*I. The Evolution of the Implied Warranty of Habitability **

The emergence of the implied warranty of habitability at common law has been called "revolutionary," while the court opinions that ignited this revolution have been described as "doctrinal flagship[s]." The warranty merits such accolades primarily because it usurped ancient property concepts that had become entrenched in the English and American legal systems over hundreds of years.

A. The Common Law Birth of the Implied Warranty of Habitability

Before the development of the implied warranty of habitability, a fundamental premise in common law was that, "in the absence of some agreement, there is no obligation upon a landlord to make repairs upon leased property or to keep it in a safe condition." The reason for this doctrine was twofold.

First, in medieval times, the bargained-for expectation of the tenant was the use of the land itself. Any structures on the land were usually easy to inspect, and courts assumed that the tenant had the skill to make any necessary repairs. Second, earlier courts held that the tenant more properly bore the burden of initial inspection of the home and subsequent repairs, because any structure on the land was considered an inconsequential part of the tenant's consideration. This "no repair" doctrine shares a common history with caveat emptor, the doctrine generally applicable to commencement defects. Beginning in the Middle Ages, English courts applied both doctrines to the conveyance of real property; American courts adopted this approach in the seventeenth century. Between caveat emptor and the "no repair" doctrine, the general rule was that the landlord was completely insulated from liability at all stages of the tenancy.

The "no repair" doctrine was even more formidable when combined with an equally entrenched common law contract principle: the doctrine of 'independent covenants.' This doctrine mandated that even if the landlord covenanted to keep the leased premises in good repair, his covenant was independent of the tenant's covenant to pay rent. Thus, the tenant was prohibited from withholding performance (i.e., paying rent) even if the landlord breached any promise he had made to complete needed repairs. Once again, these courts reasoned that any additional covenants in the lease made by the landlord were "merely incidental" to his main covenant of land conveyance. Therefore, as long as the landlord conveyed the land, the tenant had received his primary bargained-for consideration, obligating him to provide the landlord's primary consideration--the rent.

The medieval doctrines of "no repair" and independent covenants entered the twentieth century well-intact in the United States. But their foundation began to erode as their common law sibling, caveat emptor, came under heavy attack.

* Christopher F. Brennan, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to* Condominiums, 67 Fordham L. Rev. 3041, 3048-3050 (1999).

INGALLS et al. v. HOBBS

Supreme Judicial Court of Massachusetts, Suffolk
May 9, 1892.

Appeal from superior court, Suffolk County.

Action by Sarah P. Ingalls and others against Warren D. Hobbs to recover rent for a dwelling house. Defendant had judgment on an agreed statement of facts, and plaintiffs appeal. Affirmed.

KNOWLTON, J.

This is an action to recover $500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of $500, with interest from the date of the writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered as an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub.St. c. 152, § 10; Rand v. Hanson, 154 Mass. 28, 18 N.E.Rep. 6; Mayhew v. Durfee, 138 Mass. 584; Co Railroad. v. Wilder, 137 Mass. 536; Hecht v. Batcheller, 147 Mass. 335, 17 N.E.Rep. 651; Fitzsimmons v. Carroll, 128 Mass. 401; Charlton v. Donnell, 100 Mass. 229. The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. 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. Dutton v. Gerrish, 9 Cush. 89; Foster v. Peyser, Id. 242; Stevens v. Pierce, 151 Mass. 207, 23 N.E.Rep. 1006; Sutton v. Temple, 12 Mees. & W. 52; Hart v. Windsor, Id. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it

as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine caveat emptor, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. Smith v. Marrable, 11 Mees. & W. 5; Wilson v. Hatton, 2 Exch.Div. 336; Warehouse Co. v. Carr, 5 C.P.Div. 507; Sutton v. Temple, ubisupra; Hart v. Windsor, ubi supra; Bird v. Lord Greville, 1 Cababe & E. 317; Charsley v. Jones, 53 J.P.Q.B. 280. In Dutton v. Gerrish, 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in Edwards v. McLean, 122 N.Y. 302, 25 N.E.Rep. 483; Smith v. Marrable, and Wilson v. Hutton, cited above, are referred to with approval, although held inapplicable to the question then before the court. See Cleves v. Willoughby, 7 Hill, 83; Franklin v. Brown, 118 N.Y. 110, 23 N.E.Rep. 126. We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

DELAMATER v. FOREMAN et al.

Supreme Court of Minnesota.
No. 28536.
Nov. 13, 1931.

Appeal from Municipal Court of St. Paul; John A. Rounds, Judge.

Action by Lawrence M. Delamater against Sarah Foreman and another. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

Syllabus by the Court.

