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Notes

LANDLORD AND TENANT—NEW REMEDIES FOR OLD PROBLEMS

In *Marini v. Ireland*, the Supreme Court of New Jersey held that in a lease of residential property to be used for a dwelling, the landlord should be held to an implied covenant of fitness for the purpose of the lease.[1] That is, the landlord must warrant that the dwelling is fit for habitation. Upon a breach of this covenant, and after notice to the landlord, the tenant may repair the premises himself and deduct the cost of the repairs from his rent.[2]

On April 2, 1969, plaintiff landlord and defendant tenant entered into a one year lease for an apartment dwelling in Camden, New Jersey. While the lease contained a covenant of quiet enjoyment, it did not contain an express covenant to repair. In June the defendant discovered that her toilet was cracked, leaking and discharging water onto the bathroom floor. After repeated but fruitless attempts to inform the landlord of this condition, the defendant hired a plumber who repaired the toilet. On July 15 the defendant sent the landlord the plumber's receipt and $9.28, the difference between the cost of repairs and the rent due. The plaintiff challenged the offset and demanded the balance of the rent due.

When his demand was refused, plaintiff filed suit in the county court alleging that since he was entitled to the rent and was under no duty to repair, the offset should not be allowed. The court,

1. 50 N.J. 130, 265 A.2d 526 (1970).
2. *Id.*

ruling that the issue was a matter of law, entered a judgment of possession for the plaintiff. Defendant appealed. The Appellate Division granted a stay of judgment and warrant of eviction pending appeal. Before the Appellate Division could hear arguments, the Supreme Court certified the case on its own motion.

The reasoning revealed three major issues in the case. The first was a jurisdictional question, basically a local issue and not within the purview of this Note. The other two closely-related issues were: (1) did the landlord have a duty to repair; and (2) upon a breach of that duty did the tenant have the right to repair the property himself and deduct the cost of such repairs from his rent?

The general rule is that in the absence of statute or an express covenant by the landlord to the contrary, the lessor is under no duty to repair the leased property.[3] The landlord is bound by no implied covenant to repair during the term of the lease,[4] even if the premises are in a dangerous condition.[5] The doctrine of *caveat emptor* governs leases and bailments,[6] with only four exceptions:[7] first, where the leasehold is to be used for a public purpose;[8] second, where the lessor retains possession of public areas (stairways, halls, etc.);[9] third, where a dangerous defect is known to the lessor but difficult for the lessee to discover;[10] and fourth, where an express covenant to repair is made a part of the lease.[11]

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3. Farber v. Greenberg, 98 Cal. App. 675, 277 P. 534 (1929); Pignatario v. Meyers, 100 Conn. 234, 123 A. 263 (1924); Old Time Petroleum Co. v. Tureol, 18 Del. 121, 156 A. 501 (1931); Bailey v. First Realty Co., 305 Mass. 306, 25 N.E.2d 712 (1940); Lipsitz v. Schechter, 377 Mich. 685, 142 N.W.2d 1 (1966); Bauer v. 141-149 Cedar Lane Holding Co., 24 N.J. 139, 130 A.2d 833 (1957); Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922); Rotte v. Meierjohan, 78 Ohio App. 387, 70 N.E.2d 684 (1946); Lopez v. Quakcenback, 391 Pa. 359, 137 A.2d 771 (1958).

4. Rathburn Co. v. Simmons, 90 Cal. App. 692, 266 P. 369 (D.C. 3rd 1928); Woodcock v. Pope, 164 Md. 165, 140 A. 76 (App. Ct. 1928); Rosenberg v. Krinick, 116 N.J.L. 587, 186 A. 446 (1936); Potter v. N.Y. O&W R.R. Co., 233 App. Div. 578, 253 N.Y.S. 394, aff'd, 261 N.Y. 489, 185 N.E. 708 (1933); Irish v. Rosenbaum, 348 Pa. 194, 34 A.2d 486 (1943).

