Chapter 1: Property and Conveyancing

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CHAPTER 1

Property and Conveyancing

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§1.1. Abolition of the doctrine of worthier title. Sections 33A and 33B of chapter 184 have been added to the General Laws.1 These statutes abolish the doctrine of worthier title. In order to comprehend the impact of these statutes it is necessary to understand both of the common law branches of this rule—testamentary worthier title and inter vivos worthier title. Since these statutes may not affect prior conveyances or devises, such an understanding of the common law branches remains essential.

At common law, if land was devised, and a devisee was given an estate of the same quantity and quality as he would have taken if the devise had been stricken out of the will, he was deemed to take the interest by descent and not by devise.2 This is known as the Doctrine of Testamentary Worthier Title. A variety of reasons have been suggested for the rule, including the desire on the part of medieval lords to preserve the valuable incidents of tenure.3 For example: O owns Blackacre in fee simple absolute. O devises it to A. At O’s death, A is O’s heir. A takes Blackacre by intestacy and not by devise.

Many authorities feel that the doctrine is obsolete and of no practical significance today;4 so long as a devisee takes, it is immaterial to him whether he took by descent or devise. However, the doctrine may still be of some effect in a number of areas.5 In several states, if an unmarried minor dies, property that came to him by intestacy will descend differently than property that he received by a devise.6 Furthermore, the

3 See Harper & Heckel, supra note 2.
4 Restatement of Property §314; 1 American Law of Property §4.19 (1952); 3 R. Powell, Real Property §381 (1952).
5 See, e.g., Morris, supra note 2.
6 Morris lists fourteen states as being in this category; Massachusetts, however, is not one of them. Morris, supra note 2, at 471, n.106.

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doctrine may be a determining factor as to whether a homestead has been waived\(^7\) and whether dower has been barred.\(^8\) There is authority that creditors cannot prevent a devisee from renouncing a devise in his favor, but that an heir by descent lacks this power.\(^9\) The application of the Doctrine of Testamentary Worthier Title may preclude a devisee from renouncing a devise and defeating his creditors.\(^10\) If property passes by descent, rather than devise, it will be abated first to satisfy creditors since intestate property is sacrificed before testate assets. The application of the Testamentary Worthier Title Doctrine could result in one devisee's property being taken first to satisfy the decedent's debts.\(^11\) In addition, the doctrine may affect the application of an anti-lapse statute.\(^12\) It could also influence the construction of conditions such as gifts over on marriage and limitations where there is a failure of a succeeding interest.\(^13\)

This doctrine is applicable as long as the person named in the will is in fact the heir of the testator.\(^14\) There is no requirement that there be an express limitation to "heirs." In this respect, as will appear, the doctrine is broader than the Doctrine of Inter Vivos Worthier Title.

There is authority in England that "quality" referred not to the amount of the gift, but to the duration of the estate created. The questions raised in the English cases were whether the devisee took a fee simple, life estate, or a fee tail under the will and whether he would have taken a similar estate in the event of intestacy.\(^15\) In this country, there is a division of authority on this point. Some American cases require that the devise be equal in amount to what would have passed by intestacy before the doctrine can be applied.\(^16\) The mere fact that a devisee's share could be increased in the event of a contest (contrary to

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\(^7\) Rossiter v. Soper, 384 Ill. 47, 50 N.E.2d 701 (1943).
\(^8\) Id. at 49, 50 N.E.2d at 702.
\(^10\) See McQuiddy Printing Co. v. Husig, 23 Tenn. App. 484, 134 S.W.2d 197 (1939).
\(^11\) See Ellis v. Page, 61 Mass. (7 Cush.) 161 (1851); but cf. Biederman v. Seymour, 49 Eng. Rep. 144 (1840). This last factor can be mitigated, of course, by the testator expressing a desire as to the order in which assets are to be taken to satisfy debts.
\(^12\) See Note, 29 Iowa L. Rev. 199, 201 (1958); Note, 46 Harv. L. Rev. 993, 998 (1933); In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931). But see Beem v. Beem, 241 Iowa 247, 41 N.W.2d 107 (1950).
\(^13\) See Morris, supra note 2, at 477-81. Morris also suggests that it could affect the pleadings. Id. at 483.
\(^14\) Stillwell v. Knapper, 69 Ind. 558 (1880); Hoover v. Gregory, 18 Tenn. (10 Yerger) 444 (1857).
\(^16\) See Harper & Heckel, Doctrine of Worthier Title, 24 Ill. L. Rev. 627, 648 (1930); In re Everett's Estate, 238 Iowa 564, 28 N.W.2d 21 (1947); In re Coleman's Estate, 242 Iowa 1096, 49 N.W.2d 517 (1951); Beamer v. Ashby, 204 Okla. 530, 231 P.2d 668 (1951). For a case following the English view, see Whitney v. Whitney, 14 Mass. (14 Tyng) 88 (1817).
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the terms of a no-contest clause) has been held to be sufficient to preclude the application of the doctrine.\(^\text{17}\)

There is likewise a division of authority over whether the doctrine is applicable if the devise is subject to a charge, executory interest, or a trust.\(^\text{18}\) The English view, as expressed in one case, was that although these encumbrances may definitely lessen the amount, either in whole or in part, received by the devisee, they do not alter the nature of the estate that the devisee would have taken by intestacy.\(^\text{19}\) In other words, even though the devise involved is subject to an annual charge in favor of another devisee or is subject to total divestment by an executory interest, the doctrine is still applicable if the devisee-heir is initially given some sort of fee simple.\(^\text{20}\)

Like Shelley's Rule, and unlike Inter Vivos Worthier Title, this doctrine is a rule of law and not a rule of construction.\(^\text{21}\) Although it evolved out of medieval land law, some courts have applied the doctrine to personalty as well.\(^\text{22}\)

Unlike some other common law rules in the property area, the doctrine has not been treated extensively by the legislatures. It has been abolished in only a handful of states.\(^\text{23}\) It has been repudiated by the courts in only two states.\(^\text{24}\) It has been recognized in twenty-one states.\(^\text{25}\) It is still a potent doctrine, and even though there may be no modern rationale for it, the estate planner should draft with care testamentary dispositions in favor of heirs at law.\(^\text{26}\) It may be desirable to avoid the use of a limitation to "heirs." Rather, the estate planner should ascertain whom the client wants to benefit and then name these beneficiaries individually.

When a person transfers an interest in property inter vivos to his heirs or next of kin, the interest given the heirs or next of kin is null and void.\(^\text{27}\)

\(^{17}\) Luglan v. Lenning, 214 Iowa 439, 239 N.W. 692 (1931).

\(^{18}\) For cases holding the doctrine inapplicable in such circumstances, see Davis' Estate, 204 Iowa 1231, 213 N.W. 395 (1927); Dillman v. Fulwider, 57 Ind. App. 632, 105 N.E. 124 (1914). Contra, Banes v. Finney, 209 Pa. 191, 58 A. 136 (1904); Whitney v. Whitney, 14 Mass. (14 Tyng) 88 (1817).


\(^{24}\) Lucas v. Parsons, 24 Ga. 640 (1847); Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532, 142 S.W.2d 181 (1940).

\(^{25}\) Morris, supra note 2, at 486.

\(^{26}\) He should weigh such factors as the possible minority of an heir, creditors' rights, etc.
This is known as the Doctrine of Inter Vivos Worthier Title. The application of this doctrine usually results in the retention of a reversion by the transferor. For example: O owns property in fee simple absolute. O transfers it inter vivos "to A for life, and then to O’s heirs." A has a life estate and O has a reversion in fee simple absolute. The heirs of O have nothing.

The authorities agree that, unlike the Doctrine of Testamentary Worthier Title, the Inter Vivos branch of Worthier Title is of vital significance today since the application of this doctrine often determines who receives the property involved. For example: O transfers property inter vivos to "A for life, and then to O’s heirs." Subsequent thereto, O devises all of his property to B, who is not O’s heir. If the doctrine is applied, B, rather than O’s heirs, receives the property. This is due to the fact that when the doctrine is applied to the inter vivos transfer, O retains a reversion which can be subsequently transferred or devised to anyone he desires; and O can thus exclude his heirs from receiving a share of the property although they were specifically named as remaindermen. It should be noted at the outset that although the doctrine originally applied only to realty, courts now uniformly apply it to personalty as well.

Application of the doctrine can also affect the rights of creditors. Since the grantor is deemed to have retained a reversion in this situation, the grantor’s creditors will be able to reach the reversion in satisfaction of their debts.

The doctrine may also affect the rights of beneficiaries to compel a termination of a trust. If all the beneficiaries of a trust and the settlor consent to the termination of the trust, it may be terminated. The problem is one of obtaining the consent of all of the parties. If there is a limitation in the trust in favor of the settlor’s heirs and the doctrine is applied, the consent of the heirs of the settlor is not necessary to effectuate a termination. The consent of the settlor, who is deemed to have retained a reversion, will suffice. On the other hand, if the doctrine is not applied, the heirs have an interest. It will be impossible to terminate the trust while the settlor is alive since the heirs are as yet unascertained (it is, of course, hornbook law that a living man has no heirs), and their

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29 Morris, The Inter-Vivos Branch of the Worthier Title Doctrine, 2 Okla. L. Rev. 155, 141 (1949).
consent obviously cannot be obtained. In some states, that problem has been solved by the enactment of a statute permitting the revocation of a trust if the settlor and all living beneficiaries of the trust consent.

Tax consequences may flow from an application of the doctrine. If the transferor is deemed to have retained a reversion, it may be includible in his gross estate for federal estate tax purposes. The doctrine may also affect one's income tax liability.

Unlike the Testamentary Worthier Title Doctrine, the Inter Vivos Worthier Title Doctrine is applicable only if there is an express limitation to "heirs" or "next of kin" and then only if these words have been used in their technical sense. It does not suffice that the person designated subsequently turns out to be the heir or next of kin. Although most cases have involved remainders, the doctrine has been applied where there was an executory limitation in favor of "heirs."

Most of the recent cases hold that the doctrine is a rule of construction. A majority of the states holding it to be a rule of construction seem also to hold that there is at least a rebuttable presumption in favor of a reversion. However, it has been contended that there is no presumption in favor of a reversion in New York. Where the rule is

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33 See Beach v. Busey, 156 F.2d 496 (6th Cir. 1946); see also Estate of Bertha Low, 2 T.C. 114 (1945).

34 Morsman v. Comm'r, 90 F.2d 18, cert. denied, 302 U.S. 701 (1937), noted in 16 Texas L. Rev. 270 (1938). See also Bartlett v. United States, 146 F. Supp. 719 (U.S. Ct. Cl. 1956); Dept. of Revenue v. Kentucky Trust Co., 313 S.W.2d 401 (Ky. 1958); In re Hawes Estate, 162 App. Div. 173, 147 N.Y.S. 329 (Sup. Ct. 1914). For basic problems that may arise, see Comment, 23 U. Chi. L. Rev. 672 (1956).

35 Boone v. Baird, 91 Miss. 420, 44 So. 929 (1907). The doctrine is not applicable if the word "heirs" is construed in a non-technical sense to denote children.

36 However, courts have occasionally construed "children" to mean "heirs." See Bottimore v. First & Merchants Nat'l Bank, 170 Va. 221, 196 S.E. 593 (1938).


39 See 3 R. Powell, Real Property §381 (1952); Restatement of Property §314(1).

40 See Powell, supra note 3, and 24 Ind. L.J. 292 (1949).
treated as a rule of construction, the court will weigh various factors to ascertain the transferor's intent.41

In the New York case of Richardson v. Richardson,42 the Court of Appeals stressed the following four factors as being indicative of an intent to create a remainder:

To summarize, therefore, we believe the settlor evidenced her intention to give a remainder to her next of kin because she (1) made a full and formal disposition of the principal of the trust property, (2) made no reservation of a power to grant or assign an interest in the property during her lifetime, (3) surrendered all control over the trust property except the power to make testamentary disposition thereof and the right to appoint a substitute trustee, and (4) made no provision for the return of any part of the principal to herself during her lifetime.43

Other factors have been stressed by the courts. A reversion was found where the instrument provided that the property was "to revert" to the "heirs."44 Some courts have held that a remainder was intended where the heirs were to be ascertained at a time other than the transferor's death45 or ascertained by the law of a particular jurisdiction.46

Unlike Shelley's Rule, the doctrine has been left relatively untouched by the legislatures of most states.47 Statutes abolishing Shelley's Rule have not been construed as abolishing the Doctrine of Worthier Title.48 Furthermore, even if a jurisdiction has a statute purporting to abolish the doctrine, it may not be given a retroactive effect.49 Thus, attorneys in Massachusetts will still have to be concerned with the doctrine when

42 298 N.Y. 135, 81 N.E.2d 54 (1948).
43 Id. at 144, 81 N.E.2d at 59.
44 Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897 (1938).
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dealing with local conveyances or devises made before the effective date of sections 33A and 33B of chapter 184.