In the absence of a contrary provision in a written lease for an apartment in a modern multiple apartment building, the landlord impliedly covenants that the premises will be habitable. Bedbugs coming in great numbers into the apartment through cracks and loose boards in the floor from sources under the jurisdiction of the landlord may cause such discomfort and distress to the tenant and his family as to constitute constructive eviction, the landlord neglecting his duty in reference thereto, and justify the tenant in vacating the premises.

WILSON, C. J.

Defendants appealed from a judgment entered against them for $50.95.

The case involves landlord and tenant; vermin, viz. bedbugs; constructive eviction.

Plaintiff leased from defendants an apartment on the third floor of a modern multiple apartment building; the owner providing the usual caretaker in charge of the building.

The written lease was silent as to any provision as to who should be charged with the responsibility of waging any necessary war on vermin. The rule at common law was that the law did not impliedly impose any such duty upon the landlord. This rule still prevails as to the leasing of an unfurnished dwelling house. But such rule, like many of the rules of law, is not inflexible, but to some degree elastic, and must be construed to meet conditions unknown at common law. There is much in and about such an apartment building far beyond the control of a tenant in one of the apartments. He cannot interfere with the walls, partitions, floors, and ceilings wherein the verminous enemy may propagate, nor can he interfere with the cracks and openings affording an opportunity of access from such walls, partitions, floors, and ceilings into the apartment. If the attack is sufficiently serious and comes from this source, it violates the landlord's implied covenant that the premises will be habitable. Smith v. Marrable, 11 M. & W. 5; Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N. Y. S. 1050; Streep v. Simpson, 80 Misc. Rep. 666, 141 N. Y. S. 863; Batterman v. Levenson, 102 Misc. Rep. 92, 168 N. Y. S. 197; 2 Underhill on Landlord & Tenant, p. 1149, § 682; 4 A. L. R. 1453, annotation; 13 A. L. R. 818, annotation.

On the contrary, if the partitions, walls, ceilings, and floors are free from offense which may consist of verminous habitation, noise, or smell, and they are tight and free from openings so as to provide no verminous entrance, and the apartment becomes infested by bedbugs or other vermin, without fault of the landlord, he has no concern therewith, and the responsibility for such presence is necessarily with the tenant. Jacobs v. Morand, 59 Misc. Rep. 200, 110 N. Y. S. 208.

It is not necessary to consider here the judicial blows directed at the case Smith v. Marrable, supra. See 4 A. L. R. annotation 1453, 1456. We think the rule as above stated, limited to such modern apartment building as here involved, is sound and consistent with modern standards.

The evidence is that bedbugs came into the plaintiff's apartment in large numbers. Plaintiff and his wife used 20 gallons of gasoline trying to exterminate them. They did many other things in their vigilant efforts to rid the apartment of this pest. The evidence adequately shows the seriousness of the situation. It is not as satisfactory as we would like as to the source from which the vermin came. There is evidence, however, that defendants admitted such bugs were in a lower apartment, though not directly below plaintiff's apartment. The testimony is that the bedbugs came into plaintiff's apartment from cracks in the floor where the floor was loose and that these 'cracks were just full of them.' The presence of loose floors in a modern apartment does not speak well for the landlord. Such condition gives an opportunity for such trouble as the plaintiff experienced.

We are of the opinion that the evidence supports the finding of the jury that the vermin came from a source within the jurisdiction of the landlord under the rule stated.

The evidence is also sufficient to show that the presence of the bedbugs in such large numbers caused the greatest discomfort and distress to plaintiff and his family, and since it was, under the findings of the jury, due to defendants' fault, it was sufficient in law to constitute a constructive eviction, and plaintiff was justified in vacating the premises as he did.

Affirmed.

Burton PINES et al., Respondents,
v.
Leon PERSSION, Appellant.

Supreme Court of Wisconsin.

Oct. 31, 1961.

Action by plaintiffs Burton Pines, Gary Weissman, David Klingenstein and William Eaglestein, lessees, against defendant Leon Perssion, lessor, to recover the sum of $699.99, which was deposited by plaintiffs with defendant for the fulfillment of a lease, plus the sum of $137.76 for the labor plaintiffs performed on the leased premises. After a trial to the court findings of fact and conclusions of law were filed which determined that plaintiffs could recover the lease deposit plus $62 for their labor, but less one month's rent of $175. From a judgment to this effect defendant appeals. Plaintiffs have filed a motion for review of that part of the judgment entitling defendant to withhold the sum of $175.

At the time this action was commenced the plaintiffs were students at the University of Wisconsin in Madison. Defendant was engaged in the business of real estate development and ownership. During the 1958-1959 school year plaintiffs were tenants of the defendant in a student rooming house. In May of 1959 they asked the defendant if he had a house they could rent for the 1959-1960 school year. Defendant told them he was thinking of buying a house on the east side of Madison which they might be interested in renting. This was the house involved in the lease and is located at 1144 East Johnson Street. The house had in fact been owned and lived in by the defendant since 1951, but he testified he misstated the facts because he was embarrassed about its condition.