5. Casais v. Meyer L. Shapiro Estate, 136 N.J.L. 304, 55 A.2d 819 (1947), aff'd., 137 N.J.L. 608, 61 A.2d 238 (1948).

6. Lusco v. Jackson, 27 Ala. App. 531, 175 So. 566 (1937); Borden v. Hirsh, 249 Mass. 205, 143 N.E. 912, 33 A.L.R. 526 (1924).

7. 21 BAYLOR L. REV. 326, 1969.

8. Perez v. Raybauld, 76 Tex. 191, 13 S.W. 177 (1890).

9. Fergusen v. National Bank of Commerce, 174 S.W.2d 1015 (Tex. Civ. App. 1943).

10. Burton-Lingo Co. v. Morton, 136 Tex. 263, 126 S.W.2d 727 (1939).

11. F.H. Vohlsing Inc. v. Hartford Ins. Co., 108 S.W.2d 947 (Tex. Civ. App. 1937).

In *Marini*, the court found a duty to repair existing outside of the usual exceptions. There was no expressed covenant to repair; the leaking toilet was hardly a dangerous or concealed defect; nor was it part of a public area. The *Marini* court arrived at its holding via a more novel route.

The court first recognized that the old *caveat emptor* approach to leases was outmoded.[12] Although that approach was logically pertinent to land transactions in a rural, agrarian society, it had lagged far behind the changes brought about by industrialization and urbanization and ignored economic realities. Large scale urbanization, coupled with a severe housing shortage, has resulted in housing becoming a seller's (lessor's) market, with a resulting inequality of the bargaining position between lessors and lessees.[13] The lessee rarely has as much knowledge of the true condition of the premises as the lessor.[14] Many defects, among them quite probably the toilet in the *Marini* case, are not readily visible and arise after the signing of the lease, or occur through normal use during the term of the lease. The landlord is in a better position to discover latent or structural defects than the tenant, who rarely has the expertise to realize the implications of a defect, should he be so fortunate as to discover one.[15] A tenant, for example, would probably not know if the plumbing and wiring conformed to local codes.[16] Nor, as the *Marini* court stated, should the tenant be required to hire an expert to inform him of the condition of a prospective rental.[17]

These factors, *Marini* stated, are persuasive arguments for abandoning the *caveat emptor* doctrine with respect to leases and adopting "an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws."[18] The court held that such a covenant must arise in a lease because it is indispensable to effect the purpose of the lease.[19] Since in this case the lease was for a dwelling:

> The effect which the parties, as fair and reasonable men, presumably would have agreed upon was that the premises were habitable and fit for living. The very ob-

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12. Marini v. Ireland, 50 N.J. 130, 135, 265 A.2d at 532, citing Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).
13. Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). As a result of the recognition of the problem by state legislatures, a growing number of "multiple dwelling" statutes have been enacted. *See, e.g.*, N.J.S. 55: 13A-1, *et. seq.* and regulations thereunder. *See also*, CONN. GEN. STAT. Tit. IV, § 19-347b (1965); ILL. STAT. ANN., Tit. 24, § 11-31-2 (1961); MICH. COMP. LAWS ANN., § 125.534(5) (Supp. 1965); N.Y. MULTIPLE DWELLING LAW, § 302-a (McKinney, 1965).
14. Marini v. Ireland, 50 N.J. 130, 134, 265 A.2d at 553.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

> ject of the letting was to furnish the defendant with quarters suitable for living purposes.[20]

The *Marini* court held that since the express purpose of the lease was to furnish a dwelling,[21] the landlord should warrant the premises to be suitable for that purpose, even though no express warranty was given.[22] The court concluded that this warranty of habitability was really a semantic camouflage for an implied warranty to repair.[23]

Although the court's reasoning is not clear, it apparently held that the warranty of habitability was a continuing one which existed for the term of the lease. Thus, since normal wear and tear will reasonably occur during the course of a year, a covenant to repair necessarily arises in order to keep the leased property suitable for the purpose for which it was leased.

