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LANDLORD-TENANT: THE MEDIEVAL CONCEPTS OF FEUDAL PROPERTY LAW ARE ALIVE AND WELL IN LEASES OF COMMERCIAL PROPERTY IN ILLINOIS

INTRODUCTION

During the past two decades the basic principles of landlord-tenant law have been the subject of close judicial scrutiny.[1] Prompted by the social and economic realities of the twentieth century, the courts in a number of jurisdictions have attempted to reevaluate and substantially revise the antiquated precepts and doctrines of medieval property law that until recently had been consistently applied to contemporary lease transactions.[2] The modern trend of case law has, for the most part, emphatically rejected two outdated common law principles which had become firmly entrenched in the traditional landlord-tenant relationship. These fundamental principles include the application of the doctrine of *caveat emptor* to leases[3] and the inequitable theory that

1. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Green v. Superior Ct., 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Givens v. Gray, 126 Ga. App. 309, 190 S.E.2d 607 (1972); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (furnished dwellings); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969) (unfurnished dwellings); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Reed v. Classified Parking Sys., 232 So. 2d 103 (La. App. 1970); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Glyco v. Schultz, 289 N.E.2d 919 (Ohio Mun. Ct. 1972); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

2. *See* cases cited in note 1 *supra*. For an excellent compilation of the leading cases, statutes and relevant commentary dealing with the current developments in landlord-tenant law prior to 1973, see *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689 (1973); *see also* RESTATEMENT (SECOND) OF PROPERTY ch. 5 (Tent. Draft No. 2, 1974).

Another outstanding source which provides an exceptionally thorough analysis of the historical development, as well as the current status of landlord-tenant law, with special emphasis upon tort liability of landlords, is Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19 [hereinafter cited as Love].

3. The maxim *caveat emptor*, which technically means "let the buyer beware," was originally applied to lease transactions during the early feudal period when the lease was characterized as the conveyance of an estate for a "term of years." *See* text accompanying notes 14-21 *infra*. Application of the doctrine to landlord-tenant law meant that when a tenant entered into a rental agreement he took the premises with whatever defects were present at the time of the lease. Thus, there were no implied warranties of any kind and the landlord was not bound to make repairs or maintain the leased premises, unless he expressly agreed to do so. As noted by the court in Koenigshofer v. Shumate, 68

the covenants within a rental agreement are independent, unilateral obligations rather than mutually dependent promises.[4]

When the Illinois Supreme Court handed down its landmark decision in *Jack Spring, Inc. v. Little*,[5] there was only a handful of cases that had departed from the traditional common law rules. Nevertheless, a majority of the justices in *Jack Spring* decided to totally reject the doctrine of *caveat emptor* and held that the lessor of a multiple-unit dwelling impliedly warranted that the premises would be maintained in a habitable condition.[6] The court also departed from the well-established doctrine of independent covenants by construing the landlord's duty to repair and the tenant's duty to pay rent as mutually dependent and conditional promises, thereby permitting the tenant to raise a breach of the newly-created implied warranty of habitability as a defense in a forcible entry and detainer action.[7]

Certainly the current shortage of adequate housing[8] and the resulting plight of the low-income residential tenant, has justified, if not compelled, *Jack Spring*'s departure from the common law tradition. Perhaps because of the revolutionary nature of its decision, however, the majority in *Jack Spring* was careful

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Ill. App. 2d 474, 477, 216 N.E.2d 195, 196 (1966), "there is no law against letting a tumbledown house." *See also* Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902); Park v. Penn, 203 Ill. App. 188 (1916); Strong v. Soodvoisky, 141 Ill. App. 183 (1908); 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952) [hereinafter cited as 1 AM. LAW]; 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 225[2] (P. Rohan ed. 1976) [hereinafter cited as 2 POWELL].

4. In the absence of an express or implied agreement to the contrary, only the landlord's covenant to transfer possession of the land and the tenant's covenant to pay rent were regarded as mutually dependent and conditional. Contrary to ordinary contract principles, all other covenants in the lease were deemed to be independent of each other. Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1904); Truman v. Rodesch, 168 Ill. App. 304 (1912); *cf.* White v. YMCA, 233 Ill. 526, 84 N.E. 658 (1908). *See also* 3A A. CORBIN, CONTRACTS § 686, at 238-40 (rev. ed. 1960); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 585-89 (3d ed. 1962); RESTATEMENT OF CONTRACTS § 290 (1932).

5. 50 Ill. 2d 351, 280 N.E.2d 208 (1972), *noted in* 22 DE PAUL L. REV. 51 (1972), 3 LOY. CHI. L.J. 386 (1972), 66 NW. U.L. REV. 790 (1972) and 1972 U. ILL. L.F. 589.

6. 50 Ill. 2d at 366, 280 N.E.2d at 217.

7. *Id.* at 359, 280 N.E.2d at 213. In arriving at this aspect of the decision the court admittedly altered the nature and the function of the Illinois Forcible Entry and Detainer Act, ILL. REV. STAT. ch. 57 (1975), which was designed as a summary eviction proceeding for the landlord. In Rosewood Corp. v. Fisher, 46 Ill. 2d 249, 251, 263 N.E.2d 833, 835 (1970), *cert. denied*, 401 U.S. 928 (1971), the court stated that "the distinctive and limited purpose of [the Illinois Forcible Entry and Detainer Act] is to supply a speedy remedy to permit persons entitled to the possession of lands to be restored thereto."

8. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 n.47 (D.C. Cir. 1970) (citing NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 9 (1968)); PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 96 (1968). *See also* P. MARTIN, THE ILL HOUSED (1971).

to limit its holding to the precise factual situation presented to the court, *i.e.*, "the occupancy of multiple dwelling units."[9] It is important to note that the Illinois Supreme Court did not preclude the possibility of extending the *Jack Spring* rationale to other types of leases, but merely emphasized and reiterated the fact that the controversy in question involved a residential lease in a multi-family apartment building.[10]

Since its inception, the concept of an implied warranty of habitability in residential lease transactions has been rapidly gaining popularity in many American jurisdictions. There is little doubt that this theory, along with the application of ordinary contract principles to residential leases, is destined to become the majority view in the United States. Although there are persuasive arguments in favor of a similar revision of the law with respect to short-term leases in a commercial setting,[11] such as the lease of a store or office, judicial reform in Illinois,[12] as well as in a number of other states,[13] has been strictly limited to leases involving residential property. When analyzing a dispute that involves a commercial lease, the few courts that have specifically addressed the problem have simply refused to depart from the common law property rules that were developed for the agrarian tenant during the early feudal period.

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9. 50 Ill. 2d at 367, 280 N.E.2d at 218.

