
**Landlord and Tenant - Implied Warranty of Habitability - How
"Constructive" is "Eviction"? - Lemle v. Breeden, -- H. --, 462 P.2d
470 (1969)**

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Recommended Citation

Robert F. Klimek, *Landlord and Tenant - Implied Warranty of Habitability - How "Constructive" is "Eviction"?*
- *Lemle v. Breeden, -- H. --, 462 P.2d 470 (1969)*, 19 DePaul L. Rev. 619 (1970)
Available at: <https://via.library.depaul.edu/law-review/vol19/iss3/14>

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The present policy is for the insurer to either turn the matter over to house counsel or to an independent attorney. In any case, only one attorney is retained and he is to represent both the insured and the insurer.⁹⁶ The law requires the insurer, in cases of excess-limits claims, to notify the insured that the claim against him exceeds his policy limits and that he has a right to hire personal counsel to represent his interests in the resulting conflict of interests situation.⁹⁷ This notice is customarily given to the insured by letter.⁹⁸ If the insured wishes to retain personal counsel, he must do so at his own expense.⁹⁹

Since the policy requires the insurer to "defend" the insured and since the court in *Crisci v. Security Insurance Co.* said "it is common knowledge that one of the usual methods by which an insured receives [defense] under a liability insurance policy is by settlement of claims without litigation,"¹⁰⁰ it does not seem an undue extension of present law to require that the insured be adequately represented by counsel at the insurer's expense during the negotiation of such settlement. The insurer's attorney would continue to represent both the insured and the insurer in trial and all phases of the defense where the interests are not in conflict.¹⁰¹ Such a solution would not relieve the insurer of its duties under present law, but it would avoid burdening the insurer with the impossible duty of discussing contributions as required by *Brockstein*.

Edward L. Schrenk

LANDLORD AND TENANT—
IMPLIED WARRANTY OF HABITABILITY—
HOW "CONSTRUCTIVE" IS "EVICTION"?

Plaintiff, a New York businessman, his wife, and their four children arrived on the island of Oahu, Hawaii, on September 1, 1964. On September 21, they inspected a furnished Tahitian-style residence of relatively open structure owned by the defendant. The house was on

96. *Supra* note 5, at 1168-69.

97. *See* note 48, and text *supra*.

98. *Supra* note 5, at 1169.

99. *Supra* note 5, at 1169; *Brockstein II*, *supra* note 1, at 707 n.6.

100. *Supra* note 3.

101. If because of special circumstances there were a conflict of interests in the actual conduct of the trial, two attorneys could be utilized here also. *See supra* note 5, at 1170.

the beach, in a luxury section of Hawaii; the woven cocoanut leaves on the corrugated-iron roof and the absence of screening on windows and doorways indicated why the residence was called "The Grass Shack."¹

The tour, conducted by defendant's agent, lasted at least one-half hour during the middle of the day. The entire premises were inspected, including the bedrooms.² Because of the enthusiastic reception by plaintiff and his family, a rental agreement was executed that night. The term of the lease was for eight months at a monthly rental of \$800.00.³

The next day, September 22, 1964, plaintiff and his family took possession of the premises. On that night their first encounter with rats occurred, which resulted in the entire family remaining in the living room all night, with all doors and windows shut. Immediately after the first night, plaintiff contacted defendant's agent, who engaged the services of a local exterminator, Terminix. Terminix sent agents to examine the premises and take steps to eliminate the rats. As a result of the efforts of Terminix, several dead rats were found on the grounds—one rat died between the sliding doors of the living room as it attempted to squeeze back into the house from the outside.⁴ Plaintiff also purchased two traps, which proved successful.⁵ However, all the endeavors were only partially successful, for the rat problem was "mostly outside" of the house, and the open structure of the dwelling permitted free ingress and egress to the vermin.⁶

On the second or third night of their occupancy, a rat jumped out of a kitchen cupboard a few feet from plaintiff—a rat said to be at least three feet long.⁷ On the third night, which they again spent in the living room,

1. Opening Brief of Appellant at 2, *Lemle v. Breedon*, — H. —, 462 P.2d 470 (1969).

2. Memorandum of Appellant at 3, *Lemle v. Breedon*, *supra* note 1.

3. Answering Brief of Appellee at 1, *Lemle v. Breedon*, *supra* note 1.

4. *Id.* at 2.

5. *Supra* note 2, at 4; Record at 23.

6. Deposition of Mr. William K. Ouchi, agent of Terminix, at 12, lines 2-6, 24-25; at 13, lines 2-18, 21-22, 24-25; at 14, lines 1-25; and at 15, lines 1-8, in which Mr. Ouchi stated that rats were found "all over" the island, and that screens on the doors and windows would virtually eliminate the infestation on the inside of the house. But plaintiff had been informed by the exterminators before he vacated the property that the rats could not be completely controlled because of the grass roof, which necessitated greater security measures (*See* Record at 25, and Plaintiff's Exhibit "3"). Mr. Ouchi's testimony, however, is further vindicated by the fact that, after screens were installed, defendant sub-let the house in order to mitigate damages and no complaints were had from the new tenants (*See* Plaintiff's Exhibit "9" paragraph 2).

7. Record at 22-23.

the tenants heard a "parade of rats" in the second floor bedrooms.⁸ Finally, on September 25, plaintiff gave notice to defendant's agent, and he and his family vacated the premises.

Plaintiff brought this action to recover his deposit and first month's rent, alleging constructive eviction and breach of an implied warranty of habitability and fitness for use. Justice Bernard H. Levinson, in writing the opinion of the court, found for the plaintiff tenant, and held that in the lease of a dwelling house, there is an implied warranty of habitability and fitness for the intended use. The same reasoning which implies a warranty of fitness and merchantability in the law of sales was found to be equally persuasive in leases of real property, which is not only a sale of an interest in land, but also a contractual relationship. The judge discarded the admitted judicial fiction of constructive eviction as an exception to the general doctrine of caveat emptor, and espoused the more flexible doctrine of implied warranty. He found that the implied warranty doctrine recognizes the nature of the transaction and contemporary housing realities and provides the tenant with a choice among the three basic remedies for breach of contract: damages, reformation, and rescission. In this holding is the basic importance of the case. *Lemle v. Breeden*, — H. —, 462 P.2d 470 (1969).

