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Contract Remedy for the Slum Dweller, *Javins v. First National Realty Corporation*, 428 F.2d 1071 (D.C. Cir. 1970)

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COMMENTS

A CONTRACT REMEDY FOR THE SLUM DWELLER

Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. Cir.)
cert. denied, ____ U.S. ____ (1970).

*If the legislatures have not meant what they have said, let the courts make them end the verbal mythology of decent housing; and if the legislatures have meant what they have said, let [the courts] get busy and implement their principles.*¹

Plaintiff-landlord, First National Realty Corporation, brought an action for possession based upon nonpayment of rent in the Landlord and Tenant Branch of the District of Columbia Court of General Sessions. In defense,² tenants offered to prove “approximately 1500 violations of the Housing Regulations of the District of Columbia”³ in the apartment building, all violations having arisen after creation of the tenancy. The offer of proof was rejected, and judgment rendered for the landlord. The District of Columbia Court of Appeals affirmed, holding that the landlord is under no contractual duty to maintain the premises in compliance with the Housing Regulations, and any violations arising after the tenancy is created are not a defense to an action for possession based upon nonpayment of rent.⁴

On appeal to the District of Columbia Circuit Court of Appeals, *held*: a warranty of habitability, measured by the standard set out in the Housing Regulations for the District of Columbia, is implied by operation of law in all leases of urban dwelling units covered by the Regulations, and breach of such warranty gives rise to usual remedies for breach of contract.⁵

1 Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 921 (1967).

2 Rule 4(c) of the Landlord and Tenant Branch of the Court of General Sessions provides:

In suits in this branch for recovery of possession of property in which the basis of recovery of possession is nonpayment of rent, tenants may set up an equitable claim by way of recoupment or set-off in an amount equal to the rent claim. No counterclaim may be filed unless plaintiff asks for money judgment for rent. The exclusion of any claims in this branch shall be without prejudice to the possession of any claims in other branches of the court.

WASH., D.C. CT. GEN. SESS. (LANDLORD AND TENANT) R. 4(c).

3. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1073 (D.C. Cir.), *cert. denied*, U.S. ____ (1970).

4 *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. Ct. App. 1968).

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

Javins is the latest addition to the line of "remedial case law that is now slowly being fashioned in the District of Columbia and elsewhere—a case law that articulates new landlord responsibilities and new limitations on landlord's rights."⁶

The significance of *Javins* lies in two directions. First, it offers a new and potentially powerful weapon to the slum tenant in his fight for decent housing. Secondly, in so doing, property law is finally being remolded to meet modern exigencies.

The decision has been prophesied⁷ as a natural outgrowth of the 1968 ruling in *Brown v. Southall Realty Co.*⁸ In *Brown*, the District of Columbia Court of Appeals held that where the landlord entered into a lease knowing of serious violations of the housing code, the lease was an illegal contract, void and unenforceable, and thus a defense to an action for rent.⁹ The *Brown* opinion looked to the purpose behind the

6. Murphy, *A Proposal for Reshaping the Urban Rental Agreement*, 57 GEO. L.J. 464, 467 (1969).

7. See Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61, 66 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); 18 CATH. U.L. REV. 80, 92 (1968); 56 GEO. L.J. 920, 931 (1968); 25 WASH. & LEE L. REV. 335, 340-41 (1968).

8. 237 A.2d 834, *aff'd on rehearing without opinion* (D.C. Ct. App. 1968); an earlier unreported case came to the same conclusion: *Adams v. Lancaster*, Small Cl. No. C-12912-67 (D.C. Ct. Gen. Sess., Oct. 25, 1967); *cf.* *Jones v. Sheetz*, 242 A.2d 208 (D.C. Ct. App. 1968).

A case decided shortly after *Brown* by the same court clarified that if an owner of premises actually knew or should have known about conditions which violated the housing code, the absence of an official inspection had no effect on the finding of illegal contract. *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 494 (D.C. Ct. App. 1969).