Having found that an implied covenant to repair existed in the *Marini* lease, the court then found it necessary to discuss the respective rights and duties which arose from such a covenant. The court recognized that historically, under the law of real property, when a landlord failed to perform a covenant the tenant could not deduct any resultant loss from his rent, but had to sue for breach of the covenant.[24] More recently, however, the landlord's covenants and the tenants covenants (most importantly, the covenant to pay rent) have been weighed together, according to the manifest intentions of the parties, to ascertain whether they are "mutual covenants," with a breach by one party relieving the other of the duty to perform.[25] This view marks a trend toward a contract theory interpretation of leases and departs from the older real property view. The breach by a landlord of a covenant found to be mutual with the tenant's covenant to pay rent would release the tenant from the covenant. Thus the tenant, in effect

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20. *Id.*

21. The purpose of the lease (*i.e.*, to be used as a dwelling) was expressly stated in the lease.

22. 50 N.J. 130, 133, 265 A.2d at 531.

23. *Id.* at 136, 265 A.2d at 534.

24. Marini v. Ireland, 50 N.J. 130, 136, 265 A.2d at 534. *See also,* Duncan Land Development Co. v. Duncan Hardware, Inc., 34 N.J. Super. 293, 112 A.2d 274 (App. Div.), *cert. denied,* 19 N.J. 328, 116 A.2d 829 (1955); Stewart v. Childs Co., 86 N.J.L. 648, 92 A.2d 392 (Ct. of App. 1914).

25. Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (Supp. Ct. 1925); 56-70 58th St. Holding Co. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 159 N.E.2d 150 (1959); Enos v. Foster, 155 Cal. App. 2d 152, 317 P.2d 670 (1957); Cragmere Holding Corp. v. Socony-Mobil Oil Co., 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961); *See also,* 3 Thompson *Real Property,* § 1115 (1959 Replacement).

claiming a constructive eviction based on the landlord's breach of contract, would have the right to remove himself from the premises and stop paying rent.[26] Since the *Marini* court held that an implied covenant to repair existed in order to perpetually fulfill the implied warranty of habitability, and that this covenant was "mutual" with the tenant's covenant to pay rent, the breach of the covenant by the landlord gave the tenant the right to cancel the lease and vacate.[27]

For Mrs. Ireland, however, the problem was more complex. Although as the tenant she was released from her obligation to pay rent by the landlord's breach of his covenant, she could not remain in the apartment without paying rent. She simply had the option either to pay the rent or not to pay the rent and vacate the premises. As the *Marini* court stated, this was not a satisfactory remedy.[28] Vacation during the term of the lease is a drastic and dangerous step. If the tenant is wrong and a court, in a suit by the landlord to recover unpaid rent, should decide that the landlord's breach was not serious enough to warrant a constructive eviction (in other words, the covenant breached was not "mutual" with the covenant to pay rent) a substantial liability could be imposed on the tenant to pay the rent for the balance of the term.[29] More importantly, however, the court in *Marini* acknowledged the effect of the present housing shortage. A mere right to vacate leaves an aggrieved tenant with two equally distasteful choices: (1) vacate and face the possibility of not being able to relocate satisfactorily or (2) assume responsibility for the repairs himself. The first alternative is rendered even less acceptable by the general rule that a tenant's right to vacate under a constructive eviction is lost if not exercised within a reasonable time.[30] Thus, a tenant cannot take the time to search for a new residence before vacating without the risk of losing his right to vacate.

Recognizing the deficiencies in the right-to-vacate remedy, the *Marini* court held that, upon a constructive eviction due to

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26. Stevenson Stanoyevich Fund v. Steinacher, 125 N.J.L. 326, 15 A.2d 772 (Supp. Ct. 1940); McGurdy v. Wychoff, 73 N.J.L. 368, 63 A. 992 (Supp. Ct. 1906); Weiler v. Pancoast, 71 N.J.L. 414, 58 A. 1084 (Supp. Ct. 1904). *Acc'd.*, Richards v. Dodge, 150 So. 2d 477 (Fla. D.C. App. 1963); Ira Handleman Bldg. Corp. v. Dolan, 15 Ill. 49, 145 N.E.2d 250 (App. Ct. 1957); Weiss v. I. Zapinski, Inc., 65 N.J.S. 351, 167 A.2d 802 (Supp. Ct. 1961); Bronx Garment Center, Inc. v. Acme Multi-Stiching Corp., 37 Misc. 2d 994, 235 N.Y.S. 123 (N.Y. City Civil Ct. 1962).