The purpose of this note is to examine the historical setting within which the doctrine of implied warranty of habitability was first expressed, and the struggle the American courts have had with it; particular focus is upon leases and vermin infestation, whether they be of apartments or dwelling houses, as viewed in the light of the determinative factors courts have found to be paramount. It will be seen that many of the arguments expressed in favor of constructive eviction render conversion to the doctrine of implied warranty easily effectuated, should courts choose to make the implied warranty an integral part of today's law.

At early common law, the contract law concept of mutual dependency of the various provisions relating to the performance of bilateral contracts was in its infancy. Property law, however, had long since established the doctrine that a lease was a *conveyance* of realty for a term.⁹ Being strictly a conveyance, and without mutual dependency, the landlord's

8. *Supra* note 1, at 3.

9. Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279, 1281 (1960); Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, WASH. U. L.Q. 461 (1968) [hereinafter called *The Indigent Tenant*]; 6 WILLISTON, CONTRACTS § 890 (3rd ed. 1962). But American courts are firmly headed in the direction of treating a lease as both a conveyance and a contract, see 1 AMERICAN LAW OF PROPERTY § 3.11 (Casner ed. 1952).

performance was completed upon his relinquishing the property to the tenant at the beginning of the term. But the tenant's performance was the payment of rent throughout the term; and, moreover, he "purchased" only the *land*. Thus, if the house in which he was living was destroyed during the term, he was still liable for rent.

Since the tenant "owned" the property, it was he who assumed the responsibility for its maintenance. Also, since the transaction was looked upon as a conveyance, it was very easy indeed for the law to apply the same principle it had prospectively applied to sales of freehold interests in property: the doctrine of *caveat emptor*.¹⁰

Thus, in the absence of an express covenant requiring more on the part of the landlord, he was not compelled to deliver the premises in a fit condition for habitability, and the lessee took the property "as is."¹¹ The law, of course, looked upon both parties as being in an equal bargaining position. Because of this, the lessee was thought to be able to negotiate such a covenant into the lease freely. Certainly it was not the province of the law to *imply* such a covenant.¹²

With the turn of the nineteenth century, a new doctrine was introduced which afforded a quantum of solace to the unfortunate tenant who found himself in fief to a remiss or hostile landlord. Should the conduct of the landlord render the premises seriously uninhabitable, the lessee, if he quickly quit the premises, could consider himself constructively evicted, and could in this manner avoid the necessity of paying rent for premises in which he could not live.¹³ The doctrine of constructive eviction thus became the ultimate weapon in the tenant's limited arsenal.

10. *Caveat emptor* (let the buyer beware) imposes a duty of inspection of the premises on the tenant. If the tenant evades his responsibility, it is his fault if the premises are in fact uninhabitable. See *Fowler v. Bott*, 6 Mass. 62 (1809); *The Indigent Tenant*, *supra* note 9, at 462-63.

11. *The Indigent Tenant*, *supra* note 9, at 463. See also *Hopkins v. Murphy*, *infra* note 38.

12. *The Indigent Tenant*, *supra* note 9. See *Goldstein v. Totman*, 163 Misc. 114, 116, 297 N.Y.S. 135, 138 (1937). For modern attempts of tenants to attain an "equal bargaining position," see Fossum, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304 (1965); and Note, 77 YALE L.J. 1368 (1967-1968).

13. The leading case in constructive eviction is *Dyett v. Pendleton*, 8 Cow. 535 (N.Y. 1826). See *The Indigent Tenant*, *supra* note 9, at 467-69: "In the early cases, the application of the doctrine of constructive eviction was generally limited to those situations in which the conduct of the landlord had rendered the premises uninhabitable, and even today it is universally held that the tenant may not escape rent liability by abandoning the premises because of minor inconveniences or defects. . . . Gradually, however, courts began to listen sympathetically to arguments that the tenant should be able to claim a constructive eviction when the

By 1840, several concepts were found in the landlord-tenant milieu: the lease as a sale of realty, with independent performances to be rendered by each party; caveat emptor applying to all prospective tenants; the "equal bargaining position" assumption; and the "new" doctrine of constructive eviction. It was in this setting that the case of *Smith v. Marrable*¹⁴ arose. Smith leased a house to Marrable, the lease agreement providing for the letting of a furnished house for five weeks. Marrable soon found the premises to be infested with bugs and left after one week. In an action for rent for the entire term, the English court stated:

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

[I]f the demised premises are encumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. . . . [I]t . . . rests in an implied condition of law, that [the lessor] undertakes to let them in a habitable state. . . .¹⁶

Thus the court, in rather broad terms, gave the tenant a new weapon—the doctrine of implied warranty of habitability—which did not require conduct by the landlord sufficient to "constructively evict" the tenant. The doctrine was soon to be qualified.

Smith v. Marrable came under attack in two other English cases decided in the same year, *Sutton v. Temple*¹⁷ and *Hart v. Windsor*.¹⁸ The *Sutton* case involved the lease of an estate of grazing land, which was to extend for a period of seven months. The animals set out to graze died because of the presence of refuse paint on the grass. The court rejected the lessee's defense that the estate was not fit for the intended use. In doing so, the court distinguished *Smith*, saying that there the lease contemplated a use by Marrable not only of realty (the land and house), but

premises are not necessarily uninhabitable, but are worthless, through the fault of the landlord, for the particular purposes for which they were rented. This change in the attitude of the courts is reflected by an early Michigan decision [citing *Grinnell Bros. v. Asiuliewicz*, 241 Mich. 186, 216 N.W. 388 (1927)] Today it appears that a majority of jurisdictions recognize that constructive eviction may occur when the conduct of the landlord causes the premises to become uninhabitable or unfit for the particular purpose for which they were leased. . . . [citing *Berwick Corp. v. Kleinginna Invest. Corp.*, 143 So.2d 684 (Fla. Dist. Ct. App. 1962); *Overstreet v. Rhodes*, 212 Ga. 521, 93 S.E.2d 715 (1956)]."

