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TO REPAIR OR NOT TO REPAIR: THAT IS NO LONGER THE QUESTION

INTRODUCTION

Low income tenants throughout the United States are faced with an extreme scarcity of adequate housing,¹ the impecunious California tenant being no exception to this general condition. Poverty level tenants are restricted both by the housing shortage and by limited financial resources. These problems are further complicated by the large portion of low income tenants who are members of minority groups and thus face the additional obstacle of racial discrimination. Welfare families and low income families with several children are in substantially worse straits, confronting difficulties arising from family size and landlords hostile to welfare tenants. Despite housing codes which are designed to legislate against the maintenance of untenantable dwellings, low income tenants, hampered by their tenuous financial condition, the severe lack of adequate housing and the superior bargaining position of landlords, have been vitually powerless to compel improvement of substandard housing conditions.

The low income urban dweller is buffeted between the rock of Scylla and the whirlpool of Charybdis largely because property law, with its outmoded principles and anachronistic foundation, has been recalcitrant in adapting to modern conditions. The modern low income dweller who lives in a small apartment in an inner-city ghetto often finds that his apartment is unsafe, unhealthy and untenantable. However, due to the lack of available housing, he is unable to relocate and frequently finds himself forced to remain on premises inimical to his health and safety.

This comment will discuss the recently recognized tenant remedy of implied warranty of habitability. It will focus initially upon the development of landlord-tenant law with its early construction of a lease as a conveyance of a possessory interest in land coupled with the pervasive application of the doctrine of caveat emptor. Then the ramifications of the traditional tenant remedies of constructive eviction, partial actual eviction, repair and deduct, and their ensuing inadequacies will be discussed.

¹. See President’s Committee on Urban Housing, A Decent Home (1969).
An analysis of the implied warranty of habitability will commence with an analogy between the landlord-tenant relationship and that of the vendor-vendee, and will continue with the development of the warranty as recognized in jurisdictions other than California. The comment will then concentrate on the recognition of implied warranty of habitability in residential leases in California as first enunciated in *Hinson v. Delis*, as applied in *Ball v. Tobeler*, and as expanded most recently by the California Supreme Court in *Green v. Superior Court*.

**DEVELOPMENT OF LANDLORD-TENANT LAW**

The landlord-tenant relationship first arose in the form of a lease, which, from its inception in the sixteenth century, was treated as a conveyance of a possessory interest in land. At that time, and in subsequent years, the conveyance theory was justified by the rural, agrarian character of society; a lessee's primary interest was necessarily in the land he would farm to secure a livelihood. The lessee expected only possession and quiet enjoyment of his demesne, without interference by the lessor, and for these rights the tenant was obliged to pay rent. If he failed to do so, he would lose possession, the real value of his bargain. The landlord's sole obligation after delivering possession consisted of collecting rent for the use of the property.

While this relationship was suitable in a rural, agrarian society, vast problems are encountered when the identical rent-possession requirements are applied to a modern urban scheme, where apartment dwellers interested in shelter, water, heat and services replace self-sufficient farmers interested only in the agricultural potential of the land. The shift from independent farmers to transient apartment dwellers undermined the use of a lease as a real property conveyance, at least in an urban context, because traditional construction of a lease unfairly placed severe burdens on the urban lessee, forcing him to pay rent as long as he remained in possession, regardless of defects in the leased premises. However, the property concept of possession has been the crux of the lease for centuries, and only in recent years has this ancient theory begun to erode under the onslaught of more modern no-

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5. 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1954).
8. Absent, of course, stipulations of further duties.
tions of contract law applied to real property transactions, notions far more applicable in an urban context. Nonetheless, the courts have been generally reluctant to explore the contractual nature of a lease as a solution to landlord-tenant problems. Covenants in the lease agreement usually have been assumed to be independent under traditional notions of property law. A landlord's breach of an express covenant to repair or supply services was held not to excuse his tenant from the obligation to pay rent, regardless of the fact that the failure of the covenant destroyed or impaired the real value of the lease. Often the tenant's only recourse was payment of rent as long as he remained in possession and an ensuing suit for a breach of contract to supply services. He had no right to withhold rental payments, and faced eviction if he attempted to do so. Even if the tenant chose to abandon the premises he was liable for the rent covering the entire term of the lease under a periodic tenancy or a tenancy for years.

In addition to being forced to pay rent irrespective of any breach of the landlord's duties short of actual eviction, the tenant was further burdened by the doctrine of caveat emptor. This doctrine imposed the burden of inspection upon the lessee, who, once he had accepted the premises, could not require the lessor to remedy any latent defects absent an express covenant to repair. This idea was justified in an agrarian society where the lessee had considerable skill in maintaining premises and was primarily interested in the land, but lacks merit in a modern urban society where the lessee has little interest in the land per se and lacks the necessary skill to cure any latent defects arising in the premises. According to the doctrine of caveat emptor there was no warranty that the premises would be in a habitable condition at the commencement of the lease, nor that they would be subsequently placed or maintained in a habitable condition. The only implied covenant initially found in a lease was that of quiet enjoyment, which was breached only by interference with the tenant's beneficial enjoyment of his premises by third parties under

14. Id. § 3.47.
a paramount title\textsuperscript{15} or by the lessor himself.\textsuperscript{16} Actionable interference also occurred if the landlord rendered the tenant's premises unfit for the purposes for which they were leased or if the tenant's rights incidental to possession were disturbed.\textsuperscript{17}

**TRADITIONAL TENANT REMEDIES**

**Constructive Eviction**

In the instance of actual eviction, the tenant's obligation to pay rent ceases. Constructive eviction, one of the earliest tenant remedies for damaged leaseholds, also excuses the tenant from the payment of rent.\textsuperscript{18} The concept of constructive eviction arose from a hybrid theory of possession coupled with the covenant of quiet enjoyment, and was one of the first theories based in part on the value of the lease as housing. When a lessee's right to possession and quiet enjoyment are so greatly interfered with by the condition of the premises that he is deprived of beneficial use of the property, the lessee is excused from his obligation to pay rent.\textsuperscript{19} Positive acts by the lessor or negative acts such as the denial of elements essential to full enjoyment constitute a constructive eviction.\textsuperscript{20} Unfortunately, this doctrine is of dubious value as a remedy for the low income apartment dweller facing severe housing shortages since the tenant can be excused from paying rent only if he first abandons the premises.\textsuperscript{21} If the tenant is precluded from abandoning the premises by his inability to secure other housing, he will remain liable for the rent and will be deemed to have waived any defects. Although a tenant may be excused from his rental obligation when he abandons the premises subsequent to the landlord's breach of an express covenant,\textsuperscript{22} or when he is constructively evicted, these remedies still lack vi-

\textsuperscript{15} Id. § 3.48.
\textsuperscript{16} Id. § 3.49.
\textsuperscript{19} 1 American Law of Property § 3.51 (A.J. Casner ed. 1954).
\textsuperscript{20} Id. An example of constructive eviction would be the situation where a landlord living directly above a tenant's apartment was a member of a rock band and held band practices in his apartment late into the night, thereby preventing the tenant from sleeping and effectively destroying the tenant's right to quiet enjoyment of his leased premises.
\textsuperscript{22} See Giddings v. Williams, 336 Ill. 482, 168 N.E. 514 (1929) (covenant to supply heat); see also Gibbons v. Hoefeld, 229 Ill. 455, 132 N.E. 425 (1921) (covenant to waterproof basement).
tality because they are ultimately based on possession. If the tenant finds adequate housing and is therefore able to abandon, he faces yet another hurdle, that of abandonment within a reasonable time. If he is found not to have abandoned within a reasonable time, the tenant will again be held liable for rent and will be found to have waived the defects in his apartment. The theory ostensibly justifying this requirement of abandonment arose from the concept that a tenant should not be allowed to avoid his duty to pay while remaining in possession of the premises.