9. See *Ewert v. Bluejacket*, 259 U.S. 129 (1922); *Hartman v. Lubar*, 133 F.2d 44 (1942), *cert. denied*, 319 U.S. 767 (1942); *cf.* *Weil v. Neary*, 278 U.S. 160 (1929). It has been suggested that even though he participates in the illegal agreement, the tenant is not similarly barred from recovering from the landlord rent paid during the time the premises contained housing code violations. See *Royall v. Yudelevit*, 268 F.2d 577 (D.C. Cir. 1959) (holding that a member of the class for whose protection the statute was passed was not *in pari delicto* and thus should be allowed recovery); *Indian Lake Estates v. Ten Individual Defendants*, 350 F.2d 435 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 947 (1966); *Rubin v. Douglas*, 59 A.2d 690 (D.C. Ct. App. 1948); RESTATEMENT OF CONTRACTS §§ 601, 604 (1932); 18 CATH. U.L. REV. 80 (1968); 56 GEO. L.J. 920 (1968). However, the tenant may be liable for the reasonable value of the use of the property during his occupancy. See *Brown v. Southall Realty Co.*, No. 4199 (D.C. Ct. App., April 17, 1968) (order on rehearing); *cf.* *Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961) (court found breach of an implied warranty of habitability and returned to tenant pre-paid rent minus the reasonable value of the premises for period of possession); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 n. 25 (1969); 66 MICH. L. REV. 1753 (1968). *But see* *Strong v. District of Columbia*, 12 D.C. (1 Mackey) 265 (1881) (quantum meruit recovery on an illegal contract forbidden); 6 F. WILLISTON, CONTRACTS § 1887 (rev. ed. 1938) (one who has given illegal consideration or performed in whole or in part illegal acts stipulated for in a contract cannot recover reasonable compensation for what he has done).

enactment of the housing code to determine the illegality of the lease.¹⁰ The court concluded that “the Commissioners of the District of Columbia, in promulgating these Housing Regulations, were endeavoring to regulate the rental of housing in the District and to insure for the prospective tenants that these rental units would be ‘habitable’ and maintained as such.”¹¹ While the *Brown* holding did not reach, and could not reach under the theory of illegal contract, violations arising after commencement of the lease, such violations also clearly frustrated the policy of the code.

Three separate considerations bring the court to the conclusion that the common law must acknowledge the landlord’s obligation to keep his premises in a habitable condition: (1) The old rule was based on certain factual assumptions which are no longer true, (2) the consumer protection cases require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest, and (3) the nature of today’s urban housing market also dictates abandonment of the old rule.¹²

From the sixteenth century onward, the lease was considered a conveyance of land, to which any covenants were merely incidental and thus independent of the other party’s obligation to perform.¹³ Remedy for breach of covenant lay in a suit for damages.¹⁴ Indeed, the ancient lease was invariably a conveyance of land for agricultural purposes, and both parties were willing to concede that the landlord had substantially performed upon execution of the conveyance.¹⁵ Accordingly, the lessor

10. Section 2304 of the District of Columbia Housing Regulations provides:

No persons shall rent or offer to rent any habitations or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents and vermin.

Section 2501 states:

Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.

WASH., D.C., HOUSING REG. §§ 2304, 2501 (1955).

11. 237 A.2d at 837.

12. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir. 1970).

13. 1 AMERICAN LAW OF PROPERTY § 3.11 at 202 (A. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY]. This is in contrast, of course, to the *dependency* of covenants in a contract, where breach by one party relieves the other from performance. 3A A. CORBIN, CONTRACTS § 686 (1960).

14. *Mitchell v. Weiss*, 26 S.W.2d 699 (Tex. Civ. App. 1930).

15. *Friedman, The Nature of a Lease in New York*, 33 CORNELL L.Q. 165 (1947).

was under no duty to render the premises in a habitable condition,¹⁶ or to repair.¹⁷ Exceptions were created to both rules. The landlord had a duty to repair if the premises were to be used for a public purpose,¹⁸ or in some cases, if he had retained control over a portion of the premises.¹⁹ And a warranty of habitability was implied if furnished premises were let for a short term,²⁰ or if the premises were to be constructed or altered by the

16. *Hughes v. Westchester Corp.*, 77 F.2d 550 (D.C. Cir. 1935); *Lawler v. Capital City Life Ins. Co.*, 68 F.2d 438 (D.C. Cir. 1933); *Fisher v. Lighthall*, 15 D.C. (4 Mackey) 82 (1885); *Slabe v. Beyer*, 149 A.2d 788 (D.C. Ct. App. 1959); *Hariston v. Washington Housing Corp.*, 45 A.2d 287 (D.C. Ct. App. 1946); *Briggs v. Pannaci*, 106 N.J.L. 541, 150 A. 427 (Ct. Err. & App. 1930); 1 AMERICAN LAW OF PROPERTY § 3.45 at 267. The cases are collected in Annot., 4 A.L.R. 1453 (1919); Annot., 13 A.L.R. 818 (1921); Annot., 29 A.L.R. 52 (1924); 34 A.L.R. 711 (1925). A handful of states have imposed a warranty of habitability and duty to repair upon the landlord by statute. See Lesar, *Landlord & Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1286 & n. 43 (1960). In enacting such a statute, the California legislature attached the following note of explanation:

This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year eighteen hundred and sixty-one shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a part of the law could not arise again and again for adjudication were it not that the community at large revolt at every application of the rule.