14. 152 Eng. Rep. 693 (Ex. 1843).

15. *Id.* at 694.

16. *Id.* at 694.

17. 152 Eng. Rep. 1108 (Ex. 1843).

18. 152 Eng. Rep. 1114 (Ex. 1843).

also of personalty (the furniture therein).¹⁹ The *Sutton* case was for land alone; therefore, the *Smith* doctrine did not apply.

The court in the *Hart* case was presented with substantially the same facts as in *Smith*. Here too was involved the lease of a house with furnishings; here too the tenant left because of an infestation of the premises with bugs. But the term of the lease in this case was for three years. The court seized upon the opportunity to limit the doctrine of *Smith v. Marrable*. The court would now apply the doctrine of implied warranty of habitability only in the case of a furnished dwelling leased for a period of short and definite duration. It is with this doctrine, as so limited, that courts in England and in America have wrestled for over a century.²⁰

In America, it was generally held that, in the absence of a statute, there was no implied warranty of habitability or fitness for intended use.²¹ Certain courts, even when presented with a problem of constructive eviction, could not eschew the chance of commenting on the *Smith* doctrine.²² One New York court refused constructive eviction even though the rooms

19. The lease agreement was stated to be of a "mixed nature, being a bargain for a house and furniture, which was necessarily such as was fit for the purpose for which it was to be used. It resembles the case of a ready-furnished room in an hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation. In such case the bargain is not so much for the house as the furniture. . . ." *Supra* note 17, at 65, 152 Eng. Rep. at 1113.

20. For well-presented discussions of the *Smith*, *Sutton*, and *Hart* cases, see *Reubens v. Hill*, 115 Ill. App. 565, 570-75, *aff'd* 213 Ill. 523, 72 N.E. 1127 (1905); *Murray v. Albertson*, 50 N.J.L. 167, 13 A. 394 (1888). See also *White v. Walker*, 31 Ill. 422 (1863); *Eskin v. Freedman*, 53 Ill. App. 2d 144, 152-54, 203 N.E.2d 24, 27-28 (1964).

21. See *Little Rock Ice Co. v. Consumers Ice Co.*, 144 Ark. 532, 170 S.W. 241 (1914); *Davidson v. Fischer*, 11 Colo. 583, 19 P. 652 (1888); *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708 (1872); Annot., 343 A.L.R. 711; Annot., 29 A.L.R. 53 (1924); Annot., 13 A.L.R. 818 (1921); Annot., 4 A.L.R. 1462 (1919); 1 AMERICAN LAW OF PROPERTY § 3.45 (Casner ed. 1952); and 2 POWELL, THE LAW OF REAL PROPERTY § 225 (Rohan ed. 1967).

22. See, e.g., *Franklin v. Brown*, 118 N.Y. 110, 111, 23 N.E. 126, 127 (1889): "[T]he principle that there is an implied condition or covenant in a lease that the property is reasonably fit for the purpose for which it was let, as laid down in *Smith v. Marrable*, has been frequently questioned by the courts of this country, and has never been adopted as the law of this state We have [been] referred to no decision of this court involving the application of that principle to the lease of a ready-furnished house, and it is not necessary to now pass upon the question, because the case under consideration differs from the English cases above mentioned in two significant particulars: (1) It involves a lease for the ordinary period of one year, instead of a few weeks or months during the fashionable season. (2) The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default. . . ." See also Annot., 4 A.L.R. 1453, 1453-59, 1468-80 (1919).

rented by the tenant were overrun with vermin, making it "inconvenient" to inhabit the premises and rendering them untenable.²³ However, the emphasis of the courts remained primarily on caveat emptor and the presence or absence of express covenants imposing greater duties on the landlord; reliance on an implied warranty of habitability was consistently avoided.²⁴

In the twentieth century, the status of the caveat emptor-express covenant philosophy, constructive eviction doctrine, and the principle of implied warranty is best described not as a trichotomy, but as a continuum, with the subclass R being the landlord-tenant relationship itself. The caveat emptor-express covenant philosophy places the onus of inspecting the premises on the tenant. It is thought that the tenant enters into the relationship with his eyes open. Such a factor as uninhabitability is looked upon as not evading those eyes.

While the constructive eviction doctrine places the burden of inspection on the tenant also, it does not require the tenant to be a good judge of character.²⁵ Thus, if the landlord causes the premises to become uninhabitable, the doctrine allows the tenant to avoid the payment of rent by a speedy abandonment of the premises.

Although constructive eviction allows for abandonment when the premises become untenable after occupancy has begun, the principle of the implied warranty of habitability, besides providing for additional remedies, has the incidence of uninhabitability occurring at the beginning of the tenancy,²⁶ and allows abandonment for conditions not caused by the landlord.²⁷ This continuum has been used by the courts, and in being so used, it was necessary to find conceptual bridges for the vacillation.

It is not uncommon, even today, for both lawyers and courts to argue

23. *Pomeroy v. Tyler*, 9 N.Y. St. Rep. 514 (1887).

24. Typical of the language used by the courts in these circumstances is the following quotation from *Jacobs v. Morand*, 59 Misc. Rep. 200, 201, 110 N.Y.S. 20 (1908): "[N]o evidence was given of any express covenant in the lease to keep the apartment free from vermin; and, in the absence of such a covenant, the lessee . . . in the absence of fraud, deceit, or wrongdoing on the part of the [landlord], ran the risk of the condition of the property in that regard . . ." It might be noted at this point also that in *Lemle* the court was confronted with dictum to this effect when it rendered the decision about which this note is concerned: "In the absence of an express covenant the landlord is not obliged to repair, nor is he responsible for the uninhabitable condition of the premises. . . ." *Peterson v. Frazier*, 18 H. 457, 458 (1907).