27. Overstreet v. Rhodes, 212 Ga. 521, 93 S.E.2d 715 (1956); Sewell v. Hukill, 128 Mont. 232, 356 P.2d 339 (1960). *See also,* Schaaf v. Mortman, 19 Wis. 2d 540, 120 N.W.2d 654 (1963); Reste Realty Co. v. Cooper, 53 N.J. 462, 251 A.2d 268 (1969).

28. 50 N.J. 130, 136, 265 A.2d at 535.

29. Reste Realty Co. v. Cooper, 53 N.J. 462, 251 A.2d 268 (1969).

30. Weiss v. Zapinski Inc., 65 N.J. Super. 351, 167 A.2d 802 (App. Div. 1961); Duncan Development Co. v. Duncan Hardware Inc., 34 N.J. Super. 293, 112 A.2d 274 (App. Div. 1955).

failure to repair, a tenant, besides having his right to vacate, should have the alternative remedy of removing the grounds for the constructive eviction. That is, he should have the right to repair the premises himself, accompanied by the right to offset the cost of such repairs from his rent.[31] However, the court placed some limitations on the tenant's right to exercise this alternative: the damage which the tenant wishes to repair must have been caused through normal wear;[32] the tenant's recourse to such self-help must be preceded by timely notice to the landlord of the faulty condition;[33] and finally, the condition of which the tenant is complaining must be such that it affects facilities vital to the use of the premises as a residence (that is, it must render the property "uninhabitable or unlivable").[34] The court further warned that its holding did not mean that the tenant is relieved from paying rent as long as the landlord fails to repair.[35] The aggrieved tenant in New Jersey now simply has an alternative to vacation under a constructive eviction. Moreover, the court stated that if a trial upon this issue is delayed, the tenant may be required to post a bond to protect the landlord's interest should he prevail.[36] This bond requirement, however, rests upon the court's discretion.[37]

The *Marini* decision is a clear break with the prior law in this area. In New Jersey, the law had been that a tenant for years made repairs at his own risk; that is, the landlord, in the absence of an express covenant to repair, was under no duty to repair or to pay for his tenant's repairs.[38] In other jurisdictions the common law rule prevails that there is no implied covenant that the lessor must repair during the term,[39] even if the defects are

31. 50 N.J. 130, 136, 265 A.2d at 535.
32. *Id.* at 136, 265 A.2d at 535. Where the damage is caused deliberately, maliciously or through abnormal use the tenant is conversely liable.
33. *Id.* If the tenant is unable to give notice to the landlord after reasonable attempts, he may repair regardless of the landlord's ignorance.
34. *Id.* at 135, 265 A.2d at 534.
35. *Id.*
36. *Id.*
37. *Id.*
38. Patton v. Texas Co., 13 N.L. Super. 42, 80 A.2d 231 (App. Div. 1951); Daniels v. Brunton, 9 N.J. Super. 294, 76 A.2d 73 (App. Div. 1950); Grugan v. Shore Hotels Finance and Exchange Corp., 126 N.J.L. 257, 18 A.2d 29 (Ct. App. 1941); Harrenberg v. August, 119 N.J.L. 831, 194 A. 152 (Ct. App. 1937); Briggs v. Pannaci, 106 N.J.L. 541, 150 A. 427 (Ct. App. 1930).
39. Rathburn v. Simmons, 90 Cal. App. 692, 226 P. 369 (D.C. App. 3rd 1928); Lesser v. Kline, 101 Conn. 740, 127 A. 279 (1925); Potter v. N.Y.

