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### **Knight v. Hallsthammar: The Implied Warranty of Habitability Revisited**

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# KNIGHT V. HALLSTHAMMAR: THE IMPLIED WARRANTY OF HABITABILITY REVISITED

## I. INTRODUCTION

In *Green v. Superior Court*,<sup>1</sup> the California Supreme Court recognized an implied warranty of habitability in residential leases.<sup>2</sup> The warranty implies a landlord's covenant that the leased premises will be maintained in a habitable state<sup>3</sup> for the duration of the lease.<sup>4</sup> The

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1. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

2. *Id.* at 619, 517 P.2d at 1169, 111 Cal. Rptr. at 705. In *Green*, the court reasoned: Under traditional common law doctrine, long followed in California, a landlord was under no duty to maintain leased dwellings in habitable condition during the term of the lease. In the past several years, however, the highest courts of a rapidly growing number of states and the District of Columbia have reexamined the bases of the old common law and have uniformly determined that it no longer corresponds to the realities of the modern urban landlord-tenant relationship.

*Id.* The *Green* court held that the warranty does not require that a landlord ensure that the leased premises are in a perfect, aesthetically pleasing condition, but that "bare living requirements" must be maintained. In most cases, substantial compliance with building and housing codes which materially affect health and safety suffice to meet the landlord's obligations. *Id.* at 637, 517 P.2d at 1182-83, 111 Cal. Rptr. at 718-19. The standards of "tenantability" set out in CAL. CIV. CODE § 1941.1 (West Supp. 1982) also provide guidance in determining whether the landlord has satisfied the warranty of habitability. *Id.* at 637-38 n.23, 517 P.2d at 1183 n.23, 111 Cal. Rptr. at 719 n.23; see *infra* note 43 for the text of § 1941.1.

3. As a good indication of the general scope of the warranty of habitability, the *Green* court cited *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970), where the court held that "[i]n a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service" and the "[f]ailure to supply such things is a breach of the implied covenant of habitability." 10 Cal. 3d at 637 n.22, 517 P.2d at 1182 n.22, 111 Cal. Rptr. at 718 n.22. In *Green*, the following defects rendered the premises uninhabitable: 1) the collapse and nonrepair of the bathroom ceiling; 2) the continued presence of rats, mice, and cockroaches; 3) the lack of any heat in four rooms; 4) plumbing blockages; 5) exposed and faulty wiring; and 6) an illegally installed and dangerous stove. *Id.* at 621, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

4. 10 Cal. 3d at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718. The *Green* court's abolishment of the common law rule of caveat emptor and imposition on a landlord of a duty to maintain leased premises in a habitable condition reconciled California law with the majority of jurisdictions.

At common law, the real estate lease was viewed under property law concepts because the lease was considered a conveyance of the premises for a term of years, subject to the doctrine of caveat emptor. C. SMITH & R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 138, 140-41 (2d ed. 1971); 1 H. TIFFANY, *A TREATISE ON THE LAW OF LANDLORD AND TENANT* § 86, at 556-58 (1912); 6 S. WILLISTON, *CONTRACTS* 890, at 580-89 (3d ed. 1962). Thus, the landlord owed no duty to place leased premises in a habitable condition and no obligation to repair. *Id.* These precepts suited the era of agrarianism in which they arose because the primary value of the lease was the land itself. Additionally, the simple living structures were of secondary importance and repairable by the lessee. 10 Cal. 3d at 622, 517 P.2d at 1172,

*Green* court further held that a landlord's breach of the implied war-

111 Cal. Rptr. at 708. Because property law crystallized before the development of mutually dependent covenants in contract law, the lessee's covenant to pay rent and any of the lessor's covenants were independent. *Id.*

However, in today's urban residential leases, land, as such, is of little importance. The lessee cannot realistically be viewed as acquiring an interest in land. *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708. Rather, the lessee has contracted for a place to live "which includes not merely walls and ceilings, but also adequate heat, light and ventilation . . . ." *Id.* (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)). For a further discussion of the obsolescence of the principle of caveat emptor and the landlord-tenant relationship, see Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279, 1285-87 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227-28, 231-32 (1969); Rose, *Responsibility of Landlords for Conditions of Habitability*, 1 REAL ESTATE L.J. 53, 54-59 (1972) [hereinafter cited as Rose]; Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 387-88, 397-98 (1967) [hereinafter cited as Skillern].

The implied warranty of habitability had been recognized in the following cases: *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.) (recognition of implied warranty of habitability based upon urban tenant's interest in a dwelling suitable for occupation, and not land itself, the better position of landlord to maintain premises in a habitable state, shortage of adequate housing, and detrimental effect of substandard housing on society as a whole), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969) (court gave recognition to change in lease transaction to basically one between landlord and tenant, and to contemporary housing realities, and stated that landlord covenants that premises are fit for intended use); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (court found reasoning of *Javins* decision persuasive and implied a warranty of habitability which is fulfilled by substantial compliance with pertinent provisions of building code); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (common law concepts lost their vitality in era of industrialization, with exploding urban population; and landlord is in superior position with respect to knowledge of housing law violations and discovering deficiencies); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974) (development of common law is determined by social needs of society it was designed to serve and capacity for growth and change is significant; lease must be viewed essentially as a contract and economic realities recognized by court in *Javins* support recognition of warranty); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (implied warranty of habitability judicially imposed so that common law concept of lease would conform with statutory law which recognized that tenant's payment of rent and landlord's obligation to maintain habitable premises are mutually dependent covenants); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973) (warranty of habitability imposed based on contemporary housing shortage and resultant inequality in bargaining power between landlord and tenant, and landlord's superior knowledge of condition of the premises); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971) (implied warranty of habitability arose by operation of law because of recognition of modern-day landlord-tenant relationship, whereby tenant contracts with landlord for habitable premises); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (historical view of lease as sale of interest in land suitable for agrarian setting in which it arose, but could not be reconciled with changes in dwelling habits and economic realities; object of letting is to furnish tenant with liveable residence); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973) (tenant is not interested in land, but in house suitable for occupation, and tenant's promise to pay rent is in exchange for landlord's promise to provide habitable dwelling); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (rule prohibiting implied warranty of habitability in leases inconsistent with current legislative policy concerning housing standards; and need and social

ranty was a defense to an unlawful detainer action.<sup>5</sup> While the *Green* decision did not delineate the specific elements of the defense of the breach of the implied warranty of habitability, stringent prerequisites for pleading the landlord's breach<sup>6</sup> were set forth by the court of appeal in *Quevedo v. Braga*.<sup>7</sup>

In *Knight v. Hallsthammar*,<sup>8</sup> the California Supreme Court held that the prerequisites established in *Quevedo* were inapplicable to a breach of the warranty of habitability when asserted as a defense in an

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desirability of adequate housing could not be defeated by outdated doctrine of caveat emptor).

Idaho, Maine, Michigan, Minnesota, New York, Rhode Island and Wisconsin have statutorily implied a warranty of habitability in residential leases. IDAHO CODE § 6-320(5) (1982); ME. REV. STAT. ANN. tit. 14, § 6021(2) (West 1981); MICH. COMP. LAWS ANN. § 554.139 (Supp. 1982-1983); MINN. STAT. ANN. § 504.18 (West Supp. 1982); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981); R.I. GEN. LAWS § 34-18-16 (Supp. 1981); WIS. STAT. ANN. § 704.07 (West 1981).

5. 10 Cal. 3d at 619, 517 P.2d at 1170, 111 Cal. Rptr. at 706. "[A] defendant in an unlawful detainer action may raise any affirmative defense which, if established, will preserve the tenant's possession of the premises." *Id.* at 620, 517 P.2d at 1170, 111 Cal. Rptr. at 706. The *Green* court held that a landlord's breach of the implied warranty of habitability directly relates to whether any rent is due and owing by the tenant and may be determinative of the landlord's entitlement to possession upon a tenant's nonpayment of rent. *Id.* "Accordingly, the tenant may properly raise the issue of warranty of habitability in an unlawful detainer action." *Id.* If the trial court determines that the landlord's breach of the implied warranty is total and no rent is due, judgment is entered for the defendant in the unlawful detainer action. If the damages from the breach of warranty justify a partial rent reduction, the tenant may maintain possession of the premises only if he or she pays that portion of the back rent that is owing; if the tenant fails to pay such sum, the landlord is entitled to possession. The landlord is also entitled to possession if he or she has not breached the implied warranty. *Id.* at 639, 517 P.2d at 1184, 111 Cal. Rptr. at 720; see *infra* note 19 for a discussion of the California statutes concerning unlawful detainer actions.