10. This point was well illustrated by the dissenting remarks of Justice Ryan who was perplexed by the fact that the majority's holding was specifically limited to *multiple*-unit dwellings. Justice Ryan stated:

> Since the housing code of the city of Chicago applies to *all* dwellings and family units (Municipal Code of Chicago, pars. 78-11.1, 78-13) and imposes certain obligations to maintain and repair upon the owner of *single-unit* dwellings as well as multiple-unit dwellings, I fail to understand the reason for the distinction.

50 Ill. 2d at 375, 280 N.E.2d at 222 (emphasis added).

Although it may have been more logical to extend the implied warranty of habitability to *all* residential leases, as suggested by Justice Ryan, the limitation of the majority's holding was probably a proper exercise of judicial restraint since the controversy in the case merely involved the lease of a multiple-unit dwelling.

11. Within the context of this article the term "commercial lease" will be used to refer to a lease of a building or a part of a building that is used for business, rather than residential purposes. "Long-term leases," which are commonly defined as leases for a period of twenty-one years or more, and "net leases," whereby the tenant pays all or a part of the cost of operating and maintaining the leasehold, are beyond the scope of this work and will not be treated herein.

12. *See* Clark Oil & Ref. Corp. v. Banks, 34 Ill. App. 3d 67, 339 N.E.2d 283 (1975); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975); Clark Oil & Ref. Corp. v. Thomas, 25 Ill. App. 3d 428, 323 N.E.2d 479 (1974); Germania Fed. Sav. & Loan Ass'n v. Jacoby, 23 Ill. App. 3d 145, 318 N.E.2d 734 (1974); and text accompanying notes 66-69 *infra*.

13. *See* E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974); Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108 (App. D.C. 1973), *noted in* 35 U. PITT. L. REV. 90 (1974); Service Oil Co. v. White, 218 Kan. 87, 542 P.2d 652 (1975); Kruvant v. Sunrise Mkt., Inc., 58 N.J. 452, 279 A.2d 104 (1970), *modified on other grounds*, 59 N.J. 330, 282 A.2d 746 (1971); and text accompanying notes 94-99 *infra*.

This comment will examine the rationale for revising the basic principles of landlord-tenant law in order to determine whether there is a justifiable basis for subjecting short-term commercial leases to the dictates of ancient property law, while at the same time applying modern, more equitable contract principles to residential leases. The feasibility and desirability of extending the novel theory of an implied warranty of habitability to commercial leases will also be discussed in light of the current developments in contemporary landlord-tenant law.

HISTORICAL PERSPECTIVE

Property Law Rules Applied to Both Residential and Commercial Lease Transactions

At the outset, it is important to emphasize the fact that throughout the historical development of the landlord-tenant relationship there was no legal distinction between residential and commercial leases. Originally, the transfer of an "estate for a term of years" was used as a device to circumvent the church's prohibition against usury.[14] During the fourteenth century the lease became a popular form of conveyance among the feudal landowners as a means of encouraging agricultural development.[15] Possession of a tract of land was transferred to a tenant who, in return, paid rent by working the soil.[16] The leasehold, therefore, provided a tenant and his family with a place to live as well as a place to work. By 1500, the lease came to be regarded primarily as a conveyance of land[17] which was subject to property rather than contract law.[18] This meant that the entire transaction was governed by the doctrine of *caveat emptor*[19] and that the landlord made no implied promises that the premises were fit for any particular purpose or intended use.[20] Possession of the land was transferred to the tenant for a

14. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 448 (1972) [hereinafter cited as Hicks]; Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 370 (1961) [hereinafter cited as Lesar].

15. Hicks, *supra* note 14, at 449; Love, *supra* note 2, at 25.

16. Love, *supra* note 2, at 26.

17. 1 AM. LAW, *supra* note 3, § 3.11; 1 M. FRIEDMAN, LEASES § 1.1, at 3 & n.8 (1974) [hereinafter cited as 1 FRIEDMAN]; 2 POWELL, *supra* note 3, ¶ 221[1], at 177-78.

18. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123, 123 (1971) [hereinafter cited as 40 FORDHAM L. REV.].

19. 1 AM. LAW, *supra* note 3, § 3.45, at 267; 2 POWELL, *supra* note 3, ¶ 233, at 300; Grimes, *Caveat Lessee*, 2 VALPARAISO L. REV. 189 (1968); Love, *supra* note 2, at 28; Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DE PAUL L. REV. 955 (1971).

20. *See* authorities cited in note 19 *supra*.

term of years and the landlord was relieved of all obligations to repair or maintain the leasehold.[21]

In the rural, agrarian society of fourteenth and fifteenth century England the treatment of the lease as a conveyance was both practical and in conformity with the custom of the time.[22] The primary object of the rental agreement was the land itself and both parties had an equal opportunity to inspect and acquire information about the property before the transaction was finalized.[23] If the tenant desired some type of warranty after inspecting the premises, he generally had the bargaining power to negotiate for one.

With the advent of the Industrial Revolution, the emphasis in both England and the United States shifted from agricultural to industrial development. The relatively simple husbandry lease was replaced by complex residential and commercial leases which often contained sophisticated provisions regulating the use and maintenance of the leasehold.[24] To the scholars and commentators it was clear that the lease was not merely a conveyance of land but was both a conveyance and a contract.[25] The courts, however, continued to characterize the lease primarily as a conveyance[26] and refused to apply the contract principle of mutually dependent promises to lease transactions.[27] Thus, even if the leased premises were totally destroyed or rendered uninhabitable, the tenant was not relieved of his duty

21. 1 AM. LAW, *supra* note 3, § 3.78; Love, *supra* note 2, at 28; 3 LOY. CHI. L.J. 386, 387 (1972).

22. 1 FRIEDMAN, *supra* note 17, § 1.1, at 5; Hicks, *supra* note 14, at 450; Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) [hereinafter cited as Quinn & Phillips].

23. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970); Hicks, *supra* note 14, at 450.

24. *See* Hicks, *supra* note 14, at 451-52; Lesar, *supra* note 14, at 374.

25. 1 AM. LAW, *supra* note 3, § 3.11, at 203; 3A A. CORBIN, CONTRACTS § 686, at 236 (rev. ed. 1960); 2 POWELL, *supra* note 3, ¶ 221[1], at 179; 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 580-81 (3d ed. 1962); Hicks, *supra* note 14, at 452-53; Lesar, *supra* note 14, at 374; Love, *supra* note 2, at 27.