dangerous or existed before the demise.[40] Although in some jurisdictions landlords are required to repair by statute,[41] these statutes are somewhat rare and are usually restricted to specific types of repairs, usually of conditions which violate fire or building codes.[42] Furthermore, in light of the strong majority common law rule of non-liability of landlords to repair, the statutes are usually construed strictly and often in favor of the landlord.[43]

Since there is no common law duty to repair, there is, of course, no rule permitting a tenant to repair himself and subtract the cost of such repairs from his rent. Such a self-help device seems to be law only in New Jersey. The rent withholding device, however, as an alternative to vacation upon a constructive eviction, is gaining favor particularly in urban states where it is most needed. This trend is reflected in several recent statutes.[44] Generally referred to as "rent withholding acts," they actually fall into three types: (1) *rent withholding* statutes, which usually provide an escrow account for the collection of rent during the dispute,[45] (2) *rent abatement* statutes, which suspend the collection of rent by the landlord;[46] and (3) *repair-deduction* statutes, where the cost of repairs can be deducted from the rent due.[47]

Although a comparison of these statutes with the New Jersey *Marini* rule is outside the scope of this Note, it should be pointed out that most of the statutory procedures are much more cumbersome than the New Jersey rule. The Michigan repair-deduction statute, for example, requires *effective* notice to be given to the landlord before the tenant begins to repair (New Jersey only requires that the tenant reasonably try to contact the landlord) and that a receiver be appointed to hold the rent in escrow until some settlement is reached.[48]

It is submitted, however, that the *Marini* holding is not without shortcomings of its own. It has created some difficulties which the courts will have to deal with in the near future. The holding is actually two-fold: Under *Marini* the landlord is not only held to a covenant to keep the premises in a useable condition—that is to repair them when defects appear through normal use—but he is

O&W R.R. Co., 233 App. Div. 578, 253 N.Y.S. 394 (1931); Irish v. Rosenbaum Co. v. Pittsburgh, 348 Pa. 194, 34 A.2d 486 (1943); Yarbrough v. Booker, 141 Tex. 420, 174 S.W.2d 47 (1943).

40. Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350 (1947); Casais v. Meyer L. Shapiro Estate, 136 N.J.L. 304, 55 A.2d 819 (1947), *aff'd*, 137 N.J.L. 608, 61 A.2d 238 (1948).

41. *See, e.g.*, OKLA. STAT. ANN. Tit. 41 § 31, 32 (Supp. 1968).

42. Gordon v. Reinheimer, 167 Okla. 343, 29 P.2d 596 (1934).

43. Callahan v. Loughran, 102 Cal. 476, 36 P. 835 (1894).

44. CONN. GEN. STAT., Tit. IV, § 19-347(b) (1965); ILL. STAT. ANN. Tit. 24, § 11-31-2 (1961); MICH. COMP. LAWS ANN., § 125-530 (Supp. 1969); PA. STAT. ANN., Tit. 35, § 1700-1 (Supp. 1969).

45. CONN. GEN. STAT., Tit. IV, §§ 19-347(b) (1965).

46. N.Y. MULTIPLE DWELLING LAW, § 302-a (McKinney 1965).

47. MICH. COMP. LAWS ANN., § 125-534(5) (Supp. 1969).

48. *Id.*

also required to warrant that the premises are free from *latent* defects in facilities which are vital to the purpose of the letting.[49] The use of the term "latent" raises some interesting questions. For instance, does this mean that the landlord's warranty does not cover obvious defects? If so, how obvious must the defects be in order not to be under the warranty? To what standard of inspection would a prospective tenant be held? Because of the housing shortage many landlords have developed a take-it-or-leave-it attitude toward prospective lessees. Under *Marini* a landlord could theoretically point out all latent defects to a prospective tenant, thus escaping the *Marini* warranty, and still be reasonably assured that the tenant will have to rent the premises out of desperation. Further questions arise as to the repair and offset remedy proffered in *Marini*. Since the case restricts the self-help remedy to conditions which render a residence uninhabitable, most of the defects likely to result in this condition would be major and costly to repair. The offset remedy, however, is far more satisfactory for effecting small repairs. Major defects may mean that the cost of repair is higher than a month's rent. The cost conceivably may even be higher than the amount of rent due for the term of the lease. Would this mean that the tenant is left with only the remedy of vacation under a constructive eviction?