Partial Actual Eviction

Recognition of the burden imposed on tenants by constructive eviction led to an attempt by the courts to alleviate some of those burdens by acknowledging the remedy of partial actual eviction. This remedy was the first which did not require abandonment as a condition precedent to the withholding of rent. A lessee's liability for rent was suspended when he was physically evicted from a portion of the premises. He was allowed to remain in possession of the remainder of the premises and was excused from his duty to pay any rent until the partial eviction terminated. Under this theory, the court held that the entire rent rather than a portion thereof would be suspended on the grounds that a lessor should not be allowed to apportion his wrong by destroying the value of the lease. This remedy implied a movement forward because it was not based on the all-or-nothing concept of possession. Under this theory, the tenant was not forced to abandon entirely, but instead was allowed to retain the use of the habitable portion of the leased premises. This remedy creates problems, however, especially in cases where the areas of partial eviction are of vital necessity to the health, safety, and welfare of the tenants. Thus, partial eviction is of limited value when it is imperative that the tenant be able to use the areas constructively denied to him by the condition of the premises. If he continues to use "mandatory" defective areas, he will be held to be

27. Physical eviction meant that the tenant was unable to use a portion of the premises due to problems with the physical structure, such as a caved-in floor.
29. These areas would include rooms in the premises such as a bathroom or kitchen.
in continued use of the entire premises, rendering him liable for the full amount of rent.

**Repair and Deduct**

Upon initial consideration, the remedy of repair and deduct\(^{30}\) appears to have cured the defects inherent in prior common law tenant remedies. Under repair and deduct, a tenant is allowed to repair defects which violate housing codes, deducting the cost of the repairs from his rent.\(^{31}\) This remedy is conditional, however, upon the tenant's giving adequate notice of the defects to the landlord and upon the landlord's subsequent failure to repair.\(^{32}\) The repair and deduct remedy may be a viable means for eliminating smaller defects which violate housing codes, but is valueless in deteriorating slum dwellings due to the strict limitations constraining its use. Since the cost of repairs may not exceed one month's rent, and because the remedy may be effected only once within a twelve-month period,\(^{33}\) its usefulness is practically nonexistent in damaged slum dwellings which are in such a state of disrepair that even several months' rent would be insufficient to obviate their defects. Equally problematical is the financial condition of the low income tenant who is unlikely to have sufficient funds to pay for the repairs, and who may later face a rent raise or an eviction by an angry landlord,\(^{34}\) despite statutory protections. If he exercises his right to live in a habitable dwelling by repairing the premises, the tenant is confronted with the difficulty of determining what he actually may do in effecting repairs. If he makes repairs which are subsequently found to be improvements rather than repaired defects, the tenant will be liable for his entire rent and will be unable to collect for the cost of the improvements from his landlord.\(^{35}\) He is left bearing the fi-

\(^{30}\) California has codified this remedy in **Cal. Civ. Code** § 1942 (West 1972), which provides in part:

> If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs . . . does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions. This remedy shall not be available to the lessee more than once in any 12-month period.


\(^{32}\) Schweiger v. Superior Court of Alameda County, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).


\(^{34}\) If the tenant can prove to the court that a landlord's attempt to evict him or raise his rent was retaliatory pursuant to the tenant's use of repair and deduct, the landlord's actions will be prohibited. Schweiger v. Superior Court of Alameda County, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

nancial burden of improving premises owned by the landlord.

Repair and deduct in California is fraught with complications, for under Civil Code section 1941 the lessor must place the building in a habitable condition only if the lease does not contain a provision to the contrary. A lessee, therefore, is essentially denied both a tenantable building and any expectation that the landlord will make needed repairs when his lease contains a clause contracting away the landlord's obligations. The codification of repair and deduct remedies continues to place the tenant in an inequitable position regarding the maintenance of the premises, for under present statutes the burden of making repairs effectively lies with the tenant. To alleviate the unfairness intrinsic in present statutes, the obligation to repair should unequivocally be moved from the tenant to the landlord, who is usually in a far better financial position to make major repairs and who should have a substantial financial interest in maintaining or improving the quality of his buildings.

The Vendor-Vendee Analogy

Landlord-tenant law has retained a unique status as compared to traditional vendor-vendee situations in which the rights and obligations of parties have long been held to be mutually dependent. Tradition, with the custom and usage of the marketplace, has imposed definite standards of quality on vendors who offer goods to the general public, and it seems inapposite that there should be such a dearth of comparable standards in the apartment marketplace. However, judicial and legislative reluctance to alter outdated concepts of substantive property law has

37. CAL. CIV. CODE § 1941 (West 1972) reads:
The lessor of a building intended for the occupation of human beings must, in absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine. (emphasis added).
38. Because of this superior bargaining position in a market manifesting a scarcity of low income housing, a lessee may be forced into the position of signing a rental lease which includes an exculpatory clause. If he refuses to accept such a clause, the landlord may simply refuse to rent to him, knowing there are more tenants in need of housing than there are units available.
40. Although CAL. CIV. CODE § 1942.1 (West 1972) provides:
Any agreement by a lessee of a dwelling waiving or modifying his rights under Section 1941 or 1942 shall be void as contrary to public policy with respect to any conditions which render the premise untenable. . . .
the statute also declares that
the lessor and the lessee may agree that the lessee shall undertake to improve, repair, or maintain all or stipulated portions of the dwelling as part of the condition for rental. . . .
led to impractical California statutes which fail to protect lessees from undesirable living conditions. Although most housing codes are designed to prevent substandard conditions, they have neither effectively eliminated the conditions they were designed to alleviate nor have they successfully promulgated healthful and safe housing conditions. The understaffing of enforcement agencies, the bureaucratic complications of statutory inspection processes and the considerable overlap in housing authority jurisdiction have all made the enforcement of the housing codes highly unsatisfactory. The criminal sanctions imposed by housing codes have not been strictly enforced, and where they have been imposed, penalties are of such a nominal nature as to make them virtually ineffectual. The cost of a fine for a housing code violation is often much less than the cost of repairing the building and the lessor who pays the fine in lieu of repairing is in a better financial position than a lessor who effects repairs. Thus, lack of enforcement plus insignificant fines have rendered criminal sanctions for housing code violations ineffective as a means of protecting a tenant's right to habitable urban dwellings. It is at least arguable, therefore, that the tenant remedies explored thus far, steeped as they are in ancient and anachronistic concepts of real property law, do not alleviate the problems faced by the urban apartment dweller. New solutions and a clear break from the past are therefore necessary to obviate the tremendous problems faced by today's urban tenant.