Three of the plaintiffs looked at the house in June, 1959 and found it in a filthy condition. Pines testified the defendant stated he would clean and fix up the house, paint it, provide the necessary furnishings and have the house in suitable condition by the start of the school year in the fall. Defendant testified he told plaintiffs he would not do any work on the house until he received a signed lease and a deposit. Pines denied this.

The parties agreed that defendant would lease the house to plaintiffs commencing September 1, 1959 at a monthly rental of $175 prorated over the first nine months of the lease term, or $233.33 per month for September through May. Defendant was to have a lease drawn and mail it to plaintiffs. It was to be signed by the plaintiffs' parents as guarantors and a deposit of three months' rent was to be made.

Defendant mailed the lease to Pines in Chicago in the latter part of July. Because the plaintiffs were scattered around the country, Pines had some difficulty in securing the necessary signatures. Pines and the defendant kept in touch by letter and telephone concerning the execution of the lease, and Pines came to Madison in August to see the defendant and the house. Pines testified the house was still in terrible condition and defendant again promised him it would be ready for occupancy on September 1st.

Defendant testified he said he had to receive the lease and the deposit before he would do any work on the house, but Pines could not remember him making such a statement.

On August 28th Pines mailed defendant a check for $175 as his share of the deposit and on September 1st he sent the lease and the balance due. Defendant received the signed lease and the deposit about September 3rd.

Plaintiffs began arriving at the house about September 6th. It was still in a filthy condition and there was a lack of student furnishings. Plaintiffs began to clean the house themselves, providing some cleaning materials of their own, and did some painting with paint purchased by defendant. They became discouraged with their progress and contacted an attorney with reference to their status under the lease. The attorney advised them to request the Madison building department to inspect the premises. This was done on September 9th and several building code violations were found. They included inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair, handrail on stairs in disrepair, screens on windows and doors lacking. The city inspector gave defendant until September 21st to correct the violations, and in the meantime plaintiffs were permitted to occupy the house. They vacated the premises on or about September 11th.

The pertinent parts of the lease, which was dated September 4, 1959, are as follows:

'1. For and in consideration of the covenants and agreements of the Lessees hereinafter mentioned, Lessor does hereby devise, lease and let unto Lessees the following described premises, to-wit:

'The entire house located at 1144 East Johnson Street, City of Madison, Dane County, Wisconsin, including furniture to furnish said house suitable for student housing.

'2. Lessees shall have and hold said demised premises for a term of one (1) year commencing on the first day of September, 1959 * * *

'3. [Total annual rent was $2100, to be paid in monthly installments in advance, prorated over the first nine months of the term, or $233.33 per month. The deposit of three months' rent of $699.99 was to be applied for March, April and May of 1960.]

'4. The Lessees also agree to the following: * * * to use said premises as a private dwelling house only * * *

'7. If Lessees shall abandon the demised premises, the same may be re-let by Lessor for such reasonable rent, comparable to prevailing rental for similar premises, and upon such reasonable terms as the Lessor may see fit; and if a sufficient sum shall not be realized, after paying the expenses of re-letting, the Lessees shall pay and satisfy all deficiencies * * *'

The trial court concluded that defendant represented to the plaintiffs that the house would be in a habitable condition by September 1, 1959; it was not in such condition and could not be made so before October1, 1959; that sec. 234.17, Stats. applied and under its

provisions plaintiffs were entitled to surrender possession of the premises; that they were not liable for rent for the time subsequent to the surrender date, which was found to be September 30, 1959.

Wilkie, Anderson, Bylsma & Eisenberg, Madison, for appellant.

Immell, Herro, Buehner & DeWitt, Duane P. Schumacher, Robert D. Martinson, Madison, for respondents.

MARTIN, Chief Justice.

We have doubt that sec. 234.17, Stats. applies under the facts of this case. In our opinion, there was an implied warranty of habitability in the lease and that warranty was breached by the appellant.

There is no express provision in the lease that the house was to be in habitable condition by September 1st. We cannot agree with respondents' contention that the provision for 'including furniture to furnish said house suitable for student housing' constitutes an express covenant that the house would be in habitable condition. The phrase 'suitable for student housing' refers to the 'furniture' to be furnished and not to the general condition of the house.

Parol evidence is inadmissible to vary the terms of a written contract which is complete and unambiguous on its face. Hunter v. Hathaway, 1901, 108 Wis. 620, 84 N.W. 996; 32 Am.Jur., Landlord and Tenant, secs. 130, 134.