A California tenant can also assert a landlord's breach of the implied warranty of habitability in an affirmative action for damages. *Quevedo v. Braga*, 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143 (1977). "[T]he doctrine of implied warranty already applied . . . to the contractual relationship created by the lease of a dwelling unit will support an independent cause of action for damages." *Id.* at 7, 140 Cal. Rptr. at 146-47. Some jurisdictions have expressly recognized a tenant's right to assert the basic contract remedies of damages, reformation and rescission if the landlord breaches the implied warranty of habitability. See, e.g., *Lemle v. Breeden*, 51 Hawaii 426, 436, 462 P.2d 470, 475 (1969); *Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971). THE UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101(b) [hereinafter cited as URLTA] provides that a tenant may obtain injunctive relief for the landlord's noncompliance with the obligation imposed by § 2.104. See *infra* note 173. A tenant in possession may also bring an action for specific performance of the landlord's obligations under the implied warranty of habitability. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.61 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). See also Note, *Implied Warranty of Habitability as a Defense to Unlawful Detainer Actions*, 63 CALIF. L. REV. 301, 315-22 (1975).

6. 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143 (1977).

7. See *infra* text accompanying note 29.

8. 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981).

unlawful detainer action.<sup>9</sup> The *Knight* court held that the implied warranty of habitability is not waived where a tenant knows of defects or fails to inspect the premises prior to occupancy.<sup>10</sup> The court further refused to restrict the defense to situations where the landlord had been allowed a reasonable time to repair, while the tenant remained in possession, following notice of the defects.<sup>11</sup> The *Knight* court focused on the actual habitability of the premises in determining the landlord's breach of the implied warranty; the tenant's knowledge of defects and the landlord's opportunity to correct the defects were irrelevant to the court's inquiry.<sup>12</sup>

This note will discuss: 1) the elements of the breach of the implied warranty of habitability as set forth in *Knight*; 2) the issue of a tenant's waiver of the warranty; 3) the issue of notice to the landlord of a breach; and 4) the effect of a change in ownership of the leased premises on the tenant's right to assert a breach of the warranty. This note concludes by discussing the *Knight* court's development of the implied warranty of habitability and the significance it will have on tenants' assertion of the landlord's breach of the warranty.

## II. FACTS OF THE CASE

On May 18, 1977, James E. Knight purchased a thirty unit apartment building located on Ocean Front Walk in Venice, California. The structure suffered from wall cracks, peeling paint, water leaks, heating and electrical fixture problems, broken or inoperable windows, rodents and cockroaches, and lack of sufficient heat in the apartments. The tenants had complained in vain to the former owner and the resident manager about the defective conditions of the building and of their individual apartments. After the change in ownership, the tenants again complained about the deficiencies to the manager, who had been retained by the new owner.<sup>13</sup>

The new landlord hired Western Investment Properties, Inc. (WIP) to manage the property. On May 19, 1977, WIP notified the tenants of substantial rent increases to take effect July 1, 1977. On May 26, 1977, Clara Breit,<sup>14</sup> representative of the building's tenant associa-

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9. *Id.* at 54-55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

10. *Id.* at 54 & n.5, 623 P.2d at 273 & n.5, 171 Cal. Rptr. at 712 & n.5.

11. *Id.* at 54-55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

12. *Id.* at 59, 623 P.2d at 276, 171 Cal. Rptr. at 715.

13. *Id.* at 50, 623 P.2d at 270, 171 Cal. Rptr. at 709; see *infra* note 16.

14. Clara Breit, Maria Hallsthammar and Cecelia DeCaprio were the appellants. All appellants resided in the apartment building purchased by Knight.

tion informed WIP that the tenants would withhold future rent payments because of the rent increase and the state of disrepair of the building. WIP did not respond.<sup>15</sup> In late May, however, WIP represented to the news media that repairs would be made to the common areas and vacant apartments, but that occupied apartments would not be renovated until vacated.<sup>16</sup>

Between June second and August fifth, a Los Angeles County health officer visited the premises five times and inspected a few apartments. The health officer discovered seven code violations, which were abated.<sup>17</sup> The building, however, had hot and cold water, adequate sewage, and sound structural conditions. Therefore, it was not condemnable under Los Angeles County Health Department standards.<sup>18</sup>

In early June, 1977, the tenants were served with three-day notices to pay rent or quit. Unlawful detainer actions were commenced upon non-compliance with the notices.<sup>19</sup> The tenants raised the landlord's breach of the implied warranty of habitability as a defense to the un-

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15. At the trial, an agent of WIP acknowledged receipt of this letter. *Id.* at 51, 623 P.2d at 271, 171 Cal. Rptr. at 710.

16. Knight had inspected the premises during escrow and noted certain needed improvements. The new owners planned to renovate the common areas and the exterior and had in fact begun repairs to the common areas. *Id.* at 50, 623 P.2d at 270, 171 Cal. Rptr. at 709. The owners painted the front entrance and some of the hallway French doors and windows. New carpeting was installed in the elevator, hallways and landings. Repairs were made to hallways and the back stairway. In addition, the landlords refurbished vacant apartments by repainting, recarpeting the living areas, placing new vinyls on kitchen and bathroom floors, and in about five apartments, converting the bathtub to shower-tub combination. *Id.* at 61, 623 P.2d at 277, 171 Cal. Rptr. at 716 (Clark, J., dissenting). A pest control company was retained on a monthly basis, and an elevator maintenance service was hired to make monthly checks. The resident manager installed a radiator in appellant Breit's apartment after she complained that there was no heater. *Id.* at 50-51, 623 P.2d at 270-71, 171 Cal. Rptr. at 709-10.

17. *See supra* note 16.

18. However, as the supreme court noted, the definition of "uninhabitable" used by the health officer, *i.e.*, lack of any water, hot or cold, and extensive sewage leakage or structurally unsound conditions, is the standard used to condemn a building and is not the standard of habitability set forth in *Green*. *Id.* at 51, 59 n.10, 623 P.2d at 271, 276 n.10, 171 Cal. Rptr. at 710, 715 n.10; *see supra* note 2.

19. CAL. CIV. PROC. CODE § 1161(2) (West 1982) (tenant guilty of unlawful detainer when he continues in possession of premises after default in payment of rent and after service of three days' notice, in writing, requiring payment of amount due, or possession of property); CAL. CIV. PROC. CODE § 1162 (West 1982) (manner of service of notice required under section 1161(2)); CAL. CIV. PROC. CODE § 1164 (West 1982) (necessary parties to unlawful detainer proceeding); CAL. CIV. PROC. CODE § 1166 (West 1982) (necessary allegations in a complaint for recovery of possession of premises); CAL. CIV. PROC. CODE § 1171 (West 1982) ("Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases."); CAL. CIV. PROC. CODE § 1179a (West 1982) (precedence given to proceedings to recover possession of real property).

lawful detainer actions.<sup>20</sup> The jury returned a verdict for the landlord, and the tenants appealed<sup>21</sup> on the ground that the trial court erroneously gave certain jury instructions requested by plaintiff, while refusing to give others requested by defendants.<sup>22</sup> The California Supreme Court reversed the judgments entered against the tenants upon its determination that "[t]he trial court's erroneous instructions to the jury and failure to set forth properly the standards of habitability were

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20. See *supra* text accompanying note 5.

21. All appellants surrendered possession of the premises in question after the trial court entered judgment for the landlords. The tenants appealed, and in April 1979, the appellate department of the Los Angeles Superior Court reversed the trial court's decision on the basis of erroneous jury instructions. Appellants' Petition for Hearing at 8, *Knight v. Hallsthammar*, 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981) [hereinafter cited as *Petition for Hearing*]. On its own motion, the court of appeal ordered the matter transferred to it. Order Transferring Action, *Knight v. Hallsthammar*, 29 Cal. 3d 46, 623 P.2d 623, 171 Cal. Rptr. 707 (1981). See CALIF. RULES OF COURT, RULES 62(a). In December, 1979, by a two-to-one vote, the court affirmed the judgment of the trial court. In January, 1980, a petition for rehearing was denied and the tenants appealed to the California Supreme Court. *Petition for Hearing, supra*, at 8.

22. The trial court instructed the jury, over the tenants' objection, that a tenant may not defend an unlawful detainer action upon the basis of a landlord's breach of the implied warranty of habitability unless 1) "[t]he defective condition was unknown to the tenant at the time of the occupancy of his or her apartment;" 2) "[t]he effect on habitability of the defective condition [was not] apparent to the tenant upon a reasonable inspection;" and 3) the landlord was allowed a reasonable time to repair. 29 Cal. 3d at 54 & n.5, 623 P.2d at 273 & n.5, 171 Cal. Rptr. at 712 & n.5. The tenants also objected to the reading of CAL. CIV. CODE § 823 (West 1982), which provides:

Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incumbrances or relating to the title or possession of the premises.