POMEROY, CAL. CIV. CODE ANN., Explanatory Note to § 1941 at 514 (1901).

English law implies a warranty of habitability along with a duty to repair, however only in leases of low-rent housing—that with an annual rent of £ 80 or less in London or £ 52 or less elsewhere. English Housing Act, 5 & 6 Eliz. 2, c. 5b, § 6(1)(c) (1957). See Lesar, *Landlord & Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1290 & n. 70 (1960).

17. *Paratino v. Gildenhorn*, 4 F.2d 938 (D.C. Cir. 1925); *Kaufman v. Clark*, 7 D.C. (Mackey) 1 (1869); *Dunnington v. Thomas E. Jarrell Co.*, 96 A.2d 274 (D.C. Ct. App. 1953); 1 AMERICAN LAW OF PROPERTY § 3.78 at 346. The cases are collected in Annot., 4 A.L.R. 1453 (1919); Annot., 29 A.L.R. 52 (1924). The tenant may not commit waste, and therefore *he* is obligated to repair to the extent necessary to preserve the property in substantially the same condition as at the beginning of the lease, subject to ordinary depreciation. *Newbold v. Brown*, 44 N.J.L. 266 (1882); *Chalmers v. Smith*, 152 Mass. 561, 26 N.E. 95 (1891); 1 AMERICAN LAW OF PROPERTY § 3.78 at 347.

18. *Junkerman v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915).

19. *Claude v. Nash*, 46 A.2d 542 (D.C. Ct. App. 1946); *Aprile v. Colonial Trust Co.*, 118 Conn. 573, 173 A. 237 (1934); *Murphy v. Illinois State Trust Co.*, 375 Ill. 310, 31 N.E.2d 305 (1941); *Lunde v. National Citizens Bank of Mankato*, 213 Minn. 278, 6 N.W.2d 809 (1942); *Reinagel v. Walnuts Residence Co.*, 194 S.W.2d 229 (Kansas City Ct. App. 1946); *Rowe v. Ayer & Williams, Inc.*, 86 N.H. 127, 164 A. 761 (1933); *Ward v. Broadway Marlboro Realty Corp.*, 137 Misc. 71, 241 N.Y.S. 472 (1930); *Woods v. Forest Hill Cemetery, Inc.*, 183 Tenn. 413, 192 S.W.2d 987 (1946); *Archibald v. Fidelity Title & Trust Co.*, 296 S.W. 680 (Tex. Civ. App. 1927); *Andrews v. McCutcheon*, 17 Wash. 2d 340, 135 P.2d 459 (1943).

20. *Young v. Povich*, 121 Me. 141, 116 A. 26 (1922); *Horton v. Marston*, 352 Mass. 322, 225 N.E.2d 311 (1967); *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942); *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892); *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931); *Morgenthau v. Ehrich*, 77 Misc. 139, 136 N.Y.S. 140 (1912); *Smith v. Marrable*, 152 Eng. Rep. 693 (1843).

landlord for a particular use, and the lessee was restricted to that use.²¹ In these two situations, it was reasoned, the lessee would not have an adequate opportunity to inspect the premises himself.²² Apart from these exceptions, the landlord had a duty to reveal all latent dangers of which he was aware.²³

There was, however, one covenant to the ancient lease that was not incidental. In accordance with the original concept of the lease as a conveyance of land, the mere relation of landlord and tenant would imply in every lease a covenant of quiet enjoyment.²⁴ Eviction was a defense to rent,²⁵ as was partial eviction.²⁶ It was fundamental to the earliest lease that the farmer did not have to pay rent if his landlord took away the farm. While the dependency of the covenant of quiet enjoyment and the obligation to pay rent may be visualized as an exception to the rule that the covenants to a lease are independent,²⁷ in fact possession was so central to the lease that all other covenants were insignificant in comparison and therefore independent. Upon the "exception" was built the doctrine of constructive eviction,²⁸ "designed to operate as though there were a substantial breach of a material covenant in a bilateral contract."²⁹ Constructive eviction required a substantial interference

21. *Woolford v. Electric Appliances, Inc.*, 24 Cal. App. 2d 385, 75 P.2d 112 (1938); *Hardman Estate v. McNair*, 61 Wash. 74, 111 P. 1059 (1910).