25. See text accompanying *infra* notes 38, 39 and 40.

26. See text accompanying *infra* notes 36 and 37.

27. As the rats were not controllable on the island of Oahu in *Lemle v. Breen*, *supra* note 1.

not only the constructive eviction doctrine, but also the implied warranty principle, in cases of vermin infestation. One of the first conceptual bridges found for doing so was the difference between "modern" conditions and the common law.²⁸ Because a tenant has placed upon him the duty not to commit waste, he cannot effectually solve the problem of vermin himself, for the job would necessarily entail a partial destruction of the premises. It was therefore found that "[i]n the absence of a contrary provision in a written lease for [a third floor] apartment in a modern multiple apartment building, the landlord impliedly warrants that the premises will be habitable. . . ."²⁹

Another perhaps more persuasive "bridge" was the "consistency with the current legislative policy" argument, advanced by the Wisconsin Supreme Court in *Pines v. Perssion*,³⁰ this time striking a definite blow at *caveat emptor*:

To follow the old rule of no implied warranty of habitability in leases [of accommodations for housing] 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 that obnoxious legal cliché, *caveat emptor*.³¹

The court quoted with approval an English case³² which argued that the implied warranty concept promotes the public good and preserves the public health.

The most persuasive argument given, especially for the typical *Smith v. Marrable*³³ situation of the rental of a furnished dwelling for a period of short and definite duration, is that the lessee does not have an adequate

28. *Delamater v. Foreman*, 184 Minn. 428, 429, 239 N.W. 148, 149 (1931): "The rule at common law was that the law did not impliedly impose [the duty of riding an apartment of insects] upon the landlord. This rule still prevails as to the leasing of an unfurnished dwelling house. But such a rule . . . is not flexible . . . and must be construed to meet conditions unknown at common law." The tenant's apartment was infested with bedbugs. The language above was used even though the tenant defended on the ground of constructive eviction.

29. *Id.* at 428, 239 N.W. at 148.

30. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). See also *infra* note 53.

31. *Id.* at 596, 111 N.W.2d at 412. This argument seems feasible in Illinois, since the following dictum, used in an appellate case, was cited by the court: "[T]he Housing Code represents a significant change from common-law standards. . . . The Housing Code thus establishes a duty of care based upon contemporary conditions, values and norms of conduct in this community. We must assume that the ordinance reflects the collective judgment of the community. . . ." *Gula v. Gawel*, 71 Ill. App. 2d 174, 183-84, 218 N.E.2d 42, 46 (1966). See also *Whetzel v. Jess Fisher Realty Co.*, 282 F.2d 943, 946 (D.C. Cir. 1960).

32. *Collins v. Hopkins*, 2 K.B. 617, 34 A.L.R. 703, 705 (1923).

33. *Supra* note 14.

opportunity to inspect the premises before he accepts the lease.³⁴ This is also a direct attack on *caveat emptor*.

Armed now with the arguments courts have used during the twentieth century to traverse the continuum, an examination of the determinative factors courts have considered in deciding whether or not they *will* cross is necessary. These factors are: (1) the time of vermin infestation; (2) the conduct of the landlord; (3) the conduct of the tenant; and (4) the gravity of the condition.

As noted previously, the doctrine of constructive eviction enables a tenant to vacate the premises for an act of the landlord which deprives the tenant of the beneficial enjoyment of the estate to which he is entitled by the lease agreement.³⁵ The nature of the action permits a quitting of the property after the beginning of the term, should the constructive eviction (*i.e.*, act of the landlord) occur after that time.

The courts, however, when confronted with applying the principle of the implied warranty of habitability, have almost uniformly held that the condition of uninhabitability must be present at the beginning of the term in order for the landlord to have been in breach of the warranty.³⁶ This, at least for policy reasons, makes good sense. Just as constructive

34. See 1 AMERICAN LAW OF PROPERTY, § 3.45, *supra* note 21; Lesar, *supra* note 9, at 1283-87.

35. See text following *supra* note 25; see also *The Automobile Supply Co. v. The Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930).

36. See *Legere v. Asselta*, 342 Mass. 178, 179, 172 N.E.2d 685, 686 (1961), in which the court states "The implied condition [that the premises are fit for habitation] is based upon the inference that the lessee intends immediately to occupy the premises as they stand. Moreover, the condition is implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later The house was fit for habitation when the [lessee] took possession. That is the extent of the [landlord's] warranty." *Davenport v. Squibb*, 320 Mass. 629, 632-33, 70 N.E.2d 793, 795 (1947); *Hopkins v. Murphy*, 233 Mass. 476, 124 N.E. 252 (1919) [Noted in Annot., 13 A.L.R. 816 (1919)]. In the latter case there were no cockroaches in the leased premises until more than two years after the tenant's occupancy began. The landlord "was not responsible for the presence of the cockroaches, and . . . he did nothing with the intention and effect of depriving the [tenant] of the demised premises." *Id.* at 477-78, 124 N.E. at 252-53. See also *Ingalls v. Hobbs*, 56 Mass. 348, 31 N.E. 286 (1892); *Sarson v. Roberts*, 2 Q.B. 395 (1895). *But see* *Mr. Justice Bazelon's* strong dissent in *Bowles v. Mahoney*, 202 F.2d 320, 325 (D.C. Cir. 1952). Speaking with reference to the common law rule that there was no liability on the part of the landlord for injury resulting from a defect in the premises which arose *during* the term, he stated: "I think that rule is an anachronism which has lived on through *stare decisis* alone rather than through pragmatic adjustment to 'the felt necessities of [our] time.' I would therefore discard it and cast the presumptive burden of liability on the landlord. This, I think, is the command of the realities and mores of our day."

eviction requires an act on the part of the landlord, it stands to reason that he should be held liable for a condition in or about the premises which was present when they were let. However, once the lessee is given exclusive possession, an argument might be made that any condition of uninhabitability arising thereafter would be more likely to be caused by him alone than by the landlord.³⁷

The impact of caveat emptor was felt in the 1900's by a concentration on the conduct of the landlord. The earlier cases were decided by courts which felt constrained to refuse a remedy to the tenant in the absence of fraud, misrepresentation, or active concealment on the part of the landlord.³⁸ At least one author has stated a counter-argument to the former proposition:

