby, at the insistence of the city or of a tenant, properties posing a threat to the health or safety of the community can be dealt with. Rent withholding, and authority to the tenant himself to repair and to deduct this (from rental payment) should be given under appropriate condi-

⁵¹ *Id.* at 370; note that more than 200,000 residents of Cuyahoga County, Ohio, live in substandard housing. One out of four families in the City of Cleveland lives in a rat-infested dwelling.

⁵² Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 16 N. Y. L. F. 60 (1968).

⁵³ Gribetx & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Col. L. Rev. 1259, 1280 (1966).

⁵⁴ Marco and Mancino, *supra*, n. 50 at 371.

⁵⁵ Castrataro, *supra*, n. 52 at 69, cited by 1966 N.Y.C. Dep. of Bldgs. Ann. Rep. 141, 253. Each of these cases generally involved upwards of 30 violations, giving an average fine per violation of \$0.50 under statutes which call for a maximum punishment of first offenders of \$500.00 fine and 30 days imprisonment. For second offenders, the fines are substantially greater and, in some cases, minimum fines are set far above the \$0.50 index. See N.Y. Multiple Dwell. Law § 304(1) (McKinney Supp. 1967); N.Y.C. Admin. Code § 26-52.01 (1967).

⁵⁶ *State, ex rel. Schulman v. City of Cleveland*, 8 Ohio Misc. 1, 220 N.E. 2d 386 (1967).

⁵⁷ Marco, Mancino, *supra*, n. 50 at 371, 372.

⁵⁸ *Supra*, n. 49 at § (b).

tions and safeguards. Statutes should be enacted, extending to tenants the type of protection now afforded to consumers, *i.e.*, a warranty that rental properties are fit for the purpose of rental occupancy and are in compliance with applicable codes. Such covenants should also obligate the landlord to maintain the property in good order and to repair, in conformity with applicable codes during the term of the lease. All of these ideas were promulgated in the Code Enforcement Proposals: Outline of Bills drafted Feb. 15, 1969. The drafter's intentions, though honorable, evidently were not very persuasive with the Ohio legislature.

Ohio Revised Code Section 715.30 presently gives some municipal corporation and the owner of any contiguous or neighboring property a right to seek injunctive relief, where there is a violation of a local building, housing, health or safety ordinance. The proposed amendment, if acted upon by the state legislature, would have provided an alternate ground for seeking injunctive relief—the existence of any condition hazardous to life, health, welfare or safety—thus obviating the necessity for establishing a violation of a local ordinance. This would have permitted a court to determine whether or not proper cause exists for injunctive relief without requiring adherence to local code enforcement administrative machinery.⁵⁹

Proposed Section 1923.131 was designed to increase the tenant's bargaining power in dealing with his landlord, and to permit the tenant some range of choice when he is the moving party, to secure code compliance.

Under the provisions of this statute, when a court concludes that hazardous conditions exist in a building it simply forbids the lessor from permitting the premises to be occupied again until the hazardous conditions are reduced.⁶⁰

The circumstances which will support an order such as is called for in this proposal are limited to those which are "hazardous to the life, health, welfare or safety of the public or of the occupants."⁶¹

Perhaps the most far reaching code enforcement proposal of 1969 is H.B. 727, which grants jurisdiction to the municipal court in appointing receivers to take possession and control of any residential structure containing conditions hazardous to health, welfare and safety.⁶² H.B. 697—providing a rental for repair and rent collection where property

⁵⁹ Code Enforcement Proposals: Outline of Bills Drafted Feb. 15, 1969. This information was provided through the courtesy of P.A.T.H. (Plan of Action for Tomorrows Housing in Greater Cleveland).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² League of Women Voters Legislative Bulletin #10 p. 4 (1970).

has been declared a nuisance⁶³ and H.B. 717 which allows to the tenant remedies for conditions which are hazardous to life, health, welfare and safety, were too hot for the legislature to handle. All of these bills have been held over.

Coupled with the failure of the legislature to act affirmatively in light of the fact that more than 200,000 residents of Cuyahoga County live in substandard housing is the failure of the City of Cleveland to properly enforce its housing Code.⁶⁴ At present the city has too few qualified housing inspectors, who do little beyond merely handling specific complaints. Further, once the violation by a landlord reaches the court, prosecution of such violator has been too often slowed by the court's attempts to obtain compliance.⁶⁵

Can we ever be sure that even the most sophisticated code enforcement provisions will be enforced? This writer has his doubts. Rather, what is needed is the extension of existing law so as to give to the tenant a direct cause of action against a landlord for breach of the implied warranty of habitability.

What should the tenant look for?⁶⁶

(1) The breach must be substantial; one that should be able to "demonstrate the uninhabitability and unfitness of the premises for residential purposes."⁶⁷

(2) Note whether, before entering the premises, the landlord represented or impliedly warranted the condition of the premises.

(3) Check local city or state housing codes, and note whether the conditions that exist are violative of the applicable statutes or ordinances.

(4) Notify the landlord of the conditions of the premises in writing, further noting if any action or inaction has taken place on his part.

(5) If the above conditions have been met, note that a breach of warranty gives rise to the usual remedies for breach of contract⁶⁸: specific performance, damages,⁶⁹ rescissions,⁷⁰ and reformation.

⁶³ *Id.* at 5, "Authorized payment of rent to the bailiff of the court if he finds that there exists in such building any condition hazardous to the life, health, or safety of the tenant of which the tenant has notified the landlord and which has gone uncorrected for 30 days . . ."

⁶⁴ Information received from a report prepared by P.A.T.H. Citizen's Advisory Committee for the Greater Cleveland Associated Foundation p. 7 (July, 1968).

⁶⁵ *Id.* at 44.

⁶⁶ *Supra*, n. 8 at n. 63. The jury should be instructed that one or two minor violations, standing alone, which do not effect habitability, are *de minimis*.

⁶⁷ *Supra*, n. 14 at 474.

⁶⁸ *Supra*, n. 8 at 1082 n. 61.

⁶⁹ *Charles E. Burt, Inc. v. Seven Brand Corp.*, 340 Mass. 124, 163 N.E. 2d 4, 8 (1959).

⁷⁰ *Supra*, n. 27 at 276.

(6) Note that where "substantial" Code violations exist when the lease or rental agreement is made, the withholding of total rent payments *might* be permitted.⁷¹ Check local state statutes, local ordinances, and case law before withholding rent payments.

It is not unreasonable to ask the legislature and the courts to allow tenants to help themselves by providing them with some incentive to act. Tenants who are given the right, through court and legislative action, to enforce the housing and building codes, will learn to act more responsibly. It will place the landlord in a position of responsibility towards his tenants, thereby engendering equality among the participants in a lease transaction.

The state must, through court and or legislative enactment, afford to a tenant reasonable relief against a negligent landlord. This right, when given to the tenant, will go far towards correcting grave inequities, and will give strength to the social and legislative objectives of insuring decent housing for low and moderate income families.

⁷¹ *Brown v. Southall Realty Co.*, *supra*, n. 13 at 834, See also *Bonner v. Beechem*, *supra*, n. 24.