22. *Lesar, Landlord & Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1286 (1960).

23. *Sunasack v. Morey*, 196 Ill. 562, 63 N.E. 1039 (1902); *Moore v. Parker*, 63 Kan. 52, 64 P. 975 (1901); *Steeffel v. Rothchild*, 179 N.Y. 273, 72 N.E. 112 (1904); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 689 (1934); see *Lawler v. Capital City Life Ins. Co.*, 68 F.2d 438 (1933). For a recent application of the rule see *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

24. *Johansen v. Arizona Hotel*, 37 Ariz. 166, 291 P. 1005 (1930); *Cohen v. Hayden*, 180 Iowa 232, 163 N.W. 238 (1917); *Stewart v. Murphy*, 95 Kan. 421, 148 P. 609 (1915); *Winchester v. O'Brien*, 266 Mass. 33, 164 N.E. 807 (1929); *York v. Steward*, 21 Mont. 515, 55 P. 29 (1898); *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917); *Hanley v. Banks*, 6 Okla. 79, 51 P. 664 (1897); *Northern Brewery Co. v. Princess Hotel*, 78 Ore. 453, 153 P. 37 (1915); *Hannon v. Harper*, 189 Wis. 588, 208 N.W. 255 (1926); 1 AMERICAN LAW OF PROPERTY § 3.47 at 271.

25. 1 AMERICAN LAW OF PROPERTY § 3.52 at 284.

26. *Id.* See *Gombo v. Martise*, 41 Misc. 2d 475, 246 N.Y.S.2d 750 (N.Y. City Civ. Ct. 1964), *rev'd per curiam*, 44 Misc.2d 239, 253 N.Y.S.2d 459 (1964).

27. 1 AMERICAN LAW OF PROPERTY § 3.50 at 278.

28. *Automobile Supply Co. v. Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930); *Giddings v. Williams*, 336 Ill. 482, 168 N.E. 514 (1929); *Shindler v. Grove Hall Kasher Delicatessen, Inc.*, 282 Mass. 32, 184 N.E. 673 (1933); *Dolph v. Barry*, 165 Mo. App. 659, 148 S.W. 196 (1912); *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. Ct. Err. 1826); *Thirteenth & Washington Sts. Corp. v. Neslen*, 123 Utah 70, 254 P.2d 847 (1953); 1 AMERICAN LAW OF PROPERTY § 3.51 at 279.

29. *Lemle v. Breedon*, 462 P.2d 470, 475 (Hawaii 1969).

with possession or enjoyment,³⁰ and that the tenant abandon the premises within a reasonable time.³¹

A fortuitous³² departure from the rule took place in a relatively small group of cases concerned with commercial leases.³³ In establishing the rights and obligations of parties to a commercial lease, a court will look to the whole contract and the intention of the parties to determine whether the covenants are "independent" or "dependent".³⁴

Land was at the heart of the sixteenth century lease. When land, as consideration, gave way to "space" in a building, the doctrine of constructive eviction provided equitable results for what amounted to, in essence if not in fact, dispossession. But no longer are covenants to an urban dwelling lease incidental. The modern landlord's obligations consist not merely of delivery of land, or even of space, but rather of "a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."³⁵

30. 1 AMERICAN LAW OF PROPERTY § 3.51 at 282. See *Northwestern Realty Co. v. Hardy*, 160 Wis. 324, 151 N.W. 791 (1915).

31. 1 AMERICAN LAW OF PROPERTY § 3.51 at 282. The cases are collected in Annot., 75 A.L.R. 1114 (1931). Two New York City cases attempted to do away with the necessity of abandonment in view of the local housing shortage. This, in effect, made rent and services dependent. *Johnson v. Pemberton*, 197 Misc. 739, 97 N.Y.S.2d 153 (N.Y. City Mun. Ct. 1950); *Majen Realty Corp. v. Glotzer*, 61 N.Y.S.2d 195 (N.Y. City Mun. Ct. 1946). Other courts achieved the same end by more liberal application of the partial eviction doctrine. See *Barash v. Pennsylvania Terminal Real Estate Corp.*, 31 App. Div. 2d 342, 298 N.Y.S.2d 153 (1969); cf. *Robb v. Cinema Francais, Inc.*, 194 Misc. 987, 246 N.Y.S.2d 750 (N.Y. City Civ. Ct.), *rev'd per curiam*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (1964). See also F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 120 (Nat'l Comm'n on Urban Problems, Research Report No. 14, 1968); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 238-42 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 531 (1966).