26. *See, e.g.*, Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902); Park v. Penn, 203 Ill. App. 188 (1916); Strong v. Soodvoisky, 141 Ill. App. 183 (1908); Martin v. Surman, 116 Ill. App. 282 (1904). *See also* 1 AM. LAW, *supra* note 3, § 3.78; 2 POWELL, *supra* note 3, ¶ 221, at 177-78; Lesar, *supra* note 14, at 374; Love, *supra* note 2, at 27.

27. Rubens v. Hill, 213 Ill. 523, 533, 72 N.E. 1127, 1129 (1904); Truman v. Rodesch, 168 Ill. App. 304, 306 (1912); *see also* Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457 (1942); University Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914).

Milton Friedman, one of the foremost authorities in landlord-tenant law today, has stated that "[t]he rule that covenants in a lease are independent, rather than mutually dependent, can hardly be overemphasized. It is the distinguishing feature between lease and contract." 1 FRIEDMAN, *supra* note 17, § 1.1, at 4.

The apparent reason for the discrepancy between the rule applied to most bilateral contracts and the rule applied to leases appears to

to pay rent.[28] Rent was the *quid pro quo* of possession and if the tenant had possession of the leasehold he retained everything he was entitled to under the conveyance.[29] The tenant's only recourse against a landlord who breached a material covenant in the lease was a separate action in contract for damages.[30] This remedy, however, was, and still is, expensive, time consuming and often impractical. Thus, by characterizing the lease as a conveyance of land and by refusing to treat the covenants within the lease as mutually dependent promises, the courts deprived the tenant of his most effective weapon against an unscrupulous landlord—the right to withhold the rent or the right to make necessary repairs and have the cost thereof deducted from the rent.[31]

Initial Departure from the Common Law Tradition

Recognizing the inordinate burden that had been placed upon the average tenant by the independence of lease covenants and the maxim *caveat emptor*, the courts developed a number of exceptions to the traditional common law rules. Perhaps the most important and widely recognized remedy available to both the residential and the commercial tenant alike has been the doctrine of constructive eviction.[32] Under this theory, a tenant can be excused from his duty to pay rent if the landlord fails to perform a material provision in the lease, such as a covenant to provide heat, electricity or plumbing.[33] In applying the doctrine of constructive eviction, however, the courts have refused to depart from the possession-oriented philosophy of the common

stem from the fact that the basic principles of landlord-tenant law were established before the development of mutual dependency in contracts. Hicks, *supra* note 14, at 454.

28. *See, e.g.*, Sigal v. Wise, 114 Conn. 297, 158 A. 891 (1932); Fowler v. Bott, 6 Mass. 63 (1809); Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1908); *see also* Graves v. Berdan, 26 N.Y. 498 (1863).

29. Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 201-02, 172 N.E. 35, 38 (1930); 1 AM. LAW, *supra* note 3, § 3.11, at 202; Quinn & Phillips, *supra* note 22, at 228; 40 FORDHAM L. REV., *supra* note 18, at 123.

30. Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1904); Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N.E. 247 (1900); Love, *supra* note 2, at 34; Quinn & Phillips, *supra* note 22, at 228 n.4.

31. 1 FRIEDMAN, *supra* note 17, § 1.1, at 5; Love, *supra* note 2, at 34; Quinn & Phillips, *supra* note 22, at 234.

32. Dyett v. Pendleton, 8 Cow. 727 (1826); 1 AM. LAW, *supra* note 3, § 3.50, at 278; 3A A. CORBIN, CONTRACTS § 686, at 242-44 (rev. ed. 1960); 1 FRIEDMAN, *supra* note 17, § 1.1, at 6; 2 POWELL, *supra* note 3, ¶ 225[3], at 232.5-39; Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69 (1951); Comment, *Constructive Eviction of a Tenant*, 13 BAYLOR L. REV. 62 (1961); Comment, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U.L.Q. 461.

33. *See, e.g.*, Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Everson v. Albert, 261 Mich. 182, 246 N.W. 88 (1933); Bass v. Rollins, 63 Minn. 226, 65 N.W. 348 (1895).

law. Therefore, it is absolutely necessary for the tenant to actually abandon the premises within a reasonable time after the landlord's breach before the tenant can claim that he was constructively evicted.[34] If the tenant remains in possession of the property the full rent is due, regardless of whether the premises are in a habitable condition.

Although the doctrine of constructive eviction has been extremely beneficial in helping to alleviate the harsh impact of the independence of lease covenants, the requirement of abandonment imposes a difficult burden on many tenants and tends to limit the practical value of the exception. To the low-income residential tenant who must contend with a severe shortage of adequate housing, abandonment means a long, expensive, and often fruitless search for another place to live.[35] Moreover, to the lessee of a small commercial enterprise who has worked hard to establish goodwill and a quality reputation in the community, abandonment of a prime location can mean the termination of a thriving business.[36] If the injustice created by the independence of lease covenants is to be totally eliminated, the tenant must be allowed to withhold the rental payments without surrendering possession of the leasehold. Efforts to dispense with the requirement of abandonment, however, have met with almost no success.[37]

Judicial and Legislative Preference for Leases in a Residential Setting

Another important exception to the traditional common law rules, which was designed to mitigate the inequity caused by the maxim *caveat emptor*, was initially formulated in the English case of *Smith v. Marrable*,[38] where the court held that there is an implied warranty of habitability in the lease of a furnished house.[39] Although the rule announced in the *Smith* case eventually became the majority view in both England and the United States,[40] it has been strictly limited to situations involving the

34. *See, e.g.*, Automobile Supply .Co. v. Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Barrett v. Boddie, 158 Ill. 479, 42 N.E. 143 (1895); Lipkins v. Burnstine, 18 Ill. App. 2d 509, 152 N.E.2d 745 (1958); Herstein Co. v. Columbia Pictures Corp., 4 N.Y.2d 117, 149 N.E.2d 328, 172 N.Y.S.2d 808 (1958); Quinn & Phillips, *supra* note 22, at 236-37. In Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69, 85 (1951), the author explains that to allow a tenant to "claim an eviction while in possession would be a contradiction and unjust in that the tenant had the use of the premises."

35. 1 FRIEDMAN, *supra* note 17, § 1.1, at 8; Love, *supra* note 2, at 37; 40 FORDHAM L. REV., *supra* note 18, at 126.

36. 1 FRIEDMAN, *supra* note 17, § 1.1, at 8.

37. *Id.* at 7; Quinn & Phillips, *supra* note 22, at 237-38.

38. 152 Eng. Rep. 693 (EX. 1843).

39. *Id.* at 694.