The general rule is that there are no implied warranties to the effect that at the time a lease term commences the premises are in a tenantable condition or adapted to the purposes for which leased. A tenant is a purchaser of an estate in land, and is subject to the doctrine of *caveat emptor*. His remedy is to inspect the premises before taking them or to secure an express warranty. Thus, a tenant is not entitled to abandon the premises on the ground of uninhabitability. See I American Law of Property, sec. 3.45; 32 Am.Jur., Landlord and Tenant, sec. 247.

There is an exception to this rule, some courts holding that there is an implied warranty of habitability and fitness of the premises where the subject of the lease is a furnished house. This is based on an intention inferred from the fact that under the circumstances the lessee does not have an adequate opportunity to inspect the premises at the time he accepts the lease. 35 N.Y.Univ.L.Rev. 1279, 1283-1287; Collins v. Hopkins (1923), 2 K.B. 617, 34 A.L.R. 703, 705. In the Collins Case the English court said:

'Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. *It is a warranty to be extended rather than restricted*. (Emphasis supplied.)'

See also Delamater v. Foreman, 1931, 184 Minn. 428, 239 N.W. 148; Ingalls v. Hobbs, 1892, 156 Mass. 348, 31 N.E. 286, 16 L.R.A. 51.

We have not previously considered this exception to the general rule. Obviously, however, the frame of reference in which the old common law rule operated has changed.

Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment-that it is socially (and politically) desirable to impose these duties on a property owner-which has rendered the old common law rule obsolete. 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 that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

There is no question in this case but that the house was not in a condition reasonably and decently fit for occupation when the lease term commenced. Appellant himself admitted it was 'filthy,' so much so that he lied about owning it in the first instance, and he testified that no cleaning or other work was done in the house before the boys moved in. The filth, of course, was seen by the respondents when they inspected the premises prior to signing the lease. They had no way of knowing, however, that the plumbing, heating and wiring systems were defective. Moreover, on the testimony of the building inspector, it was unfit for occupancy, and:

'The state law provides that if the building is not in immediate danger of collapse the owner may board it up so that people cannot enter the building. His second choice is to bring the building up to comply with the safety standards of the code. And his third choice is to tear it down.'

The evidence clearly showed that the implied warranty of habitability was breached. Respondents' covenant to pay rent and appellant's covenant to provide a habitable house were mutually dependent, and thus a breach of the latter by appellant relieved respondents of any liability under the former.

Since there was a failure of consideration, respondents are absolved from any liability for rent under the lease and their only liability is for the reasonable rental value of the premises during the time of actual occupancy. That period of time was determined by the trial court in its finding No. 9, which is supported by the evidence. Granting respondents' motion for review, we direct the trial court to find what a reasonable rental for that period would be and enter judgment for the respondents in the amount of their deposit plus the amount recoverable for their labor, less the rent so determined by the court.

Cause remanded with instructions to enter judgment for the respondents consistent with this opinion. Respondents may tax double costs in this court for appellant's failure to comply with Rule 6(3), W.S.A. 251.26 as to inclusion of record or appendix page references in the statement of facts.

Superior Court of Pennsylvania.

J. C. PUGH, Appellee,
v.
Eloise P. HOLMES, Appellant.

Decided April 13, 1978.

Before WATKINS, President Judge, and JACOBS, CERCONE, PRICE, VAN der VOORT and SPAETH, JJ.

JACOBS, President Judge:

This appeal presents an issue important to the application of landlord-tenant law. Appellant Mrs. Holmes requests that Pennsylvania join the growing number of jurisdictions which have abolished the principle of caveat emptor (or caveat lessee) and applied the doctrine of implied warranty of habitability to landlord-tenant relationships.[FN1] For the reasons stated below, we hold that caveat emptor is no longer applicable to residential leases and that an implied warranty of habitability will apply to all such leases.

FN1. We commend appellant's counsel on the thorough and well-written brief submitted.

Appellant has rented a residential dwelling in Chambersburg, Franklin County, from appellee since November, 1971. The rental is based on a month-to-month oral lease and the rent is sixty dollars monthly. The only income appellant and her two minor children receive is $294 in monthly public assistance payments.

In April, 1976, appellee filed an assumpsit action against appellant before a justice of the peace alleging that appellant had failed to pay her rent from September, 1975, through April, 1976. Appellee obtained a judgment and appellant filed a notice of appeal with the Court of Common Pleas of Franklin County. Appellee then filed a complaint requesting judgment for unpaid rent in the amount of $576. In August, 1976, appellee filed a second action against appellant before the justice of the peace and obtained a judgment for possession and for unpaid rent. Appellant again appealed to the Court of Common Pleas and appellee filed a complaint seeking possession and unpaid rent.