**IMPLIED WARRANTY OF HABITABILITY IN LEASES AS A SOLUTION TO MODERN URBAN DWELLERS' HOUSING PROBLEMS**

The realization that a modern lease is more accurately construed as a contract for services than as a conveyance of property, plus awareness of the plight of the low income tenant, has fostered a gradual evolution in the courts toward acceptance of the implied warranty of habitability in a rental lease as one solu-

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42. See Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 801-02 (1965).
43. Id. at 804.
44. Id. at 809-10.
47. E.g., People v. Rowen, 9 N.Y.2d 732, 174 N.E.2d 331. Whereas a fine of $50 was imposed for code violations, the correction of the violation would have cost $42,500.
tion to landlord-tenant problems. The doctrine of implied warranty first arose in tort law under the traditional vendor-vendee relationship in the goods and products marketplace.\textsuperscript{48} This relationship is sufficiently close to that of landlord-tenant to make the extension of the implied warranty doctrine into the forum of landlord-tenant law a reasonable approach to the problem of unhabitable rental dwellings. In both instances, the vendee or the lessee is the person who is placed in the inferior bargaining position. The manufacturer and the lessor are in a superior bargaining position, both due to their economic strength and because they occupy a better position to inspect and ascertain latent defects and problems when the product or building is put to its intended use. The vendee or the lessee lacks both the expertise and the time to make more than a cursory inspection as well as the requisite skill to make a detailed evaluation which would expose serious latent defects. Because he lacks experience, the lessee is forced to rely upon the knowledge and expertise of the lessor just as the vendee relies upon the manufacturer's warranties. The courts allow recovery based on implied warranty in products liability cases on the assumption that by placing his product on the market, the manufacturer is representing to the consumer that his product may safely be used for its intended purpose. By marketing his product, the manufacturer is held to represent himself as having certain skill and knowledge upon which the consumer may reasonably rely. Therefore, consumer reliance on the manufacturer's expertise justifies the standard of strict liability to which the manufacturer is held.\textsuperscript{49}

The acceptance of implied warranty in rental leases can be justified by analogizing the position of the lessor of real property to the vendor of consumer goods. The lessor places his dwelling place on the market, and by so doing represents that it may be safely used for its intended purpose of providing a habitable dwelling for residents. The position of the lessor is superior to that of the lessee because his business is the leasing of apartments, and he is thus better able to know of defects which violate the housing codes: problems such as inadequate sanitation, insect and

\textsuperscript{48} The doctrine of implied warranty of fitness, which is analogous to implied warranty of habitability, has been accepted in tort law in the area of products liability. Henninger v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) recognized that a manufacturer was strictly liable for any product he placed on the market. California accepted this theory in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

rodent infestation, and faulty wiring, plumbing or heating systems. These latent defects are not readily apparent to an inexperienced prospective lessee during a superficial inspection. Since this information is readily available to the lessor, the lessee must necessarily rely upon the superior expertise and knowledge of the lessor, the obvious implication being that the same standard of strict liability should be placed on the lessor through an implied warranty of habitability as is placed on a manufacturer of consumer products.

California courts have recently extended the theory of implied warranty to the homebuilding industry. In Kriegler v. Eichler Homes, Inc., the appellate court held that where a plaintiff had purchased a development home from the defendant, the defendant was strictly liable to the plaintiff for failure of the heating system, on the grounds that the plaintiff had relied on the defendant's skill in producing the home and the heating system, and had relied that the home would be reasonably fit for its intended purpose. California has expanded the implied warranty theory of Kriegler to the sale of residential lots, holding in Avner v. Longridge Estates that the developer of a lot could be held strictly liable for defective soil conditions caused by improper filling and grading.

The California courts, following the reasoning employed in Avner and Kriegler, have also allowed recovery under a theory of strict liability in landlord-tenant cases where the lessee has sustained injuries caused by defective conditions about which the landlord either knew, concealed, or should have discovered through the exercise of reasonable care. The general rule in this area has been that a lessor has no duty to keep premises free from defects which could injure a tenant unless these defects were unknown to the lessee but were known and concealed by the lessor. In such a situation, the lessor is held strictly liable for the injuries sustained by the lessee. The lessor is also held strictly liable for injuries sustained by a lessee caused by defective conditions in appurtenant areas of the building under the control of the lessor, if the lessor could have discovered the defective condi-
tions and made them safe.\textsuperscript{56} In \textit{Hanson v. Luft}\textsuperscript{57} for example, the California Supreme Court held that where a young child sustained injuries when her pajamas were ignited by a living room heater, the landlord was strictly liable on the grounds that he knew of the dangerous propensities of the heater, yet had concealed them by failing to warn the tenants of the hidden danger.\textsuperscript{58} A subsequent case, \textit{Anderson v. Shuman},\textsuperscript{59} extended this doctrine to impose liability upon the landlord on grounds of concealment, if he had reason to suspect that a latent defect existed even if he had no actual knowledge of the defect. The court defined concealment as "the withholding of knowledge which is material and ought to be revealed, and therefore as including the withholding of knowledge of a dangerous condition by a landlord from a tenant."\textsuperscript{60} In \textit{Anderson} the injuries were caused by a fall which occurred when a defectively installed sink became dislodged from the wall. Several prior accidents of a similar nature had occurred, putting the landlord on notice of the defect, yet he effectively concealed the condition from the tenants by failing to inform them of the defect.

Although \textit{Hanson} and \textit{Anderson} have helped to bring implied warranty into the arena of landlord-tenant law in California, several problems still exist. For instance, if the lessee knows of defects and informs the landlord of them, there is no concealment, and thus no liability. Furthermore, \textit{Hanson} and \textit{Anderson} have considered situations where the defects are patent rather than latent and have not covered defects which come into existence subsequent to the execution of the lease. These cases offer the tenant little aid when defective housing conditions, although not the cause of bodily injury, are nonetheless inimical to his health. It

\textsuperscript{56} Id. at 717, 344 P.2d at 304.
\textsuperscript{57} 22 Cal. Rptr. 48 (1962), vacated on other grounds, 59 Cal. 2d 443, 24 Cal. Rptr. 681 (1962). The California Supreme Court vacated the earlier decision on the ground that the danger was patent, rather than latent. The court affirmed the rule holding that a landlord is under a duty to warn a tenant of any hidden danger or defect, noting that there is no duty to warn the tenant of obvious and patent defects and dangers.
\textsuperscript{58} The court recognized the concept of shifting the financial burden to the landlord to maintain the premises in a habitable condition, citing Prosser's theory that the financial burden should be borne by the landlord, just as the burden in products liability is borne by the manufacturer, which states that there is an increasing recognition of the fact that the tenant who leases defective premises is likely to be impecunious and unable to make the necessary repairs, and that the financial burden is best placed upon the landlord, who receives a benefit from the transaction.
\textsuperscript{60} Id. at 273-74, 64 Cal. Rptr. at 664.
is thus readily apparent that the doctrine of implied warranty needed to be more fully expanded if tenants were to be afforded substantial protection against defective conditions irrespective of the time when they occur and whether they are within the tenant's knowledge.