§1.2. Joint tenants—husband and wife. In *Hoag v. Hoag*, the habendum of a deed provided that the grantees, husband and wife, were to take as "joint tenants in joint tenancy, and to the survivor of them and their and such survivors, heirs and assigns, to their own use and behoof forever." The court held that this language plainly indicated that there was not to be a tenancy in common and therefore, the statutory presumption of a tenancy in common was inapplicable. In addition, the court concluded:

[O]ne of the principal common law rules of construction upon this subject is that the same words of conveyance which would make other grantees joint tenants will make a husband and wife tenants by the entirety . . . . Such is presumed to be the intention.

The effect of the *Hoag* rule was that, unless the deed expressly negated the existence of a tenancy by the entirety, it was presumed to create such a tenancy.

Even though both estates have the incident of survivorship, there are a number of key differences between joint tenancy and tenancy by the entirety. For example, neither spouse can sever a tenancy by the entirety. Furthermore, where property is held by husband and wife as tenants by the entirety, the husband, during their joint lives, is entitled to exclusive possession of the realty.

The existence of the *Hoag* presumption thus complicated the lawyer's task of drafting and often led to results contrary to the intent of the parties. Confronting these problems, the Legislature has amended section 7 of chapter 184 of the General Laws so as to abrogate the presumption established in *Hoag*. Under this statute, a conveyance or devise of land to a person and his spouse, which expressly states that the grantees or devisees shall take jointly, or as joint tenants, or to them and the survivor of them, creates a joint tenancy and not a tenancy by the entirety.

The amending statute also changes the rules of construction which had been adopted in *Fulton v. Katsowney*. In that case, land was conveyed to A, being unmarried, and B and C, B's wife, as "joint tenants and not as tenants in common." Based upon the statutory presumption

§1.2. 1 213 Mass. 50, 99 N.E. 521 (1912).
2 Id. at 53, 99 N.E. at 522.
3 G.L. c. 184, §7.
5 See, e.g., Finn v. Finn, 348 Mass. 443, 446, 204 N.E.2d 293, 296 (1965).
favoring tenancies in common over joint tenancies, by the court concluded that A acquired a one-half interest in the property to be held as a tenancy in common with B and C, who, as between themselves, held their one-half interest as tenants by the entirety under the Hoag rule. The last sentence of the amending statute provides that in a conveyance or devise to three or more persons, words creating a joint tenancy shall be construed as applying to all of the grantees unless a contrary intent appears from the tenor of the instrument. If the statute had been applicable in the Fulton fact pattern, A, B, and C would have taken as joint tenants in the absence of a manifestation of contrary intent. Needless to say, since joint tenants must have a unity of interest, A, B, and C would each have taken a one-third interest in the property.

In order not to disrupt conveyances and devises made in light of prior law, the amending statute provides that it shall apply only to conveyances or devises made after its effective date.

§1.3. Landlord and tenant: Termination of tenancy at will. In the 1955 case of Stedfast v. Rebon Realty Co., the Supreme Judicial Court held that an existing tenancy at will was terminated by a conveyance of the leased premises to a corporation dominated by the landlord, and that the receipt of rent after the conveyance to the corporation resulted in the creation of a new tenancy at will between the tenant and the corporation. This new tenancy, effectively created even though the tenant had no notice of the conveyance to the corporation, was governed by a different tort standard than the old tenancy. The corporate landlord was obliged to use reasonable care to maintain the common passageways, within its control, in as good a condition as they were, or appeared to be, at the time of the creation of the new tenancy. Although the landlord's conveyance of his realty to a corporation dominated by himself may have been motivated by business and estate planning considerations and may not have been an attempt to reduce his tort obligations, we still cannot lose sight of the adverse effect that the Stedfast rule had on injured tenants.

The basic inequities of the Stedfast rule were demonstrated when the doctrine was applied in the later case of Auld v. Jordan. In Auld, the plaintiff tenant had been injured by a fall in a common passageway in 1957. The plaintiff originally became a tenant in the building in 1943, when the premises were held by the defendant, Jordan, as trustee under a will. Upon the death of the life beneficiary of the trust, Jordan became owner of the building in his own right, and thereafter conveyed

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10 G.L. c. 184, §7.
11 342 Mass. at 504-05, 174 N.E.2d at 367-68.

the premises to himself and his wife. On July 24, 1956, he and his wife conveyed the premises to W.E. Jordan & Sons, Inc., a Massachusetts corporation. The court, applying the Stedfast rule, held that the trial judge had correctly directed a verdict for Jordan since he was no longer the landlord in his individual capacity. Furthermore, the court indicated that suit against the corporation would also prove to be futile since under Stedfast the corporation had only a duty to use reasonable care to maintain the area in as good a condition as the premises were, or appeared to be, at the time of the first receipt of rent by the corporate landlord. This conclusion was reached in the face of the evidence that the plaintiff tenant was not notified of any of the transfers and the testimony of Jordan that he always "considered himself the landlord and intended to be the landlord" and that he "never made any representation to the plaintiff that he was not the landlord." In addition, all rent receipts were signed at all times in Jordan's name.

It would appear that, upon such facts, the decision for the landlord in the Jordan case was unwarranted. A holding for the tenant, who placed his reliance upon the continuance of the old tenancy and who relied upon representations made by Jordan, could have been justified upon principles akin and analogous to estoppel. Furthermore, in Cairns v. Giumentaro, the court intimated that the Stedfast rule would not be applied when a tenant holds over after the termination of a lease. Was it thus not anomalous to hold that one party may unilaterally alter the rules governing the relationship in the fact situation present in Auld? If the Stedfast rule was to retain any vitality, it should have been limited to the situation in which the tenant received notice of the transfer of the ownership of the building. Since the landlord would have retained legal counsel to organize the corporation and effect the transfer, the requirement of notice would not have been an onerous burden.

In this Survey year, the Legislature ameliorated the inequities of Stedfast. It amended section 13 of chapter 186 by adding the following sentence: "A tenancy at will of property occupied for dwelling purposes shall not be terminated by operation of law by the conveyance, transfer or leasing of the premises by the owner or landlord thereof." It should be noted that, under this statute, a conveyance would not effect a termination of the tenancy even though the landlord notified the tenant of the conveyance. Evidently, however, a transfer by the tenant of his interest will still effect a termination. The benefits of this amendment clearly run toward the tenant. By preventing a transfer of ownership

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from lessening the standard of care owed to the tenant, the amendment affords greater tort protection to the tenant and also interdicts the use of formal ownership transfer as an intentional means of limiting the liability of the de facto lessor.

The ability of the parties voluntarily to terminate a tenancy at will has also been modified by statutory amendment. Section 12 of chapter 186 has been amended so as to provide a minimum notice period of thirty days for termination of tenancies at will. The prior version of section 12 allowed notice as sufficient if it were equal to the amount of time between rental payments. For example, if rent were paid every two weeks, two weeks notice would satisfy the notice requirement. By expanding the minimum notice requirement to thirty days, the amendment gives the landlord a more reasonable period of time in which to budget or plan for repairs or to find new tenants. It also gives the tenant more time in which to locate a new dwelling. In addition, section 13 of chapter 186 has been amended to provide for a minimum period of thirty days from the receipt of written notice by the tenant of termination of a tenancy at will before an action to recover the premises may be brought or the tenant dispossessed. The prior version of section 13 permitted an action to recover possession once the interval between rental payments had elapsed from the time the tenant had received notice of the termination of his tenancy. As in section 12, the expanded thirty day minimum period in section 13 affords the tenant a greater opportunity to relocate satisfactorily.

§1.4. Landlord and tenant: Expanding civil remedies for the tenant. The common law position of the lessee, members of his family, and his visitors regarding recovery from the landlord for harm from defects in the leased premises was quite bleak. In the 19th Century, the economic interests of landowners were given paramount consideration. Lessors were generally immune from tort liability as a result of courts adopting as a basic assumption the theory that a lease was a sale of the premises for a term. Because the heartless rule of caveat emptor applied and left the lessee free to determine for himself the condition of the premises before making his uncoerced choice, such a "jurisprudence of conceptions" meant that the landlord was subject to no liability at all for leasing premises that were in a dangerously defective condition. An English judge once succinctly summed up the dismal plight of the tenant.


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at common law by stating that "fraud apart, there is no law against letting a tumbledown house."8

In the last ninety years or so, there has been a discernible shift from the rule of the lessor's immunity to an approach which makes the landlord primarily responsible for the safe condition of his premises and thus places the duty of making repairs on the party best able to make them. Basic transformations in social and economic conditions created an irresistible need first to broaden and then to replace most of the original common law immunity doctrine. Wider use of the short term lease developed due to the greater mobility and stir of the population. Changes in construction styles and patterns, increased urbanization, and the flow of workers from the country to the city necessitated larger financial outlays to make repairs. Resulting urbanization increased the ratio of the population living in multiple dwellings, where the same defective condition might endanger more than one family unit. The cumulative force of these factors led to a shifting of responsibility to the lessor by circumvention of the sales concept and increasing exceptions to and modifications of the common law.4

Liability has moved even beyond negligence theory in this area. The first step was taken when courts held that where furnished premises are let for immediate occupancy for a short term there is an implied warranty that the premises and furnishings are fit; the lessor is therefore liable in tort as well as contract if the premises are unfit at the date of the commencement of the lease.6 Massachusetts has held that this implied warranty exists in a lease of furnished premises for a period of up to nine months.6 The warranty theory has been justified by the presumption that "an important part of what the [tenant] pays for is the opportunity to enjoy . . . [a dwelling] without delay, and without the expense of preparing it for use."7

The case of Boston Housing Authority v. Hemingway,5 decided this Survey year, is a path-finding precedent in this corner of the law. The Supreme Judicial Court decided that in the rental of any premises for

4 For a cataloguing of such inroads on the lessor's immunity, including: (1) concealed dangerous conditions known to lessor; (2) conditions dangerous to those outside the premises; (3) premises leased for admission of public; (4) lessor's covenant to repair; (5) negligence in making repairs; (6) portions of premises retained in lessor's control; (7) statutes (frequently extended to multiple dwellings) requiring lessors to keep premises in good repair, see Prosser, supra note 1, and 2 F. Harper & F. James, Torts §27.15 (1956).
5 See 4A "PIADD" [Personal Injury, Action, Defenses, Damages], Landlord & Tenant, §1.10.
dwelling purposes there is an implied warranty of habitability and that the landlord’s breach of such warranty constituted a total or partial defense to the landlord’s claim for rent. The court specifically refrained from determining whether this implied warranty would sound in tort as well so as to create strict liability for personal injuries sustained.\(^9\) Hemingway and its ramifications are discussed in detail infra,\(^10\) and there is consequently no need for elaborating on that case at this point. This section is more concerned with the fact that, while the court was extensively broadening tenant protection, the Legislature was also “racing” to expand the tenant’s civil remedies.