Appellant filed an Answer Containing New Matter to both complaints in which she raised a breach of the implied warranty of habitability as a defense. In support of her answer, appellant alleged that since September, 1975, appellee failed to maintain her dwelling “in a safe, sanitary, and healthful condition fit for human habitation.” She listed ten specific factors, including a leaking roof, lack of hot water, leaking pipes, infestation by cockroaches, and hazardous steps and floors, as examples of the uninhabitable condition of her rental

premises. She also alleged that she had notified appellee of these defective conditions and that he did not repair them. On the basis of this implied warranty defense, appellant argued that her obligation to pay rent to appellee had been relieved and that she was neither responsible for the past rent nor should she have to relinquish possession of the dwelling.

Appellant also denied that the total rent for May, 1976, was due because, after notifying appellee of a broken lock on her front door and giving him a reasonable opportunity to repair it, she replaced the lock herself at a cost of six dollars. The six dollars, she stated, should be deducted from the rent claimed as past due. Finally, appellant asserted a counterclaim for twenty-five dollars for the cost of repairing several other defective conditions of which she had given appellee notice, but which he did not correct.

Appellee entered preliminary objections in the nature of a demurrer both to appellant's request that her rental obligation be abated and to the counterclaim for repair costs. The lower court sustained appellee's preliminary objections and appellant brought this appeal. During the pendency of this appeal, appellant has been depositing forty-five dollars monthly into an escrow account.

Landlord-tenant law traditionally has been controlled by the common law. The origins of the doctrine caveat emptor stem back to the sixteenth century when landlord-tenant relationships developed in a primarily agrarian society.[FN2] Leases were treated as conveyances and tenants rented the land surrounding their dwellings, with the dwellings themselves regarded as little more than appendages to the land. ". . . (T)he governing idea (was) that the land (was) bound to pay the rent," that is, rent issued out of the land, not from the dwelling or the tenant. Pollock and Maitland, The History of English Law, II, 130-131 (1909).

FN2. For related discussions on the history of caveat emptor as applied to the landlord-tenant relationship, see Javins v. First National Realty Corporation, 138 U.S.App.D.C. 369, 428 F.2d 1071 (1970), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969), reh. denied, 51 Haw. 478 (1969); Old Town Development Company v. Langford, Ind. App., 349 N.E.2d 744 (1976), Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961), and the cases and authorities therein cited.

Because the focal point of early landlord-tenant relationships was the land itself, little attention was paid to the dwelling situated on the land. The landlord had no obligations to the tenant other than those made expressly, and the tenant's obligation to pay rent was independent of the landlord's obligation to maintain a habitable dwelling for the tenant. The doctrine of caveat emptor was fully applicable. The tenant's only protections were to inspect the premises before taking possession or to extract express warranties from the

landlord. It was assumed that landlords and tenants held equal bargaining power in arranging their rental agreements, and that the agrarian tenant had the ability to inspect the dwelling adequately and to make simple repairs in the buildings which possessed no modern conveniences such as indoor plumbing or electrical wiring.

As agrarian society declined and population centers shifted from rural to urban areas, the common law concepts of landlord-tenant relationships did not change. Despite the facts that the primary purpose of the urban leasing arrangement was housing and not land and that the tenant could neither adequately inspect nor repair urban dwelling units, landlords still were not held to any implied warranties in the places they rented and tenants leased dwellings at their own risk.

In some instances, the courts created exceptions to the common law landlord-tenant rules in order to alleviate the law's harshness. For example, the Massachusetts Court implied a warranty of fitness for immediate use as applicable to furnished dwellings rented for short time periods. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). A landlord's fraud on the tenant and the legal fiction of constructive eviction also have been applied as exceptions to the doctrine of caveat emptor. See, Lemle v. Breeden, 51 Haw. 426, 429, 462 P.2d 470, 472 (1969), reh. denied 51 Haw. 478 (1969); King v. Moorehead, 495 S.W.2d 65, 69-70 (Mo.App., 1973).

These exceptions, however, have proved inadequate to protect many tenants. Most rental units are neither furnished nor leased for short periods of time. Constructive eviction requires that a tenant vacate the leasehold, a difficult, if not impossible, requirement in times of low cost housing shortages. And, fraud by a landlord is not easily proved. For these reasons, the courts in many jurisdictions have explicitly rejected the applicability of caveat emptor and have implied a warranty of habitability and fitness for use of the premises.[FN3] Those courts which have abolished caveat lessee in favor of an implied warranty of habitability have all made a similar finding: the tenant is no longer interested in renting land, but rather a dwelling house fit for habitation. As the Court in Javins v. First National Realty Corporation stated,

FN3. One court which adopted the implied warranty of habitability indicated that caveat emptor has been abolished and the implied warranty of habitability applied to residential leases by courts in all jurisdictions which have considered the issues. King v. Moorehead, 495 S.W.2d at 71. The Restatement (Second) of Property lists cases in 18 jurisdictions which, to date, have adopted an implied warranty of habitability in residential leases. Explanatory Notes, s 5.1, comment b at 175 (1977). The Indiana Appellate Court, in a 1976 opinion, listed cases in 21 jurisdictions which have explicitly or implicitly embraced some form of the implied warranty of habitability. Old Town Development Company v. Langford, at Ind.App., 349 N.E.2d 757-758. Both sources cite Pennsylvania cases, a Common Pleas

Court decision, Derr v. Cangemi, 66 Pa.D. & C.2d 162 (Philadelphia Co., 1974), as implying a warranty of habitability in a residential lease, and a Supreme Court case, Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974) as embracing a warranty of habitability by applying the Unfair Trade Practices and Consumer Protection Law to residential leases.