40. 1 AM. LAW, *supra* note 3, § 3.45, at 267-68; 2 POWELL, *supra* note

lease of a furnished dwelling for a short and definite time period.[41]

The development of the furnished dwelling exception is especially significant because it represents the beginning of a trend in which residential leases were accorded preferential treatment over commercial leases.[42] Near the beginning of the twentieth century, a few state legislatures also acted to protect the residential tenant by adopting building and health codes,[43] which, in effect, imposed a statutory duty upon landlords to maintain and repair defective residential dwellings. Most states now have some type of housing code,[44] but it is evident from the deplorable living conditions in many large, urban cities that these statutes have not been strictly enforced.[45] Indirectly, however, the enactment of building and health codes has had a significant impact upon the demise of the common law property rules. In *Pines v. Perssion*,[46] for example, the Wisconsin Supreme Court leveled a direct attack on "that obnoxious legal cliché, *caveat emptor*," based upon the public policy considerations

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3, ¶ 225[2][a], at 232.1; Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 391-92 (1967) [hereinafter cited as Skillern].

The furnished dwelling exception was first recognized in the United States in the case of Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892), a landmark decision which has played an important role in the development of the implied warranty theory in residential lease transactions. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078-79 (D.C. Cir. 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 360-61, 280 N.E.2d 208, 213-14 (1972).

41. *See, e.g.*, White v. Walker, 31 Ill. 422 (1863); Roth v. Adams, 185 Mass. 341, 70 N.E. 445 (1904); Bertie v. Flagg, 161 Mass. 504, 37 N.E. 572 (1894); Stevens v. Pierce, 151 Mass. 207, 23 N.E. 1006 (1890), *cited in* Moran, *Proposed Statutory Alterations of the Landlord-Tenant Relationship for the State of Illinois*, 19 DE PAUL L. REV. 752, 758 n.13 (1970).

42. *See* Love, *supra* note 2, at 30 n.57, wherein the author notes:

> When a building is leased for business purposes, the majority of courts refuse to recognize an implied warranty of fitness, even though the building contains equipment and is rented for immediate occupancy. . . . *See, e.g.*, Gade v. National Creamery Co., 324 Mass. 515, 519, 87 N.E.2d 180, 182 (1949): 'The renting of a refrigeration room for commercial purposes and for an indefinite time, although the room was needed by the tenant for immediate occupancy, is not within the *Ingalls v. Hobbs* exception.'

See also Skillern, *supra* note 40, at 392 & n.26.

43. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1259 (1966) [hereinafter cited as Gribetz & Grad]; Love, *supra* note 2, at 37; Quinn & Phillips, *supra* note 22, at 239 n.29; 40 FORDHAM L. REV., *supra* note 18, at 127.

44. *See* Love, *supra* note 2, at 37-48.

45. Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Gribetz & Grad, *supra* note 43; Comment, *The Failure of a Landlord to Comply with Housing Regulations as a Defense to the Non-Payment of Rent*, 21 BAYLOR L. REV. 372 (1969); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Comment, *Housing Codes and a Tort of Slumlordism*, 8 HOUS. L. REV. 522 (1971).

46. 14 Wis. 2d 590, 111 N.W.2d 409 (1961), *noted in* 45 MARQ. L. REV. 630 (1962).

embodied in the state's building codes and health regulations.[47] Speaking for the members of the court, Chief Justice Martin stated that "[t]o 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."[48] Although the holding in the *Pines* case was ultimately limited to its facts,[49] thus bringing the decision within the furnished dwelling exception, the Wisconsin Supreme Court clearly recognized the need for large-scale reform in modern landlord-tenant law and attempted to eliminate the injustice created by the doctrine of independent covenants and the maxim *caveat emptor*.

Reste Realty Corp. v. Cooper: Recognition of the Need for Judicial Reform in Commercial Leases

Ironically, one of the first cases to advocate the need for a substantial revision of landlord-tenant law, *Reste Realty Corp. v. Cooper*,[50] involved a dispute over a lease in a commercial setting. The tenant's small jewelry business in *Reste Realty* was located in the basement of a commercial building and was continually disrupted by water runoff from a neighbor's driveway. The landlord refused to correct the defect and thus the tenant was forced to abandon the premises with more than two years remaining on the lease. In an action to recover the unpaid rent, the New Jersey Supreme Court upheld the trial court's finding that the tenant had been constructively evicted.[51]

Although the actual holding in *Reste Realty* was based upon the widely recognized doctrine of constructive eviction, the court seized the opportunity to reevaluate the basic principles governing the landlord-tenant relationship. In extensive dicta, Justice John J. Francis, the author of the leading products liability case *Henningsen v. Bloomfield Motors, Inc.*,[52] laid the foundation for the development of an implied warranty of habitability in residential leases, *as well as an implied warranty of suitability in commercial leases*. Justice Francis argued that there is an inequality of bargaining power between landlord and tenant in many cases today and that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor.[53] In addition, the lessor, and not the lessee, is informed of building

47. *Id.* at 595-96, 111 N.W.2d at 412-13.
48. *Id.*
49. Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970), *discussed in* Love, *supra* note 2, at 95 n.400.
50. 53 N.J. 444, 251 A.2d 268 (1969), *noted in* 24 RUTGERS L. REV. 508 (1970) and 31 U. PITT. L. REV. 138 (1969).
51. *Id.* at 462, 251 A.2d at 278.
52. 32 N.J. 358, 161 A.2d 69 (1960).
53. Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

code requirements and violations and thus is in a better position to know of latent defects or of restrictive zoning ordinances.[54] Justice Francis also emphasized the fact that the modern-day tenant does not have the knowledge or expertise to conduct an adequate inspection of the property. The actual language used by the eminent jurist deserves close attention:

> A prospective lessee, *such as a small businessman*, cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee. These factors have produced persuasive arguments for reevaluation of the *caveat emptor* doctrine and, for imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws.[55]

The importance of the facts in *Reste Realty* cannot be overemphasized. The controversy involved a lease that was designed to accommodate business purposes in a commercial setting. Nevertheless, in subsequent cases directly dealing with leases of commercial property, *Reste Realty* has neither been discussed nor distinguished,[56] whereas in a number of decisions dealing with residential leases, the popular opinion by the New Jersey Supreme Court has been heavily relied upon.[57]

CURRENT STATUS OF THE LAW

Recognition of an Implied Warranty of Habitability

The Supreme Court of Hawaii, citing *Reste Realty* in the case of *Lemle v. Breeden*,[58] became the first jurisdiction to make a complete break with the vestiges of the *caveat emptor* doctrine and the independence of lease covenants by holding that there is an implied warranty of habitability in the lease of a residential

54. *Id.*

55. *Id.* *See also* Earl Milliken, Inc. v. Allen, 21 Wis. 2d 497, 124 N.W.2d 651 (1963), where the Supreme Court of Wisconsin, in resolving a dispute over a commercial lease, stated that "[t]he covenant of possession implies not only that the tenant will be able to physically occupy the premises on the date of delivery of possession, but that he will also be able to use the premises for its intended purpose." 21 Wis. 2d at 501, 124 N.W.2d at 654 (citing Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961)).