Although it is true that many defects which render premises untenable are obvious, some, at least, are latent. Defects of this nature include vermin infestation. . . . Such inadequacies are often not discoverable by the untrained eye of the prospective tenant, and consequently, if known by the landlord, constitute fraudulent nondisclosure and give the tenant the right of rescission or an action for damages based on deceit. . . .³⁹

The question therefore remains open whether or not it is the landlord's duty to *discover* these inadequacies." But recently the New Jersey Supreme Court in *Reste Realty Corp. v. Cooper*⁴⁰ stated:

It has come to be recognized that ordinarily the lessee does not have as much [knowledge of the premises] as the lessor. . . . [The lessor] is in a better position to know of latent defects, structural and otherwise, in a building, which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee . . . cannot be expected . . . to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee. These factors

37. *Supra* note 28, at 430, 239 N.W. at 149: "[If the premises become uninhabitable without the fault of the landlord] he has no concern therewith, and the responsibility for such presence [of cockroaches] is *necessarily* with the tenant." (Emphasis added).

38. *See, e.g.,* *Leech v. Husbands*, 34 Del. 362, 366, 152 A. 729, 731 (1930): "[I]n the absence of fraud, there is no implied . . . representation . . . that a house or apartment is free from vermin, bugs, or disease germs, and . . . such conditions should usually be guarded against by express covenants. . . ."; *Hopkins v. Murphy*, *supra* note 36, at 477, 124 N.E. at 252: "In the absence . . . of fraudulent representations or concealment by the lessor, the lessee takes the demised premises as they exist and the rule of caveat emptor applies." *But see* *Jamison v. Ellsworth*, 115 Iowa 90, 87 N.W. 723 (1901), which held for the landlord even in the *presence* of false representations attending the lease. *See also* *Jacobs v. Morand*, *supra* note 24.

39. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 522 (1966). *See, e.g.,* *Ackarey v. Carbonaro*, 320 Mass. 537, 70 N.E.2d 418 (1946). *Compare* *Deskey v. Lack*, 11 H. 395, 396-97 (1898).

⁴⁰ 53 N.J. 444, 251 A.2d 268 (1969).

have produced persuasive arguments for re-evaluation of the *caveat emptor* doctrine and, for imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws.⁴¹

Assuming, *arguendo*, that vermin infestation is latent, might it not then be assumed to be information readily available to the lessor? If so, the landlord might have the duty to inspect for the defects and to inform the tenant of them, or be held liable for fraudulent nondisclosure, giving rise to rescission.

Over the years, courts have occasionally considered the conduct of the tenant to be of some import in reaching a decision. One possible explanation for this approach is the necessity of the courts to in some way side-step *caveat emptor* (which they are understandably reluctant to do), in granting relief to a tenant. Before they do this, and without an actual constructive eviction by the landlord, they on occasion observe whether or not the tenant tried unsuccessfully to exterminate the vermin himself, or at least whether the tenant afforded such an opportunity to the landlord.⁴² Thus, the fact that a tenant merely vacated was looked upon with disfavor by some courts.⁴³ Likewise, if the premises were uninhabitable, it

41. *Id.* at 452, 251 A.2d at 272. Compare *Horton v. Marston*, 352 Mass. 322, 225 N.E.2d 311 (1967), which held that in a rental of a summer cottage for nine months, the risk of concealed defects remained on the landlord, with *Owens v. Ramsey*, 213 Ky. 279, 282, 280 S.W. 1112, 1114 (1926): "There is no allegation that plaintiff fraudulently represented to or concealed from defendant the alleged fact that the house was infested with rats and cockroaches; but it is only alleged that the plaintiff did know it was so infested, or could have known the same by the exercise of ordinary care and diligence." (Emphasis added). The trend seems to be toward granting a tenant a remedy even in the face of inaction by the landlord. See Note, 13 BAYLOR L. REV. 62, 64 (1961).

42. In *Leo v. Santagada*, 45 Misc. 2d 309, 310, 256 N.Y.S.2d 511, 513 (1964) the court said: "The law is well settled, the condition must be such that the tenant neither caused nor can cope with it. The landlord must also have the opportunity to remedy the situation. The plaintiffs-tenants made no attempt to help themselves by using what an ordinary housewife would use under the same circumstances nor did they notify defendant-landlord to afford him an opportunity to remedy the situation." See *Morgenthau v. Ehrich*, 77 Misc. 139, 136 N.Y.S. 140 (1912). The lease here involved a furnished house for the winter season, which would seem to be well within the doctrine of implied warranty. The house was so overrun with vermin that it turned out to be untenable. The court took note that the tenants' efforts to cure the infestation with corrosive sublimate were unsuccessful. See also *Ray Realty Co. v. Holtzman*, 234 Mo. App. 802, 119 S.W.2d 981 (1938).

43. See *Leo v. Santagada*, *supra* note 42. See generally *Charlie's Transfer Co. v. Malone*, 159 Ala. 325, 48 So. 705 (1909); *Smith v. State*, 92 Md. 518, 48 A. 92 (1901); *Chapin Publicity Co. v. Saybrook Holding Corp.*, 105 N.J.L. 215, 147 A. 490 (1929); *Goldberg v. Reed*, 97 N.J.L. 170, 116 A. 429 (1922); *Whitcomb v. Bryant*, 76 N.J.L. 201, 68 A. 1102 (1908); *Murray v. Albertson*, *supra* note 20; *Wainwright v. Helmer*, 193 N.Y.S. 653 (1922 Sup. Ct. App. term); *Westlake v. De Graw*, 25 Wend. 669 (N.Y. 1841).

was believed that the tenant would not wait too long to complain to the landlord or vacate the premises.⁴⁴ The reasoning was that a person could not claim uninhabitability and yet continue to live in the premises.⁴⁵

The feasibility of such an inquiry is lessened when compared to the very nature of an action in implied warranty. The warranty, if present in a lease, is broken or not broken by the presence or absence of the condition of inhabitability existing at the inception of the landlord-tenant relationship, *i.e.*, when the lease agreement is entered into and the tenant takes possession of the property. The breach or non-breach of the warranty occurring at that time renders any discussion of later action or inaction by the lessee superfluous, unless it be considered only in mitigation of damages or in assessing the gravity of the infestation.