Breach of Implied Warranty of Habitability: A New Remedy

California courts have very recently applied an expanded view of implied warranty of habitability in landlord-tenant law, treating a lease agreement between a landlord and a tenant as a contract rather than conveyance of land. Several jurisdictions have followed a similar line of reasoning in recognizing and expanding this doctrine to its fullest use whereby a tenant is afforded contractual remedies in lieu of the unsatisfactory tenant remedies previously recognized.

In Shepard v. Lerner, for example, the premises contained numerous code violations existing at the time the lease was executed. The court found that the lease had been executed unlawfully because the leased premises contained housing code violations known to both parties, and, recognizing the lease as a contract, declared it to be null and void. A similar rule was found in Brown v. Southall Realty Co., where the tenant appealed from an action for possession for the nonpayment of rent. In this case, the landlord was aware that the premises violated the District of Columbia housing codes, yet informed the tenant prior to execution of the lease that the leased premises were in a habitable condition. The code sections in question prohibited the renting of habitations which were unclean, unsafe, or in an unsanitary condition, and required that every habitation be kept in repair. Basing its opinion on the language in the codes, the court of appeals held that the execution of a lease in violation of those regulations was an act prohibited by law, and that upholding the validity of the lease in light of defects violating the housing codes would be a frustration of legislative intent.

The courts in both Shephard and Brown considered the lease

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61. This was first recognized in California in Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).
63. 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960).
65. Id. at 836.
66. Id. at 837.
agreement to be contractual in nature, at least to the extent that it was void when executed due to the presence of code violations known to the lessor. The remedy offered by Shephard and Brown had severe limitations. In each case the tenant had abandoned the premises and sought only to be relieved of his rental obligation. Thus, because the contracts were void ab initio, the tenants were allowed to abandon and cease paying rent, but were not allowed to remain in possession of the defective premises. The remedy in Shephard and Brown was further limited by the fact that it applied only to defects existing at the time the lease was executed, the respective courts having failed to consider the problem of defects which occur subsequent to the signing of a lease. In the latter situation, the tenant would be precluded from alleging that the contract was executed for an illegal purpose, since the contract would not have been void ab initio.

While Shepard and Brown recognized a lease as a contract in a limited sense only, the Wisconsin Supreme Court in Pines v. Perssion⁶⁵ expressly held a lease to be a contract containing mutually dependent covenants and an implied warranty of habitability. The tenants in Pines, after signing a lease for a furnished house, discovered that it was in an untenable condition, and requested an inspection by the building inspector, which revealed latent defects violative of housing codes. The tenants informed the landlord, yet he failed to make substantial repairs. After two weeks of unsatisfactory occupancy, the tenants vacated the premises. Although the lease contained no express warranty of habitability, the court found an implied warranty⁶⁶ which the landlord was held to have breached when the plumbing, heating and wiring systems were found to be defective. This breach of warranty relieved the tenants of their rental liability.

Although the dwelling leased in Pines was a furnished house, the court repudiated the old rule under which an implied warranty of habitability existed only when the subject of the lease was a furnished house.⁶⁹ The court found that building codes and health regulations were the result of legislative policy judgments intending to impose duties on all rental property owners to maintain their premises in a certain condition, regardless of whether the premises were furnished or unfurnished.⁷⁰ The Wisconsin

⁶⁵. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
⁶⁶. Id. at 593, 111 N.W.2d at 412.
⁶⁹. See 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner, ed. 1954). See note 75 infra.
⁷⁰. 14 Wis. 2d 590, 593, 111 N.W.2d 409, 412-13 (1961). The court stated:
Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose those duties on a property owner—which has rendered the old common law rule obsolete. To follow
court also expressly repudiated the antiquated doctrine of caveat emptor,\textsuperscript{71} finding that under the contract theory of mutually dependent covenants, a lessee's covenant to pay rent is dependent upon the lessor's covenant to provide a habitable dwelling, whether that covenant is express or implied.\textsuperscript{72} Thus, the lessees' duty to pay rent in \textit{Pines} was excused when the landlord was found to have breached his duty to provide a habitable dwelling. The lessees were held to be liable only for the reasonable rental value of the premises during their actual occupancy. As in prior cases, however, the facts in \textit{Pines} indicate an abandonment of the premises, with no indication given that the tenants might have been allowed to remain on the premises and continue to withhold rent until such time as the defects were repaired.

The court in \textit{Pines} implied that if the tenants had remained in possession, they would have been entitled to a rent abatement rather than total rent withholding, since the tenants were only held responsible for the "reasonable rental value of the premises during the time of actual occupancy."\textsuperscript{73} Unfortunately, this does not alleviate the problem of the slum dweller who is forced to stay and pay rent because his mobility is severely hindered by the scarcity of low income housing. In a situation like \textit{Pines}, had the tenant remained he would have been faced with a dwelling replete with unhealthy and unsafe conditions, and would have been confronted with the choice of squalor or the street. Despite its limitations, \textit{Pines} substantially affected landlord-tenant law by expressly repudiating the doctrine of caveat emptor as applied to rental agreements, and by recognizing that a lease is a contract including an implied warranty of habitability, which, if breached, excuses a tenant from his rental obligation.

The Supreme Court of Hawaii, in \textit{Lemle v. Breedon},\textsuperscript{74} has also recognized an implied warranty of habitability. In \textit{Lemle}, a family had rented a furnished house for $800 a month and discovered during the first day of occupancy that it was infested with rats. The entire family, after being relegated to sleeping in the living room, vacated the premises after only three days of occupancy. The court held that their deposit was to be returned, not on the grounds of the furnished house exception\textsuperscript{75}

\begin{itemize}
  \item \textsuperscript{71} \textit{Id.}
  \item \textsuperscript{72} \textit{Id.} at 593, 111 N.W.2d at 413.
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} 51 Haw. 426, 462 P.2d 470 (1969).
  \item \textsuperscript{75} The furnished house has been found to be an exception to the rule of
\end{itemize}
but because "the tenant is implicitly or expressly bargaining for immediate possession of the premises in a suitable condition."\textsuperscript{76}

The court in \textit{Lemle} implied that the expectations of a tenant provide a more viable and operative test than that of the subject matter of the lease, because today's tenant, irrespective of what type of dwelling he is leasing, signs a standardized lease, is unable to make more than a cursory inspection, and is unlikely to be cognizant of latent defects. The court, reasoning that any tenant interested in residential housing is bargaining for immediate possession of premises in a habitable condition,\textsuperscript{77} expressly held that a lease is a contractual relationship between the landlord and the tenant, and that a warranty of habitability and fitness is implied by this relationship.\textsuperscript{78}

Although the facts in \textit{Lemle} are based on the abandonment of an expensive dwelling, its reasoning can be applied to slum tenants as well. Repudiation of the furnished house exception to caveat emptor and recognition of an implied warranty of habitability in leases applies equally to low income tenants who also have little knowledge as to latent defects and who are also bargaining for immediate occupancy of premises in a habitable condition. An important aspect of \textit{Lemle} is the express ruling by the court that in the case of a breach of an implied warranty of habitability, the basic contractual remedies of reformation, damages and rescission are available to the tenant.\textsuperscript{79} Not only is it no longer necessary for a tenant to claim constructive eviction and abandon the premises, but the gravity and duration of the alleged breach are now determinative factors as to its materiality, an interpretation especially helpful to slum dwellers who have previously been forced to live for many months in unhealthy or dangerous dwellings.