56. E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974); Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108 (App. D.C. 1973); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975); Service Oil Co. v. White, 218 Kan. 87, 542 P.2d 652 (1975); Kruvant v. Sunrise Mkt., Inc., 58 N.J. 452, 279 A.2d 104 (1970).

57. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

58. 51 Hawaii 426, 462 P.2d 470 (1969), *noted in* 38 FORDHAM L. REV. 818 (1970).

dwelling.[59] Shortly after the *Lemle* decision, the Supreme Court of New Jersey, in *Marini v. Ireland*,[60] authoritatively approved of the dicta in *Reste Realty*, again in the context of a residential setting, and at the same time extended the scope of the implied warranty of habitability by concluding that the landlord's duty to repair continues throughout the entire duration of the rental agreement. In addition, the *Marini* court expanded the tenant's remedies by allowing him to repair defects in vital facilities and deduct the cost of the repairs from the rent.[61]

The decision which has achieved the most notoriety in the area of landlord-tenant law reform, *Javins v. First National Realty Corp.*,[62] was handed down by the United States District Court of Appeals for the District of Columbia. In an extremely well-reasoned opinion, Judge Skelly Wright emphasized the absurdity of applying precepts and doctrines that were developed during the Middle Ages to leases in a modern, complex society. Relying upon the Housing Regulations of the District of Columbia,[63] the court held that there is an implied warranty of habitability with respect to urban residential leases and that such leases should be interpreted and construed like any other contract.[64] Decided in 1970, the *Javins* case established an ideal model for judicial reform of the outdated principles of landlord-tenant law, but more importantly, it solidified the trend of disparate treatment between residential and commercial leases. Two years later, the Illinois Supreme Court relied upon and

59. *Id.* at 433, 462 P.2d at 474. It is interesting to note that the leased property in *Lemle* consisted of an $800 per month beach house which was designed as a single-family unit. The *Lemle* court, therefore, could not rely upon the housing shortage or inequality of bargaining power arguments to support its departure from the common law rules.

60. 56 N.J. 130, 265 A.2d 526 (1970), *noted in* 16 VILL. L. REV. 395 (1970).

61. *Id.* at 145, 265 A.2d at 534.

62. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), *noted in* 39 GEO. WASH. L. REV. 152 (1970), 84 HARV. L. REV. 729 (1971) and 24 VAND. L. REV. 425 (1971).

63. Although the court cited and relied on the housing regulations as a standard by which to measure the implied warranty of habitability, Judge Wright also stated that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition." 428 F.2d at 1077.

64. In a footnote Judge Wright explained the rationale for departing from the common law practice of treating the lease as a conveyance of land and for applying ordinary contract principles to the rental agreement:

> This approach does not deny the possible importance of the fact that land is involved in a transaction. The interpretation and construction of contracts between private parties has always required courts to be sensitive and responsive to myriad different factors. We believe contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations.
>
> . . . The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law.

428 F.2d at 1075 n.13.

quoted extensively from the *Javins* case in arriving at its decision in *Jack Spring, Inc. v. Little*,[65] thus impliedly approving of the application of ordinary contract principles to modern residential lease agreements in Illinois.

Judicial Reform and the Implied Warranty Theory Restricted to Leases of Residential Property

Although the underlying philosophy of the implied warranty theory and the application of contract law to lease transactions has been widely accepted by the courts in cases dealing with residential property, the law in conjunction with commercial leases has remained stagnant. Subsequent to the *Jack Spring* decision, the Illinois Appellate Court for the First District, in *Yuan Kane Ing v. Levy*,[66] rejected an excellent opportunity to update and revise the law with respect to leases in a commercial setting. The *Levy* case involved a real estate broker who had rented a storefront office in a building located in Chicago. The lease was for a term of four years and before the broker moved in he spent over $5,200 "fixing up" the office. When the pipes running through the ceiling of the bathroom began to leak, the tenant notified the landlord of the defect and refused to pay rent until the premises were repaired. Approximately five months later the landlord filed a summary eviction proceeding based upon the Illinois Forcible Entry and Detainer Act.[67] The tenant cited the *Jack Spring* case as a defense alleging that he was relieved of his duty to pay rent due to numerous breaches by the landlord of her obligations under the lease. In a unanimous decision the three judge panel concluded that "[n]o Illinois court has extended the [*Jack Spring v.*] *Little* rule to commercial leases, and since in the case at bar we are reviewing a dispute which arose over a commercial lease, we must apply traditional common law principles."[68] The court then went on to find that the lease included no express covenant to repair and "even if one existed" the landlord's violation of it would not have justified the withholding of rent.[69] Thus, the *Levy* case

65. 50 Ill. 2d 351, 280 N.E.2d 208 (1972). The Illinois Supreme Court initially decided to follow the established common law rule in the *Jack Spring* case, but after a change in court personnel the prior ruling was reversed on rehearing and withdrawn from the North Eastern Reporter advance sheets by order of the court. 66 Nw. U.L. Rev. 790, 790 n.1 (1972).

66. 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975).

67. Ill. Rev. Stat. ch. 57 (1975).

68. Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 891-92, 326 N.E.2d 51, 54 (1975).

69. *Id.* at 892, 326 N.E.2d at 54. To support this conclusion the court relied upon Truman v. Rodesch, 168 Ill. App. 304 (1912), a popular opinion by the Illinois Appellate Court that had previously been rejected by the majority in *Jack Spring, Inc. v. Little.* The tenant in *Truman* had

not only put a halt to the development of implied warranties in lease transactions, but it also prolonged the life of the outdated doctrine of independent covenants.

The District of Columbia Court of Appeals, in *Interstate Restaurants, Inc. v. Halsa Corp.*,[70] has similarly refused to extend the holding of *Javins v. First National Realty Corp.*[71] to commercial leases. Like the *Levy* case, the court in *Interstate Restaurants* indicated that the implied warranty theory was applicable to residential leases only:

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refused to pay rent because the landlord breached his promise to adequately heat the premises. In refusing to allow the tenant to raise the breach as a defense in a forcible entry and detainer action the court stated that "[t]he law is well settled in this and other states, that the tenant cannot prove his damages suffered because of the failure or neglect of the landlord to perform an independent covenant on his part, in an action solely for possession." 168 Ill. App. at 306.