In an answer to some of these questions, another case should be discussed which has taken a slightly different approach to the problem of repairing defective conditions. In *Javins v. First National Realty Corp.*,[50] the United States Court of Appeals, District of Columbia Circuit, also found an implied warranty of habitability in leases of urban dwelling units. In that case the landlord was seeking possession of his premises on the ground that the tenants had defaulted in their rent payments. The tenants admitted that they had not paid the rent but alleged some 1500 violations of the Housing Regulations of the District of Columbia, which they claimed entitled them to an "equitable defense or a claim by way of recoupment or setoff in an amount equal to the rent claim."[51] The Court of General Sessions refused the tenant's offer of proof of the violations and entered judgment for the landlord. The District of Columbia Court of Appeals affirmed, and the Circuit Court granted the tenant's petition for leave to appeal.[52]

The court in *Javins*, as in *Marini*, recognized the inadequacies

49. 50 N.J. 130, 136, 265 A.2d at 534.
50. 428 F.2d 1071 (D.C. Circuit 1970).
51. *Id.* at 1073.
52. *Id.*

of the law of real property to deal with modern urban landlord and tenant problems.[53] Landlord and tenant law, derived principally from feudal property law, historically considered a lease to be the conveyance of an interest in land. This body of law, the *Javins* court reasoned, may have been practical in an agrarian society where the value of the lease to the tenant was the land itself.[54] However, the value of a lease to an urban apartment dweller is not the use of the land, but rather its value as a place to live. The court stated:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[55]

The circuit court noted with approval the trend toward interpreting leases under a contract approach rather than a real property view. Using this technique, the results reached in lease disputes would, the court held, be more in accord with the expectations of the parties.[56] *Javins* thus held that leases of urban dwelling units should be construed like any other contract.[57]

The *Javins* court based its holding in part on analogies drawn from recent developments in other areas of the law. The court noted, for example, the extension of the implied warranties of sales law to other situations such as the renting of a chattel, payment for services, or the buying of a combination of goods and services; that is, all transactions where the buyer must rely on the skill and honesty of the merchant.[58] The same reliance is present in the letting of urban dwelling units. Other examples stated were the elimination of privity in products liability cases, the holding of builders of new houses liable for faulty construction on the theory of a breach of an implied warranty of fitness, and holdings by at least two state supreme courts (New Jersey and Hawaii) finding implied warranties of quality in leases.[59] Recognizing such warranties of merchantability and fitness inherent in other contracts, the court reasoned that the same warranties should be extended to leases in the form of an implied warranty of habitability.[60]

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53. *Id.* at 1074.
54. *Id.*
55. *Id.*
56. Javins v. First Nat'l. Realty Corp., 428 F.2d at 1075 *citing*: Medico-Dental Bldg. Co. v. Horton and Coaverse, 21 Cal. 2d 411, 132 P.2d 457 (1942); *See also, The California Lease-Contract* or *Conveyance,* 4 STAN. L. REV. 244 (1952); Friedman, *The Nature of a Lease in New York,* 33 CORN. L.Q. 165 (1947).
57. Javins v. First Nat'l. Realty Corp., 428 F.2d at 1075.
58. *Id.* at 1076.
59. *Id.*
60. *Id.* at 1077.

Finally, *Javins* cited a host of legal-sociological reasons for finding an implied warranty of habitability to exist in leases, including: the mobility of modern tenants which makes tenant repairs infeasible, the difficulty for tenants of procuring financing for such repairs, the inequality of the bargaining position between the tenant and the landlord because of the current housing shortage, impediments to competition in the renting market because of such factors as racial discrimination and standard form leases which result in landlords placing the tenant in a take-it-or-leave-it position, and finally the undesirable impact of bad housing on the whole society.[61]