29 Cal. 3d at 55, 623 P.2d at 274, 171 Cal. Rptr. at 713. Lastly, the tenants objected to the instructions that 1) a residence is uninhabitable if there is a "materially defective condition affecting habitability;" 2) the implied warranty of habitability relates to conditions which affect the tenant's bare living requirements, and does not extend to what may be called amenities; 3) amenities, as distinguished from living requirements, may include living with lack of or unsightly painting, water leaks, wall cracks or defective or malfunctioning blinds; and 4) minor housing code violations which do not affect habitability will not entitle the tenant to a reduction in rent. *Id.* at 57 n.8, 623 P.2d at 275 n.8, 171 Cal. Rptr. at 714 n.8.

The trial court refused the tenant's requested instruction that the landlord is the assignee of leases entered into between the former owners and the tenants; "[t]hat the effect of the assignment is to transfer the interest of the former owners in the leased property to the new landlord;" that the landlord stands "in the shoes of the former owners, taking their rights and remedies, subject to any defenses which the [tenants] had prior to the notice of assignment"; and that the landlord "can gain no better position than the former owners had with respect to the subject matter of the assignment." *Id.* at 55-56, 623 P.2d at 274, 171 Cal. Rptr. at 713. The trial court also refused any instructions which purported to list the specific housing requirements of state or local law as contained in CAL. CIV. CODE § 1941.1 (West Supp. 1981), the LOS ANGELES MUNICIPAL CODE or the CALIFORNIA ADMINISTRATIVE CODE. 29 Cal. 3d at 58, 623 P.2d at 275, 171 Cal. Rptr. at 714.

likely to mislead the jury.”<sup>23</sup>

### III. REASONING OF THE COURT

#### A. Status of the Implied Warranty of Habitability Prior to Knight

The *Green* decision approved the basic concept of an implied warranty of habitability in residential leases.<sup>24</sup> The *Knight* court, however, was confronted with questions concerning the practical application of the doctrine which were left unanswered by the *Green* court. Among the unresolved issues were: 1) whether premises uninhabitable at the inception of the lease were subject to the rule of implied warranty;<sup>25</sup> 2) the parameters of the concept of “habitability”;<sup>26</sup> and 3) whether a tenant could assert the landlord’s breach of the warranty only if the landlord had been notified of the defects and afforded a reasonable opportunity to repair.<sup>27</sup>

The only case to expound upon the principles of the *Green* case

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23. *Id.* at 59, 623 P.2d at 276, 171 Cal. Rptr. at 715. It is interesting to note that at the trial level, the court ordered the rent monies deposited into a trust account. Upon reversal of the judgment entered against the tenants, the monies were returned to them. Telephone interview (Sept. 24, 1981) with Ronald Rouda, attorney for the *Knight* appellants.

24. For an analysis of the *Green* decision, see Graham, *The Greening of Tenants’ Pastures: Implied Warranty of Habitability*, 49 CAL. STATE BAR J. 374 (1974); Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974) [hereinafter cited as Moskowitz]; Note, *Implied Warranty of Habitability as a Defense to Unlawful Detainer Actions*, 63 CALIF. L. REV. 301 (1975); Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729 (1976).

25. The *Green* court avoided this issue because there were no allegations by either the landlord or the tenant in that case that the premises were in an uninhabitable state when first rented by the tenant. 10 Cal. 3d at 621 n.3, 517 P.2d at 1170-71 n.3, 111 Cal. Rptr. at 706-07 n.3.

26. See *supra* note 2.

27. In *Green*, the landlord had notice of the conditions rendering the premises uninhabitable and failed to make repairs. 10 Cal. 3d at 620-21, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

The *Green* court also left unanswered the question of how damages were to be assessed, i.e., the method by which the rental value of the defective premises should be determined. It recognized the difficulty of ascertaining damages and delegated to the trial courts the responsibility of using “all available facts to approximate the fair and reasonable damages under all of the circumstances.” *Id.* at 638-39, 517 P.2d at 1183, 111 Cal. Rptr. at 719. The court in *Knight* did not address the issue of damages. For an overview of the various methods of computing damages see Myers, *Implied Warranty of Habitability*, 4 L.A. LAW. 34, 41-42 (1981) [hereinafter cited as Myers]. For an analysis of the measurement of damages for breach of the warranty see Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. LAW ANN. 3, 102-09 (1979) [hereinafter cited as Cunningham]; HIRSCH, HIRSCH & MARGOLIS, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation of the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1110 n.50 (1975) [hereinafter cited as Hirsch].



was the court of appeal decision in *Quevedo v. Braga*.<sup>28</sup> *Quevedo* limited tenants' use of the implied warranty of habitability, and established a basis for tenants' waiver of the warranty, by requiring that a tenant's affirmative cause of action for breach of the warranty allege that: 1) a materially defective condition affecting habitability exists; 2) the defective condition was unknown to the tenant at the time of occupancy; 3) the effect on habitability of the defective condition was not apparent upon a reasonable inspection; 4) notice was given to the landlord within a reasonable time after tenant discovered or should have discovered the breach; and 5) the landlord was given a reasonable time to correct the defect while the tenant remained in possession.<sup>29</sup>

*Quevedo*, by formulating these restrictive prerequisites, obfuscated the rationale underlying the recognition of the implied warranty of habitability.<sup>30</sup> In *Knight*, however, the California Supreme Court returned to the public policy considerations of *Green* and resolved the difficulties created by the court of appeal in *Quevedo*.

### B. Waiver of the Warranty of Habitability

The first issue addressed by the *Knight* court was whether a residential tenant who continues to occupy uninhabitable premises after learning of defects waives the landlord's breach of the implied warranty of habitability.<sup>31</sup> The court bifurcated the waiver issue as follows: 1) the tenant's awareness of defects (whether at the inception of the lease or at any time during the lease term);<sup>32</sup> and 2) a new tenant's failure to discover defects upon a reasonable inspection.<sup>33</sup>

The *Knight* court, as did the *Green* court, identified the policy considerations underlying the implied warranty of habitability as housing shortage, the inequality of bargaining power between landlord and tenant, and the impracticability of imposing a duty of inspection upon tenants.<sup>34</sup> In *Green*, the court stated that "public policy requires that landlords generally not be permitted to use their superior bargaining

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28. 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143 (1977).

29. *Id.* at 7-8, 140 Cal. Rptr. at 147.

30. *See supra* note 4.

31. 29 Cal. 3d at 51, 623 P.2d at 271, 171 Cal. Rptr. at 710.

32. *Id.* at 51, 54, 623 P.2d at 271, 273, 171 Cal. Rptr. at 710, 712.

33. *Id.* at 54 & n.5, 623 P.2d at 273 & n.5, 171 Cal. Rptr. at 712 & n.5.

34. 29 Cal. 3d at 52-53, 54, 623 P.2d at 271-72, 273, 171 Cal. Rptr. at 710-11, 712; *see Green*, 10 Cal. 3d at 624-25, 517 P.2d at 1173, 111 Cal. Rptr. at 709. For a further discussion of the contemporary landlord-tenant relationship underlying these considerations see Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572, 572 (1974) [hereinafter cited as Clocksin]; Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 WIS. L. REV. 19, 98-100 [hereinafter

power to negate the warranty of habitability."<sup>35</sup> While disapproving generally of a compelled waiver of the implied warranty, the *Green* court did not decide whether a tenant's occupancy of uninhabitable premises at the commencement of the lease term constitutes a waiver of the warranty.<sup>36</sup> The *Knight* court held that the policy considerations underlying the imposition of the warranty compel the conclusion that "a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty."<sup>37</sup>

The *Knight* court also rejected a waiver of the implied warranty of habitability based on a tenant's failure to inspect the premises, reasoning that prospective tenants are under no duty to inspect a residence for defects which may render it uninhabitable.<sup>38</sup> In *Green*, the court reasoned that "the increasing complexity of modern apartment buildings . . . makes adequate inspection of the premises . . . a virtual impossibility; complex heating, electrical and plumbing systems are hidden from view, and the landlord . . . is certainly in a much better position to discover . . . dilapidations . . ."<sup>39</sup> According to the *Knight* court, it was inconsistent to recognize the impracticability of the tenant conducting an adequate inspection of the premises to discover defects, while simultaneously imposing on the tenant a duty of inspection.<sup>40</sup>

The *Knight* court recognized that California's statutory pattern of landlord-tenant relations is consistent with the policy of prohibiting waiver of the warranty.<sup>41</sup> Under Civil Code section 1941,<sup>42</sup> a landlord is obligated to put a building in a condition fit for human occupation

cited as Love]; Comment, *The Implied Warranty of Habitability: A Dream Deferred*, 48 U. MO. KANSAS CITY L. REV. 237, 238-40 (1980); see also sources cited *supra* note 4.

35. 10 Cal. 3d at 625 n.9, 517 P.2d at 1173-74 n.9, 111 Cal. Rptr. at 709-10 n.9.