Two New Jersey cases, \textit{Reste Realty Corp. v. Cooper}\textsuperscript{80} and \textit{Marini v. Ireland}\textsuperscript{81} have also recognized an implied warranty of habitability in a residential lease. In \textit{Reste}, a case in which a tenant was unable to use her premises due to flooding resulting from improper outdoor grading, the court rejected the defense of caveat emptor on the grounds that the lessee was unlikely to have known

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\textsuperscript{77} \textit{Id}. at 429-30, 462 P.2d at 473-74.
\textsuperscript{78} \textit{Id}. at 430, 462 P.2d at 474.
\textsuperscript{79} \textit{Id}. at 431, 462 P.2d at 474.
\textsuperscript{80} 53 N.J. 444, 251 A.2d 268 (1969).
\textsuperscript{81} 56 N.J. 130, 265 A.2d 526 (1970).
of latent defects either outside the premises or within them.\textsuperscript{82} The opinion in \textit{Reste} is limited by its recognition that an implied warranty of habitability applies only to latent defects in existence at the inception of a lease. The court does not go so far as to say that an implied warranty of habitability exists with regard to patent defects or those defects occurring subsequent to the signing of the lease. The \textit{Reste} decision is also limited in the sense that although the court purports to recognize an implied warranty of habitability, effectively it is merely applying the older doctrine of constructive eviction since the decision requires both abandonment and a breach of a landlord's duty to provide habitable premises which is sufficiently substantial to constitute constructive eviction.\textsuperscript{83}

In \textit{Marini v. Ireland},\textsuperscript{84} where a tenant repaired a cracked, leaking toilet and deducted the cost from her rent, the New Jersey court again denied the landlord's summary disposition action, recognizing that a lease for an urban residential dwelling contains an implied covenant of habitability against latent defects.\textsuperscript{85} In this case the court extended the \textit{Reste} doctrine, explicitly requiring that the landlord bear the financial burden of repairing any defective conditions in the leased premises whether they arise at the inception of the lease or subsequent to its execution. The court delineated the boundaries of this doctrine by saying that

\textquote{actually it is a covenant that at the inception of a lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.}\textsuperscript{86}

The court in \textit{Marini} expanded \textit{Reste} to include the acceptance of a breach of implied warranty of habitability as a defense to an unlawful detainer action, by recognizing that constructive eviction is an insufficient tenant remedy because it requires the abandonment of the premises. The New Jersey court acknowledged that a tenant, especially when faced with a housing shortage, should be allowed to remain on the premises and make the repairs necessary to place them in a livable condition, deducting

\begin{table}
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\textsuperscript{82} 53 N.J. 444, 448, 251 A.2d 268, 272 (1969).  \\
\textsuperscript{83} Id. at 451, 251 A.2d at 275.  \\
\textsuperscript{84} 56 N.J. 130, 265 A.2d 526 (1970).  \\
\textsuperscript{85} Id. at 138, 265 A.2d at 534.  \\
\textsuperscript{86} Id.  \\
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the cost of repairs from future rental payments. The tenant's only obligation would be to give the landlord adequate notice before resorting to self-help. The New Jersey remedy is more expansive than that allowed in California, where the maximum amount deductible for repairs is one month's rent.

As a leader in the development of modern landlord-tenant law, the District of Columbia has provided a comprehensive interpretation of an urban lease and the ensuing rights and duties evolving from the landlord-tenant relationship. These developments are discussed by Justice J. Skelly Wright in Javins v. First Nat'l Realty Corp. In Javins, the tenants alleged more than 1,500 housing code violations which had arisen since the commencement of the lease, arguing that the housing code violations were an equitable defense to the landlord's action for summary eviction. The landlord's action was denied and the court held that a tenant may reasonably expect that the apartment will be fit for habitation for the entire term of his lease. The court extended previous holdings, in which an implied warranty was applied only to latent defects, to those defects occurring at any time during the lease, essentially implying that a landlord should be required to repair where conditions become uninhabitable subsequent to the time the lease was signed.

According to Javins an implied warranty of habitability is an integral part of any residential lease and is to be measured by the applicable housing and health regulations. The warranty of fitness is implied by law in residential leases by operation of the housing codes, and if breached, gives rise to the normal remedies concomitant with breach of contract. The court in Javins established a direct nexus between the implied warranty of habitability, the state housing codes and the tenant's duty to pay rent. Thus, the housing codes become a measure of the warranty itself, setting the standards for a landlord's contractual duty as a lessor.

The court went on to overturn the archaic no-repair rule in favor of a contractual interpretation analogous to a retailer's widening responsibility for his goods and services through implied warranties of fitness and merchantability. The residential

87. Id. at 139, 265 A.2d at 535.
90. Id. at 1079.
91. Id. at 1081, where the court says, “by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.”
92. Id. at 1080-81.
93. Id. at 1077.
94. Id. at 1075-76.
lessor in the District of Columbia now has greater responsibility for the premises and services he provides to the lessee through an implied warranty of habitability.

*Javins* goes far in promoting tenants' rights by allowing the tenant to remain on the premises and withhold rent, thus giving the landlord an incentive to repair the defects. The burden of repair is properly placed on the landlord, who has a more permanent financial interest in the premises. The *Javins* holding also implies that breach of an implied warranty of habitability may be used as a defense to an unlawful detainer action. This theory arises from the contract principle of mutuality of covenants creating an interdependency between the tenant's duty to pay rent and the landlord's duty to keep the premises habitable. Thus, in an action for possession, the tenant must be allowed to prove the alleged code violations before a determination is made that rent is owed to the landlord.

**IMPLIED WARRANTY OF HABITABILITY IN RESIDENTIAL LEASES IN CALIFORNIA**

*Hinson v. Delis*

*Hinson v. Delis* is the first California case to recognize an implied warranty of habitability in a residential lease. In its decision, the California court of appeal relied primarily on *Pines, Lemle* and *Javins* in reaching its noteworthy decision. In *Hinson*, the plaintiff was a welfare recipient who had signed a month-to-month lease for a low income apartment. With the exception of a minor defect in the front door, the apartment appeared to be in adequate condition at the time the lease was executed. Shortly thereafter, however, a hole caused by dry rot developed in the bathroom floor, the toilet began to leak and the linoleum on the kitchen floor lost its water-repellent qualities. On several occasions the tenant notified the landlord of the defective conditions, which had arisen through no fault of her own. Even after repeated warnings the landlord failed to repair the premises, thereby placing the tenant and her children in a position of serious danger and inconvenience. After confirmation by a city building inspector that the defects were in violation of the city housing codes, the tenant withheld her rent.