32. The contrast between the rise of dependency of covenants in the law of commercial leases, as opposed to residential leases, has been attributed to the greater complexity of the former, and to the paucity of appellate level litigation, due to financial limitations, on behalf of the residential tenants prior to the emergence of neighborhood legal services projects under the antipoverty program. See Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 679 (1966).

33. *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944); *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); *Siracusa v. Leloup*, 28 S.2d 406 (La. App. 1946).

34. *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 419, 132 P.2d 457, 462 (1942).

35. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 at 1074 (D.C. Cir. 1970). Having conceptualized the landlord as a seller of goods and services, the principal case finds support for a

The court in *Javins* in finding an implied warranty of habitability in all leases for urban dwellings found support in a recent decision of the Supreme Court of Hawaii. In *Lemle v. Breedon*³⁶ the Supreme Court of Hawaii stated, "Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house . . . there is an implied warranty of habitability and fitness for intended use."³⁷ It was their view "that to search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions where preferable alternatives exist."³⁸

The *Javins* opinion finds that the common law supports a warranty of habitability in every urban dwelling lease, but that even if there were no such support in the common law, the enactment of the Housing Regulations imposed such a warranty in every lease within the jurisdiction of the code.

A line of personal injury cases in the District of Columbia and elsewhere³⁹ lend weighty support to the court in its alternative finding that the housing code requires an implied warranty of habitability in the leases of all housing under the code. In those cases, it was held that

warranty of habitability in the proliferation of implied warranties of fitness in the products liability field. See *Bowles v. Mahoney*, 202 F.2d 320, 325 (D.C. Cir. 1952) (dissenting opinion of Bazelon, J.), *cert. denied*, 344 U.S. 935 (1953).

36. 462 P.2d 470 (Hawaii 1969).

37. *Id.* at 474.

38. *Id.* at 475. In addition to *Lemle*, the opinion in the principal case looks to the Supreme Court of New Jersey's recent decision in *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969). In that case the tenant vacated leased offices while the lease still had two years to run. The landlord sued for the rent, and the tenant successfully contended at the trial level that she had been constructively evicted because each rainstorm flooded her office. The appellate division reversed on the ground that the interference was not "permanent". The supreme court reversed the appellate division in a broad, three-pronged holding, stating:

[W]henver a tenant's right to vacate leased premises comes into existence because he is deprived of their beneficial enjoyment and use on account of acts chargeable to the landlord, it is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects.

Id. at 461; 251 A.2d at 276-77. Note that in *Reste*, in contrast to *Lemle*, the court stayed within the protection of the traditional exceptions.

39. *Kanelos v. Kettler*, 406 F.2d 951 (D.C. Cir. 1968); *National Bank of Washington v. Dixon*, 301 F.2d 507 (D.C. Cir. 1961); *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943 (D.C. Cir. 1960); *McNally v. Ward*, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); *Ewing v. Balan*, 168 Cal. App. 2d 619, 336 P.2d 561 (1959); *Saracino v. Capital Properties Associates, Inc.*, 50 N.J. Super. 81, 141 A.2d 71 (Sup. Ct. 1958); *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (Ct. App. 1922); *cf. Emigrant Industrial Savings Bank v. 108 West 49th St. Corp.*, 255 App. Div. 570, 8 N.Y.S.2d 354 (1938). *Contra*, *Chambers v. Lowe*, 117 Conn. 624, 169 A.2d 912 (1933).

enactment of the Housing Regulations imposed a legislative standard of due care upon the landlord, and breach of that duty was evidence of negligence.⁴⁰ In the leading case, *Altz v. Leiberson*,⁴¹ Justice Cardozo said, "The command of the statute, directed, as it plainly is, against the owner, has thus changed the ancient rule of no duty to maintain."⁴² If the Housing Regulations import a duty of due care, breach of which renders the landlord liable in an action in tort for any resulting injury, then the Regulations may also logically impose a warranty of habitability based upon the minimum standard of decent housing required by law.⁴³

At least one case has so held. In *Pines v. Perssion*,⁴⁴ the Supreme Court of Wisconsin, basing its decision on the legislative intent and public policy evidenced in the housing code, allowed the tenant to rescind the lease and recover his deposit on the theory that the landlord had breached his implied obligation to provide habitable premises.