36. *Id.* at 621 n.3, 517 P.2d at 1170-71 n.3, 111 Cal. Rptr. at 706-07 n.3.

37. 29 Cal. 3d at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712.

38. *Id.* at 54 n.5, 623 P.2d at 273 n.5, 171 Cal. Rptr. at 712 n.5.

39. 10 Cal. 3d at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

40. 29 Cal. 3d at 54 n.5, 623 P.2d at 273 n.5, 171 Cal. Rptr. at 712 n.5.

41. *Id.* at 53, 623 P.2d at 272, 171 Cal. Rptr. at 711. For a discussion of the statutes governing landlord relations see Hirsch, *supra* note 27, at 1102-06; Comment, *Rent Withholding Won't Work: The Need for a Realistic Rehabilitation Policy*, 7 LOY. L.A.L. REV. 66 (1974); Comment, *Landlord and Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAW. 298 (1971); Comment, *California's New Legislation on a Landlord's Duty to Repair - Legal Problems of Landlord and Tenant*, 3 U.C.D. L. REV. 131 (1971).

42. CAL. CIV. CODE § 1941 (West 1954) provides:

The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine.

CAL. CIV. CODE § 1929 (West 1954) provides that "[t]he hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."

and to repair subsequent dilapidations rendering it untenable.<sup>43</sup> Civil Code section 1942<sup>44</sup> authorizes a tenant to repair untenable

43. 29 Cal. 3d at 53, 623 P.2d at 272, 171 Cal. Rptr. at 711. CAL. CIV. CODE § 1941.1 (West Supp. 1982) provides:

A dwelling shall be deemed untenable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics:

(a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

(b) Plumbing or gas facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.

(c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulation of debris, filth, rubbish, garbage, rodents and vermin, and all areas under the control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.

(h) Floors, stairways, and railings maintained in good repair.

Affirmative obligations are imposed on a tenant by CAL. CIV. CODE § 1941.2 (West Supp. 1982), which provides:

(a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

44. CAL. CIV. CODE § 1942 (West Supp. 1982) provides:

(a) If within a reasonable time after written or oral notice to the landlord . . . of dilapidations rendering the premises untenable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair . . . where the cost of such repairs does not require an expenditure more than one month's rent . . . and

premises if the landlord fails to do so after notice, and to deduct the cost of repairs from the monthly rent due.<sup>45</sup> Civil Code section 1942.1<sup>46</sup> voids as contrary to public policy any agreement by a lessee purporting to waive or modify his or her rights under sections 1941 or 1942 with respect to any condition which renders the premises untenable, except that the lessor and lessee may agree that the lessee shall be responsible for repair as part of the consideration for the rental.<sup>47</sup> In *Knight*, there was no agreement requiring the tenants to repair the premises.<sup>48</sup>

Based on the policy considerations underlying the implied warranty of habitability, and bolstered by California's statutory scheme in the area of landlord-tenant relations,<sup>49</sup> the court concluded that the duty of the landlord to maintain habitable premises<sup>50</sup> was not depen-

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deduct the expenses of such repairs from the rent when due, . . . . This remedy shall not be available to the tenant more than twice in any 12-month period.

(b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. . . .

(c) The tenant's remedy under subdivision (a) shall not be available if the condition was caused by a violation of Section 1929 or 1941.2.

(d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

45. The court noted that the statutory remedy of "repair and deduct" is only available twice in any twelve-month period, and that to invoke the remedy the tenant has to adhere to certain procedural requirements. 29 Cal. 3d at 53, 623 P.2d at 272, 171 Cal. Rptr. at 711. See *supra* note 44. The court further emphasized that the remedy provided by § 1942 was not the exclusive remedy for tenants when a landlord neglected to maintain tenantable premises. 29 Cal. 3d at 53, 623 P.2d at 272, 171 Cal. Rptr. at 711. In *Green*, and *Secretary of HUD v. Layfield*, 88 Cal. App. 3d Supp. 28, 152 Cal. Rptr. 342 (1978), the courts stated that the enactment of section 1942 does not preclude the recognition of a common law warranty of habitability, and that the "repair and deduct" provisions are not an exclusive remedy. 10 Cal. 3d at 620, 517 P.2d at 1170, 111 Cal. Rptr. at 706; 88 Cal. App. 3d Supp. at 30, 152 Cal. Rptr. at 344. In 1979, § 1942 was amended to provide explicitly that the remedy of that section is in addition to "any other remedy provided by . . . applicable . . . common law." CAL. CIV. CODE § 1942(d) (West Supp. 1982). It appears that the *Knight* court was stating that the tenants did not waive the implied warranty of habitability by failing to comply with the provisions of § 1942.

46. CAL. CIV. CODE § 1942.1 (West Supp. 1981).

47. CAL. CIV. CODE § 1942.1 (West Supp. 1981) provides in pertinent part that "the lessor and the lessee may agree that the lessee shall undertake to improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental."

48. 29 Cal. 3d at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712.

49. In *Green*, the California Supreme Court recognized the interrelation of the development of the common law doctrine of an implied warranty of habitability and legislative policy concerning housing standards. 10 Cal. 3d at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

50. *Id.* The term "habitable" is more comprehensive than the term "tenantable." "Tenantable" is the legal definition of habitability for purposes of Civil Code §§ 1941-1942, in-

dent upon the tenant's lack of awareness of specific defects.<sup>51</sup> Accordingly, the tenants in *Knight* did not waive the landlord's implied warranty of habitability despite their possible failure to inspect the premises prior to occupancy,<sup>52</sup> and despite their continued occupancy in an uninhabitable dwelling.

### C. Reasonable Time to Repair

The *Knight* court next considered whether the landlord's breach of the implied warranty of habitability arises only after the landlord is allowed a reasonable time to repair the defect while the tenant remains in possession. The *Knight* court, quoting the Massachusetts case of *Berman & Sons, Inc. v. Jefferson*,<sup>53</sup> declared that "[t]he landlord's lack of fault and reasonable efforts to repair do not prolong the duty to pay full rent."<sup>54</sup> The *Knight* court stated that "it is significant" that California law imposes a duty on a lessor "to put a building into a condition fit for occupation *and* to repair all later defects which make the premises uninhabitable."<sup>55</sup> The court further stated that the mutual dependence of a landlord's obligation to maintain habitable premises, and a tenant's duty to pay rent would be meaningless if the breach of the warranty did not arise until the landlord had been allowed a reasonable time to repair defects.<sup>56</sup> Accordingly, the court held that in a

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clusive. Comment, *California's New Legislation of a Landlord's Duty to Repair - Legal Problems of Landlord and Tenant*, 3 U.C.D. L. REV. 131, 143 (1971). Reference to habitable premises for purposes of the implied warranty of habitability encompasses the judicially mandated standards for habitability, and may include those conditions that render a dwelling "tenantable." *Id.* at 146-47. See also 29 Cal. 3d at 57-59, 623 P.2d at 275-76, 171 Cal. Rptr. at 714-15.

51. 29 Cal. 3d at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712.

52. The *Knight* opinion does not state whether the tenants had inspected the premises prior to occupancy. Apparently the tenants had resided in the apartment building for some time prior to the change in ownership, and all of the defective conditions existed before the new landlord acquired ownership. *Id.* at 50, 623 P.2d at 270, 171 Cal. Rptr. at 709.

53. 396 N.E.2d 981 (Mass. 1979).

54. 29 Cal. 3d at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712 (quoting *Berman & Sons, Inc. v. Jefferson*, 396 N.E.2d at 983). The *Berman* court defined the implied warranty of habitability as a landlord's covenant that, at the inception of the lease and for its entire term, the premises are and will remain free of defects in facilities "vital to the use of the premises for residential purposes." *Id.* at 985 (citations omitted). The *Berman* court further held that the tenant's obligation to pay full rent abated "as soon as the landlord has notice that the premises failed to comply with the requirements of the warranty of habitability." *Id.* at 983.

55. 29 Cal. 3d at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712; Cal. Civ. Code § 1941 (West 1954); see *supra* note 19.

56. 29 Cal. 3d at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712. In *Green*, the court held that "the tenant's duty to pay rent is 'mutually dependent' upon the landlord's fulfillment of his implied warranty of habitability." 10 Cal. 3d at 635, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

situation where a landlord has notice of uninhabitable conditions,<sup>57</sup> not caused by the tenants, a breach of the implied warranty of habitability exists whether or not the landlord has had a reasonable time to repair.<sup>58</sup>

#### D. Change of Ownership

The *Knight* court next addressed whether it was error for the trial judge to read section 823 of the Civil Code to the jury.<sup>59</sup> Section 823 prohibits a lessee from asserting against the lessor's assigns any ripened chose in action arising from the lessor's breach of a covenant against encumbrances or relating to the title or possession of the premises. A lessee's assigns are likewise prohibited from asserting such a cause of

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57. In *Knight*, the tenants withheld rent after notifying the landlord of the defects rendering the premises uninhabitable. 29 Cal. 3d at 50, 623 P.2d at 270, 171 Cal. Rptr. at 709. The jury instruction regarding notice was not challenged on appeal, and, therefore, the *Knight* court did not consider the issue of notice as a prerequisite to a tenant's assertion of a landlord's breach of the warranty. *Id.* at 55 n.6, 623 P.2d at 273 n.6, 171 Cal. Rptr. at 712 n.6.