Section 14 of chapter 186 was amended to afford a tenant a specific civil remedy, for actual and consequential damages (which, it is important to note, could conceivably include personal injuries) or three months rent, whichever is greater, if the landlord commits an act in violation of the section.\(^11\) The tenant may also recover the costs of the action, including a reasonable attorney’s fee. Such liability exists in four categories of cases:

1. The landlord is required by law or by the express or implied terms of any contract, lease or tenancy at will to furnish certain utilities and certain services and wilfully or intentionally fails to furnish such utilities or services;
2. The landlord, directly or indirectly, interferes with the furnishing by another of such utilities or services, or transfers the responsibility for payment for any utility services to the occupant, without his knowledge or consent;
3. The landlord, directly or indirectly, interferes with the quiet enjoyment of the premises by the tenant; and
4. The landlord attempts to regain possession of such premises by force without the benefit of judicial process.\(^12\)

Because of its broad language, the third category, dealing with quiet enjoyment, is likely to be invoked frequently. Although the term “quiet enjoyment” probably would require an actual or constructive eviction, the landlord may well be held strictly liable, even in tort, if an eviction has taken place. This third category does not require a showing of “wilfulness” or “intent” on the part of the landlord. It is triggered into action when the landlord “directly or indirectly” interferes with quiet enjoyment. At least in the context of an actual or constructive eviction, the statute may have extended the implied warranty of habitability adopted in the Hemingway case to personal injury action as well.

\(^9\) Id. at 558, n.13, 293 N.E.2d at 848, n.13.
\(^10\) See §1.9 infra.
\(^12\) Id.
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The fourth category treats a situation which has been a source of long standing confusion in the courts. In 1381, a statute was enacted in England which made a forcible entry to recover land a criminal offense.\textsuperscript{13} In \textit{Newton v. Harland},\textsuperscript{14} it was held that an action for assault and battery would lie if force was used upon the occupant. This decision was overruled in England in 1920,\textsuperscript{15} but in the interim most American courts adopted the rule in \textit{Newton v. Harland}.\textsuperscript{16} Massachusetts, however, adhered to the minority view that the landlord had a privilege to use reasonable force to expel the occupant.\textsuperscript{17} Section 14 of chapter 186 now brings Massachusetts into the mainstream of the developing law in this area.

§1.5. Landlord and tenant: Rent withholding. Section 8A of chapter 239 of the General Laws authorizes a tenant to withhold payment of rent if the premises are in violation of the standards of fitness for human habitation established under the state sanitary code or any ordinance, by-law, rule or regulation and if such violation may endanger or materially impair the health or safety of persons occupying the premises. As a condition precedent to withholding rent, the tenant was required to give notice in writing to the person to whom he customarily paid his rent that he would, because of such violation, withhold rent until the violations were remedied and notify him that a report of an inspection of such premises has been issued by the Board of Health which stated that such violation existed.\textsuperscript{1} This year, the statute was amended so that this notice requirement is satisfied if the person to whom the tenant customarily paid his rent or the owner of the premises or his agent knew of the conditions in violation of the standards of fitness before the tenant was in arrears in his rent and the owner or his agents had not taken reasonable steps to remedy such conditions.\textsuperscript{2} It is unclear from the amendment as to whether the notice requirement is satisfied if there is merely knowledge of the existence of the condition or whether he must also know that such conditions are in violation of the standards of fitness.

\textsuperscript{13} Statute of Forcible Entry, 5 Rich. II, c. 2.
\textsuperscript{14} 133 Eng. Rep. 490 (1840).
\textsuperscript{15} Hemmings v. Stokes Pages Golf Club, 1 K.B. 720 (1920).
\textsuperscript{17} See Low v. Elwell, 121 Mass. 309 (1876). See also Sampson v. Henry, 30 Mass. (13 Pick.) 36 (1832).

The Board of Health itself may notify the lessor of the violations, and such notice would obviate the need for notice from the tenant. However, since the Board does not have a duty to give such notice for Rent Withholding Act purposes, the tenant would be well-advised to give notice himself. The ability of the tenant to give notice has been greatly facilitated by G.L. c. 239, §8A, which requires inspectors to furnish a complaining tenant with a detailed inspection report and provides the tenant with information essential for notice compliance.

\textsuperscript{2} Acts of 1973, c. 471.
§1.6. Mortgages. In Carpenter v. Suffolk Franklin Savings Bank,¹ mortgagors brought a class action in which they alleged that their mortgages required them to make monthly payments to the mortgagee bank of one-twelfth of the annual real estate taxes and during the interval between payments by the plaintiffs and the time when the taxes are due the municipality, the bank had invested these payments for profit. The mortgagors asserted that the tax payments were held by the bank "as escrowee," that the investment profits on the tax payments belonged to them as mortgagors, but that the bank had refused to pay or account for profits so realized. Upon these allegations, the plaintiffs prayed for an accounting of the earnings realized and a declaration that any profits realized belonged to the mortgagors. Alternatively, the plaintiffs prayed that the bank be ordered to pay the tax moneys to the municipality immediately upon receipt. The superior court sustained a demurrer to the bill. On appeal, the Supreme Judicial Court reversed and remanded the case for further proceedings consistent with its opinion.

Chief Justice Tauro concluded that the bill properly put in issue the creation of a trust:

There is nothing in the plaintiffs' allegations that necessarily precludes a fiduciary relationship and there are sufficient allegations that could lead to a finding that the tax installments were impressed with a trust . . . . If the defendant, as a fiduciary, invested the tax payments and accumulated a profit thereon . . . then an accounting, as prayed for by the plaintiffs, would be an appropriate form of relief to determine what, if anything, is due the plaintiffs.²

In the course of his opinion, Chief Justice Tauro noted that certain legislative bills were then pending. Subsequently, and during this Survey year, the Legislature did add a section 61 to chapter 183 of the General Laws, but it is applicable only to advance deposits made on or after July 1, 1975.³ The new statute is applicable only to first mortgages on dwelling houses of four or fewer separate households occupied or to be occupied, in whole or in part, by the mortgagor. The mortgagee is required to pay interest on the advance deposit at least once a year. However, the statute is vague as to the rate and manner of payment. It delegates the rate and manner of payment to the discretion of the mortgagee. Furthermore, if the mortgagee shows a net loss from the investment of the deposits, he can request from the Commissioner of Banks an exemption from the requirement that interest be paid to mortgagors.

¹ 1973 Mass. Adv. Sh. 49, 291 N.E.2d 609. This case is also commented upon in the Commercial Law chapter, §10.1 infra.
² Id. at 56-57, 291 N.E.2d at 615.
Despite the fact that the mortgagee may make a substantial net profit on the investment, the statute could be construed as delegating absolute discretion to the mortgagee as to the rate of interest. Thus, mortgagees could simply adopt a policy of paying only nominal interest. In addition, the statute is silent as to the charges and expenditures which may be taken into account in computing net profit or net loss.

A question also remains as to whether the statute preempts the field and provides the sole remedy for mortgagors. On the one hand, it can be plausibly contended that the statute only deals with the obligation of the bank to pay interest on the tax deposit, and that it does not treat the common law obligations of a mortgagee, when acting in a fiduciary capacity, to account for profit realized from the investment of such funds. Chief Justice Tauro's opinion in Carpenter carefully pointed out that the plaintiffs in that case were seeking an accounting of profits and "not the payment of a fixed rate of interest."\(^4\) Hence, if the mortgagors could prove a fiduciary relationship, they could still claim a common law right to recover profits. This interpretation would provide a common law alternative to the statutory scheme, and mortgagors would not have to rely solely on the statutorily conferred discretion of the mortgagees as to the rate of interest to be paid. On the other hand, it could be contended that the statute provides the only recourse for mortgagors. This position arguably finds support in Chief Justice Tauro's opinion in which he pointed out that the then existing statutes were silent on the issue.\(^5\)

Section 60 of chapter 183, which was also added this year, deals with a first mortgage on dwellings of three or fewer separate households occupied or to be occupied, in whole or in part, by the mortgagor and which will not amortize the outstanding principal amount in full by the maturity of such note.\(^6\) In such circumstances, no increased rate of interest can be imposed as a condition of renewing the note unless such increased rate of interest is not greater than one-half of one percent more than the rate charged on the note immediately before maturity and the term of the renewal note is not less than five years.

§1.7. Deeds. In 1971, section 58 of chapter 183 was added to the General Laws.\(^1\) It provided that a deed passing title to real estate abutting a way, watercourse, wall, fence, or other monument shall be construed to include any interest of the grantor in such way, watercourse or monument. The statute contained a number of exceptions, including the negation of such presumed intent by the manifestation of contrary intent by an express exception or reservation in the deed. In this Survey year, this statute was amended to apply only to interests in fee owned

\(^5\) Id. at 54-54, 291 N.E.2d at 611.

§1.7. 1 Acts of 1971, c. 684.
by the grantor. Thus, it would not be applicable to other interests owned by the grantor, for a lesser duration, such as a life estate or term of years. It is uncertain whether the amendment applies to interests such as easements, if the duration of the easement is unlimited.

Interestingly enough, the second section of the statute provides that it shall be given a retroactive effect, except as to land registered under chapter 185 prior to the statute's operative date and except as to any person who has changed his position as a result of a judicial decision.

§1.8. Miscellaneous. There are a number of other statutes which should be briefly noted. Chapter 151B, section 4 has been amended to prohibit discrimination because of marital status in the sale, renting and leasing of residential real property. Chapter 112, Section 87AAA has been modified so as to prohibit real estate brokers from accepting net listings. A net listing is an agreement between a broker and a prospective seller which authorizes the broker to keep as commission any amount of money received from the sale of real estate in excess of a stated price. Chapter 183, section 4 has been rewritten, and assignment of rents and profits is now subject to the recording requirements.

Chapter 184, section 34 has been added to the General Laws. It protects bona fide purchasers from trustees notwithstanding inconsistent provisions of the trust or removal or resignation of the trustees unless such inconsistencies or changes in the office of trustees are properly recorded and noted in the chain of title. The statute pertains to inter vivos trusts and is inapplicable to testamentary trusts. Similarly, chapter 40, section 3A was adopted to protect bona fide purchasers from municipalities notwithstanding inconsistent provisions of general or special law, the city or town charter, by-laws, resolutions or votes.


But the law as to lease is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke.—Justice Holmes.

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§1.9

PROPERTY AND CONVEYANCING

[The body of private property law . . . , more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.—Justice Frankfurter.

These critical observations, uttered forty-one years apart, are nearly as apt today as when they were first made. The progress of modern property law would be hard pressed to match the pace of the proverbial snail. Recently, however, its pace has quickened. For example, beginning to yield to the exigencies of modern times is the anachronistic common law concept of the lease of residential housing as a strictly property transaction. A few courageous jurisdictions have recognized that a lease is essentially a contract between the landlord and the tenant whereby the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. Spurred on by such precedent from these other jurisdictions and the rule of reason, the Supreme Judicial Court of Massachusetts announced in *Boston Housing Authority v. Hemingway* the existence of an implied warranty of habitability in residential leases and tenancies at will.

The *Hemingway* decision arose out of four summary process actions for possession and overdue rent brought and tried in the Municipal Court of the Roxbury District. The trial judge found in favor of the landlord, *Boston Housing Authority*, and the tenants then appealed to the superior court where the cases were retried.

At the retrial the tenants answered the landlord’s claim for rent by contending that because their apartments were in uninhabitable condition, they were entitled to withhold rent under G.L. c. 239, §8A, the rent withholding statute. The evidence showed that the tenants had made

7 Id. at 1, 28. See G.L. c. 239, §5, as amended, Acts of 1969, c. 366.
8 See 1973 Mass. Adv. Sh. at 339, 293 N.E.2d at 835. G.L. c. 239, §8A, at the time of the rent withholding in question in Hemingway, stated in pertinent part:

There shall be no recovery under this chapter, pursuant to a notice to quit for nonpayment of rent . . . of any tenement rented or leased for dwelling purposes if such premises are in violation of the standards of fitness for human habitation established under the state sanitary code . . . and if such violation may endanger
repeated demands to the landlord that repairs be made to remedy the defects which had made their apartments uninhabitable; that the landlord had received from the Boston Housing Inspection Department a report "which certified that serious housing code violations existed which 'may endanger or materially impair the health or safety, and well-being of any tenant therein or persons occupying said property;"" and that on March 1, 1969, after the Housing Inspection Department had issued its report, the tenants began withholding their rent.

At the close of the evidence, the tenants presented requests for findings of fact and rulings of law. Among these requests were the following:

8. That the obligations of the Housing Authority to supply and maintain premises in compliance with the Housing Regulations and the obligations of the tenant to pay rent under a rental agreement are dependent.