Subsequently, in Clark Oil & Ref. Corp. v. Banks, 34 Ill. App. 3d 67, 339 N.E.2d 283 (1975), the Illinois Appellate Court reaffirmed the conservative position it had adopted in the *Levy* case. The principal issue in *Banks* was whether certain affirmative defenses raised by the tenant in a forcible entry and detainer action had been properly stricken by the trial court. Although the Illinois Supreme Court in *Jack Spring* had concluded that the forcible entry and detainer action had, "to some extent, lost its distinctive purpose" as a summary eviction proceeding and that the "salutary trend" was to determine the rights and liabilities of the parties in one, rather than multiple proceedings, the court in *Banks* did not adopt the *Jack Spring* philosophy and dismissed the tenant's claim. In arriving at this decision the court stated that "[a] development in this area of litigation has recently emerged; a distinction has been drawn between residential and commercial leases for purposes of determining what matters are germane to the limited purpose of a forcible entry and detainer action." 34 Ill. App. 3d at 71, 339 N.E.2d at 287. The court then went on to point out that the *Jack Spring* case was expressly limited to "the occupancy of multiple dwelling units" and therefore its narrow holding did not extend to a situation in which a commercial lease was involved.

It is interesting to note that the court in *Banks* could have achieved the same result without making such a broad, generalized distinction between all residential and all commercial leases by concentrating on another, more important factual difference between *Jack Spring* and the controversy before the court in *Banks*. In *Jack Spring* the affirmative defenses raised by the tenant were directly related to the amount of rent outstanding and thus were "germane to the distinctive purpose of the proceeding." In *Banks*, however, the affirmative defenses raised by the tenant involved a claim that the lessor had engaged in an antitrust violation and had breached a separate Retail Consignment Agreement—*neither* of which were germane to the issue of possession. If a distinction must be made as to which defenses are available to a tenant in a forcible entry and detainer action it should be made on the basis of the type of defense that the tenant intends to assert, rather than on the basis of whether a residential or a commercial lease is involved.

In Germania Fed. Sav. & Loan Ass'n v. Jacoby, 23 Ill. App. 3d 145, 318 N.E.2d 734 (1974), a decision cited by the court in *Banks*, the Illinois Appellate Court for the Fifth District was even more explicit in limiting the *Jack Spring* holding to residential leases. In the *Jacoby* case, which also involved a forcible entry and detainer action against a commercial lessee, the court stated that "the theories developed in *Spring* are good and are needed to protect tenants and to get away from the agrarian overtones in property rental, but they simply do not apply in this case . . . ." 23 Ill. App. 3d at 148, 318 N.E.2d 737.

70. 309 A.2d 108 (App. D.C. 1973), *noted in* 35 U. PITT. L. REV. 901 (1974).

71. 428 F.2d 1071 (D.C. Cir. 1970).

> *Javins* involved the application of the Housing Regulations to urban dwelling units. The rationale of that decision does not, in our view, extend to a commercial lease such as here involved, even assuming that the breaches alleged were of the nature of those fundamentally underlying *Javins*.[72]

The courts in a number of other jurisdictions have also refused to depart from the traditional principles of landlord-tenant law with respect to leases in a commercial setting or have specifically left the question open.[73] For the most part, the basic rationale for this double standard appears to stem from a desire for stare decisis and from the belief that the commercial tenant is in a better position to negotiate a proper division of repair responsibilities with the landlord.[74]

To date, several courts have specifically relied upon the importance of inequality of bargaining power in determining whether a particular tenant should be protected by an implied warranty. In *E.P. Hinkel & Co. v. Manhattan Co.*,[75] the United States Court of Appeals for the District of Columbia Circuit followed the lead of the court in *Interstate Restaurants* and refused to extend the rationale of the *Javins* case to a commercial lease explaining that "in a commercial lease *negotiated between parties of equal bargaining power* . . . there is no reason to modify the common law rule."[76] Likewise, in *Service Oil Co. v. White*,[77] the Supreme Court of Kansas noted that the lessee of commercial property "*does not generally occupy an*

72. 309 A.2d 108, 110 (App. D.C. 1973).

73. The Supreme Court of New Jersey, a well-respected leader in the consumer protection trend and in real estate law generally, has moved from one end of the spectrum to the other during the past decade. In its final analysis the New Jersey court has deliberately elected to leave open the question of whether the implied warranty theory should be extended to commercial leases.

As previously noted, an implied warranty of habitability with respect to residential leases was officially sanctioned in the case of Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), even though the implied warranty theory was first introduced in New Jersey in the context of a commercial setting in Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). In Kruvant v. Sunrise Mkt., Inc., 112 N.J. Super. 509, 271 A.2d 741 (1970), the trial court flatly stated that the *Marini* case and the implied warranty theory were restricted to residential leases only. On appeal, however, the New Jersey Supreme Court modified the original decision and redefined the scope of the implied warranty theory stating that "[w]hen and under what circumstances the doctrine of *Marini* should be applied in other than residential situations is a matter we leave open for future determination in an appropriate case." Kruvant v. Sunrise Mkt., Inc. 58 N.J. 452, 456, 259 A.2d 104, 106 (1971).

74. RESTATEMENT (SECOND) OF PROPERTY § 5.1, comment b (Tent. Draft No. 2, 1974).

75. 506 F.2d 201 (D.C. Cir. 1974).

76. *Id.* at 206 (emphasis added). The court did not indicate whether the converse of this statement was necessarily true, *i.e.*, that in a commercial lease which has *not* been negotiated between parties of equal bargaining power there *is* reason to modify the common law rule.

77. 218 Kan. 87, 542 P.2d 652 (1975).

inferior bargaining position" and thus the court "decline[d] to engraft an implied warranty of suitability . . . upon the parties to a business or commercial lease."[78] And in *Kruvant v. Sunrise Market, Inc.*,[79] the New Jersey Supreme Court reversed a lower court decision restricting the *Marini* case to residential leases stating:

> The opinion of the trial court did, however, make the flat statement that *Marini* is not applicable to commercial leases. The statement was unnecessary to the conclusion because here *Marini* was clearly not applicable by virtue of the fact that *this lease was negotiated at arm's length between parties of equal bargaining power* . . . .[80]

By recognizing the importance of inequality of bargaining power in contemporary lease transactions the aforementioned courts have opened the door for eliminating the arbitrary and unjustified practice of placing all residential leases into one category and all commercial leases into another. However, even this comparatively liberal position regarding commercial leases has at least one major drawback: It forces an aggrieved tenant to resort to litigation in order to affirmatively establish the fact that the landlord occupied a position of superior bargaining strength when the rental agreement was consummated. Certainly a tenant that has been forced to endure the conduct of an unscrupulous landlord should not have to bear the burden and the trauma of an expensive lawsuit that may take years to ultimately resolve.