58. *Id.* at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712. The *Knight* court disapproved *Quevedo* and *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972), to the extent that both decisions held that a tenant could not assert the landlord's breach of the implied warranty of habitability if the landlord had not been allowed a reasonable time to repair defects. 29 Cal. 3d at 55 n.7, 623 P.2d at 273 n.7, 171 Cal. Rptr. at 712 n.7; *Quevedo v. Braga*, 72 Cal. App. 3d Supp. at 7, 140 Cal. Rptr. at 147; *Hinson v. Delis*, 26 Cal. App. 3d at 70, 102 Cal. Rptr. at 666; see *supra* note 29 and accompanying text.

*Hinson* was an action by a tenant seeking to enjoin the filing of an eviction action based on nonpayment of rent and praying for a declaratory judgment to the effect that the tenant was not obligated to pay full rent until the landlord complied with his duty substantially to obey the housing codes. 26 Cal. App. 3d at 65, 102 Cal. Rptr. at 663. The court of appeal held that there was an implied warranty of habitability for residential leases and upheld the tenant's right to claim a rent abatement if the warranty were breached. *Id.* at 70-71, 102 Cal. Rptr. at 666. The *Hinson* court held that:

In considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. . . . [T]he violation must be relevant and affect the tenant's apartment or the common areas which he uses. . . . The tenant must also give notice of alleged defects to the landlord and allow a reasonable time for repairs to be made.

*Id.* at 70, 102 Cal. Rptr. at 666. The *Hinson* court did not expressly state why it required time to repair.

Both *Hinson* and *Quevedo* were actions instituted by the tenant, whereas *Knight* was a summary eviction proceeding. The requirement of reasonable opportunity to repair was eliminated as an element of the claim of a breach of the implied warranty of habitability, whether asserted as a defense to an unlawful detainer action or as an affirmative action against a landlord for damages. In *Knight*, the court declared that "a landlord's breach of the implied warranty of habitability exists whether or not he has a 'reasonable' time to repair." 29 Cal. 3d at 55, 629 P.2d at 273, 171 Cal. Rptr. at 712. The court did not distinguish between the two procedures for alleging the breach of warranty.

59. CAL. CIV. CODE § 823 (West 1982). See *supra* note 22.

action against the lessor or the lessor's assignees.<sup>60</sup> The court framed the issue as "whether a residential tenant may defend an unlawful detainer action brought by a current landlord based on uninhabitable conditions which have existed since the tenant entered possession under a former owner."<sup>61</sup> The tenants requested an instruction that a successor landlord should be held liable for a previous owner's breach of the implied warranty of habitability.<sup>62</sup> The trial court refused to proffer this instruction.<sup>63</sup>

Both the landlord and the tenants relied on the supreme court's language in *Standard Livestock v. Pentz*<sup>64</sup> to support their conflicting contentions concerning the applicability of section 823 to the *Knight* case. In *Standard Livestock*, the assignee of the original lessee sued the lessor for breach of the implied covenant of quiet enjoyment,<sup>65</sup> alleging that the covenant was breached when a mortgagee of the property commenced a foreclosure action.<sup>66</sup> The foreclosure action was filed after the assignment of the lease.<sup>67</sup> The lessor in *Standard Livestock* argued that section 823 barred the assignee from asserting the action because he was not the original lessee.<sup>68</sup> The court held that section 823 related to remedies as distinguished from rights,<sup>69</sup> and that the assignee of a lease acquired the right to the enforcement of any unbroken covenant contained in the lease. The assignment, however, did not transfer to the assignee those ripened choses in action for a breach of the covenant against encumbrances or relating to the title or possession of the premises.<sup>70</sup>

The *Knight* court, without detailed analysis, held that the interpretation of section 823 contained in *Standard Livestock* was inapplicable under the facts of the case.<sup>71</sup> The court stated that the successor land-

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60. *Knight* is a case of first impression regarding the applicability of Civil Code § 823 to the implied warranty of habitability.

61. 29 Cal. 3d at 55, 623 P.2d at 274, 171 Cal. Rptr. at 713.

62. *Id.* at 55-56, 623 P.2d at 274, 171 Cal. Rptr. at 713.

63. *Id.* The court did not explain the trial court's refusal of the tenants' requested instruction.

64. 204 Cal. 618, 269 P. 645 (1928); see *infra* text accompanying notes 70, 167.

65. 204 Cal. at 620-21, 269 P. at 646.

66. *Id.* at 621, 269 P. at 646.

67. *Id.*

68. *Id.* at 629, 269 P. at 649.

69. *Id.*

70. *Id.*; see *infra* text accompanying note 167.

71. 29 Cal. 3d at 56, 623 P.2d at 274, 171 Cal. Rptr. at 713. The *Knight* court noted that the tenants did not cross-complain against the new owner for damages caused by a previous owner; nor did they seek retroactive rent reductions for any period before the change of ownership. *Id.* at 56-57, 623 P.2d at 274, 171 Cal. Rptr. at 713. The court therefore deemed

lord was in breach of the implied warranty of habitability, if the premises were in fact uninhabitable.<sup>72</sup> "Moreover, the change in ownership was an event over which the tenants had no control."<sup>73</sup>

The dissent in *Knight* concluded that the reading of Civil Code section 823 in its entirety was not improper because the instruction stated a valid principle of law.<sup>74</sup> The dissenting opinion further stated that the tenants did not request additional instructions explaining the applicability of the code section language to the case.<sup>75</sup> The tenants, however, had requested an instruction stating that the assignment of the lease transferred to the new landlord the interest of the former owners in the leased premises; and the landlord acquired the rights and remedies of the former owners, subject to any defenses available to the tenants prior to the assignment.<sup>76</sup>

The court concluded that a tenant may defend an unlawful detainer action against a successor owner, at least with respect to rent claimed due since the time the new owner acquired possession, despite the existence of the uninhabitable conditions under a former owner.<sup>77</sup> Because the jury could have inferred from the trial court's instruction that the tenants had no defense against the landlord if the premises were uninhabitable prior to the change in ownership, the supreme court held that it was error to offer section 823 as a jury instruction.<sup>78</sup>

### E. Definition of Habitability

The final issue considered by the court in *Knight* was the definition of habitability. The trial court spoke of a "materially defective condition affecting habitability," and generally distinguished between bare

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it unnecessary to decide whether the "applicability of Civil Code section 823 to a tenant's affirmative action against a new owner, or whether the implied warranty of habitability is 'an agreement in the lease' or a covenant 'relating to . . . possession of the premises' within the meaning of that section." *Id.* at 57, 623 P.2d at 274, 171 Cal. Rptr. at 713. The court also did not consider the tenants' contention that the products liability exception to the general rule against imposing liabilities of a predecessor corporation upon its successor is applicable in landlord-tenant cases. *Id.* at 57, 623 P.2d at 274-75, 171 Cal. Rptr. at 713-14; see *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). For a discussion of products liability and the landlord-tenant relationship see Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458 (1970).

72. 29 Cal. 3d at 57, 623 P.2d at 275, 171 Cal. Rptr. at 714.

73. *Id.*

74. 29 Cal. 3d at 68, 623 P.2d at 281, 171 Cal. Rptr. at 720 (Clark, J., dissenting).

75. *Id.* (Clark, J., dissenting).

76. *Id.* at 55-56, 623 P.2d at 274, 171 Cal. Rptr. at 713.

77. *Id.* at 57, 623 P.2d at 275, 171 Cal. Rptr. at 714.

78. *Id.*



living requirements and amenities,<sup>79</sup> but refused instructions which enumerated the specific housing requirements of state or local law, as contained in Civil Code section 1941.1.<sup>80</sup>

Without evaluating the propriety of each item contained in the tenants' requested instruction, the *Knight* court ruled that depending upon the facts of the case, the standards contained in section 1941.1 may be relevant to a determination of habitability.<sup>81</sup> The supreme court rejected the landlord's argument that the standards set forth in section 1941.1 were inapplicable because the tenants claimed a breach of the implied warranty of habitability rather than invoking the "repair-and-deduct" remedy provided in Civil Code section 1942.<sup>82</sup> The court reasoned that: 1) section 1941.1 defines untenable standards for purposes of section 1941; 2) section 1941 imposes on landlords the duty to maintain tenantable premises; and 3) the language of section 1941 does not demonstrate a legislative intent to vary the duty of a landlord depending upon whether a tenant relies on the statutory remedy of "repair-and-deduct" or on the common law implied warranty of habitability.<sup>83</sup>

While the *Knight* court declined to set forth a complete definition of uninhabitable conditions, it noted various standards relevant to a determination of a premises' habitability.<sup>84</sup> The court indicated that, depending on the particular facts of the case, a landlord's noncompliance with applicable building and housing codes may or may not constitute a breach of the implied warranty of habitability.<sup>85</sup> In some cases, housing code violations are not dispositive of whether the landlord has breached the warranty.<sup>86</sup> The *Knight* court, however, did not establish precise rules for defining uninhabitable premises.