15. That any money owed by the Defendants to the Plaintiff ought to be determined by this Court according to the degree of inhabitability of each apartment.

21. That even if the Defendants had not complied with Chapter 239(8)(A) of the Withholding Statute the defense of uninhabitability would still exist if the premises were as a matter of fact found to be in violation of the State Sanitary Code.

However, the superior court judge found that the tenants had failed to comply with the statutory requirements of furnishing the landlord written notice of their intent to withhold rent on account of housing code violations. They were thus foreclosed from asserting the rent with-

or materially impair the health or safety of persons occupying the premises; provided, however (1) that the person occupying the premises, while not in arrears in his rent, gave notice in writing to the person to whom he customarily paid his rent (a) that he would, because of such violations, withhold all rent thereafter becoming due until the conditions constituting such violations were remedied and (b) that a report of an inspection of such premises has been issued by the board of health . . . which report states that such violation exists and that it may endanger or materially impair the health or safety of persons occupying said premises . . . ; (3) that the premises are not situated in a hotel or motel; nor in a lodging house or rooming house wherein the person occupying the dwelling unit has maintained said occupancy for less than three consecutive months; and (4) that the conditions constituting the violation can be remedied without the premises being vacated . . . .


9 1973 Mass. Adv. Sh. at 340, 293 N.E.2d at 835. The tenants complained that "their apartments had, among other defects, leaking ceilings, wet walls, improper heating and broken doors and windows, and were infested with rodents and vermin." Id. at 339, 293 N.E.2d at 835.

10 Id. at 340, 293 N.E.2d at 835.

11 Id.

12 Id. at 341, 293 N.E.2d at 836.

13 G.L. c. 239, §8A, at the time of the rent withholding in question in Hemingway, required, for a tenant to withhold rent because of alleged code violations,
holding statute as an affirmative defense to the Boston Housing Authority's claim. The superior court then denied the tenants' requested rulings. Holding that it need not reach the first two requests for rulings because of the tenants' failure to comply with the notice requirement of G.L. c. 239, §8A, the superior court further denied the third request by applying the common law as it has existed in Massachusetts for many years: "There is no implied agreement, apart from fraud, that the demised premises are or will continue to be fit for occupancy or safe and in good repair." On this basis the superior court dismissed the tenants' defenses and ruled that the landlord was entitled not only to possession, but also to the full amount of rent owed, up to and including the time of retrial in superior court. An appeal was then taken by some of the tenants to the Supreme Judicial Court. Reversing the decision of the trial court, the Supreme Judicial Court announced that the doctrine of caveat emptor and the independent covenants rule had "outlived their usefulness . . . . Modern tenants that the person occupying the premises, while not in arrears in his rent, gave notice in writing to the person to whom he customarily paid his rent (a) that he would, because of such violations, withhold all rent thereafter becoming due until the conditions constituting such violations were remedied . . . . Acts of 1967, c. 420, §1 (emphasis added). On May 27, 1969, the Legislature amended G.L. c. 239, §8A, effective ninety days thereafter, to allow written notification of code violations to the landlord from the appropriate local agency (such as the Boston Housing Inspection Department) to satisfy the tenant's obligation to notify the landlord. Acts of 1969, c. 355. However, since the amendment was enacted after the tenants had begun to withhold their rent, it did not apply to them. G.L. c. 239, §8A was further amended on June 29, 1973 to eliminate the need for written notice under certain limited circumstances: In a proceeding under this chapter, proof by the person occupying the premises that the person to whom he customarily paid his rent or that the owner or his agents, servants, or employees knew of conditions in the premises in violation of the standards of fitness for human habitation established under the state sanitary code or any ordinance [sic], by-law, rule or regulation which endanger or materially impair the health or safety of persons occupying the premises shall satisfy and be the equivalent of the notice requirement of clause (1) of the first paragraph of this section [see note 7 supra], provided that the conditions and the knowledge of them existed before the person occupying the premises was in arrears in his rent and that the owner or his agents, servants, or employees had not taken reasonable steps to remedy such conditions. Acts of 1973, c. 471 (emphasis added).
rightfully expect that the premises they rent . . . will be suitable for occupation." The court stated that an implied warranty of habitability, which had previously applied only to a short term lease of furnished premises, would now apply to "a rental of any premises for dwelling purposes, under a written or oral lease, for a specified time or at will . . . ." The court further stated that this warranty could not be waived by any provision in the lease or rental agreement. The court also abolished the old common-law rule that the tenant's obligation to pay rent is independent of any obligation of the landlord and held that the tenant's obligation to pay rent is dependent upon the landlord's compliance with the implied warranty that the premises are fit for human occupation.

Having so redefined the rights and liabilities of landlords and tenants, the Supreme Judicial Court applied the new common law to the appellants and sustained the trial court's finding. Because of their failure to comply with its notice requirement, these two tenants could not raise G.L. c. 239, §8A as a defense to the Boston Housing Authority's claim for possession. However, the court remanded the cases to the superior court for a redetermination of the amount of rent owed, if any, in light of its ruling that the landlord's breach of his implied warranty of habitability provided the tenants with a "total or partial defense" to the landlord's claim for overdue rent.

Due to its substantial reordering of landlord-tenant common-law obligations, *Hemingway* represents a historical bridge between now abandoned property rules and newly embraced contractual concepts. The court's use of *Hemingway* as a vehicle for discussing and then building upon major landlord-tenant developments within and without the Commonwealth underscores its legal and historical importance. After discussing the historical development of the now discarded property concepts governing the landlord-tenant relationship, this comment will examine the principal source of the court's decision: public policy as evidenced by recent legislative enactments and foreign precedent. It will then outline current tenant remedies and consider some of the practical as well as theoretical problems raised by the *Hemingway* result. In particular it will

repairs, are independent of the tenant's obligations to pay rent. See text at note 44 infra.

23 Id.
24 Id. at 350, 293 N.E.2d at 841.
25 Id. at 352, 293 N.E.2d at 843.
26 Id. at 356, 293 N.E.2d at 845. Although the court uses the term "total or partial defense," in this instance the defense of breach of the implied warranty of habitability operates as a total or partial set-off, rather than as an affirmative defense, to the landlord's claim for overdue rent. See text at notes 111-13 infra.
examine the difficulty of formulating standards of habitability and the implications of the implied warranty obligation upon landlord tort liability. Finally, it will offer a modest evaluation of the role of an implied warranty of habitability in the war against substandard housing.

I. THE HISTORICAL DEVELOPMENT OF THE LANDLORD-TENANT RELATIONSHIP

The modern lease between landlord and tenant originated during the time of the Norman Conquest.\textsuperscript{27} Leases for a term of years, as they were known, were probably used to circumvent the laws against usury. A landowner in need of funds would lease his land for a lump sum, and the lessee of the parcel would enjoy the prospect of a sizable profit from the sale of crops cultivated on the land—more profit than he would have otherwise realized on a regular loan under existing law.\textsuperscript{28} This arrangement was essentially contractual in nature; the lessee was "one who had no right in the land, but merely the benefit of a contract."\textsuperscript{29}

Despite these economic benefits, this arrangement was not wholly satisfactory from the lessee's point of view. Under a lease for a term of years a lessee had little protection in his enjoyment of the land. Since a term of years was not considered a free tenement,\textsuperscript{30} the lessee did not have available to himself the assize of novel disseisin\textsuperscript{31} to protect his possession. Thus, if a lessor decided to sell his land, the lessee had no possessory rights as against the purchaser and could thus be forced off the land. Under a free tenement lease, on the other hand, the petty assizes\textsuperscript{32} were created to give the lessee full and speedy protection against all wrongdoers. The reason is readily understood. The free tenement was the patrimony of an established family and its primary means of support, and the family was the basic unit of social and political organization. Protecting a family's possession of its free tenement was important for the maintenance of that family's economic viability. The economic viability of these units of social and political organization, in turn, contributed to the long-term stability of the society at large. Estates for a term of years made no such long-range contributions; they were specula-

\textsuperscript{27} H. Tiffany, Law of Real Property §73 (3d ed. 1989).
\textsuperscript{28} 2 F. Pollock & F. Maitland, History of English Law 117-24 (2d ed. 1923).
\textsuperscript{29} 1 F. Pollock & F. Maitland, supra note 28, at 36.
\textsuperscript{30} See 2 F. Pollock & F. Maitland, supra note 28, at 115. Examples of free tenements include estates for life in dower, by curtesy, in tail or in fee. See T. Plucknett, A Concise History of the Common Law 512 (2d ed. 1936).
\textsuperscript{31} The assize of novel disseisin was a form of action in the royal courts designed to restore the possession to a tenant who had been wrongfully dispossessed. See generally T. Plucknett, supra note 30, at 322.
\textsuperscript{32} "Petty assizes" was the name given to the various actions at common law designed for the protection of seisin. See generally id. at 320-21.
tive and short-term investments which turned a profit for the lessee, often at the expense of a family which had fallen on hard times. It is no surprise, then, that the common law would provide such enterprises no succor when they themselves were the subjects of some misfortune.38

By the end of the fourteenth century, the husbandry lease, a type of estate for a term of years, had become popular.84 The rapid spread of the husbandry lease can be tied to several factors. By 1340, the large-scale farming so characteristic of manorial estates had lost much of its attractiveness as prices for agrarian produce had fallen off and wages for agricultural workers had risen. There was an increasing tendency among landowners to shelve responsibility for their manors by leasing them in parcels. This development was accelerated in the late fourteenth century by the spread of the Black Death. High mortality rates resulting from plagues drove farm prices down further, intensified the labor shortage, and thereby drove up wages even further.85

Under these fortuitous circumstances the termor acquired a heretofore unknown respectability. The typical termor was a freeman who did not have sufficient capital to purchase land of his own; however, he was enterprising enough to work the land of others in return for a share of the profits.86 By facilitating the efficient use of arable land, the husbander-lessee played a vital economic role in his society and was thus able to solicit greater legal protection for his interests than his historical predecessor, the tenant for a term of years. Thus there developed within the lease concept a bundle of possessory rights in the termor through the lease, which Blackstone described as a "conveyance of any lands or tenements."87 As these possessory rights became firmly embedded in the law of real property, leases were gradually transformed from contracts into conveyances of land for the purpose of protecting the tenant's interests.

Nevertheless, the law of leases remained a hybrid creature and retained its contractual origins. Since an estate for a term of years was considered less than a freehold interest,88 and therefore a chattel personal rather than

33 See id. at 510-12. Plucknett's discussion of the economic role of the estate for a term of years relies heavily on 1 F. Jouon des Longrais, La Conception Anglaise de la Saisine du XII au XIVE Siecle 141-48 (1925). Pollock and Maitland offer a different explanation of why an estate for a term of years was not considered a free tenement, based on the influence which the Roman concept of an "usufruct" had on early English judges. See 2 F. Pollock & F. Maitland, supra note 28, at 114-15. But this theory is indirectly discredited by both Plucknett and des Longrais because of its reliance on Brackson and the latter's use of "Roman words in a non-Roman sense." Plucknett, Book Review, 40 Harv. L. Rev. 921, 921 (1927).

34 T. Plucknett, supra note 30, at 512.
37 2 W. Blackstone, Commentaries 517 (W. Lewis ed. 1902).
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a chattel real, the vendor-purchaser rule of *caveat emptor* applied to its making: the landlord made no implied covenant that the premises were or would remain fit for their intended use throughout the term.

The doctrine of *caveat emptor* imposed a minimal burden upon the agrarian leaseholder. Arable land was the principal object of a lease, and its productivity depended in large measure on the efforts of the tenant. Dwellings were simple and inexpensive to repair, and the tenant-farmer, by necessity a jack-of-all-trades, was usually capable of making repairs himself. However, when the industrial revolution developed in the mid-nineteenth century, urban shelter became the primary subject matter of leaseholds. Unlike the simple farmhouse, multi-unit tenements were more complicated to repair. And unlike the self-sufficient husbander, the urban tenant was less capable of repairing and maintaining his demised premises. While *caveat emptor* made sense in the agrarian setting, it operated harshly in the urban context and created many injustices.