As soon as the courts enter into the implied warranty spectrum of the continuum, one factor of primary importance is the gravity of the condition of infestation, which causes, according to the tenant, the breach of the warranty. Although this is normally a question of fact,⁴⁶ it is clear that recovery should not be granted for twelve cockroaches,⁴⁷ or two bed-bugs.⁴⁸

It is to be remembered that the courts use the conceptual bridges and the sundry focuses discussed above on a case-to-case basis. An examination of the type of premises to which the rules are applied is thus in order. While the legacy of *Smith v. Marrable* is universally accepted in America,⁴⁹ nevertheless certain trends can be plotted.

44. In *Griffin v. Freeborn*, 181 Mo. App. 203, 168 S.W. 219 (1914), the tenant remained in possession for fifteen months after the conditions were discovered. See generally *Applegate v. Wojaczyk*, 103 N.J. Super. 455, 247 A.2d 678 (1955); *Duncan Development Co. v. Duncan Hardware*, 34 N.J. Super. 293, 112 A.2d 274 (1955); *Doyle v. Colosante*, 65 A.2d 863 (N.J. 1949); *Ellis v. McDermott*, 7 N.J. Misc. 757, 147 A. 236 (1929); *Gunther v. Oliver*, 97 N.J.L. 376, 117 A. 402, *aff'd* 98 N.J.L. 563, 119 A. 925 (1923); *Heilbrun v. Aaronson*, 116 N.Y.S. 1096 (1909); *Annot.*, 91 A.L.R. 2d 638 (1963).

45. See, *e.g.*, *Bowles v. Mahoney*, *supra* note 36; *Two—Rector Street Corp. v. Bein*, 226 App. Div. 73, 234 N.Y.S. 409 (1929); *Chelton Ave. Bldg. Corp. v. Mayer*, 316 Pa. 228, 172 A. 675 (1934).

46. It has been suggested that if the condition can be remedied by the tenant, it is not sufficiently grave. See generally *Masser v. London Operating Co.*, 106 Fla. 474, 145 So. 79 (1932); *Ben Har Holding Corp. v. Fox*, 147 Misc. 300, 263 N.Y.S. 695 (1933); *Wainwright v. Helmer*, 193 N.Y.S. 653 (1922 Sup. Ct. App. Term); *Michtom v. Miller*, 178 N.Y.S. 395 (1919 Sup. Ct. App. Term); *Jacobs v. Morand*, *supra* note 24; *Parmelee v. Pulvola Chem. Co.*, 31 Misc. 818 (N.Y. 1900).

47. *Leo v. Santagada*, *supra* note 42.

48. *Michtom v. Miller*, *supra* note 46.

49. See *Skillern, Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 392 (1967).

At least one change from the common law with which courts have had to cope is the prevalence of apartment house dwelling. It still, however, is not entirely clear whether any particular court will grant the tenant relief, for some courts place their emphasis upon the inability of the lessee to cope with the situation, while other courts stress the inability of the landlord to alleviate the condition, especially where the uninhabitable condition arises not from the premises itself, but from the outside.⁵⁰ If anything of substance can be garnered from the cases, it is safe to say that the tenant will most probably be protected if the infestation is present in other apartments in the same building, with a trend of liberality in placing the burden on the landlord.⁵¹

It is with houses that the implied warranty doctrine has found its earliest and most lasting fruition. It may be noted at this point that the principle of the implied warranty has even been recently extended to *sales of new houses*.⁵² With leases of houses, however, the true impact of *Smith*

50. See *Barnard Realty Co. v. Bonwit*, 155 App. Div. 182, 183, 139 N.Y.S. 1050, 1051 (1913). In this case, the tenant and his wife moved into a top floor apartment. Their defense to an action for rent was constructive eviction, due to the stench of dead rats within the walls and nightly disturbance of rats running between the walls. It is interesting to note the "change from the common law" and waste arguments discussed (*supra* note 23 and accompanying text): "Very large numbers of people live in tenement houses, apartment houses, and apartment hotels in this city. Such tenants have, and can have, control only of the inside of their limited demised premises. Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof. An intolerable condition, which the tenant neither causes nor can remedy, seems to me warrants the application of the doctrine of constructive eviction." *Id.* at 183, 139 N.Y.S. at 1051. Compare *Lemle v. Breeden*, *supra* note 1, with *Stanton v. Southwick*, 2 K.B. 642, 646 (1920), in which the court states: "[T]he case was fought upon the footing that the rats had their home in the sewer passing below the house, that from the sewer they made incursions into the house in search of food, and that that was how they were found to be in the house. . . . Clearly there is no duty on the occupier above, whether he be landlord or only occupier, to guard against an accident of this nature. It is absurd to suppose a duty on him to exclude the possibility of the entrance of rats from without." See generally *Laffey v. Woodhull*, 256 Ill. App. 325 (1930); *Washington Chocolate Co. v. Kent*, 183 P.2d 514 (Wash. 1947).

51. See *Buckner v. Azulai*, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967). In that case, the premises were infested with psocids. There was evidence that the infestation came from other parts of the building and that the psocids were present in other apartments. The lessee had waived the portion of the Civil Code in the lease requiring the landlord to put the premises in a fit condition for occupancy. The court granted the tenant relief, holding that the waiver had to be strictly construed. Thus the tenant waived the requirements only as to the let premises; the vermin coming from other parts of the building, to which her waiver did not apply, caused a constructive eviction.

52. At least eight jurisdictions in the past decade have recognized an implied warranty—of inhabitability, sound workmanship, or proper construction—in the sale

v. Marrable is felt. The tenant in order to qualify for the warranty ordinarily must meet two prerequisites. First, the lease must be short-term, as opposed to long-term.⁵³ Second, the house must be furnished, as opposed to unfurnished.⁵⁴ This is in keeping with the spirit of the original exception as enunciated in *Smith*. That case, it will be recalled, dealt with a short-term lease of a furnished house. *Sutton* and *Hart* made it clear that the doctrine applied in such a situation alone. Just as it was an arduous process for courts to accept the principle of *Smith* as qualified, so too has it been difficult for them to extend it. Thus the universal acceptance of the exception to caveat emptor seems to be confined to these narrow limits.