In light of the enthusiasm that has accompanied the demise of the doctrine of *caveat emptor* and the independence of lease covenants in cases dealing with residential property, it is surprising that the courts have not been more receptive to a similar change in the law with respect to leases in a commercial setting. By examining the arguments that have been advanced by the courts for revising residential landlord-tenant law, it is possible to demonstrate that the implied warranty theory should also be extended to leases of commercial property.

Rationale for Departing from the Common Law Rules with Respect to Commercial as well as Residential Leases

Outdated Factual Considerations

Perhaps the most well-known and strongest argument in favor of a complete departure from the common law tradition is

78. *Id.* at —, 542 P.2d at 659 (emphasis added).
79. 58 N.J. 452, 279 A.2d 104 (1970), *modified on other grounds*, 59 N.J. 330, 282 A.2d 746 (1971).
80. *Id.* at 456, 279 A.2d at 106 (emphasis added).

that the precepts and doctrines governing the landlord-tenant relationship are premised upon factual assumptions which were appropriate to the agrarian economy of the feudal period, but which are no longer valid today.[81] When the basic principles of landlord-tenant law were initially formulated, buildings and structures on the premises were very rare and only of secondary importance. If the tenant had possession of the land he could obtain "grain from the fields, fruit from the orchard, water from the stream, and heat from the woods."[82] The typical agrarian tenant desired only to be left alone and the ideal landlord was the one who interfered the least.

The modern-day tenant, on the other hand, normally does not derive his income from the actual land.[83] Buildings or parts of buildings are the primary object of most contemporary leases and the average tenant does not have the ability or the opportunity to make a thorough inspection of the heating, electrical or plumbing facilities before entering into the rental agreement.[84] In many instances the commercial tenant, like his residential counterpart, must rely upon the landlord to provide suitable space for the use contemplated by the parties.[85] Because of this radical change in the elementary purpose and design of the typical lease transaction, continued adherence to the doctrines of *caveat emptor* and independent covenants in present-day leases is both impractical and inherently unfair. Action must be taken, therefore, to update and revise these antiquated concepts which have become totally out of touch with reality and which can only be justified on purely historical grounds.

Increased Emphasis on Consumer Protection

A second factor which supports a complete departure from the common law rules with respect to commercial as well as residential leases, is that the principles governing the landlord-tenant relationship should be brought into harmony with the law of sales and with the consumer protection philosophy of the Uni-

81. In one form or another this argument has been advanced by a countless number of courts and commentators advocating the need for judicial reform in landlord-tenant law. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-79 (D.C. Cir. 1970); Lemle v. Breeden, 51 Hawaii 426, 428-30, 462 P.2d 470, 472-73 (1969); 1 FRIEDMAN, *supra* note 17, § 1.1, at 5; Lesar, *supra* note 14, at 372-75; Love, *supra* note 2, at 26-34.

82. Quinn & Phillips, *supra* note 22, at 230.

83. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970).

84. *Id.* at 1074; Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

85. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970).

form Commercial Code.[86] Under article 2 of the UCC a transaction involving the sale of goods is subject to an implied warranty of merchantability and fitness for a particular purpose.[87] Technically, the code provisions only cover the sale of tangible personal property and do not apply to real estate or any interest therein.[88] By analogy, however, the implied warranties created by the UCC have been extended to the sale of realty[89] and to the rental of chattels.[90] In addition, a number of courts have relied upon the public policy considerations embodied in the UCC to support the development of an implied warranty of habitability in residential leases. In *Lemle v. Breeden*,[91] for example, the Supreme Court of Hawaii concluded that the public interest in safety and consumer protection, which is safeguarded by the implied warranty of fitness and merchantability in the law of sales, is equally applicable to leases of real property.[92] Similarly,

86. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970); W. PROSSER, THE LAW OF TORTS (4th ed. 1971); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953); Hicks, *supra* note 14, at 483-98; Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962); Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262 (1964); Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710, 723-27 (1971).

87. UNIFORM COMMERCIAL CODE §§ 2-314 & 2-315.

88. *Id.* § 2-102.

89. *See, e.g.*, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); *see also* Kratovil, *The Uniform Land Transactions Act: A First Look*, 49 ST. JOHN'S L. REV. 460 (1975), wherein the author, a member of the advisory committee for the Uniform Land Transactions Act (ULTA) notes that the ULTA "is designed to accomplish for real estate transactions what the Uniform Commercial Code (UCC) accomplished for personal property." In fact, one of the primary objectives of the ULTA, according to Professor Kratovil, "is that a code of real estate law should be modeled after the UCC." *Id.* at 460-61.

90. The UCC itself has recognized the possibility of extending the implied warranty provisions to nonsales cases, UNIFORM COMMERCIAL CODE § 2-313, comment 2.

In Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965), the New Jersey Supreme Court extended the implied warranty theory established in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), to leased trucks, Justice Ryan stating:

> There is no good reason for restricting such warranties to sales. Warranties of fitness are regarded by law as an incident of a transaction because one party to the relationship is in a better position than the other to know and control the condition of the chattel transferred and to distribute the losses which may occur because of a dangerous condition the chattel possesses.

Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 446, 212 A.2d 769, 775 (1965). *See also* Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976) (applying strict products liability to a commercial lease transaction); W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970) (breach of implied warranty of suitability for leased chattel's known and intended use); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

91. 51 Hawaii 426, 462 P.2d 470 (1969).

92. *Id.* at 432, 462 P.2d at 474.

in *Javins v. First National Realty Corp.*,[93] the court argued that a tenant must rely upon the skill and honesty of the landlord in much the same way that a purchaser of an automobile relies upon the expertise of the manufacturer and dealer. Since the landlord is the one who places the "product" on the market, he has the "greater opportunity, incentive and capacity to inspect and maintain the condition of the premises."[94] Following this line of reasoning, it is only logical to conclude that if the lessor's "product" was designed to be used only by a commercial tenant for business purposes, then the lessor should impliedly warrant that the "product" is in fact suitable for its intended use,[95] just as a leasehold that is designed for residential purposes should be maintained in a habitable condition.

Inequality of Bargaining Power

The final and probably the most controversial element that has been influential in the area of landlord-tenant law reform has been the presumed inequality of bargaining power that exists in many residential lease transactions today.[96] Due to the current shortage of adequate housing, it is a commonly accepted belief that the average residential tenant must contend with a "take-it-or-leave-it" situation in which he has no bargaining power whatsoever, whereas the lessor and lessee in a commercial lease generally occupy a position of equal bargaining strength. But not every commercial tenant has the benefit of a negotiated lease and it is common for an inexperienced lessee to sign a standardized form agreement which heavily favors the interests of the landlord.[97] The presumption, therefore, should operate in favor of

93. 428 F.2d 1071 (D.C. Cir. 1970).