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79. As instructed by the trial court, in some situations amenities include living with lack of or unsightly paint, water leaks, wall cracks or defective or malfunctioning venetian blinds. The court further instructed that minor housing code violations which do not affect habitability would not entitle the tenant to a rent reduction. *Id.* at 57 n.8, 623 P.2d at 275 n.8, 171 Cal. Rptr. at 714 n.8.

80. *Id.* at 58, 623 P.2d at 275, 171 Cal. Rptr. at 714; see *supra* note 43 for the text of § 1941.1.

81. 29 Cal. 3d at 58, 623 P.2d at 276, 171 Cal. Rptr. at 715.

82. *Id.* at 58, 623 P.2d at 275-76, 171 Cal. Rptr. at 714-15; see *supra* note 44.

83. *Id.* at 58-59, 623 P.2d at 276, 171 Cal. Rptr. at 715.

84. *Id.* at 59 n.10, 623 P.2d at 276 n.10, 171 Cal. Rptr. at 715 n.10 (citations omitted); see *Green v. Superior Court*, 10 Cal. 3d at 637, 517 P.2d at 1182-83, 111 Cal. Rptr. at 718-19.

85. 29 Cal. 3d at 59 n.10, 623 P.2d at 276 n.10, 171 Cal. Rptr. at 715 n.10.

86. *Id.*

## V. ANALYSIS

Although a majority of jurisdictions has recognized an implied warranty of habitability in residential leases,<sup>87</sup> there is no unanimity among courts concerning the nature and scope of the warranty.<sup>88</sup> This section will compare the majority opinion in *Knight* with the more restrictive view of the implied warranty of habitability set forth by the *Knight* dissent.

A. *Waiver of the Implied Warranty of Habitability*

## 1. The argument supporting waiver

The dissent in *Knight* maintained that the implied warranty of habitability may be waived in appropriate circumstances.<sup>89</sup> A tenant who is aware of specific deficiencies at the inception of the tenancy can entertain no reasonable expectation that the premises will be habitable for the duration of the lease, absent a landlord's expressed intention to effect repairs or improvements.<sup>90</sup> The dissent's major premise was that when a tenant who is aware of defects occupies an apartment without complaint, he or she has demonstrated a willingness to endure the defects either in exchange for the agreed rent,<sup>91</sup> or because the defects do not render the premises uninhabitable.<sup>92</sup>

A rigid rule prohibiting waiver of the implied warranty of habitability, according to the dissent, fails to effect the intentions of the par-

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87. See *supra* note 4. Alabama is one of the few states that has not recognized the implied warranty of habitability. See *Martin v. Springdale Stores, Inc.*, 354 So. 2d 1144, 1145-46 (Ala. Civ. App. 1978) ("As between the landlord and tenant, where there is no fraud, false representations or knowing concealment of defects, there is no implied covenant or warranty that the premises are suitable for occupation . . .").

88. Love, *supra* note 34, at 101.

89. 29 Cal. 3d at 65, 623 P.2d at 280, 171 Cal. Rptr. at 718 (Clark, J., dissenting). Several jurisdictions have held that the warranty of habitability can be waived. *E.g.*, *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972) (a tenant can voluntarily, knowingly and intelligently waive defects constituting a breach of warranty); *Berzito v. Gambino*, 63 N.J. 460, 464, 470, 308 A.2d 17, 19, 22 (1973) (although court held that tenant did not waive warranty by continuing in possession of defective premises, court acknowledged that warranty could be waived — court did not specify conditions under which a waiver would be found); *Kline v. Burns*, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971) (whether a tenant had waived warranty of habitability was listed as a factor in determining a breach of warranty, but court did not specify manner in which a waiver could occur).

90. 29 Cal. 3d at 65, 623 P.2d at 279-80, 171 Cal. Rptr. at 718 (Clark, J., dissenting).

91. The assumption of the dissenting opinion was that in the free market, the primary determinant of the agreed rent is the physical condition of the premises. *Id.* at 64, 623 P.2d at 279, 171 Cal. Rptr. at 718 (Clark, J., dissenting).

92. *Id.* at 66, 623 P.2d at 280, 171 Cal. Rptr. at 719 (Clark, J., dissenting). In support of this position, see *Morris v. Jones*, 128 Ga. App. 847, 847-48, 198 S.E.2d 354, 355 (1973) (Georgia Court of Appeals held that tenant's occupancy of premises proved habitability).

ties to a lease.<sup>93</sup> The landlord and tenant freely bargain to lease the premises in a condition commensurate with the agreed rent.<sup>94</sup> A tenant should not thereafter be permitted to require a landlord to provide improved property without renegotiating the rental.<sup>95</sup> Nor should a tenant who knowingly occupies defective premises be allowed to withhold rent and then defend an unlawful detainer action on the basis of the landlord's breach of the implied warranty.<sup>96</sup>

In addition, the dissent argued that imposing a nonwaivable duty on landlords to provide habitable premises will not ensure improved housing conditions.<sup>97</sup> The categories of housing which will be affected by the covenant of habitability range from those dwellings suffering from minor defects to completely dilapidated housing.<sup>98</sup> If it is assumed that landlords, as rational economic beings, seek to maximize profits and minimize losses,<sup>99</sup> the economic consequences of the implied warranty of habitability are likely to be as follows:

1. Some substandard housing would be upgraded and rents in-

93. 29 Cal. 3d at 64-65, 623 P.2d at 279-80, 171 Cal. Rptr. at 718 (Clark, J., dissenting). See also Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 884 (1975) [hereinafter cited as Meyers].

94. 29 Cal. 3d at 64, 623 P.2d at 279, 171 Cal. Rptr. at 718 (Clark, J., dissenting). The state of Maine will enforce a waiver if there is a written agreement between the landlord and tenant waiving the warranty of habitability in exchange for a stated reduction in rent or other specified fair consideration. The Maine statute provides in pertinent part as follows:

5. Waiver. A written agreement whereby the tenant accepts specified conditions which may violate the warranty of fitness for human habitation in return for a stated reduction in rent or other specified fair consideration shall be binding on the tenant and the landlord.

Any agreement, other than as provided in this subsection, by a tenant to waive any of the rights or benefits provided by this section shall be void.

ME. REV. STAT. ANN. tit. 14, § 6021(5) (West 1980).

95. See 29 Cal. 3d at 64, 623 P.2d at 279, 171 Cal. Rptr. at 718 (Clark, J., dissenting).

96. *Id.* (Clark, J., dissenting).

97. Cf. *id.* at 62-63 n.3, 623 P.2d at 278 n.3, 171 Cal. Rptr. at 717 n.3 (Clark, J., dissenting) ("Enforcement of the implied warranty does not increase the supply of rental housing. If anything, the result will be that some landlords faced with substantial costs in complying with the warranty will tear down their buildings."). See also Meyers, *supra* note 93, at 881. Meyers states:

[T]hough housing may be in short supply and though tenants may be poor and landlords rich, the duty of habitability may not change the bargaining position of tenants or improve the condition of rental housing. Whether or not it will do so depends on other considerations, primarily the rents that can be collected and the cost of repairs. . . . [T]he . . . rationale for the habitability duty is based on moral philosophy and distributive justice, but the objectives it seeks to achieve cannot be accomplished outside the narrow and perhaps selfish confines of economic behavior.