When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services (footnote omitted) a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and door, proper sanitation, and proper maintenance.

138 U.S.App.D.C. 369, 372, 428 F.2d 1071, 1074 (1970), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970). Gone are the days of equal bargaining power between landlord and tenant. In both rural and urban areas, housing, especially low cost housing, is scarce. A landlord may offer a dwelling, regardless of its condition to a tenant on an "as is" basis, knowing that if the tenant declines to accept the premises, several others who need housing just as badly will be waiting to take the property. Today's tenant can neither adequately inspect nor repair dwellings. Furthermore, at least one court has found that the continued letting of "tumbledown" houses is ". . . a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners." Pines v. Perssion, 14 Wis.2d 590, 596, 111 N.W.2d 409, 413 (1961).

The jurisdictions which have addressed the issue, then, have uniformly decided that the tenant must be afforded more protection than he or she has been given at common law. For that reason, courts have rejected caveat emptor and have adopted the doctrine of an implied warranty of habitability ". . . as the most appropriate way to restore a fair and balanced relationship between landlords and residential tenants and to encourage the decent maintenance of our residential housing supply." Morbeth Realty Corp. v. Velez, 73 Misc.2d 996, 999, 343 N.Y.S.2d 406, 410 (1973).

It is time for Pennsylvania to join the trend toward the implied warranty of habitability. To do so will not be a complete and sudden break with the past, but only the next step in the law which has been developing in the Commonwealth for a number of years. The Pennsylvania courts have long provided remedies for tenants whose landlords breach express covenants in their leases. McDanel v. Mack Realty Company, 315 Pa. 174, 172 A. 97 (1934); Gorman v. Miller, 27 Pa.Super. 62 (1905). Consumers have been protected in the buying of goods by implied warranties of merchantability and fitness for a particular purpose since the 1950's. The Act of April 6, 1953, P.L. 3, s 2-314 and s 2-315, as reenacted, Act of Oct. 2, 1959, P.L. 1023, s 2, 12A P.S. s 2-314 and s 2-315 (1970). In 1968, our

Supreme Court adopted s 357 of The Restatement (Second) of Torts and imposed liability on a landlord who had breached a contract to repair the rented premises, when such breach resulted in injury to the tenant because of a dangerous condition on the premises. Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968). In adopting s 357, at that time still the minority rule in the United States, the Court stated, "If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-a-vis the landlord when it comes to negotiating a lease." Reitmeyer v. Sprecher, at 431 Pa. 290, 243 A.2d 398.

Three years after Reitmeyer, the Supreme Court held Pennsylvania's Rent Withholding Act (the Act of Jan. 24, 1966, P.L. 1534, s 1, as amended, Act of Aug. 11, 1967, P.L. 204, s 1, Act of June 11, 1968, P.L. 159, No. 89, s 2, 35 P.S. s 1700-1 (1977)) to be constitutional. DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971). According to the Act, if a dwelling within a first class, second class, second class A, or third class city is certified as "unfit for human habitation," the tenant's rental obligation is suspended until the dwelling is recertified as fit or until the tenancy is terminated for a reason other than non-payment of rent. DePaul v. Kauffman, at 441 Pa. 389, 272 A.2d 502. In 1972, our Supreme Court overruled the doctrine of caveat emptor and applied *86 an implied warranty of workmanship and habitability in houses sold to buyers by builders-vendors. Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972). Before Elderkin, only ten other jurisdictions had abolished caveat emptor in the builder-vendor situation. Elderkin v. Gaster at 447 Pa. 126, 288 A.2d 275. Two years later, the Court extended the Unfair Trade Practices and Consumer Protection Law, Act of Dec. 17, 1968, P.L. 1224, ss 1-9, 73 P.S. ss 201-1 to 201-9 (1971), to cover the landlord tenant relationship. Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974). In holding that the tenant must be protected from unfair or deceptive practices in connection with the leasing of housing, the Court noted that,

It would be difficult indeed to imagine anything that affects the lives and welfare of the people of this Commonwealth more than housing. The Legislature has repeatedly declared that this Commonwealth suffers from a housing crisis. In 1937, 1941, 1945, 1947, 1957, 1959, 1965, 1968, and 1972, the Legislature found as a fact that a housing shortage exists. (Citations and footnotes omitted.)