The illegal contract theory employed in *Brown v. Southall Realty Company*,⁴⁵ is not applicable to *Javins* because the violations in *Javins* arose after formation of the lease. But as the court realizes, the public policy considerations inherent in that decision are also present when the landlord *performs* his obligations illegally.⁴⁶ "Courts often imply relevant law into contracts to provide a remedy for any damage caused by one party's illegal conduct."⁴⁷

40. Depending on the jurisdiction, a violation of the housing code may be negligence *per se*, or merely evidence of negligence that may be taken into account by the jury. That the housing code is irrelevant to the issue of landlord liability remains the majority view. See F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 115 (Nat'l Comm'n on Urban Problems, Research Report No. 14, 1968).

41. 233 N.Y. 16, 134 N.E. 703 (1922).

42. 233 N.Y. at 18, 134 N.E. at 704.

43. It has been suggested that this conclusion follows from the concept implicit in *Brown* and *Adams* that rights or duties imposed by statute or ordinance existing at the time a contract is made are a part of it. 56 GEO. L.J. 920 (1968). *Contra*, *Susskind v. 1136 Tenants Corp.*, 43 Misc. 2d 588, 251 N.Y.S.2d 321 (1964); *Rubinger v. Del Monte*, 217 N.Y.S.2d 792 (1961); *Kearse v. Spaulding*, 406 Pa. 140, 176 A.2d 450 (1962). Home builders have been held to an implied warranty that the completed house will conform to the local building code. *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960); *Gutowski v. Crystal Homes, Inc.*, 26 Ill. App. 2d 269, 167 N.E.2d 422 (1960).

44. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The case could have been decided under an extension of the "furnished house" exception, but the court chose to reject the common law rule in favor of the implied warranty. *Accord*, *Buckner v. Azulai*, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967).

45. 237 A.2d 834 (D.C. Ct. App. 1968).

46. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir. 1970). See *O'Rourke v. Fulton Bag & Cotton Mills*, 133 La. 955, 63 S. 480 (1913); cases collected in *Annot.*, 110 A.L.R. 1048 (1937).

47. The first enactment of housing codes at the turn of the century evidenced an attempt to

It would seem clear that the *Javins* decision appropriately realigns property law and the urban dwelling lease with modern realities. Certainly, legal scholars have long pressed for change; the exceptions to the rules of no warranty of habitability and the independency of covenants have become shop-worn with judicial use; and the legislatures on their part have responded to a felt need for remedial law.⁴⁸ But apart from the unrealities of ancient property law, underlying the court's action is the view, as articulated by Judge Wright a little more than a year before he wrote the opinion in *Javins*, that: "Though our most pressing social, moral and political imperative is to free the urban poor from their degradation, the courts continue to apply ancient legal doctrines which merely compound their plight."⁴⁹

The opinion in *Javins* notes that "official enforcement of the housing code has been far from effective."⁵⁰ While fines and imprisonment are

persuade landlords to furnish tenants with the minimal standards of decent housing. Subsequent legislative contributions to code enforcement are various. The following groups are comprehensive, but not exhaustive.

(1) Repair and deduct: If the landlord fails to repair, the tenant may do so and deduct the cost from the rent due. CAL. CIV. CODE ANN. § 1942 (Deering 1960); MONT. REV. CODE ANN. §§ 42-201, 42-202 (1947); LA. CIV. CODE ANN. art. 2694 (1952).

(2) Welfare agency rent withholding: If the building contains violations "dangerous, hazardous or detrimental to life or health" the welfare department may retain the rent money until the violations are corrected. N.Y. SOCIAL WELFARE LAW § 143-b (McKinney 1966) (Spiegel Law).

(3) Tenant withholding: As a defense to an action for rent, the tenant may prove violations in the building. Once proven, he may pay rent into the court, from which escrow the landlord may finance repairs. Having repaired, the landlord is allowed to pocket what remains of the back rent. MASS. ANN. LAWS ch. 239, § 8A (Supp. 1969); N.Y. REAL PROP. ACTIONS § 755 (McKinney Supp. 1970); PA. STAT. ANN. tit. 35, §§ 1700-1 (Purdon 1967).