For example, in the early Massachusetts case of *Kramer v. Cook*, the lessor brought an action in contract to recover rent of a building occupied under a written lease. Evidence was offered by the tenant to prove that the premises had become unsafe and uninhabitable by reason of the undermining and settling of a partition wall due to the activity of an adjacent landowner. Even though the adjacent landowner notified the lessor of his intent to build and the tenant offered to show that it was customary for lessors to shore up partitions under such circumstances, the court held that such evidence was rightfully excluded. The landlord's failure to shore up the partition wall was not actionable. Accordingly, the court held that because the landlord was not bound to keep the premises in repair, there could be no abatement or suspension of the rent because of such injury to the premises.

In another early case, *Fowler v. Bott*, the lessor had brought an action to recover rent. The defendants answered that they were excused

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40 3A G. Thompson, supra note 38, §1230. This doctrine was embraced by the courts of this Commonwealth:

It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit . . . . The rule of *caveat emptor* applies and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe, and adapted to the purposes for which they are hired.


41 73 Mass. (7 Gray) 550 (1856).
42 Id. at 553. See also Jaques v. Gould, 58 Mass. (4 Cush.) 384 (1849); Phillips v. Stevens, 16 Mass. 238 (1819); Fowler v. Bott, 6 Mass. 63 (1809).
43 6 Mass. 63 (1809).
from paying rent because the premises leased to them had been consumed by fire and the lessor had failed to rebuild. The court's unsympathetic response to the tenant's argument of hardship could not have been put more matter-of-factly:

[A] lease for years is a sale of the demised premises for the term; and, unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents, or any other deterioration. The rent is in effect the price, or purchase money, to be paid for the ownership of the premises during the term; and their destruction or any depreciation of their value, without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser.44

This view of the lease as a sale of the demised premises for the term is the key to understanding the notion that even when a landlord covenants to repair, his obligation is independent of a tenant's covenant to pay rent. For example, in Leavitt v. Fletcher,45 a landlord had agreed to make all necessary repairs on the outside of a carriage house. An accumulation of snow on the roof of the building caused it to collapse. Despite repeated requests by the tenant to rebuild the outside of the building, no repairs were made. The tenant paid rent under protest for five months, stopped and was then ejected. Commenting on the correctness of that result, the court remarked: "The lessee's covenant to pay rent was not affected by the injury to the premises . . . and is independent of the lessor's covenant to make outside repairs."46 Thus there occurred this anomalous result: the tenant had a cognizable legal right to hold his landlord accountable for his failure to repair by maintaining an action in contract for damages;47 however, he was not allowed to exercise that right through a more logical and practical means such as the withholding of rent, and the landlord's failure to make repairs would not have been an affirmative defense in a summary process action.48

Responding to the harsh injustices inherent in the interplay of caveat emptor and the independent covenants rule, the common law developed some narrow exceptions designed to ameliorate the tenant's predicament. One of the first exceptions was the doctrine of constructive eviction.49 Courts read into all leases an implied covenant by the lessor that the

44 Id. at 67.
46 Id. at 121. The ejection of the tenant was not at issue in the case.
47 Id. at 122.
48 Id. at 121.
49 See 2 R. Powell, supra note 39, ¶221(1), wherein Professor Powell concludes that the doctrine of constructive eviction "has become a respectable property garb for the contract rule of 'mutuality.'" See also Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826), the first American case to recognize the remedy of constructive eviction for the landlord's breach of the implied covenant for quiet enjoyment.
lessee should quietly enjoy the demised premises, unless such an implication were inconsistent with the terms of the lease itself or prevented by some statute. If a tenant could show that his landlord had substantially interfered with his beneficial enjoyment of the premises, he could claim that he had been “constructively” evicted and avoid further rental payments by abandoning the premises. However this remedy was a hazardous one. It required the tenant to determine at his peril that the condition of his dwelling amounted to a constructive eviction. It also required him to vacate the premises within a reasonable time. Even if a tenant desired to vacate the premises, he faced a shortage of adequate housing at a reasonable cost, especially if he lacked references from his landlord. If the tenant did elect to vacate, he still remained subject to the risk that a court might find him liable for rent for the remainder of the term. Given the hazards involved in establishing a constructive eviction defense to a landlord’s action to recover rent, the tenant often chose to remain in substandard housing rather than seek legal remedy. It thus appears that the doctrine of constructive eviction, while theoretically attractive as an ameliorative device, has little practical value to the tenant living in substandard housing.

Massachusetts did away with some of the uncertainty inherent in this traditional constructive eviction doctrine when the Supreme Judicial Court decided the case of Charles E. Burt, Inc. v. Seven Grand Corp. The court stretched the limits of judicial fiction by fashioning an “equitable constructive eviction” doctrine. The doctrine allowed a tenant to file a bill in equity describing the conditions which allegedly constituted a constructive eviction. If a court found that the conditions described amounted to a constructive eviction, it issued a declaratory judgment to that effect. The doctrine thus required no showing that the tenant had abandoned the premises. In order to assess the damages owed to the tenant by the landlord in such an instance, the court employed a theory of rent abatement, holding that “[t]he appropriate measure of damage . . . is the

51 See 2 R. Powell, supra note 39, ¶ 225(3).
54 See Palumbo v. Olympia Theatres, 276 Mass. 84, 176 N.E. 815 (1931) (tenant remaining in possession eleven months after acts complained of as constructive eviction did not yield premises within reasonable time).
56 Id. at 131, 163 N.E.2d at 8.
difference between the value of what [the tenant] should have received and the fair value of what in fact is received." While the Burt holding did eliminate the old constructive eviction remedy's requirement of abandonment, it was better suited to commercial leases than leases of residential housing. The residential tenant primarily needed a means of compelling the landlord to repair the premises while preventing his own eviction in the process. As pointed out earlier, when decent shelter at a reasonable price is in short supply, the right of a tenant to abandon substandard housing with the blessings of the common law has little relevance to his actual plight and affords no meaningful remedy. It also follows that the tenant's right to remain in substandard housing fails to ameliorate the health and safety hazards of substandard living.

A second common law exception to the rule of independent covenants was that leases of furnished dwellings for a short term contained an implied covenant that the premises were fit for their intended use. Courts reasoned that the fitness of the dwelling for immediate use was far more important than any interest in the land conveyed in the lease. For example, in Ingalls v. Hobb the court stated that "[o]ne who lets for a short term a house provided with all furnishings ... may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation." However, the short term lease of furnished dwellings exception was applied primarily to seasonal rentals of vacation cottages and provided no relief to the majority of tenants afflicted by substandard housing. Like the doctrine of constructive eviction, this ameliorative aberration in the common law of landlord-tenant proved to be of little value to the class of tenants most in need of relief from its harsh general rules.

It is clear that the common law, so mired in the legal concepts of a bygone age, could not induce decent housing. The Massachusetts Legislature bridged part of the gap created by a common law system unresponsive to the realities of the modern tenancy by enacting housing codes

87 Id. at 130, 163 N.E.2d at 8. Compare this result with the effect of G.L. c. 239, §8A, where the landlord gets all the rent withheld after code violations are removed without the tenant being compensated for the loss of what he "should have received."

88 The doctrine of constructive eviction in Massachusetts finally met its death in a footnote in the Hemingway case when the court stated: "[W]e have eliminated the defence of constructive eviction in favor of a warranty of habitability defence ..." 1975 Mass. Adv. Sh. at 555-54 n.16, 295 N.E.2d at 844 n.16.

89 Burt, the tenant-plaintiff, had leased space on the fifth floor of a business building for a period of five years. 540 Mass. at 125-26, 163 N.E.2d at 5.

60 Ingalls involved a cottage rented for the summer that was infested with insects. Other cases which were brought under the furnished dwellings exception include Legere v. Asselta, 542 Mass. 178, 172 N.E.2d 685 (1961) (furnished bungalow); Davenport v. Squibb, 520 Mass. 629, 70 N.E.2d 795 (1947) (furnished seashore dwelling); Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942) (furnished beach cottage).
aimed at the health and safety problems festering in substandard housing. However, code violations only gave the state or city the right to collect fines and failed to alter the nature of the landlord’s duty to his tenants. While these codes first provided a basis for public redress alone, they later became a source of public policy from which the common law could fashion obligations for landlords and remedies for tenants. It is thus important to trace the development of Massachusetts statutory housing law in order to understand the nature of the rights and duties created by Hemingway’s implied warranty of habitability.

II. THE LEGISLATIVE VIEW OF STANDARDS OF FITNESS FOR DWELLING PLACES PRIOR TO HEMINGWAY

Finding that there exists at common law an implied warranty of habitability in all residential leases, Hemingway relied in part on the “Legislature’s view that rent is paid for habitable premises.” The court implies that this view is of relatively recent vintage. In fact, the Massachusetts Legislature first expressed its concern over the question of housing standards more than a century ago: in 1850 it provided means for removing occupants from tenements which were “unfit as dwelling places” and a “cause of nuisance or sickness.”

This early enactment was eventually codified with a few minor changes into G.L. c. 111, §128. In 1943 the Legislature amended section 128 and set out five specific standards which all dwelling places should meet; failure to conform with two or more of these standards warranted a finding of “unfit for human habitation.” Four years later the Legislature enlarged upon these standards by ordering the Department of Public Health to

63 See text at notes 67-88 infra.
64 See text at notes 86-90 infra.
66 The gradual judicial erosion of the independent covenants rule has been accelerated by the Massachusetts Legislature’s initial reforms in the landlord-tenant area. In 1960, the Massachusetts Department of Public Health, pursuant [to authority granted it by the Legislature], adopted . . . minimum standards of fitness for human habitation for all housing in the Commonwealth. Id. at 345, 293 N.E.2d at 838-39.
67 Acts of 1850, c. 108. The act also provided for fines ranging from ten to fifty dollars for failure to obey such orders of the board of health.
68 Acts of 1943, c. 468, added to G.L. c. 111, §128:
(1) that the building and the premises appurtenant thereto shall be kept reasonably clean and free from rubbish; (2) that the floors, ceilings, walls, stairs and windows shall be kept in reasonably good repair and serviceable; (3) that the cellar, basement, floors, walls and ceilings shall be reasonably free from dampness; (4) that the water closets and drains for waste therefrom shall be maintained in good repair; (5) that the heat generating equipment shall be reasonably adequate and be maintained in a reasonably safe and serviceable condition.
establish “minimum standards of fitness for human habitation” to be enforced by the local boards of health. However, these standards were effective only in those cities or towns which adopted them.69

In 1954 G.L. c. 111, §128 was repealed70 and replaced by G.L. c. 111, §§128B-E.71 The preamble to the act declared that its purpose was “to make effective without delay the clarification of the existing statute establishing minimum standards and rules and regulations on housing . . . .”72 Section 128C again directed the Department of Public Health to establish minimum standards of fitness for human habitation, to be effective only in those towns and cities which accepted them. However, if a locality failed to adopt these standards, section 128B provided that the dwellings in such localities had to comply with all of the five standards first enunciated in Acts of 1943, c. 468.73 Sections 128D and E provided means for enforcing these provisions.74

The Legislature laid the foundation for uniform, statewide standards of fitness for human habitation in 1957 when it authorized the Department of Public Health to establish a state sanitary code. The code would “contain rules and regulations of a general as well as a specific nature to protect and improve the public health of the commonwealth . . . .”75 The 1957 Act made no specific mention of housing standards; however, G.L. c. 111, §128C had previously authorized the Department of Public Health to “make . . . and from time to time amend, alter or repeal, such regulations as are deemed reasonable and necessary to establish the minimum standards of fitness for human habitation.”76 The adoption of such standards by local boards of health had previously been optional. Presumably, the 1957 statute made these standards mandatory. In any case, in 1960 the Legislature stated that the code

may provide for the demolition, removal, repair or cleaning by local

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72 The minimum standards of fitness for human habitation established by the Department of Public Health and adopted locally under the provisions of the former statutes became ineffective with the repeal of G.L. c. 111, §128, and did not carry over under the new law. Opinion of the Attorney General, Feb. 1, 1955, at 76.
73 The provision in the original Acts of 1943, c. 468, that only a failure to comply with two or more of these standards would be sufficient reason for finding a dwelling place unfit for human habitation, was thus eliminated.
74 Section 128D authorized the board of health to issue orders to violators to comply with the standards of fitness. If an owner failed to obey the orders, the board of health could cause the premises to be cleaned at the owner’s expense. Section 128E further authorized the board of health, to seek an injunction to enforce the requirements of the board of health if an owner failed to act within a reasonable time. Acts of 1954, c. 447, §2 added §128F to G.L. c. 111, and provided that fines ranging from ten to fifty dollars be assessed against anyone who wilfully violates orders under §§128B-D.
boards of health of any structure which so fails to comply with the standards of fitness for human habitation or other regulations in said code as to endanger or materially impair the health or well-being of the public.\textsuperscript{77}