*Id.*

98. See generally Meyers, *supra* note 93, at 889.

99. *Id.* at 893.

creased. Tenants would either be forced out or required to pay higher rent. Those tenants unable or unwilling to pay for the improved housing would move out, creating an increased demand for low-priced, lower-quality housing.<sup>100</sup>

2. Some landlords would be able to repair without incurring a deficit and without raising rents. Tenants would enjoy better housing at no extra cost. The warranty of habitability would, however, retire this component of the housing stock sooner than would otherwise be the case and would discourage new investment in low-rent housing.<sup>101</sup>

3. Some portion of the housing stock would be abandoned as soon as the owner determines that income would not cover the expenses of repairs and that a deficit would persist.<sup>102</sup> Thus, if a waiver of the warranty of habitability is not implied from a tenant voluntarily choosing to live in lower-cost, lower-quality housing,<sup>103</sup> enforcement of the warranty could deleteriously affect the housing market and the situation of the lower-income tenant.<sup>104</sup>

In support of its position on the waiver issue, the *Knight* dissent also relied on the *Green* court's analogy<sup>105</sup> to the implied warranty of fitness and merchantability in the sale of goods.<sup>106</sup> The *Green* court had stated that "[i]n seeking to protect the reasonable expectations of consumers, judicial decisions, discarding the caveat emptor approach, have . . . implied a warranty of fitness and merchantability in the case of the sale of goods."<sup>107</sup> In the dissent's view, *Green* supported a waiver of the warranty of habitability where the circumstances indicate a tenant's intent to waive the implied warranty.<sup>108</sup> In the sale of goods, the implied warranties are disclaimed when the goods are accepted "as

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100. *Id.*; see also Rose, *supra* note 4, at 73.

101. Meyers, *supra* note 93, at 893.

102. *Id.* Abandonment may be more prevalent among sole proprietors who lack adequate resources to effect necessary repairs. See Grigsby, *Economic Aspects of Housing Code Enforcement*, 3 URB. LAW. 533, 535 (1971) [hereinafter cited as Grigsby]; Comment, *Landlord-Tenant Law Reform - Implied Warranty of Habitability: Effects and Effectiveness of Remedies for Its Breach*, 5 TEX. TECH. L. REV. 749, 768 (1974).

103. *Contra infra* text accompanying notes 127-29.

104. See *supra* text accompanying notes 100-02. The appropriateness of judicial intervention in the area of landlord-tenant relations for the purpose of improving housing conditions can also be questioned. Meyers, *supra* note 93, at 897; Parker, *Must the Residential Landlord Run for Cover?*, 6 REAL EST. REV. 76, 76 (1976). Meyers argues that the responsibilities imposed on the courts and litigants could prove insurmountable. Meyers, *supra* note 93, at 886-89.

105. 29 Cal. 3d at 65, 623 P.2d at 280, 171 Cal. Rptr. at 719 (Clark, J., dissenting).

106. CAL. U. COM. CODE §§ 2314(1), 2315 (West 1964).

107. 10 Cal. 3d at 626, 517 P.2d at 1174, 111 Cal. Rptr. at 710.

108. 29 Cal. 3d at 65, 623 P.2d at 279-80, 171 Cal. Rptr. at 718-19 (Clark, J., dissenting).

is" and "with all faults."<sup>109</sup> The payment of rent by the *Knight* tenants in the face of alleged defective conditions was equivalent to an expression of "acceptance" of the premises' shortcomings.<sup>110</sup>

## 2. The argument against waiver

Balanced against the arguments for waiver are the policy considerations underlying the recognition of the implied warranty of habitability. These policy considerations led to the rejection of waivers in the Washington case, *Foisy v. Wyman*,<sup>111</sup> and in the Pennsylvania case, *Fair v. Negley*.<sup>112</sup>

The tenant in *Foisy* bargained for reduced rent due to the existence of defects in the residence.<sup>113</sup> The court concluded that tenants seek housing suitable for occupation; the tenant's promise to pay rent is in exchange for the landlord's promise to provide a habitable dwelling.<sup>114</sup> The *Foisy* court ruled that bargaining for a rent reduction for defective premises is contrary to the purpose of the implied warranty of habitability.<sup>115</sup>

In *Fair*,<sup>116</sup> the rental agreement contained a clause stating that the premises were taken "as is."<sup>117</sup> In addition, the tenant expressly acknowledged that the roof leaked.<sup>118</sup> The trial court ruled on the "as is" clause based on section 2-316 of the Uniform Commercial Code (U.C.C.),<sup>119</sup> and found that the warranty of habitability had been waived because the premises were rented "as is."<sup>120</sup>

The Pennsylvania Superior Court, however, did not find the lan-

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109. CAL. COM. CODE § 2316(3)(a) (West 1964); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW Sales, §§ 76-78, at 1146-47 (8th ed. 1973).

110. 29 Cal. 3d at 64, 623 P.2d at 279, 171 Cal. Rptr. at 718 (Clark, J., dissenting).

111. 83 Wash. 2d 22, 515 P.2d 160 (1973).

112. 257 Pa. Super. 50, 390 A.2d 240 (1978).

113. 83 Wash. 2d at 24, 515 P.2d at 164.

114. *Id.* at 27, 515 P.2d at 164.

115. *Id.* The defects noted by the *Foisy* court included lack of heat, no hot water tank, broken windows, a broken door, water running through the bedroom, an improperly seated and leaking toilet, a leaking sink in the bathroom, broken water pipes in the yard and termites in the basement. *Id.* at 24-25, 515 P.2d at 162. The court stated that "[a] disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. Housing conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual." *Id.* at 28, 515 P.2d at 164.

116. 257 Pa. Super. 50, 390 A.2d 240 (1973).

117. *Id.* at 53, 390 A.2d at 242.

118. *Id.*

119. *Id.* at 55, 390 A.2d at 243; see *supra* text accompanying note 109.

120. 257 Pa. Super. at 55, 390 A.2d at 243.

guage of the U.C.C. controlling in the area of landlord-tenant law.<sup>121</sup> The court observed that dilapidated housing contributed to such problems as urban blight and juvenile delinquency<sup>122</sup> and imperiled public health and safety.<sup>123</sup> Accordingly, the *Fair* court held that a waiver was contrary to the policy underlying the warranty of habitability.<sup>124</sup> The court invalidated the negotiation between the landlord and tenant for rental of defective premises,<sup>125</sup> and concluded that the warranty of habitability could not be waived.<sup>126</sup>

The arguments supporting waiver of the warranty of habitability assume that any waiver is voluntary.<sup>127</sup> The rebuttal argument is that the inequality of bargaining power in a tight housing market practically eliminates the tenant's power to secure favorable terms in a lease agreement.<sup>128</sup> The common law assumption that a tenant can bargain for an express warranty of habitability is unrealistic.<sup>129</sup> The modern tenant relies on the landlord's implied representation that the premises are fit

121. *Id.* The court noted that if it were to find U.C.C. § 2-316 controlling, U.C.C. § 2-302, which states that a court may limit the application of any unconscionable clause of a contract to avoid an unjust result, would also be controlling. *Id.* at 55 n.1, 390 A.2d at 243 n.1. The "as is" clause would be unconscionable and the waiver of the warranty ineffective. *Id.*

The emphasis on the analogy of residential leases to consumer contracts does not negate the uniqueness and increased complexity of residential leases. Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C. R.-C. L. L. REV. 1, 27 (1976) [hereinafter cited as Blumberg & Robbins].

122. 257 Pa. Super. at 56, 390 A.2d at 243 (citing *Pines v. Perssion*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961)).

123. 257 Pa. Super. at 56-57, 390 A.2d at 244.

124. *Id.* at 56, 59, 390 A.2d at 243, 245. The factors identified by the *Fair* court were: (1) inability of tenants to adequately inspect or repair premises; (2) disparity of bargaining power between landlord and tenant; (3) scarcity of housing; and (4) the effect of uninhabitable dwellings on public health and safety. *Id.* at 55-56, 390 A.2d at 243.

125. *Id.* at 60, 390 A.2d at 245.

126. *Id.* On the issue of waiver, see generally Dutenhaver, *Non-Waiver of the Implied Warranty of Habitability in Residential Leases*, 10 LOY. U. CHI. L.J. 41 (1978) [hereinafter cited as Dutenhaver].

127. See *supra* text accompanying notes 93-94, 103.

128. See Clocksin, *supra* note 34, at 572. The California Legislature has codified the state's housing concerns. CAL. HEALTH & SAFETY CODE § 50003 (West Supp. 1982) provides in pertinent part:

(a) The Legislature finds and declares that, . . . there exists within the urban . . . areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income, . . . can afford. This situation creates an absolute present and future shortage of supply in relation to demand, as expressed in terms of housing needs and aspirations, and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all its residents.

(b) To provide a decent home and suitable living environment for every California family is the basic housing goal of state government . . . .

129. See Love, *supra* note 34, at 100.

for human habitation, and that the condition of the building will be maintained.<sup>130</sup> Because tenants usually do not possess the necessary skills to assume repairs, the capability of repairing, or the long term interest in the property necessary to justify financing repairs,<sup>131</sup> they frequently have no realistic alternative but to accept defective premises with the expectation that the landlord will make the necessary repairs.<sup>132</sup> A tenant's acquiescence in defective conditions should therefore not be construed as a voluntary waiver of the implied warranty of habitability.<sup>133</sup>

In addition, nonapplication of the warranty at the inception of the lease might encourage landlords to keep their premises in disrepair, so that new tenants could not avail themselves of the implied warranty of habitability doctrine.<sup>134</sup> This problem is avoided by recognizing that because the warranty continues for the entire lease term,<sup>135</sup> the landlord's breach exists for as long as the defective conditions persist. Although the tenants in *Knight* did not withhold rent until rents were increased, the landlord's breach of the warranty was not thereby waived; it was merely not asserted until summary eviction proceedings were commenced.