(4) Rent strikes: One third of the tenants upon petition to the court may maintain total rent suspension if there exists in the building any condition "dangerous to life, health or safety." Rent is paid into court; repairs may be made therefrom. MASS. ANN. LAWS ch. 111, § 127F (Supp. 1969); N.Y. REAL PROP. ACTIONS §§ 770-82 (McKinney Supp. 1970); PA. STAT. ANN. tit. 35, §§ 1700-1 (Purdon Supp. 1970).

(5) Receivership: The building may be placed under the control of a receiver who is authorized to borrow money to make repairs. N.Y. MULT. DWELL. LAW. § 309 (McKinney Supp. 1970).

(6) The Michigan law: Recently enacted, it provides for an artillery of remedies, including personal rights of action and contractual defenses for the tenant, a warranty of habitability and duty to repair, injunction, repair by the municipality, receivership and rent withholding. MICH. COMP. LAWS ANN. §§ 125.401-519, 554.139, 600.5634, .5637, .5646, .5670 (Supp. 1970). See F. GRAD. LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS (Nat'l Comm'n on Urban Problems, Research Report No. 14, 1968); D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT, 655-687 (1963).

48 Wright, *The Courts Have Failed the Poor*, N.Y. Times, March 9, 1969 (Magazine) at 108.

49. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 at 1082 (D.C. Cir. 1970).

50. WASH., D.C., HOUSING REGULATIONS §§ 2104, 3303 (1955).

specifically provided for enforcement of the code,⁵¹ these sanctions have failed for various reasons.⁵²

Javins extends a new legal remedy⁵³ to the slum dweller and to proponents of code enforcement. The tenant may demand specific performance by the landlord of his obligations under the lease, and, until he performs, the tenant is similarly under no obligation to pay rent. One commentator labels this the "club of continued occupancy without rent payments."⁵⁴ Another recent District of Columbia Circuit Court of Appeals decision will protect the tenants from landlord retaliation in the exercise of their rights.⁵⁵

While *Javins* finds that the purposes and structure of the housing code require that it be read into housing contracts, the court does not consider the various ramifications of that decision. In considering the possible ramifications, the question arises whether the legislature might have been better suited to fashioning the remedy.

The Washington Planning and Housing Association has reported that during the year 1965-66, 115,913 dwelling units were inspected, and of these 114,060 were found to be not in compliance with the local housing code. In addition, 10,425 cases of noncompliance uncovered by the inspectors made the previous year had not been corrected by the end of the previous year.⁵⁶ While, according to *Javins*, the tenant may not

51. The nature of a criminal prosecution does not adapt itself to efficient code enforcement. The criminal court judges have tended to impose minimal fines, and as of 1965 no landlord had yet been sent to jail for a housing code violation. P. WALD, *LAW & POVERTY* 1965 at 15 (1965). See F. GRAD, *LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS* 29-33 (Nat'l Comm'n on Urban Problems, Research Report No. 14, 1968); HUD, OEO & DEPT. OF JUSTICE, *TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING, REPORT ON A NAT'L CONFERENCE OF LEGAL RIGHTS OF TENANTS* 20 (1969); Gribetz & Grad, *Housing Code Enforcement: Sanctions & Remedies*, 66 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

52. Dunham, *Private Enforcement of City Planning*, 20 LAW & CONTEMP. PROB. 463, 465 (1955).

53. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541-42 (1966).

54. D.C. CODE ANN. §§ 45-902, 45-904 (1967).

55. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968). The court found that it was the intent of Congress in enacting the D.C. Housing Regulations that a landlord be prevented from evicting in retaliation for a tenant's reporting of code infringement. The landlord is thus precluded from regaining possession until he can rebut a tenant's prima facie showing of improper motive.

However, it has been suggested that the common law right of self-help, still recognized in the District of Columbia in situations where the landlord is lawfully entitled to possession and where he can make entry without the use of force, will operate to discourage tenant initiative. See 39 GEO. WASH. L. REV. 152, 162 (1970).

If so, the effectiveness of the remedy offered in *Javins* will lie in large-scale rent strikes.