94. *Id.* at 1079 (citing Henningsen v Bloomfield Motors, Inc., 32 N.J. 358, 375, 161 A.2d 69, 78 (1960)).

95. In W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970), the court stated:

> The reasons for imposing the warranty of fitness in sales cases are often present in lease transactions. Public policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases. Although a sale transfers ownership and a lease or bailment merely transfers possession and anticipates future return of the chattel to the owner, there may be as much or more reliance on the competence or expertise of the lessor than on the competence of the seller.

Id. at 100.

96. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

97. In Berman, *Safeguard for the Lessee of Commercial Real Estate*, 52 CHI. B. REC. 345 (1971), the author states:

> The standard printed commercial leases sold in stationery stores or distributed by the various builder or developer associations, as well as the sample lease clauses printed in the form books that I have seen, almost uniformly ignore many of the safeguards that a prudent tenant would insist upon and to which a reasonable land-

the tenant, rather than the landlord, and the implied warranty theory should be extended to both the residential and the commercial tenant alike—regardless of whether the parties occupy a position of equal bargaining strength.

Of course most landlords would, in all probability, attempt to disclaim any implied warranties by inserting a clause to that effect in the written agreement. If a dispute does arise in such a situation a court must look to the terms of the lease and resolve the controversy in accordance with the intent of the parties. Such a disclaimer clause, however, must be carefully scrutinized and if there is any evidence of unconscionability or of overreaching by the landlord the provision must be struck down. Only disclaimer clauses that are the result of an arms-length transaction between two parties of equal bargaining strength should be enforced by the courts.[98]

RESTATEMENT (SECOND) OF PROPERTY

The American Law Institute, now in the process of revising the Restatement of Property, has struggled with the question of whether to extend the implied warranty theory to commercial leases. In Tentative Draft Number One of the Restatement Second, the Institute adopted the position that in both residential and commercial leases the landlord was under a duty to maintain the leased premises in a condition that would be "suitable for the use contemplated by the parties."[99] One year later, in Tentative Draft Number Two the Institute departed from its original position and effectively restricted the scope of the implied warranty theory to residential leases.[100] The commentary accompanying section 5.1, relating to a tenant's rights and remedies against the landlord, explained that leases involving commercial or industrial properties "are usually made under circumstances of greater equality of bargaining power than in the case of residential properties" and that because of the lack of authority and the "differing considerations affecting commercial and industrial property," the Institute could not take a position regarding nonresidential leases.[101]

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lord would probably acquiesce in those instances where both parties are equally desirous of the consummation of an agreement to lease commercial property.

Id. at 345. *See also* ILLINOIS INST. FOR CONTINUING LEGAL EDUCATION, LANDLORD-TENANT PRACTICE § 1.16 (1975).

98. RESTATEMENT (SECOND) OF PROPERTY § 5.6 (Tent. Draft No. 2, 1974).

99. RESTATMENT (SECOND) OF PROPERTY § 5.1 (Tent. Draft No. 1, 1973).

100. RESTATEMENT (SECOND) OF PROPERTY § 5.1 (Tent. Draft No. 2, 1974).

101. *Id.* § 5.1, comment b at 58.

In the Reporter's Notes, Professor James A. Casner, an eminent authority in the area of property law, expressed his disapproval of the Institute's new position noting that the failure to extend the implied warranty theory to commercial leases is "not to be taken as any indication that it should or should not be so extended. The Reporter is of the opinion that the rule of [section 5.1] *should be extended to nonresidential property.* The small commercial tenant particularly needs its protection."[102]

As noted by Professor Casner and as suggested by the analysis herein, the recognition of an implied warranty of suitability in commercial leases constitutes a desirable and justified extension of the current trend in landlord-tenant law which would promote a more equitable disposition of disputes involving commercial tenants. Before any further action may be taken by the American Law Institute, however, the courts must provide some judicial authority to support such an extension.

CONCLUSION

The common law characterization of the lease as a conveyance of an "estate for a term of years" was a product of feudal property law that developed during a time when the land itself was the primary object of the bargain. As the nature and the function of the typical rental agreement began to change, it became clearly evident that the principles which were designed for the agrarian economy of fourteenth century England were no longer applicable in an urban, industrialized society where the average tenant contemplated the use of space in a building rather than the right to occupy and farm a particular tract of land. The initial response by the courts to this change in social attitude was to develop a number of exceptions to the traditional common law rules. Within the last two decades, however, the courts in a rapidly increasing number of states have elected to abandon the well-established precepts and doctrines of the past in favor of the application of more contemporary contract principles. The Illinois Supreme Court, in arriving at its decision in the *Jack Spring* case, cited a statement by Justice Cardozo which clearly exemplifies the current judicial attitude toward the doctrine of *caveat emptor* and the independence of lease covenants with respect to leases of residential property:

> 'A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even

102. *Id.* § 5.1, Reporter's Note at 65 (emphasis added).

innovation. It is the reservation for ourselves of the same power of creation that built up the common law . . . .'[103]

Although many of the factors that have played such an important role in the demise of the basic principles of landlord-tenant law can be applied to both residential and commercial leases, a number of courts have exhibited a strong desire to cling to the feudal concepts of medieval property law when dealing with leases in a commercial setting. Certainly this rigid and arbitrary practice can only result in unjustified and irreconcilable decisions since all commercial tenants are grouped together and forced to contend with outdated rules of property law, while a tenant that leases space for residential purposes can resort to ordinary contract remedies or can rely upon an implied warranty of habitability for needed protection.

If uniformity and stability is to be achieved in landlord-tenant law, the implied warranty theory must be extended to all contemporary lease transactions. The typical, modern-day rental agreement is, in essence, a contractual relationship and, as noted by the court in *Javins v. First National Realty Corp.*,[104] the refusal to apply ordinary contract principles to leases that are "predominantly contractual" in nature is inherently inconsistent with the "legitimate expectations of the parties and the standards of the community."[105] The small businessman who rents space in a commercial building needs judicial protection as much as, if not more than, a similarly situated residential tenant. The first step is for the courts to recognize the contractual nature of commercial leases. From that contractual relationship an implied warranty of suitability for the use contemplated by the parties is a just and necessary implication.

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103. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 367, 280 N.E.2d 208, 217 (1972) (citing B. CARDOZO, THE GROWTH OF THE LAW, ch. V, at 136-37 (1948)).
104. 428 F.2d 1071 (D.C. Cir. 1970).
105. *Id.* at 1075.