Upon receipt of a Notice to Pay Rent or Quit, the tenant filed an action requesting an injunction against the eviction and a declaratory judgment suspending her rental obligation until the land-

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95. *Id.* at 1082.
97. *Id.* at 65, 102 Cal. Rptr. 663.
lord had complied with the city housing codes. The lower court entered a judgment for the defendant landlord, holding that although the housing codes were enacted to protect the health, life, safety and property of tenants in residential dwellings, the tenant had no legal or equitable right to unilaterally withhold rent. The court of appeal reversed, holding that the lease agreement was a valid, legal contract between the landlord and the tenant and that an implied warranty of habitability existed as a condition precedent to the obligation to pay rent.

In its decision, the court considered whether the lease agreement could be regarded as an illegal contract due to the defective conditions which had arisen subsequent to the signing of the lease. The court found in Hinson that the lease was a legal contract, distinguishable from those situations excusing the duty to pay rent on the grounds that the lease was void ab initio. The critical factor which heretofore rendered a lease void was the time at which knowledge of the defects arose. Thus, the cases which held the lease void ab initio were those in which the defects were at least known by the landlord, and often by both the landlord and the tenant, at the time the lease was executed. Execution of the lease by a landlord with knowledge that his premises were defective rendered the contract void for having an illegal purpose. In Hinson, except for the defect in the front door, no code violations existed at the signing of the lease, although numerous defects did occur during the term of the lease. Therefore, the consideration and purpose for the lease were legal and the contract was enforceable. By holding that housing code violations which occur during the tenant's occupancy do not necessarily render the lease void, the court provided a more viable form of relief for a tenant who, rather than seeking to terminate the lease, merely wishes to have her rental obligation suspended until the defective conditions are eliminated.

The court in Hinson, basing its decision on the precedents set in Pines, Lemle, Reste and Javins, specifically overruled the outdated doctrine of caveat emptor, holding that a lease placed the landlord and the tenant in a contractual relationship, thereby

98. Id.
giving each party to the contract certain rights, duties and liabilities. Since the lease in *Hinson* was construed as a contract, the tenant’s covenant to pay rent was held to be dependent upon the landlord’s duties, both express and implied, including his duty to maintain the dwelling place in a habitable condition, a duty placed on all lessors by health and building codes. Thus, when a landlord breaches the state-imposed covenant of habitability, his breach affords the tenant contractual remedies of damages, reformation and rescission, allowing the tenant to remain on the premises rather than forcing him to abandon before he can seek redress. Permitting the tenant to remain and withhold at least part of the rent is a highly effective tenant remedy. Prior to *Hinson*, with the exception of partial actual eviction, the tenant had been forced to vacate before seeking redress, an impossible requirement for most low income tenants hampered by the limited number of available low cost housing units.

The remedy of implied warranty of habitability recognized in *Hinson* appears to be the most equitable solution for both the landlord and the tenant when code violations exist. It cannot be used by a tenant as a frivolous excuse to withhold rent when only de minimis defects exist, nor can it be used to enable the tenant to make unnecessary improvements on his apartment. When substantial defects do exist, the tenant may be allowed to withhold rent, or may be required by the court to pay the reasonable rental value of the defective premises, the value of which may be determined by the trial court. Alternatively, the court may require that the tenant make the full rental payments to the court during the action, as long as the tenant remains in possession. In this situation, upon rendering judgment the court will determine the equitable distribution of the payments, taking into account the materiality and duration of the defects. These requirements not only provide a viable alternative to the tenant, who will not be forced to make full rental payments to a landlord violating the housing codes, but they also treat the landlord equitably by giving him sufficient time to make the necessary repairs. They additionally allow him some income for the time the tenant is in possession, based upon the materiality, seriousness and duration of the alleged breaches.

103. *Id.* at 66, 102 Cal. Rptr. at 665. The court in *Hinson* uses the words of *Pines* and *Lemle* for its own holding.
104. CAL. CIV. CODE § 1941 (West 1972); CAL. HEALTH & SAFETY CODE § 17910 et seq. (West 1972).
Ball v. Tobeler

The California court affirmed Hinson in Ball v. Tobeler, an unreported appellate court decision. Ball was a class action suit brought by tenants living in various apartment houses owned by the defendant Tobeler. The plaintiffs alleged that they had all performed their covenants to pay rent in accordance with their oral rental agreements. They additionally alleged that the defendant had continuously failed to maintain the premises in a habitable and sanitary condition both before and at the time they entered into their rental agreements. All the premises in issue contained numerous defects inimical to the health, safety and welfare of the tenants, including inadequate garbage disposal which caused flies, maggots and vermin to be attracted to the premises; windows which were unscreened, causing infestation of vermin, rodents, mice, rats, bees and wasps; and plumbing and water systems which were inadequate and faulty, preventing the tenants from enjoying reasonable use of the premises.

Ball was an appeal from a dismissal for failure to state a cause of action. The complaint in Ball had alleged three causes of action. The first was based on the tenants' right to withhold rent and receive damages arising from a contract theory which incorporated the landlord's breach of his implied warranty of habitability. The second cause of action was based on the tenants' right to obtain damages and injunctive relief on the grounds that the leased premises constituted a nuisance injurious to the plaintiffs' health and obstructive to their free use and possession of the premises. The third was an additional plea for injunctive relief on the grounds that the landlord's letting of premises which violated the health and safety codes constituted acts of unfair competition within the meaning of California Civil Code section 3369.

In considering the first cause of action, the implied warranty of habitability, the court reviewed Hinson v. Delis and California Civil Code sections 1941 and 1942, finding that although section 1942, as revised in 1970, did not broaden the statutory remedies available to a tenant, neither did it act to preclude other remedies for uninhabitable rental dwellings. The court also approved the reasoning in Hinson, finding that a lease is contractual
in nature and that the implied warranty of habitability inherent in such a contract gives rise to contractual remedies when breached.

The court was reluctant to uphold a cause of action based on the plaintiffs' allegations of nuisance, allowing instead leave to amend this portion of the complaint. After considering the plaintiffs' third cause of action alleging unfair competition, the court concluded that offering apartment houses for rent was a business within the scope of California Civil Code section 3369, reasoning that a tenant is in a position analogous to a consumer, and thus should be afforded protection against the unlawful, unfair or fraudulent business practices prohibited by section 3369. By holding that the plaintiffs had sufficiently stated a cause of action for injunctive relief under section 3369, the court implied that California will now take a much stronger position against landlords who violate housing and health codes.