Illinois appears to be a steadfast champion of the common law, applying the general rule of caveat emptor consistently from the earliest cases;⁵⁵

of new houses by builder-vendors. There has been a cognizance of reality by the courts that vendees do not stand on equal footing with the builders, and are able to protect themselves no more than buyers of mass-produced automobiles. *Wawak v. Stewart*, 449 S.W.2d 922 (Ark. 1970); *Carpenter v. Donohoe*, 154 Colo. 178, 388 P.2d 399 (1964); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Waggoner v. Midwestern Dev. Co.*, 154 N.W.2d 803 (S.D. 1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Rothberg v. Olenik*, 262 A.2d 461 (Vt. 1970); and *House v. Thornton*, 457 P.2d 199 (Wash. 1969). See generally Note, 71 W. VA. L.Q. 87 (1968).

53. The foremost case on the subject is *Young v. Povich*, 121 Me. 141, 116 A. 26 (1922). The case held that short term leases come within the rule of implied warranty, and, conversely, long term leases would use the rule of caveat emptor. Short or long term was a question of fact, but the court advocated the standard "for a temporary purpose," which would make the question one of law and fact. The dichotomy was perfectly spelled out: caveat emptor still applied to a long term lease of an unfurnished dwelling house. Judgment was for the tenant, however, the lease of a furnished dwelling for eight months being on the "proper" side of the dichotomy. The longest "short term" lease was for a period of one year, in the oft-quoted case of *Pines v. Perssion*, *supra* note 30. The tenants in this case, however, were college students more or less at the mercy of their off-campus landlord, which may have proved a factor in the court's decision. See generally *Zatloff v. Winkelman*, 90 R.I. 403, 158 A.2d 87 (1960).

54. *Leech v. Husbands*, *supra* note 38, at 366, 152 A. at 731 states the rule: "[W]hatever the rule may be in a short term lease of a furnished house or apartment where immediate occupancy is intended, the rule of *caveat emptor* ordinarily applies between landlord and tenant and there is no implied covenant, or even a warranty, in a lease of an unfurnished house or apartment that it is either reasonably fit or safe for habitation, or that it will remain in that condition." See *Ingalls v. Hobbs*, *supra* note 36 at 349, 31 N.E. at 286: "It is well settled, both in this Commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. . . ." See generally *Pierce v. Nash*, 126 Cal. App. 2d 606, 272 P.2d 938 (1954); *Brandt v. Yeager*, 199 A.2d 768 (Del. Super. 1964).

55. See *Martin v. Surman*, 116 Ill. App. 282, 283 (1904): "The tenant takes

and yet it is difficult to make a perceptive prediction of the decision of a case of import, for almost all of the cases decided have never gone beyond the appellate level.⁵⁶ The typical rule can be found in the case of *Russell v. Clark*,⁵⁷ an appellate court level case, wherein the court stated:

There is no implied covenant on the part of the landlord that the premises at the time of letting are in a tenable condition . . . except in cases of fraudulent concealment of hidden defects "In some jurisdictions it has been held there is an implied covenant that the premises are fit for habitation at the beginning of the term . . . , but in those cases this applies only to the condition of the premises at the beginning of the tenancy, and not to defects arising subsequently, and where the lessee inspects the premises . . . there is no reason for implying the covenant"58

From the above quotation, the Illinois court is clearly applying caveat emptor, laying the burden of inspection on the prospective tenant. The warranty, if one is to be implied, is either broken or not broken at the beginning of the tenancy. The court reiterates the general rule that recovery will not be had in the absence of fraudulent concealment of hidden defects.

The fraudulent concealment basis of recovery brings to mind the argument that a lessor may be obliged to examine the premises in order to discover the hidden defects, of which vermin infestation is one, or else be charged with the knowledge thereof.⁵⁹ Such an argument in Illinois is futile, however, at least before an appellate court, for a recent decision

the premises at his own risk, and there is no implied covenant that they are fit for habitation or for the purposes for which they are rented. The rule caveat emptor applies to a contract of letting."; and *McCoull v. Herzberg*, 33 Ill. App. 542, 545-46 (1889); "It is the settled doctrine that there is no implied contract on the part of the landlord that the demised premises are tenable, or that they will continue so during the term."

56. See *The Automobile Supply Co. v. The Scene-in-Action Corp.*, *supra* note 35; *Gibbons v. Hoefeld*, *infra* note 64; *White v. Walker*, *supra* note 20; *Gula v. Gawel*, *supra* note 31; *Eskin v. Freedman*, *supra* note 20; *Hendricks v. Socony Mobil Oil Co.*, *infra* note 60; *Ciskoski v. Michaelsen*, 119 Ill. App. 2d 327, 334, 152 N.E.2d 479, 482 (1958); *Farmer v. Alton Bldg. & Loan Ass'n.*, 294 Ill. App. 206 (1938); *Laffey v. Woodhull*, *supra* note 50; *Allmon v. Davis*, *infra* note 62; *Reubens v. Hill*, *supra* note 20; *Carpenter v. Stone*, 112 Ill. App. 155 (1904); *Martin v. Surman*, *supra* note 55; *Watson v. Moulton*, 100 Ill. App. 560 (1901); *Sunasack v. Morey*, 98 Ill. App. 505 (1901), *rev'd*. 196 Ill. 569, 63 N.E. 1039 (1902); *McCoull v. Herzberg*, *supra* note 55; *Blake v. Ranous*, 25 Ill. App. 486 (1887). See also *Cohen v. Plumtree*, 170 Ill. App. 311 (1912); *Lazarus & Cohen v. Parmly*, 113 Ill. App. 624 (1904); *Hefling v. Van Zandt*, 60 Ill. App. 662 (1895), *modified* 162 Ill. 162, 44 N.E. 424 (1896); and *Mendel v. Fink*, 8 Ill. App. 378 (1880).