In 1963 the Legislature repealed G.L. c. 111, §§128B-F, and incorporated the substance of these sections into G.L. c. 111, §5.\textsuperscript{78} In 1965 the Legislature struck out all of the provisions in G.L. c. 111, §5 dealing with the sanitary code and in their stead added sections 127A-J to chapter 111.\textsuperscript{79} These new sections carried over many of the provisions stricken from section 5, but there were many additions as well. The most important of these are the sections providing for the enforcement of the sanitary code by tenants. Presently, a tenant may petition either the district court (pursuant to section 127C) or the superior court (pursuant to section 127H) for a hearing to determine whether a condition exists which violates the standards of fitness for human habitation.\textsuperscript{80} If the court so finds, it may direct the tenant to pay his rent to the clerk of the court until such time as the violation is removed.\textsuperscript{81} When the violation is removed, the balance of the rent monies paid into court, if any, is turned over to the landlord.\textsuperscript{82}

On the same day that the General Court added the new enforcement procedures to chapter 111, it also added G.L. c. 239, §SA, the rent withholding statute.\textsuperscript{83} Under this statute a tenant may begin withholding his rent without going into court and without fear of being evicted for nonpayment of rent, so long as he is not in arrears with rent and so long as the proper notice is given the landlord.\textsuperscript{84} From the tenant’s standpoint, section 8A is a simpler code enforcement procedure than those provided for in G.L. c. 111, §§127A-J, since it allows a tenant to set the wheels of

\begin{itemize}
\item \textsuperscript{77} Acts of 1960, c. 172, §1 amending G.L. c. 111, §5.
\item \textsuperscript{78} Acts of 1963, c. 390, §§1, 2.
\item \textsuperscript{79} Acts of 1965, c. 898, §§1, 3.
\item \textsuperscript{80} The standards are those of either the State Sanitary Code, or any local board of health, or both. G.L. c. 111, §§127C, 127H.
\item \textsuperscript{81} G.L. c. 111, §§127F, 127H.
\item \textsuperscript{82} G.L. c. 111, §§127F, 127H provide that the court may disburse all or any portion of the rent payments received by the court to the landlord for the purpose of effectuating the removal of code violations. See Angevine & Taube, Enforcement of Public Health Laws—Some New Techniques, 52 Mass. L. Q. 205 (1967), for an excellent analysis of these enforcement procedures.
\item \textsuperscript{83} Acts of 1965, c. 888. For relevant portions of the statute and comments thereon, see notes 8 and 13 supra.
\item \textsuperscript{84} Withholding rent in accordance with the provisions of G.L. c. 239, §8A is an affirmative defense to summary process for possession for failure to pay rent. Under the latest amendment to this section, Acts of 1973, c. 471, a tenant need only prove that the landlord or any agent, employee or servant of his knew of conditions in the premises which violated the standards of fitness for human habitation, in order to satisfy the notice provisions of G.L. c. 239, §8A; the tenant is no longer required to supply the landlord with written notice. See note 13 supra for the text of this amendment.
\end{itemize}
enforcement in motion without first making an appearance in court: it shifts the initiative to the landlord by forcing him either to make repairs or to contest the tenant’s action in court in order to recover the withheld rent.88

In addition to the standards of habitability set out in the sanitary codes and its predecessors, there were other, more striking examples of the Legislature’s view that rent is paid for habitable premises which went unmentioned in the majority opinion of Hemingway. These are the building codes.86 Acts of 1871, c. 280, §1 created in Boston a department “for the survey and inspection of buildings.” The Act set out comprehensive standards which all buildings had to meet: section 34 of the Act provided that “no house [or] building . . . leased or rented [as] a tenement or lodging house, shall continue to be . . . leased or rented, unless the same, . . . shall conform in its construction and appurtenances to the provisions of this act . . . .”87 Failure to meet these regulations was punishable by a fine ranging from ten to five hundred dollars for each offense.88

Yet in spite of the standards set out in these codes and provisions requiring tenants to vacate unfit premises,89 the Supreme Judicial Court persistently held that the obligations imposed on a landlord by the building codes were required in the interest of public safety alone, and not for the benefit of an individual tenant.90 That the opposite result was more than reasonable was demonstrated by the New York Court of Appeals in an opinion authored by Justice Cardozo which interpreted a similar “Tenement House Law”:

We may be sure that the framers of this statute, when regulating

88 In Applestein v. Quinn, 1972 Mass. Adv. Sh. 642, 643, 281 N.E.2d 228, 229, the court noted that G.L. c. 239, §8A does not permanently deprive a landlord of the rent but only permits the tenant to withhold it until the stated violations are corrected.
87 The first act for the “Regulation of Tenement and Lodging Houses in the City of Boston” appeared in Acts of 1868, c. 281. However, it was not nearly as comprehensive as the 1871 enactment, and its provisions were enforceable by the local boards of health, and not a separate, specialized building inspections department. The appearance of this latter feature in the 1871 enactment is what makes it a truly modern building code.
88 Acts of 1872, c. 243, §1 empowered other cities and towns in the Commonwealth to enact provisions of their own similar to those set out in Acts of 1871, c. 280 for the regulation and inspection of buildings. These tenement laws and their numerous amendments were eventually codified in G.L. cc. 143-45. These later chapters are scheduled to expire on Jan. 1, 1975 (Acts of 1972, c. 802, §30), and are to be replaced by a uniform state building code. See text at note 124 infra.
89 Acts of 1871, c. 280, §45 provided that “whenever it shall be certified to the board of health . . . that any building . . . is unfit for human habitation . . . or by reason of its want of repair has become dangerous to life, said board may issue an order . . . requiring all persons therein to vacate.”
tenement life, had uppermost in thought the care of those who are unable to care for themselves. The legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers.91

Cardozo reached this result because he recognized the function that statutes serve as a source of the common law. Professor James McCauley Landis has pointed out how deep-rooted in history this function is. The early statutes of Parliament were often special in character, drafted to apply to a particular situation or individual. The early common law courts developed the principle of the equity of the statute, which recognized that similar situations called for similar treatment. The doctrine did more than simply transform special into general legislation:

Enabling judges to distill from a statute its basic purpose, they could then employ it to slough off the archaisms in their own legal structure. Even general legislation could thus be made to yield a meaning for law beyond its expressed operative effect.92

Building codes existed in Massachusetts for one hundred and two years prior to Hemingway; and in all that time Massachusetts courts were unable to discern in these laws any legislative policy that leased residential premises had to meet minimum standards of fitness. When one considers this bit of history, as well as the Supreme Judicial Court's hair-splitting on issues of a landlord's tort liability to avoid overruling questionable precedent,93 one is hard pressed not to agree with Judge Skelly Wright's characterization of Massachusetts's highest court as "a court not known for its willingness to depart from the common law."94 Perhaps the better explanation for why the Hemingway court reached the decision it did is not to be found in the public policy it belatedly discovered in the enactments of the General Court, but instead in the existence of persuasive, well-reasoned foreign precedents.

Prior to Hemingway, other jurisdictions began to utilize legislative activity as a source of express public policy in favor of decent housing. Taking cognizance as well of the changing nature of the landlord-tenant relation in the urban context, the courts developed common law doctrine modifying the rights and obligations of landlords and tenants. Such courts are in the minority, but they nevertheless represent a growing vanguard of sentiment95 that as reasons for the old rules vanish new rules should

91 Altz v. Leiberson, 233 N.Y. 16, 19, 134 N.E. 703, 704 (1922) (emphasis added).
92 Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 216 (1934).
93 See text at notes 134-37 infra.
95 See generally cases collected at note 4 supra.
be developed on the basis of very evident new conditions and policy reasons.

Pines v. Perssion\(^{96}\) was the first modern decision to find an implied warranty of habitability in residential leases at common law. The Wisconsin Supreme Court rested its decision on a “policy judgment” made by the state legislature, as evinced by building codes, health regulations and safe-place statues, that a tenant paid rent in exchange for premises that were habitable. Eight years later Hawaii followed suit in Lemle v. Breeden,\(^{97}\) when it held that a nightly invasion by rats of a luxury waterfront home was a material breach of the landlord’s covenant of habitability, even though the rats originated from caverns not situated on the demised premises.\(^{98}\)

The landmark decision in the area of implied warranties of habitability is Javins v. First National Realty Corp.\(^{99}\) Javins is heavily relied on by the cases decided after it, and rightfully so: it is a brilliant, well-documented opinion which declares that the common law must recognize a landlord’s obligation to keep premises in habitable condition for several reasons. The factual assumptions of the old “no repair” rule, based as they were on an agrarian economy, are no longer true; the nature of modern urban housing requires their abandonment. In their stead should operate the principles of the consumer protection cases. Judge Skelly Wright found that the factual assumptions made by courts regarding the manufacturer-consumer relationship which led to a finding of warranties of merchantability implied by the common law\(^{100}\) were more nearly apt to the modern landlord-tenant relationship. Furthermore, after examining the housing code of the District of Columbia, Judge Wright concluded that a finding of an implied warranty of habitability was required by the code.\(^{101}\)

In addition to the jurisdictions mentioned above, several other states have decided that modern circumstances require a substantial judicial reworking of the traditional landlord-tenant relationship.\(^{102}\) Collectively

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\(^{96}\) 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
\(^{98}\) The result reached in Lemle was subsequently approved by the state legislature as it enacted a comprehensive landlord-tenant code: one of the three stated policies of the code is “to revise the law of residential landlord and tenant by changing the relationship from one based on the law of conveyance to a relationship that is primarily contractual in nature.” Hawaii Rev. Stat. §521-2(b)(5) (Supp. 1972).
\(^{101}\) 428 F.2d at 1080.
\(^{102}\) See, e.g., Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). A unique feature of this case is that, in addition to the contractual remedies which accompany all implied warranties of habitability, an aggrieved tenant in New Jersey may avail himself of common-law “self-help” remedies: the tenant may make repairs and replacements of vital facilities necessary to maintain the premises in a livable condition, and bill the
these jurisdictions provided the Supreme Judicial Court with a well-reasoned, albeit non-binding, basis for its decision in *Hemingway*. Now that the Commonwealth has embraced the implied warranty of habitability, it remains to examine the rights that this concept confers upon tenants as well as the numerous practical and theoretical implications of the *Hemingway* opinion.

III. THE TENANT’S NEW COMMON LAW REMEDIES

*Hemingway* rejected the old common law’s conception of the lease as a strictly property transaction and adopts the modern view espoused in several other jurisdictions that a lease is essentially a contract between landlord and tenant. Under this view the tenant is freed from prior common law restrictions which forced him to remain in uninhabitable premises or risk the continuance of his obligation to pay rent after vacating the premises. According to the traditional concept of the rights and obligations under a lease, a tenant could not affirmatively defend against a summary process action for nonpayment of rent unless he had abandoned the premises and pleaded “constructive eviction.” After *Hemingway*, a tenant need not resort to this judicial fiction. The present concept of the implied warranty of habitability is more flexible than the doctrine of constructive eviction. When confronted with premises which “may endanger or materially impair [his] health or safety,” the tenant now has at his disposal a whole new range of contractual rights and remedies. If the tenant wishes to seek a new dwelling place unfettered by the obligations of the existing lease of uninhabitable premises, he may sue the landlord for rescission of his lease from the point in time that the implied warranty of habitability was first breached. The existence of a landlord for the costs of such efforts by deducting them from the rent. However, before a tenant may take advantage of this remedy, he must provide the landlord with timely and adequate notice of the defects. Some states make this remedy available in the form of “repair and deduct” statutes. However, the tenant’s repair expenditures are usually limited. See, e.g., G.L. c. 111, §127L, discussed in text following note 97 supra; Cal. Civ. Code §1942. (West Supp. 1973).