It is clear that Ball expands the decision in Hinson regarding tenants' rights against landlords who maintain untenable premises, for in Ball the landlord not only was liable in contract for a breach of warranty of habitability, but was also held liable for unlawful business practices. Ball is also significant in that it was a class action, thus suggesting that an entire class of injured tenants may be able to seek redress against their landlord when he violates housing codes. Tenants' remedies are considerably more effective when a large group of renters can bring suit for injunctive relief and withhold rent from a landlord than when a single tenant attempts to seek redress against a recalcitrant landlord. The landlord is more likely to repair the premises when he is faced with the prospect of losing a class action than when he faces an action brought by an individual lessee. The withholding of rent by a single tenant will not exert the same economic pressure on a landlord's income as will mass rent withholdings by an entire class of renters. The Ball decision is also significant for its application of the entire scope of contractual remedies discussed by Hinson and its predecessors. In Hinson the tenant sought only to withhold her rent, whereas in Ball the tenants sought damages and restitution in the amount of total rent paid during the entire time the violations existed. This practical application of the contractual remedies discussed in Hinson demon-

strates that similarly situated tenants might be awarded damages in addition to being excused from rental payments until the defects in their dwellings are cured.

Although the decision in Ball has great merit because of its acceptance and expansion of tenant remedies evolving from a landlord's breach of an implied warranty of habitability, the decision is nugatory due to a new California rule of court which makes unpublished decisions inapplicable as precedent. Fortunately, the California Supreme Court in Green v. Superior Court has joined the growing number of jurisdictions which recognize an implied warranty of habitability. This comprehensive decision is especially important in the expanding arena of landlord-tenant law.

Green v. Superior Court

In Green v. Superior Court, the most recent California case recognizing the existence of an implied warranty of habitability, the California Supreme Court, in a commendable decision authored by Justice Mathew Tobriner, not only approved the Hinson decision, but expressly held for the first time in California that a tenant may assert a landlord's breach of an implied warranty of habitability as a defense to an unlawful detainer action.

In Green, the landlord, Sumski, instituted an unlawful detainer action in San Francisco Small Claims Court, seeking possession of the premises and $300 in back rent. The tenant, Green, admitted the non-payment of rent but defended on the ground that the landlord had failed to maintain the leased premises in a habitable condition. Upon judgment for the landlord, Green appealed the decision to the San Francisco Superior Court, where he was granted a de novo trial.

To support his defense of breach of implied warranty of habitability, Green submitted a San Francisco Department of Public Works report listing eighty housing code violations, including such defects as (1) the collapse of a bathroom ceiling, (2) the continual presence of rats, mice and cockroaches on the premises, (3) the absence of heat in four rooms of the premises, (4) the blockage of the plumbing system, (5) exposed and faulty wiring, and (6) a dangerous and illegally installed stove, all of which remained unrepaired following notice to the landlord.

Although the landlord did not contest the claims of unrepaired defects, he alleged that the tenant was precluded from us-

117. Id.
ing the defects as a defense in an unlawful detainer proceeding, asserting that the repair and deduct provisions of the California Civil Code\textsuperscript{118} constituted the tenant's exclusive remedy. Again judgment was rendered for the landlord, and Green sought a writ of mandate from the California court of appeal, alleging that the trial court had erroneously refused to follow the \textit{Hinson} decision. The California Supreme Court issued an alternative writ of mandate after the court of appeal had denied the writ, and stayed the execution of judgment conditioned upon the tenant's deposit into court of the accrued rent and all future rent as it came due.

In its judgment for the tenant, the California Supreme Court discussed in detail the evolution of landlord-tenant law, contrasting its initial foundation in property law with the more appropriate application of contract principles to the landlord-tenant relationship, and noted the growing number of courts which have discarded the obsolete notion that a lessee's covenant to pay rent is independent of the lessor's covenants. In holding that the relationship between a lessor and a lessee is contractual in nature, the court stated that,

\[
\text{our holding in this case reflects our belief that the application of contract principles, including the mutual dependency of covenants is particularly appropriate in dealing with residential leases of urban dwelling units.}\textsuperscript{119}
\]

In its determination that a tenant's covenant to pay rent is mutually dependent upon a landlord's implied warranty of habitability, the court considered such factors as a tenant's inadequate ability to inspect the premises, the superior position of the landlord both to inspect the premises and to know of latent defects, and the fact that a tenant, faced with a dearth of low cost housing, has little bargaining power through which he might obtain an express warranty of habitability from his landlord. The court specifically recognized that the older common law remedies are no longer viable in the present urban context with its paucity of low cost housing.

Because of the inequities forced upon the urban tenant as a result of anachronistic property law concepts imposed upon modern landlord-tenant law, and because of the problems concomitant with today's urban rental market, the court expressly recognized an implied warranty of habitability in a residential lease, thereby affirming the \textit{Hinson} decision. The court observed that,

\[\text{[f]or the reasons discussed at length above we believe that the traditional common law rule has outlived its use-}\]

\textsuperscript{118}. \textsc{Cal. Civ. Code} § 1942 (West 1972).
\textsuperscript{119}. \textsc{Cal. 3d} --, 111 \textsc{Cal. Rptr.} 704, 709, -- \textsc{P.2d} -- (1974).
fulness; we agree with the Hinson court's determination that modern conditions compel the recognition of a common law implied warranty of habitability in residential leases.\textsuperscript{120}

In addition to affirming the Hinson decision, the court in \textit{Green} held, as the court had held in \textit{Ball}, that the repair and deduct remedy of California Civil Code sections 1941 through 1942.1\textsuperscript{121} are not intended to be a tenant's exclusive remedy when faced with a landlord's failure to repair defects which render the premises uninhabitable. Rather, the court noted that these remedies are merely complementary to a tenant's common law rights, particularly because they are of such limited nature as to encompass only minor dilapidations in leased premises.

Contrary to the landlord's contention that a breach of an implied warranty of habitability may not be allowed as a defense to an unlawful detainer proceeding, the court in \textit{Green} held that such a defense may be raised on the grounds that there are no legal doctrines barring its use and because it relates directly to the issue of possession. Although some courts have held,\textsuperscript{122} as the landlord contended in \textit{Green}, that the summary nature of an unlawful detainer proceeding precludes the tenant from asserting defenses or crossclaims, the California Supreme Court held that issues relevant to the right of immediate possession may be raised. In an unlawful detainer proceeding, defenses which would normally be permitted in other actions because they arise out of the subject matter have been excluded if they are extrinsic to the narrow issue of possession—the only issue to be resolved in such an action.

To determine whether a breach of implied warranty of habitability could be raised, the court in \textit{Green} was first faced with a determination of whether such a breach was directly related to the issue of possession. In early times, when maintenance of buildings was merely incidental to the possession of land, any breach of a landlord's incidental covenants was considered to be insufficient to justify the tenant's withholding of rent. In today's urban context, however, the very essence of the residential lease is the habitability of the dwelling unit, and by failing to maintain the premises in a tenantable condition, the landlord frustrates the

\textsuperscript{120} \textit{Id.} at 712.

\textsuperscript{121} \textit{CAL. CRV. CODE} §§ 1941-1942.1 (West 1972).