Having thus decided that a contract theory approach was best suited to lease problems, and holding that an implied warranty of habitability is inherent in leases, the *Javins* court then faced the problem of determining what conditions would be considered a breach of the implied warranty. The court first noted that the District's housing code itself required compliance with its requirements in the leases of all housing covered.[62] In *Kanelos v. Kettler*, the Court of Appeals for the District of Columbia had held that the housing code imposed maintenance obligations on landlords which they could not ignore.[63] Further effect was given to that case in *Brown v. Southall Realty Co.*[64] In that case, the landlord knew at the signing of the lease of certain housing code violations which rendered the premises uninhabitable. The court, using the contract theory approach, held the lease void as an illegal contract.[65] The *Brown* court, however, did not reach the precise question in *Javins* for two reasons. First, in *Brown*, the violations existed and were known to exist (by the landlord) before the signing of the lease. Second, the *Brown* holding is not based on a breach of an implied warranty of habitability but rather on a violation by the landlord of a section of the housing code which forbids the letting of premises with known defects which render it uninhabitable.[66] *Javins* met the first problem by holding that it is unreasonable to hold that the housing code was meant to have effect only before the signing of the lease.[67] The housing code should be interpreted as imposing continuing

61. *Id.* at 1079, 1080.
62. 2 D.C. Register 47 (1955).
63. Kanelos v. Kettler, 406 F.2d 951 (1966). *See also,* Whetzel v. Jess Fisher Management Corp., 262 F.2d 943 (1960).
64. 237 A.2d 834 (D.C. App. 1968).
65. *Id.*
66. *Id.*
67. Javins v. First Nat'l. Realty Co., 428 F.2d at 1081.

duty on the landlord to comply with its requirements,[68] and therefore a continuing duty to repair.

The *Javins* court's handling of the second distinction in the *Brown* case is less clear. The court recognized that official enforcement under the housing code has been sorely inadequate[69] and that to follow the old rule of no duty to repair would, in effect, circumvent the legislative intent in enacting the housing code. The court held, as the only practical solution to the conflict between the legislative intent present in the housing code and the common law rule of no duty to repair, that the housing regulations *themselves* imply a duty to warrant leased premises as habitable as well as a duty to repair to keep the premises habitable. Both duties are measured by the habitability standards set out in the housing code.[70]

In summary, *Javins* held: (1) A contract approach should be used in determining the rights and duties of parties to a lease instead of the rules of real property law; (2) An implied warranty of habitability exists in leases of dwelling units; (3) This warranty is a continuing duty which requires the landlord to repair in order to maintain the premises in a habitable condition; (4) Whether or not the premises are in a habitable condition will be determined with reference to the housing code requirements.

It is submitted, however, that *Javins*, like *Marini,* is open to some criticism. For instance, the court pointed out that under contract principles as applied to a lease, the tenant's duty to pay rent is conditioned upon the landlord's performance of his obligations; namely, his implied warranty to keep the premises in a habitable condition.[71] The holding, however, leaves it to the jury to decide what portion, if any, of the rent should be suspended upon a showing of the landlord's breach of his duty.[72] That is, the jury must determine whether the violations are serious enough to suspend any, all, or only a portion of the rent due for the term. Furthermore, since there is no provision in *Javins* for the repair and offset remedy as in *Marini*, the tenant, after proving a breach of the implied warranty by the landlord, is left with only the normal contract remedies; a suit for damages, a suit for specific performance, or recission. The problem with damages as a remedy (besides the problem of vagueness discussed above) is that unless the amount of damages is enough to cover the cost of repairs, the tenant is not effectively aided. Although he is relieved from his duty to pay rent, the conditions may still exist. A suit for specific performance, to force the landlord to repair,

68. *Id.*
69. *Id.* at 1082.
70. *Id.*
71. *Id.*
72. *Id.* at 1083.

may be impossible because of the *seemingly* adequate remedy at law. Even if the suit is possible, it means a time consuming court fight, during which the conditions in all likelihood will still exist. As compared with the facility of the *Marini* self-help remedy, the specific performance suit seems unwieldy, although it has the advantage over the *Marini* remedy in that it is useful when the cost of repairs is higher than the rent due for the term of the lease. Recission, on the other hand, is tantamount to constructive eviction with all the attendant inadequacies.[73]