Commonwealth v. Monumental Properties, Inc., at 459 Pa. 474-475, 329 A.2d 824. Finally, the Courts of Common Pleas of both Columbia and Philadelphia Counties have adopted and applied an implied warranty of habitability in residential leases. Edwards v. Watt, (Columbia Co., 1975); Derr v. Cangemi, 66 Pa.D. & C.2d 162 (Philadelphia Co., 1974).

The Pennsylvania laws and cases discussed above make clear that our decision today is not a dramatic and unexpected making of new law, but rather another step in our progression toward providing tenants with the protection they need in finding habitable housing.

Accordingly, we discard the doctrine of caveat emptor as it applies to landlord-residential tenant law. We hold that a lease, be it written or oral, periodic or at will, is to be controlled by the principles of contract law. All leases will contain an implied warranty of habitability; the tenant's obligation to pay rent and the landlord's obligation to maintain habitable premises will be mutually dependent. A material breach of one of the obligations will relieve the obligation of the other so long as the breach continues.

The implied warranty is designed to insure that a landlord will provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes. King v. Moorehead at 495 S.W.2d 75. There must be no latent defects in the facilities or the utilities at the beginning of the lease and all of the essential features of the leasehold must remain in a reasonably fit condition throughout the leasehold. Old Town Development Company v. Langford, Ind.App., 349 N.E.2d 744, 764 (1976); Mease v. Fox, Iowa, 200 N.W.2d 791, 796 (1972). We hasten to add, however, that while the landlord has an obligation to repair damages caused by normal wear and tear, the tenant will be held liable for any damage caused by malicious, abnormal, or unusual use. Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970). Finally, we note that while the tenant is entitled to safe and healthy premises, he or she is not entitled to a perfect or aesthetically pleasing dwelling place.

In order to constitute a breach of the implied warranty of habitability, ". . . the defect must be of a nature and kind which will render the premises unsafe, or unsanitary and thus unfit for living therein." Kline v. Burns, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971); Mease v. Fox, at Iowa, 200 N.W.2d 796. Materiality is a question of fact to be decided by the trier of fact on a case-by-case basis. Among those factors to be considered in determining whether a breach is material are 1) whether the condition violates a housing law, regulation or ordinance; 2) the nature and seriousness of the defect; 3) the effect of the defect on safety and sanitation; 4) the length of time for which the condition has persisted; and 5) the age of the structure. This proposed list of factors is not designed to be exclusive; the lower court, in its discretion, may consider any other factors it deems appropriate.

The tenant may assert a breach of the implied warranty of habitability as a defense against a landlord's action for possession or for unpaid rent. Green v. Superior Court of City and County of San Francisco, 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974); Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Foisy v. Wyman, 83 Wash.2d 22, 515 P.2d 160 (1973). The tenant also may assert a breach of the warranty as a counterclaim and seek reimbursement or a rent reduction for sums expended by the tenant for repairs made to make the dwelling habitable. Pa.R.C.P. 1031; Garcia v. Freeland Realty, Inc., 63 Misc.2d 937, 314 N.Y.S.2d 215 (1970). If a landlord may be liable in tort for breaching his obligation to make repairs to the premises, as is the case in Pennsylvania, the landlord may be held liable for the cost of

preventive repairs made by another. Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395. In order to assert a breach of the implied warranty of habitability as a defense or as a counterclaim, a tenant must prove that he or she gave notice to the landlord of the defect or condition, that the landlord had a reasonable opportunity to correct the condition, and that the landlord failed to do so. See, Marini v. Ireland, at 56 N.J. 146, 265 A.2d 535; Garcia v. Freeland Realty Inc., at 63 Misc.2d 942-943, 314 N.Y.S.2d 222; King v. Moorehead, at 495 S.W.2d 76.

In the present case, appellant has counterclaimed for sums expended for, inter alia, repairs made to correct a dangerous condition on her bathroom floor, to replace a broken window, and to replace a broken lock on her front door. The appellant, therefore, may have prevented the commission of an actionable tort. That is, she may have prevented a serious fall caused by the dangerous condition of the bathroom floor, or she may have prevented a criminal assault, for which the landlord could have been held liable in tort, by replacing the broken window and lock. See, Kline v. 1500 Massachusetts Avenue Apartment Corporation, 141 U.S.App.D.C. 370, 439 F.2d 477 (1970). If damages based upon the commission of a tort would be appropriate, reimbursement for the reasonable cost of preventing or averting the occurrence of a tort is appropriate as well. Garcia v. Freeland Realty, Inc., at 63 Misc.2d 942-943, 314 N.Y.S.2d 222.