\textsuperscript{122} In Murdock v. Lofton, 31 Cal. App. 3d 981, 107 Cal. Rptr. 551 (1973), a California court of appeal held that the tenant could not assert a breach of implied warranty of habitability as a defense to an unlawful detainer action on the ground that the summary nature of the action would be defeated if issues irrelevant to the right of immediate possession could be introduced. The court distinguished \textit{Hinson} from the instant action because \textit{Hinson} was an action for declaratory relief instituted by the tenant where right to immediate possession was not in issue.
very nature of the lease. The court therefore reasoned that the tenant’s obligation to pay rent is mutually dependent upon the landlord’s fulfillment of his implied warranty of habitability. By finding that these two covenants were mutually dependent, the court was able to conclude that the landlord’s breach of his warranty was directly relevant to the issue of possession.

The court then considered the effect of allowing the defense of an implied warranty of habitability upon the summary nature of an unlawful detainer proceeding. It found that the summary nature of the proceeding would not be frustrated, concluding that, while the state does have a significant interest in a speedy repossession remedy, that interest cannot justify the exclusion of matters which are essential to a just resolution of the question of possession at issue. As the Court of Appeal observed in Abstract Investment Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 249: “Certainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice. To hold the preservation of the summary proceeding of paramount importance would be analogous to the ‘tail wagging the dog.’”

By allowing a breach of implied warranty of habitability to be raised as a defense in an unlawful detainer proceeding, the court made a salutory move toward giving an aggrieved tenant an opportunity to raise defenses arising directly out of the issue of possession without the necessity of a multiplicity of suits. Additionally, it has increased the tenant’s ability to protect himself against rapacious landlords who use the inadequate housing market as a means to extract rent from tenants in return for substandard, dilapidated housing. Furthermore, this remedy protects the landlord, for as the court concluded, the trial court may require the tenant to deposit rental payments into the court during the pendency of the action. At the termination of the action, the trial court can determine the distribution of the amount deposited.

The Green court endorsed some standards which should serve as a guide to courts in future actions involving suits for possession. While the landlord is held to a covenant that he will maintain the leased premises in a habitable condition, the court noted that this warranty does not mean that the landlord must ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that “bare living requirements” must be maintained. In most cases substantial compliance with those applicable building and housing code standards which

materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize.\textsuperscript{124}

It is therefore clear from \textit{Green} that de minimis defects such as cracking paint, minor leaks or broken window blinds do not come within the implied warranty of habitability, but where heat, hot water or garbage disposal are denied a tenant, a landlord will be clearly breaching his warranty.

Upon an initial finding by a trial court of a breach of implied warranty of habitability, the court in \textit{Green} observed that a determination of damages must then ensue. The court concluded that such damages may be measured by the difference between the fair market value of the premises in their warranted condition and the premises as they existed during the tenant's occupancy in their defective condition. Recognizing that damages in such actions cannot be determined with absolute certainty, the court concluded that a trial court must attempt to assess fair and reasonable damages by using all available facts and by considering the totality of the circumstances.

The court endorsed the use of rent abatement in an unlawful detainer proceeding when a landlord has breached his implied warranty of habitability, and concluded that where damage resulting from such a breach justifies only a partial reduction in rent, the tenant should be granted possession only if he pays the landlord the amount of back rent owed as determined by the trial court.

Not only did \textit{Green} affirm the decision in \textit{Hinson} by its acceptance of an implied warranty of habitability in a residential lease, but it greatly expanded the \textit{Hinson} rationale. \textit{Green} expressly holds that such a breach may be asserted as a defense in an unlawful detainer proceeding, thereby creating a viable means for a tenant to remain in possession while availing himself of this recently recognized remedy. Lastly, the \textit{Green} court provides some express standards regarding the issues of habitability and damages, which will enable any trial court faced with a landlord's failure to repair defective premises to reach a just result for both parties.

\textbf{CONCLUSION}

\textit{Hinson}, \textit{Ball} and \textit{Green} evince substantial progress from the prior recalcitrance of the California courts to offer tenants viable remedies against irresponsible and unresponsive landlords who fail to provide habitable dwellings for their tenants. By recog-
nizing a lease as a contract containing mutually dependent covenants, the California courts have now provided the tenant with feasible alternatives to self-repair or abandonment of their premises. As a result of Green a tenant may now withhold rent while remaining in possession as long as the landlord, given adequate notice of the defects in the premises, fails to repair them within a reasonable time. The tenant may be required to pay only a reasonable rental value for the defective premises, or, pending the outcome of a trial, may be required to deposit the full rental value into a trust fund held by the court until an equitable distribution can be made between the landlord and the tenant. The court will consider the length of time the tenant was forced to live with the defects, the seriousness of the defects, and their materiality in relationship to the housing codes in determining the equitable distribution of the rent.  

Because residential leases in California are now construed as a contract containing mutually dependent covenants, not only is a tenant entitled to withhold rent while remaining in possession of his leased premises when his landlord breaches his implied warranty of habitability, but the tenant is additionally entitled to utilize traditional contract remedies such as reformation, rescission and damages.  

Green expressly holds that a tenant may now use breach of an implied warranty as a defense to an unlawful detainer action. Although the parties in Hinson stipulated that there would be no eviction during the process of the trial, the court suggested that other jurisdictions have allowed this defense without such stipulations. Section 1170 of the California Code of Civil Procedure, which allows a defendant to answer or demur to an unlawful detainer action, had been previously interpreted by California courts as precluding a defendant from asserting any counterclaim or defense because of the summary nature of the action. The tenant-defendant in such an action was allowed to assert a defense or counterclaim only when he had already surrendered possession of the premises. By requiring that the tenant surrender possession of the premises before he could assert a defense to an unlawful detainer proceeding, the remedy concomitant

129. See note 122 and accompanying text supra.
with a landlord's breach was thwarted since remaining in possession of the premises is the most important and distinguishing factor of this new remedy. The court in Green, while recognizing that the only issue to be resolved in an unlawful detainer proceeding is that of possession, correctly found that there is a direct nexus inextricably binding the landlord's implied warranty of habitability with the issue of possession, on the basis of mutually dependent covenants arising from the nature of the lease. Thus it held that a tenant must be allowed to raise the defense of implied warranty in an unlawful detainer proceeding.

Despite the fact that widespread use of implied warranty of habitability as a means to force landlords to repair defective premises might ultimately force some landlords out of the housing market or cause them to invest their money in more secure business ventures, the decision in Green provides tenants the most viable remedial tool to date. A tenant is no longer forced to abandon his premises if he wishes to withhold his rent when defective conditions render them untenantable. Furthermore, such a tenant may allege his landlord's breach of implied warranty of habitability as a defense in an unlawful detainer proceeding. These new rights are especially important in light of the dearth of adequate low income housing and the inadequacies of prior tenant remedies which provided that if a tenant remained in possession of defective premises, he would be deemed to have waived any defects. Hinson and, more significantly, Green are particularly notable for their expansion of tenant remedies in California and for their alleviation of the heavy burden resulting from anachronistic property law concepts that have plagued the urban lessee. These decisions may well pave the way for the rehabilitation of substandard, low income housing in California cities.

Julie Brooks Murray