56. Lieberman, *Administrative Provisions of Housing Codes*, in *HOUSING CODE STANDARDS* 100 (Nat'l Comm'n on Urban Problems, Research Report No. 19, 1969).

successfully raise the defense of housing violations to an action for rent unless the violations constitute a substantial breach, affect the tenant's own apartment or common areas which the tenant uses, and are not caused by the tenant's own wrongful action, it is reasonable to surmise that a fair percentage of Washington's slum dwellers are presently legally justified in refusing rent. The reply is, of course, that that is the point: if that many people are subjected to the miseries of substandard housing, then that many are entitled to remedy. But the more realistic conclusion may be that that many people will be left not only without standard housing, but without slum housing.⁵⁷ The National Commission on Urban Problems has reported “. . . that strict enforcement on a mass basis would lead to mass abandonment of properties by their owners and/or higher rents with resultant occupant displacement.”⁵⁸ With an abundance of housing, the low income population can be absorbed elsewhere, and the vacant buildings, most of which will be tax delinquent, can be rehabilitated by the municipality.⁵⁹ However, in most cities, including Washington, D.C., there are shortages of low-income housing, and therefore the result of the landlord's abandonment would only be overcrowding elsewhere, or, if the tenants were permitted to remain intact, a form of public housing.⁶⁰ The National Conference on Legal Rights of Tenants has said:

[L]egal reforms can have an impact only if they are accompanied by

57 Some statistics:

In 1966, average rent/month/room ranged from \$22 in the South to \$49.50 in the West.

Only 43.1% of the gross possible income (GPI) from the large low rise apartments remained after expenses to cover debt service, depreciation, and return on investment; elevator buildings—48.3%; garden type apartments—49.5%.

Real estate taxes, up 9.2% since 1966, in 1966 took 15.7% of the GPI for elevator buildings, 16.6% for low rise, 13.3% for garden.

As a percentage of GPI, payrolls range from 6.3% on the smaller low rise to 8.4% on elevator buildings. Loss from vacancies and delinquent rents is in the area of 4% to 5%. Maintenance and repairs account for 4.3% to 6.3% and management for 4.3% to 5.2%.

E. LEAVES, *HOW THE MANY COSTS OF HOUSING FIT TOGETHER* 8 (Nat'l Comm'n on Urban Problems, Research Report No. 16, 1969).

58. NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 286 (1968). Sax and Hiestand indicate that

[t]his is the paradox which has created the present slum housing dilemma. Landlords are insulated from effective law enforcement in order to avert an intensification of the low-cost housing shortage; yet this very insulation not only perpetrates the indecent conditions of the slums, but also prevents the creation of the intense pressure needed for legislative action by preserving the status quo in its more or less stable (albeit deplorable) condition.

Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

59. NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 286 (1968).

60 HUD, OEO & DEPT. OF JUSTICE, *TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING, REPORT ON A NATIONAL CONFERENCE OF LEGAL RIGHTS OF TENANTS* 27 (1969).

resourceful economic action. The economic gap is far too great to be bridged by law alone. Legal tools, even when strengthened and refashioned, can only be an assisting force, and influence for greater fairness. The root problems are primarily economic.⁶¹

For this reason and others, the Conference found:

It was generally agreed that the legal reforms necessary to provide tenants with effective rights must be brought about through legislation. The extent of reforms needed is too sweeping, and many of them represent too great a departure from established law, for case-by-case judicial interpretation to achieve adequate results.⁶²

The holding in *Javins* does not seek to take the place of such legislative reform; it, in fact, can be viewed as laying the groundwork.

Professors Sax and Hiestand, in their advocacy of a tort remedy to combat slum housing, comment:

We are not out to reform the landlord (who, we agree, cannot afford to provide standard housing for the poor); we seek to create a pressure situation leading to additional legislative subsidization of low cost housing. Dislocation of the present housing situation, which is comfortable enough for the slum landlord, is the means for creating that pressure.⁶³

As the court in *Javins* points out, it lies squarely within the judicial function to reform old common law doctrines to reflect community values and ethics.⁶⁴ The court proceeds to do just that in finding a warranty of habitability in every urban lease, and in finding that a lease is a contract in all respects. If the landlord is financially able to bring his property up to the housing code standard, remedies such as the one offered by *Javins* will economically motivate him to do so. If he cannot, in reforming the common law, the court may have left the legislature with no choice but to come up with some economic answers posthaste.

61. *Id.* iv.

62. *Id.* 19.

63. Sax, *Slumlordism as a Tort—A Brief Response*, 66 MICH. L. REV. 465, 567 (1968).

64. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).