Because we have held that a lease is no longer to be treated as a conveyance, but as a contract, standard contract remedies are available to both landlord and tenant. If the landlord sues for possession, based upon a claim of rent past due, and the tenant asserts the implied warranty of habitability as a defense, the court must determine whether a material breach of the warranty existed during the period for which past rent is claimed and, if such a breach has occurred, what portion of the tenant's rental obligation was suspended by the breach. If no part of the tenant's obligation was suspended, the landlord is entitled to a judgment of possession and past rent; if all of the tenant's obligation is suspended by a landlord's total breach of the warranty the action for possession must fail because there is no unpaid rent; if the rental obligation is found to be suspended in part, a judgment for possession must be denied if the tenant agrees to pay the part due; if the tenant refuses to pay the partial rent due, a judgment granting possession may be ordered. Javins v. First National Realty Corporation, at 138 U.S.App.D.C. 380-381, 428 F.2d 1082-1083.

When the tenant claims the warranty as a defense or counterclaim, he or she is entitled to the same remedies which are available for the breach of an express warranty: the monthly rent past and future (until the dwelling is returned to a habitable state) may be reduced by the difference between the agreed upon rent and the fair rental value of the apartment in its present condition; the rent may be reduced by the amount spent by the tenant on reasonable reparation and replacement in making the dwelling habitable; or the rent may

be discharged if the tenant surrenders possession. See King v. Moorehead, at 495 S.W.2d 76; Marini v. Ireland, at 56 N.J. 146, 265 A.2d 535; cf. McDanel v. Mack Realty Company, at 315 Pa. 177-178, 172 A. 98; Gorman v. Miller, at 27 Pa.Super. 68. (Commercial leases.) As with all contracts, either party may seek rescission of the lease and incidental or consequential damages for a breach. Lemle v. Breeden, at 51 Haw. 436, 462 P.2d 475; Mease v. Fox, at Iowa, 200 N.W.2d 797.

As applied to the case before us, we find that appellant should be given an opportunity to prove that appellee has breached the implied warranty of habitability in the premises she has rented from him. The breach of the warranty should be available to her both as a defense and as a counterclaim.

Accordingly, we reverse the lower court's decision sustaining appellee's demurrers to appellant's proposed defense and counterclaim and the judgments for possession, rent, and costs entered in appellee's favor, and we remand this case for proceedings consistent with this opinion.

PRICE, Judge, dissenting.

I dissent for several reasons. First, unlike the majority, I do not feel that Pennsylvania has been moving consistently and inevitably toward adoption of an implied warranty of habitability in residential leases. Second, I do not consider the extreme burden imposed by the majority opinion on both landlords and the judicial machinery to be warranted.

The law in Pennsylvania is that while a landlord may expressly covenant that premises are tenantable, there is no implied covenant of this nature on the landlord's part. Smith v. M.P.W. Realty Co., Inc., 423 Pa. 536, 225 A.2d 227 (1967); Kearse v. Spaulding, 406 Pa. 140, 176 A.2d 450 (1962). Further, Pennsylvania has never imposed an ongoing duty on landlords to keep leased premises in repair, unless he expressly covenants to do so. Solomon v. Neisner Bros., 93 F.Supp. 310 (M.D.Pa.1950), aff'd, 187 F.2d 735 (3d Cir. 1951); Lopez v. Gukenback, 391 Pa. 359, 137 A.2d 771 (1958); Smith v. Kravitz, 173 Pa.Super. 11, 93 A.2d 889 (1953). Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972), abolished caveat emptor in the home builder-vendor situation. However, the obligation imposed on the builder-vendor is one to guarantee habitability at the time of the sale, as is the case in the normal buyer-seller relationship. Implied warranty, as adopted by the majority, imposes an ongoing obligation on landlords to maintain leased premises in a “habitable” condition, a crucial term which, for all practical purposes, the majority leaves undefined. Holding that “habitability” is to be determined on a case by case basis according to malleable considerations renders it unlikely that there will be efficient resolution of each case. Because varying standards will necessarily be imposed by the courts, a landlord cannot possibly anticipate what is legally demanded of him. Therefore, a landlord must accede to

every whim of the tenant or face the equally costly route of postponed rent collection pending legal proceedings.

One may argue that the housing situation in our country has deteriorated to the point of posing a serious threat to the health and welfare of the populace. While I can sympathize with that position, I do not subscribe to the majority's attempted solution. Inconvenience and injustice in residential leasing are not cured by simply substituting a new victim.

Even if I were inclined to agree that an implied warranty of habitability should be read into all residential leases, I feel that any change in landlord-tenant law so drastic as that adopted by this court today should come from the legislature. Exact standards should be articulated so that all are aware of their obligations and entitlements. In addition, an escrow system should be devised so that withheld rent is put in safekeeping from the outset of the tenant's withholding. I feel that responsibility for development of such an intricate plan properly lies with the legislature.

I would affirm the order of the lower court.