57. 173 Ill. App. 461 (1912).

58. *Id.* at 463-64.

59. See text accompanying *supra* notes 40 and 41.

has stated that the defect must be one not only undiscoverable by the tenant, but also actually known to the landlord.⁶⁰ Fraudulent concealment, it was said, "necessarily implies actual knowledge on the part of the landlord"⁶¹

The only glimmer of hope in Illinois comes from two early cases. The first is an early Illinois appellate case, *Allmon v. Davis*,⁶² which stated that it was the duty of the landlord to furnish premises that are fit for the purpose for which they are leased. This included making a dwelling house tenantable and habitable.⁶³ The second, an Illinois Supreme Court case, decided after the turn of the century,⁶⁴ intimated that, with premises leased for a certain purpose, the tenant was not required to take possession unless the premises had been made tenantable for such purpose. However, the latest Illinois case on the subject,⁶⁵ again on the appellate level, had no qualms about making a finding against the tenant.

The great weight of authority remains in support of the general rule: there is no implied warranty that leased premises will be tenantable, fit, or in a suitable condition.⁶⁶ The need for an implied warranty at present, however, would seem implicit in the priorities of reality when one is confronted with mass urban society and the ghettos it produces. The *Lemle* court, in finding such a warranty, is clearly in step with the times.

In eliminating constructive eviction, however, an extension of the doctrine of implied warranty of habitability and fitness for use is immediately required. Now, apparently, such warranty must run throughout the period of the lease, and may be broken at any time, not just at the beginning of the tenancy. Because, by its nature, the action for breach of warranty relies on the condition of the premises, such an action neces-

60. *Hendricks v. Socony Mobil Oil Co.*, 45 Ill. App. 2d 44, 53, 195 N.E.2d 1, 6 (1963): "A tenant does have a right of action against the landlord for injuries resulting from a latent defect only when it appears that the landlord had *actual knowledge* of such defect and the defect is one which a tenant could not be expected to discover upon reasonable inspection, and when the landlord fails to disclose to the tenant his knowledge of the defect. The basis of such liability is fraudulent concealment by the landlord, and this *necessarily* implies knowledge on the part of the landlord." (Emphasis added).

61. *Id.* (Emphasis added).

62. 248 Ill. App. 350 (1928).

63. *Id.* at 352.

64. *Gibbons v. Hoefeld*, 299 Ill. 455, 132 N.E. 425 (1921), *rev'g* *Martin v. Surman*, *supra* note 55.

65. *Hendricks v. Socony Mobil Oil Co.*, *supra* note 60.

66. 32 AM. JUR. *Landlord and Tenant* § 654 (1941); 52 C.J.S. *Landlord and Tenant* § 485 (1968); 1 AMERICAN LAW OF PROPERTY § 3.45 (Casner ed. 1952); TIFFANY, REAL PROPERTY § 81 (abridged ed. 1940).

sarily embraces situations where the premises become uninhabitable by the fault of the landlord, and would require recovery in the face of inaction by him. Of course a value judgment must be made as to whether a remedy will be granted where the tenant causes the condition himself.

The remedies available to the tenant under *Lemle* are rescission, reformation, and the recovery of damages. While rescission equals the vacation of the premises, reformation and damages recognize this primary weakness of constructive eviction. Often a lease entails a decision as to the desirability of the location. With rescission, the location must be left behind. It is often ultimately desired by the tenant, therefore, to render the premises suitable, rather than to incur the greater expense of relocation. Damages and reformation supply this need.

The *Lemle* decision still leaves unanswered some important questions. It will be remembered that the lease term involved in the case was for a period of approximately eight months. Likewise the rental involved the lease of a furnished dwelling house. The result itself would, therefore, probably have been the same in the jurisdictions that apply a liberal interpretation of the *Smith v. Marrable* exception to caveat emptor. Thus, although *Lemle* may be fairly applied to a broad range of situations, it is conceivable that a judge will interpret the decision as being merely a reiteration of *Smith*.

A practical problem created by *Lemle* is a change in lease forms to include a waiver by the tenant of the warranty. Reality rejects the "equal bargaining position" of landlord and tenant argument. For apartment dwellers, a line of attack in the presence of such a waiver is that the waiver is to be strictly construed. Thus a waiver would apply only to the demised premises, and the entry of vermin from other apartments in the same building would constitute a technical breach of the warranty.⁶⁷

Clearly, legislation is the best answer for any meaningful changes. But the law would have to be definite, as in England:

[There is an implied condition] notwithstanding any stipulation to the contrary, . . . that the house is fit for human habitation at the commencement of the tenancy, and an undertaking . . . that the house will be kept so fit by the landlord during the tenancy.⁶⁸

The law applies only to low-rent housing—that with an annual rental of

67. See note 51 *supra*. See generally Blum and Dunham, *Slumlordism as a Tort—A Dissenting View*, 66 MICH. L. REV. 451 (1967); Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966); Walsh, *Slum Housing: The Legal Remedies of Connecticut Towns and Tenants*, 40 CONN. B.J. 539 (1966).

68. ENGLISH HOUSING ACT, 1957, 5 & 6 Eliz. 2, c. 56, § 6(2).

£80 or less in London or £52 or less elsewhere. The enactment of such a law is quite possible, should the current inflationary rentals and corresponding pressures on the legislatures continue.

The *Lemle* decision represents a change in landlord-tenant law, a law which has remained virtually unchanged for nine-hundred years. Constructive eviction has been relegated to the position of a legal fiction discarded because not in tune with the times, while the equally ancient principles of contract law have gained ascendancy. Basic contract remedies are thus provided the tenant, and, in addition, recovery may be had in two situations previously inapplicable to the implied warranty concept: where the condition of uninhabitability arises from outside the premises and is uncontrollable by the landlord himself; and where the condition occurs after the beginning of the term set for the lease, with or without the fault of the landlord. Still, it will be interesting to see what the Hawaii Supreme Court will do with a lease of an unfurnished house for two years, when the tenant sues for damages because of an uninhabitable condition arising eight months or more after the beginning of his tenancy.

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