A last criticism of the *Javins* holding is its dependence on housing code violations to provide a basis for relief. While the court found an implied warranty of habitability to exist, breach of this warranty is to be measured solely by the standards of the housing code.[74] It is conceivable that conditions might exist in a dwelling which would render it uninhabitable, while not violating the housing code and conversely that other violations of the housing code might not significantly affect habitability. *Javins* makes no provisions for remedying such a situation. *Marini*, by contrast, leaves it to the jury to determine whether a condition renders a dwelling uninhabitable. While the *Marini* method might be too vague, it is more flexible. The only limitation to the effect of *Marini* is that the defect be serious enough to affect facilities vital to the use of the premises as a dwelling.[75]

In summary, the two cases can be compared as follows: Both cases agree that,

(1) a contract approach rather than a real property approach should be used in describing the rights and liabilities of tenants and landlords in leases of urban dwellings;

(2) all leases contain an implied warranty of habitability;

(3) in order to honor the warranty, landlords are under a duty to repair the premises whenever conditions arise, due to normal wear, which make the premises uninhabitable;

(4) upon a breach of the warranty, the tenant is relieved of his duty to pay rent (to some extent) since the covenant to pay rent is dependent upon the landlord's performance of his implied

73. Any further comparison of the remedies in *Marini* as compared to those in *Javins* would be of little value. The only real difference between them is that *Marini* allows the repair and set-off while *Javins* does not. *Marini* apparently does not limit its remedy to the set-off and, since the holding used the contract approach, it can be inferred that all normal contract remedies are available in *Marini* as well as in *Javins*.

74. Javins v. First Nat'l. Realty Corp., 428 F.2d at 1082.

75. Marini v. Ireland, 50 N.J. 130, 135, 265 A.2d at 534.

covenant to repair—the cases disagree on (1) the standard of maintenance required and (2) the remedies available.

In *Javins*, the housing code is used as the yardstick for determining whether the existence of certain defects affect the habitability of a unit. If a violation exists which materially lessens the habitability of a dwelling, and the landlord fails to repair, then the lease-contract is breached and the tenant is entitled to the usual contract remedies. In *Marini*, habitability is determined without reference to housing codes. The only recovery for defects existing *prior* to the signing of the lease is for *latent* defects, although there is a duty on the landlord to repair *all* material defects arising after the signing of the lease whether they are latent or not. Finally, while normal contractual remedies for breach are apparently available (although not specifically mentioned), the tenant may, with certain limitations, repair the defects himself and subtract the cost of such repairs from his rent.

In conclusion, it is submitted that while the two cases have taken large steps in the direction of improving the lot of the urban leasee, they are only a beginning. Perhaps a synthesis of the strong points of each case would prove more workable than the answers presented in either case taken alone. The following is submitted, therefore, as perhaps a better model for future case law or statutes dealing with the subject: (1) All leases of dwellings should be construed as contracts between the leasor and lessee, with the usual rights and duties attendant in a contract; (2) As in contracts for the sale of goods, contracts for leasing should be construed to include an implied warranty that the premises are fit for the purpose of the letting; i.e., an implied warranty of habitability exists in all leases of dwelling units; (3) The implied warranty of habitability is a covenant which exists for the term of the lease, thus creating in the landlord a duty to repair when necessary; (4) The warranty should cover all defects which materially affect the habitability of the premises, whether they exist before the signing of the lease or arise during the term of the lease, and whether they are latent or obvious; (5) The habitability of the premises should be determined by the fact-finder upon presentation of all the facts without regard as to whether the defects complained of violate the housing code, although violations of material provisons should be *prima facie* evidence of breach of the warranty; (6) The tenant's remedies upon breach of the warranty by the landlord should be the ususal contract remedies of damages, suit for specific performance, recission (constructive eviction), and, after proper notice to the landlord, repair by the tenant with a corresponding setoff from the rent.

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