103 See notes 4 and 102 supra.

104 Although the *Burt* case originally eliminated this requirement for any aggrieved tenant who received a declaratory judgment stating that the conditions complained of in the bill of equity amounted to a constructive eviction, no case has been found in which this defense was successfully interposed by a residential tenant in an action for rent due. See text at notes 87-62 supra.


106 Id. When discussing this particular remedy, the court speaks of a “rescission of [the tenant’s] written lease.” Id. (emphasis added). When announcing its holding three paragraphs earlier, the court stated that “in a rental of any premises for dwelling purposes, under a written or oral lease, for a specified time or at will, there is an implied warranty that the premises are fit for human occupation.” Id. (emphasis added).
material breach justifying rescission is a question of fact to be determined by the circumstances of each case. The court lists several factors which might be taken into account when determining whether a breach of the implied warranty is a material one:

(a) the seriousness of the claimed defects and their effect on the dwelling's habitability; (b) the length of time the defects persist; (c) whether the landlord or his agent received written or oral notice of the defects; (d) the possibility that the residence could be made habitable within a reasonable time; and (e) whether the defects resulted from abnormal conduct or use by the tenant.

If the landlord is found to have materially breached the warranty, the tenant can terminate the lease and recover any security deposits made. The landlord may counterclaim for, and the tenant is liable for, the reasonable value, if any, of the tenant's use of the premises for the time he was in possession.

If, on the other hand, the tenant wishes to keep his lease and have the premises restored to a habitable condition, he has three statutory remedies available: under G.L. c. 111, §§127A-H, he may initiate sanitary code enforcement proceedings; under G.L. c. 111, §127L, he may deduct up to two months rent in any given twelve-month period for repairs paid for by him which the landlord has refused or failed to do; or under G.L. c. 239, §8A, he may withhold rent until the landlord corrects substantial sanitary code violations.

If the tenant withholds his rent without following the procedures of G.L. c. 239, §8A, his refusal to pay the rent due will subject him to eviction proceedings, to which he will have no defense. The tenant may raise the landlord's breach of his implied warranty of habitability only as a partial or complete set-off to the landlord's claim for rent owed for the period when the dwelling violated the standards of fitness for human habitation and the landlord or his agent had written or oral notice of the defects. As the Hemingway decision stated:

The tenant's claim or counterclaim for damages based on this breach would be the difference between the value of the dwelling as war-

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In light of the broad sweep of this language, the court's limitation of the remedy of rescission to written leases appears to be inadvertent.

107 Id. For a discussion of legislative enactments concerning material breaches of the implied warranty of habitability, see text at note 125 infra.

108 Id. at 353-54, 293 N.E.2d at 843-44. (footnotes omitted). The court did not deem this list to be all-inclusive. See id. at n.14.

109 Id. at 354, 293 N.E.2d at 844.

110 Id.

111 Id. at 355, 293 N.E.2d at 845.

112 Id. at 355-56, 293 N.E.2d at 845.
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ranted (the rent agreed on may be evidence of this value) and the value as it exists in the defective condition.118

While the majority opinion expanded the landlord's obligations and the tenant's rights, it left open the problem of specifically defining standards of habitability. Embodied within these standards are the landlord's obligation to maintain the premises as well as the degree of his failure to meet that obligation which brings into play the tenant's right and remedies. It is this problem which prompted Justice Quirico to dissent in part from the majority's opinion.

IV. THE STANDARDS OF HABITABILITY PROBLEM

Justice Quirico takes the majority to task114 for failing to make an explicit change in the common law rule that a landlord has no duty to repair absent an express agreement to the contrary. According to Justice Quirico, Hemingway's new implied warranty of habitability will thus apply only in those few cases where the landlord has expressly agreed to repair or maintain the demised premises.115 Such a consequence, he believes, is compelled by the common law rule that unless a building regulation attempts

to regulate or modify the contractual relations of the parties it should not be broadened, or a construction adopted by implication which would materially limit the rights of parties to enter into such lawful contracts as they please.116

However, Justice Quirico's analysis of the scope of Hemingway appears to be unfounded in light of the very nature of the implied warranty concept. Implied warranties play an increasingly important role in the law of contracts because of the recognition by courts and other legal thinkers that the bargaining process has become more limited in modern society.

118 Id. at 356, 293 N.E.2d at 845. The remedy stated here is similar to that afforded the tenant in Burt: "The appropriate measure of damage thus is the difference between the value of what Burt should have received and the fair value of what was in fact received." 340 Mass. at 150, 163 N.E.2d at 8. See also A. Corbin, Contracts §§1105, 1108, 1114, 1115 (1964); C. McCormick, Damages §142 (1955); S. Williston, Contracts §§1404, 1455 et seq. (1920); 1 American Law of Property, §§3-51-52 (A. Casner ed. 1952).


115 Id. at 355, 293 N.E.2d at 850.

116 Palmigiani v. D'Argenio, 254 Mass. 434, 436, 125 N.E. 592 (1920). The specific holding of Palmigiani was that Acts of 1907, c. 505, §127, which provided that owners of buildings in Boston shall maintain their premises in such repair as not to be dangerous, did not change the common law with respect to tenancies at will and that in such a tenancy there is no liability for the landlord for want of repairs unless the landlord contracts to make repairs during the tenancy.
Professor Kessler offers this description of the consumer in the modern marketplace:

The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.\(^{117}\)

Given this situation, courts have looked to expressions of public policy in the statutory law and imposed certain obligations on the seller of goods as a matter of law.\(^ {118}\) "[These obligations do] not depend upon the affirmative intention of the parties. [They are] a child of the law; [they annex themselves] to the contract because of the very nature of the transaction."\(^ {119}\) The Hemingway majority accomplished this very thing when it examined rent withholding and other statutes and concluded that the common law of landlord-tenant had to be updated to correspond with existing public policy. That a landlord does not expressly covenant to make repairs and maintain the premises is no longer relevant: he has an obligation as a matter of law to insure that the premises he "sells" are habitable at all times during the life of the contract, \textit{i.e.}, the lease.\(^ {120}\)

Justice Quirico was on firmer ground when he criticized the majority for failing to enunciate explicit standards of habitability to which a landlord can be held. He took exception to the majority's position that the State Sanitary Code's minimum standards of fitness are merely \textit{threshold} requirements that all housing must meet, and that the scope of the landlord's obligation is best defined on a case-by-case basis.\(^ {121}\) Justice Quirico felt that the Supreme Judicial Court should have adopted the approach of \textit{Javins} and incorporated the standards of the sanitary code into all leases of residential dwellings as the \textit{exclusive} means of defining the landlord's obligations.

Upon closer examination, the majority's view seems the wiser one. The District of Columbia's Housing Regulations are much more comprehensive than Massachusetts's sanitary code:

The 75 pages of the Regulations provide a comprehensive regulatory scheme setting forth in some detail: (a) the standards which housing in the District of Columbia must meet; (b) which party, the lessor

\(^{119}\) Id. at 404, 161 A.2d at 96.
\(^{120}\) See also \textit{Javins v. First Nat'l Realty Corp.}, 428 F.2d 1071, 1080 n.49 (D.C. Cir. 1970).
\(^{121}\) 1973 Mass. Adv. Sh. at 353-54 n.16, 293 N.E.2d at 844 n.16.
or the lessee, must meet each standard; and (c) a system of inspections, notifications and criminal penalties.\textsuperscript{122}

In contrast, there is no codified body of law in Massachusetts dealing with housing standards. One observer summed up the confused state of housing law in Massachusetts as follows:

[T]here are at least seven state boards and three state departments concerned with problems of building inspection: the Boards of Standards; Fire Prevention Regulations; State Examiners of Plumbers; Gas Fitting Regulations; Elevator Regulations; Boiler Rules; and School House Structural Standards; and the Departments of Public Health; Labor and Industries; and Public Safety. This is all in addition to local building, wiring, plumbing, gas and health inspectors. Despite their current complexities, both the state public assistance and civil service systems seem simple by comparison.\textsuperscript{123}

Any incorporation of this crazy-quilt of standards into all residential leases would have invited chaos. Furthermore, eight months prior to the \textit{Hemingway} decision, the Massachusetts Legislature had initiated an attempt to repair this disorderly condition of housing law. It enacted Acts of 1972, c. 802, §§16-23 on July 19, 1972. The ultimate goal of this Act is the adoption and enforcement of a uniform state building code which will take effect January 1, 1975.\textsuperscript{124} In the interim, the Act established a special commission to study the present codes and make recommendations for the uniform building code.\textsuperscript{125} By refusing to formulate specific standards of habitability on its own, the \textit{Hemingway} court, it is submitted, correctly deferred this role to a legislature which had demonstrated an awareness of its responsibility and its willingness to define such standards. Furthermore, by adopting the State Sanitary Code as merely a threshold requirement of habitability, the court allowed itself a maximum of flexibility with which to deal with uninhabitable housing until such time as housing standards are codified and made uniform throughout the state.

Indeed, the majority's confidence in a responsive legislature was borne out when, on September 25, 1973, the General Court amended the Act which had first created the State Sanitary Code:

Said [sanitary] code or a supplement thereto shall designate those conditions which, when found to exist upon inspection of residential premises, shall be deemed to endanger or materially impair the health or safety of persons occupying the premises. This designation shall

\textsuperscript{122} 428 F.2d at 1080.
\textsuperscript{123} Angevine & Taube, supra note 82, at 236.
\textsuperscript{124} Acts of 1972, c. 802, §§1, 77.
\textsuperscript{125} Acts of 1972, c. 802, §§1, 68.
not be construed as prohibiting an inspector or other authorized person from certifying that any other violation or combination or series of violations of said code or other applicable laws, ordinances, by-laws, rules or regulations may endanger or materially impair the health or safety of said persons when such certification is otherwise appropriate.\textsuperscript{126}

The purpose of this amendment is clear: it commands the Department of Health to designate those conditions which, if found to exist, clearly breach the landlord's implied warranty of habitability. The effect of the amendment is threefold. First, it puts all landlords on notice as to what unsanitary conditions will always constitute a breach of a contract with a tenant. Second, it relieves the courts from having to formulate on a case-by-case basis what specific violations, or combination of violations, constitute material breaches of the implied warranty of habitability. Finally, it retains the flexibility that is Hemingway's distinguishing feature by leaving open the possibility that conditions other than those indicated by the Department of Public Health may be so intolerable that they likewise constitute a breach of the landlord's implied warranty of habitability. In short, the amendment provides for the formulation of standards that are specific enough to give landlords adequate notice of their responsibilities to tenants, yet at the same time flexible enough that they do not ossify Hemingway's change in the common law.

V. THE PROBABLE IMPACT OF HEMINGWAY ON LANDLORD'S TORT LIABILITY

Because it expands the landlord's obligation to the tenant with regard to the condition of rented housing, Hemingway's implied warranty of habitability appears to have an impact not only upon the landlord's contractual liabilities, but also upon his liability in tort. Under pre-Hemingway common law, a landlord's tort liability was generally governed by the rule of caveat emptor. Since a tenant took the premises in their condition at the beginning of the tenancy, a landlord was not liable for a dangerous condition existing on the leased premises unless he knew or should have known about it, and the discovery of it would not likely be made by a tenant exercising due care.\textsuperscript{127} And since a landlord had no

\textsuperscript{126} Acts of 1973, c. 880, amending G.L. c. 111, §127A. This amendment was signed into law by Governor Francis Sargent on Oct. 4, 1973, G.L. c. 111, §127A authorized the state board of health to promulgate a state sanitary code.

\textsuperscript{127} Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E.2d 418 (1946). Such defects are referred to as "latent" or "hidden" defects. However, if a landlord discovered a hidden defect after the commencement of the tenancy, he had no obligation to communicate the discovery to the tenant; nor was he liable for injuries resulting from it. Shute v. Bills, 191 Mass. 433, 78 N.E. 96 (1906).
common law duty to repair, a landlord was not liable for injuries resulting from defects that arose after the commencement of the lease.128 Even if a landlord did covenant to make general repairs and omitted to make them, such a covenant rendered him liable to the tenant only for the cost of repairs and not for any personal injury or harm resulting from his failure to make them.129 Only if a landlord convenanted to make repairs, undertook them and made them negligently, would he be liable in tort for personal injuries.130

A slightly different rule applied to the so-called "common areas." A landlord impliedly convenanted to maintain the common areas only in as good a condition as they were in or appeared to be in at the commencement of the tenancy; a landlord was never liable for injuries resulting from his failure to repair defects which arose after the tenancy began.131

Generally, regulatory measures in penal statutes affecting buildings, i.e., building codes, were interpreted in strict derogation of the common law and did not impose a civil liability on the landlord where none existed at common law. Thus, a violation of a building code provision was not negligence per se,132 nor was it evidence of negligence,133 unless the statute in express terms or by clear implication imposed a civil liability or affected the mutual relations and duties of landlords and tenants as between each other.

In 1972 the Massachusetts Legislature made two attempts to relieve tenants of the harsh consequences which so often resulted from the application of the common law rules. No doubt they were inspired to do so by the controversy ignited by Stapleton v. Cohen.134 In that case the Supreme Judicial Court extended the strict derogation of the common law standard to a violation of the state sanitary code and held that such a violation was neither negligence per se nor evidence of negligence. A different result could easily have been reached by distinguishing the sanitary code from the building code. Historically building codes, which

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129 Miles v. Janvrin, 200 Mass. 514, 86 N.E. 785 (1909). The court, in dicta, distinguished an agreement by a lessor to make general repairs and an agreement to keep the premises "safe and in good repair." The latter type of covenant was viewed as made specifically for the benefit of the tenant and would therefore render a lessor liable for injuries resulting from his failure to repair.
date back to the nineteenth century, are deemed to have been enacted for the furtherance of public safety and not for the benefit of individual tenants. The State Sanitary Code, on the other hand, is of much more recent vintage and appears to have been enacted for the benefit of individual tenants.185

Two years later the court modified this position in *Dolan v. Suffolk Franklin Savings Bank*188 and held that violation of a building code provision was evidence of negligence. However, it avoided overruling *Stapleton* by distinguishing it on the grounds that the violation complained of in *Stapleton* existed at the beginning of the tenancy in a common area, which the landlord had a duty of maintaining only in the condition it was in or appeared to be in at the commencement of the tenancy.187

The Legislature's resolution in 1972 of this muddled state of affairs was less than complete. In an action for damages for personal injury caused by a defect in the common areas, G.L., c. 186, §15E188 bars a landlord from raising as a defense the fact that the defect existed at the commencement of the lease if the defect is at the time of the injury a violation of the building code. However, the statute leaves unchanged the common law rule that a landlord is not liable for defects in the common areas which arise after the commencement of the tenancy. Furthermore, the statute makes no mention of the effect of a violation of a provision of the State Sanitary Code, the circumstance which created the *Stapleton* controversy in the first place. Finally, it is not clear from the language of the statute whether a violation of the building code is negligence per se or merely evidence of negligence.

G.L. c. 186, §19189 was enacted several months after section 15E and appears to have added to the confusion. Section 19 dealt mainly with a landlord's tort liability for defects existing on the premises leased by a tenant. Henceforth, regardless of whether a landlord has covenanted to repair, a landlord may be liable for any injuries resulting from his failure to make repairs within a reasonable time after receipt of written notice of the unsafe condition. However, the statute states, rather gratu-

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185 See text at notes 77-86 supra, discussing enforcement of the code by tenants whose leased premises contain code violations.
187 The court's gossamer-like distinction reminds one of the declaration that "the law of real property ... is formed into a fine artificial system, full of unseen connections and nice dependencies ..." This quotation appears in W. Leach, Property Law Indicted! 2 (1967), and is incorrectly attributed to Blackstone's opinion in the celebrated case of Perrin v. Blake, 1 W. Bl. 672, 96 Eng. Rep. 392 (K.B. 1772). Further research located the quotation in A. Casner & W. Leach, Cases and Materials on Property 347 (1964), wherein the citation is given as F. Hargrave, Tracts Relative to the Law of England 489 (1787). Wherever the original might be, the language is certainly appropriate.
itously, that no notice is required if the defect exists in a common area. Query whether this means that a landlord is now responsible for defects which arise in the common areas after the commencement of the tenancy: if the Legislature intended to change the common law regarding a landlord's liability for defects in the common area, why did it not do so by amending an existing statute which dealt exclusively with such liability?

The confusion does not end here. Section 19 goes on to state that the notice requirement for defects is satisfied by notice to a landlord from any code enforcement agency "of a violation of the state sanitary code or other applicable by-laws, ordinances, rules or regulations." Query whether this provision changes the common law and makes such a violation negligence per se rather than merely evidence of negligence. If it does change the common law, a further question arises whether the change applies only to violations occurring in the leased premises and not to violations occurring in the common areas, since the notice by an agency operates as a substitute for notice by the tenant of defects in the leased premises, and notice is not required at all if the defect exists in a common area.

The source of this confusion may be attributed in large part to the failure of the common law to impose on the landlord an obligation to make repairs; without any obligation to act, one cannot be held liable for the consequences of failing to so act, i.e., for nonfeasance. The Supreme Judicial Court had the opportunity in Stapleton, and again in Dolan, to partially bridge this gap in the common law by finding that the various codes regulating housing created duties of care unknown to the common law, the violation of which constituted negligence per se. However, it declined to do so even though other, more enlightened jurisdictions had already done so.140

Hopefully, Hemingway has rendered this controversy moot. Although the court declined to speculate on the impact of its holding on the landlord's tort liability,141 the question is not an impossible one to answer. If Hemingway stands for the proposition that a landlord now has a common law duty to repair, then his failure to do so renders him liable for the consequences of his nonfeasance, i.e., for personal injuries caused by defects either on the leased premises themselves or in the common areas. It is true that Hemingway does not explicitly state that a landlord has a common law duty to repair; however, logic dictates that a lessor who impliedly covenants that the premises are fit for the use for which they are let, i.e., that the premises are habitable for the entire term of their rental, also impliedly covenants to undertake what is reasonably necessary to insure their habitability, i.e., to make repairs. This definitional problem was resolved by the New Jersey Supreme Court:

It is a mere matter of semantics whether we designate this covenant one “to repair” or “of habitability and livability fitness.” Actually, it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.\textsuperscript{142}

It therefore appears that Hemingway’s implied warranty of habitability not only expands the tenant’s contractual rights and remedies, but also provides him with more substantial personal injury protection.\textsuperscript{143}

**CONCLUSION**

The value of the enlightened change in the common law wrought by Hemingway cannot be denied: an implied warranty of habitability can be a potent weapon in the battle against substandard housing. Perhaps the decision is put in its best light by applying to it Professor Landis’ description of the common law as a vehicle for altering the status of individuals within society:

Doctrines of common law dealing with the relationship between individuals will often be seen to hinge upon a conception as to the position that one party is to occupy in our social structure. This becomes solidified into a concept of status. But obviously status has no meaning apart from its incidents. These incidents often so numerous as to escape description, have a varying importance in shaping the nucleus of a status. The alteration of some of them possess no importance beyond the change itself; the alteration of

\textsuperscript{142} Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970).

\textsuperscript{143} At the time this comment was completed, only two of the jurisdictions which impose a common law warranty of habitability on landlords had considered the effect of such a warranty on a landlord’s tort liability for injuries arising out of defects on the premises. In Sargent v. Ross, — N.H. —, 308 A.2d 528 (1973), the New Hampshire Supreme Court extended the reasoning of the warranty of habitability to the area of torts and held that landlords must exercise reasonable care not to subject others to an unreasonable risk of harm. In Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (Super. Ct.), cert. granted, 63 N.J. 427, 307 A.2d 615 (1973), an intermediate appellate court adopted a restrictive reading of the implied warranty of habitability and held that it did not overturn existing principles of tort law restricting a landlord’s liability. Such an expansive reading of the Marini decision, the court declared, could only be made by the New Jersey Supreme Court.
others, however, may call for a radical revision of the privileges or disabilities that have generally been attached to a particular status.\textsuperscript{144} Indeed, Hemingway wrought a "radical revision of the privileges [and] disabilities" which attach to modern landlords and tenants by applying to their legal relationship many of the enlightened principles of modern consumer law. The implied warranty of habitability provides a means through which an individual tenant, aggrieved by the substandard quality of his living quarters, may seek either to have the premises restored to respectable standards or to end his legal obligations to the offending landlord.

This change in status is a result of the common law process. What are the forces which set this process in motion? By tracing the historical development of the lease, one can observe how economics was a preeminent factor in the development of legal doctrine protecting the medieval tenant. Manorial tenant families played a stabilizing role in a precarious economy recovering from severe dislocations. Providing these families with legal safeguards was a plain exercise of economic self-preservation.

The motive of self-preservation is less evident in the current change in legal doctrine represented by the implied warranty of habitability. The poor tenants who will benefit most from this new legal safeguard are not by any means the linchpins of a post-industrial economy.\textsuperscript{145} Their change in status must be attributed to something more than simple economics. For example, in analyzing the sources of reason for the Hemingway decision, it was considered how more than a century of legislative concern for standards of fitness for dwelling places was instrumental in moving the Supreme Judicial Court to depart radically from traditional common law constraints and forge new legal doctrine. This at least suggests an awareness on the part of lawmakers that there are certain fundamental guarantees which extend to all individuals irrespective of their economic status.\textsuperscript{146}

\textsuperscript{145} But see F. Piven & R. Cloward, Regulating the Poor: The Functions of Public Welfare 1-8 (1971). The authors argue that in a modern capitalist society the continued existence of a substantial class of poor people is necessary to populate a cheap labor market for a constantly fluctuating economy.
\textsuperscript{146} Housing Act of 1964, §305, 42 U.S.C. §1451(c) (1970), states that, in order to qualify for urban renewal loans and grants and other forms of federal assistance, each community had to develop a "workable program" to eliminate blight. It is not purely coincidental that the last major revamping of the State Sanitary Code in Massachusetts occurred soon after the passage of this provision. See text at notes 75 et seq. supra. However, as pointed out in the text at note 70 supra, the General Court has been active in the area of housing standards for more than a century, long before there were any federal housing programs.

What this provision does indicate, though, is the influence which federal legislative
The benignity of this doctrinal change, however, should not blind us to the fact that there are real problems which accompany it. Justice Quirico's concern that the *Hemingway* court did not provide sufficient guidelines for the lower courts has been at least partially mitigated by subsequent legislation. It now remains for the bureaucracies entrusted with the enforcement of these standards to do so diligently, and with the same spirit of concern which spawned *Hemingway*. There is the problem of tenants being made aware of their new legal remedies and facilitating the exercise of them. The implied warranty of habitability may be a near meaningless phrase in an appellate decision to a tenant ignorant of his new legal status and without timely legal advice to safeguard that status.

Finally, there are problems posed by policies of parties who are not directly involved in the landlord-tenant relationship, viz., banks and the federal government. The conservative policies of financial institutions normally preclude risky investments in blighted or even marginal neighborhoods. Oftentimes, a small-time landlord would like to rent habitable premises, but his modest rents do not provide sufficient capital with which to make improvements. If he is unable to secure financing because of the location of his building, he will have to forgo the improvements and instead allow his building to deteriorate. At the other end of the spectrum is the landlord with substantial holdings. For him, the federal government has unwittingly provided a tax structure that makes it more *profitable* for him to let his housing stock deteriorate than to prolong its useful life.  

Amid all these problems, the *Hemingway* decision represents hope. The Supreme Judicial Court has created for itself a rare opportunity to fashion a body of law shorn of archaisms and attuned to current social needs. But this hope must be tempered with the observation that "[o]ne needs only his eyes, his nose, and a willingness to walk through the slums of America's great cities to be aware that we are many leagues away from the goal of tolerable housing for all Americans."  

We must not forget that *Hemingway* is only a beginning.

JOHN P. MESSINA

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