Finally, the adverse economic impact of a rigid warranty of habitability may not prove accurate. One study has concluded that: (1) tenants' assertion of the breach of the implied warranty of habitability has not been prevalent;<sup>136</sup> (2) the existence of the warranty is encouraging

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130. *Id.*

131. See Dutenhaver, *supra* note 126, at 46. Many defects require repair work that extends beyond the term of the tenant's right of possession in the premises. *Id.*

132. Green v. Superior Court, 10 Cal. 3d at 625, 517 P.2d at 1174, 111 Cal. Rptr. at 710.

133. Comment, *Balancing the California Landlord-Tenant Relationship*, 9 CAL. W.L. REV. 326, 341 n.116 (1973) (quoting Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 527 (1966)).

134. Moskovitz, *supra* note 24, at 1449. The following cases adopted the implied warranty to premises defective at the outset: Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973) (landlord's promise that premises are liveable arises at inception of lease and continues for duration of lease term); Boston Hous. Auth. v. Hemingway, 353 Mass. 184, 293 N.E.2d 831 (1973) (landlord promises to deliver and maintain demised premises in habitable condition); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (tenant is implicitly or expressly bargaining for immediate possession of premises in suitable condition); Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (residence must be in a condition reasonably and decently fit for occupation when lease term commences).

135. Knight v. Hallsthammar, 29 Cal. 3d at 52, 623 P.2d at 271, 171 Cal. Rptr. at 710 (quoting Green v. Superior Court, 10 Cal. 3d at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718).

136. Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37, 55-56 (1978) [hereinafter cited as Heskin]. The language of Green was ambiguous, making it difficult for attorneys to explain the law to their clients and to enforce it according

landlords to make repairs;<sup>137</sup> (3) use of the warranty has not led to a reduction in the supply of available housing,<sup>138</sup> and (4) tenants who remain in possession do not experience substantial increases in rent.<sup>139</sup> Housing conditions can be improved by enforcement of the implied warranty of habitability.<sup>140</sup> The guidelines set forth in *Knight* may facilitate a greater utilization by tenants of the warranty<sup>141</sup> and provide incentive for landlords to repair neglected property.<sup>142</sup>

### B. The Notice Requirement

The majority in *Knight* held that if the premises are in fact uninhabitable, the landlord has breached the implied warranty of habitability, whether or not the landlord has had an opportunity to repair.<sup>143</sup> According to the dissent, however, the elements of a breach of the implied warranty of habitability include the requirement that the landlord be given notice of the defects in the dwelling and a reasonable time to repair them.<sup>144</sup> The dissenting opinion premised this conclusion on the holdings in *Hinson*<sup>145</sup> and *Quevedo*<sup>146</sup> that the tenant must fulfill certain requirements, including notice and reasonable time to repair, prior to claiming a breach of the implied warranty of habitability.<sup>147</sup> The

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to their clients' desires. Additionally, problems arose with defining "material breach" of warranty and "materially affects health and safety." Heskin, *supra*, at 59.

137. *Id.* at 67.

138. *Id.*

139. *Id.* The study also concluded that tenants generally withhold rent in good faith and that landlords have the ability to make the requested repairs. *Id.* at 61; see also Hirsch, *supra* note 27, at 1130-32.

140. Heskin, *supra* note 136, at 67. This author discovered no later study refuting Heskin's findings.

141. See *supra* text accompanying notes 11-12.

142. A limitation of the warranty of habitability, however, is its failure either to mandate repairs of premises by the landlord or to enable the tenant to finance repairs. The economic sanction of prospective rent abatement may or may not induce landlords to repair. Most landlords will not repair where the capitalized cost of such repair is greater than the capitalized cost of continuing rent abatement. The available money damages and savings from reduced rent will be insufficient to finance substantial repairs by tenants. Blumberg & Robbins, *supra* note 121, at 11. A tenant's successful action for specific performance of the warranty would effect repairs of defective conditions. See *id.* at 30.

143. See *supra* note 12.

144. 29 Cal. 3d at 67, 623 P.2d at 280-81, 171 Cal. Rptr. at 719-20 (Clark, J., dissenting).

145. See *supra* note 58.

146. See *supra* text accompanying note 29.

147. 29 Cal. 3d at 66-67, 623 P.2d at 280-81, 171 Cal. Rptr. at 719-20 (Clark, J., dissenting). Many jurisdictions have imposed the requirements of notice and reasonable time to repair. *E.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 201, 293 N.E.2d 831, 844 (1973); King v. Moorehead, 495 S.W.2d 65, 76 (Mo. App. 1973); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).



*Knight* dissent analogized this notice to the notice required to be given by a party claiming a breach of the implied warranty of quality and fitness imposed on builders and sellers of newly constructed real property.<sup>148</sup> "The requirement of notice is based on a sound commercial rule designed to allow the [builder or seller] opportunity for repairing the defective item . . . ." <sup>149</sup>

The argument advanced by the *Knight* dissent fails to recognize an important distinction between the warranty of habitability implied in residential leases<sup>150</sup> and the warranty of fitness implied in sales of new construction.<sup>151</sup> Once a builder has completed construction and the vendor has sold the property, actual notice by the purchaser is the only means by which the builder or seller can be apprised of defective conditions. The parties do not have a continuing mutuality of obligation (assuming the vendor is not the mortgagee of the property). Under the implied warranty of habitability, however, the landlord's responsibility to maintain habitable premises and the tenant's liability for rent are mutually dependent covenants.<sup>152</sup> The tenant's duty to pay rent ceases upon the landlord's breach of the warranty.<sup>153</sup> Therefore, a tenant's withholding of rental payments constitutes notice to the landlord of a breach of the warranty, and of defects requiring repair.<sup>154</sup>

148. 29 Cal. 3d at 66-67, 623 P.2d at 280-81, 171 Cal. Rptr. at 719 (Clark, J., dissenting) (citing *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 379-80, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974)).

149. 29 Cal. 3d at 66, 623 P.2d at 280-81, 171 Cal. Rptr. at 719 (Clark, J., dissenting) (quoting *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652).

150. See *supra* text accompanying note 4; see also *supra* note 42.

151. Builders and sellers of new construction impliedly represent that the completed structure was designed and constructed in a reasonably workmanlike manner. 12 Cal. 3d at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651.

152. See *supra* note 4.

153. As the Illinois Appellate Court reasoned in *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 987, 363 N.E.2d 626, 628 (1977):

It would be strange indeed to require a tenant to give a landlord notice of what the law is with reference to the landlord's duty or duties. Furthermore, we are unaware of any common law contract principle which requires the nonbreaching party to fulfill such conditions precedent prior to suit against the breaching party.

154. Myers, *Implied Warranty of Habitability*, 4 L.A. LAW. 34, 39 (1981). URLTA, *supra* note 5, sets forth a definition of notice which would support the abandonment of the requirement that actual notice of defects be given, and recognize that the act of withholding rent constitutes notice. URLTA, *supra* note 5, § 1.304 provides in pertinent part that:

(a) A person has notice of a fact if . . .

(3) from all the facts and circumstances known to him at the time in question he has reason to know that it exists . . . .

(b) A person "notifies" or "gives" a notice or notification to another person by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it . . . .

Because a landlord is obligated to provide a habitable dwelling and to repair subsequent dilapidations,<sup>155</sup> he or she should be required to verify that a tenant's nonpayment of rent is not due to the existence of defective conditions in the residence, *i.e.*, that there has not been a breach of the implied warranty of habitability. The landlord's duty to deliver and maintain a habitable dwelling supports the inference of a concomitant right to enter the premises for purposes of making periodic inspections,<sup>156</sup> and it is not unreasonable to compel the landlord to inspect the premises for defects.<sup>157</sup>

The *Knight* court did not consider the issue of notice.<sup>158</sup> The elimination of the "reasonable time to repair" requirement, however, may be the precursor of the demise of the notice requirement. If, prior to claiming a breach of the implied warranty of habitability, a tenant must notify the landlord of defects to allow the landlord an opportunity to repair,<sup>159</sup> but the requirement of reasonable time to repair is eliminated, the notice requirement is superfluous. As an independent element the notice requirement is insignificant because of the mutual dependence of the landlord's obligation to maintain habitable premises and of the tenant's duty to pay rent.<sup>160</sup> If the landlord breaches the implied warranty of habitability, the tenant's duty to pay rent ceases.<sup>161</sup> This mutuality of obligation would be meaningless if the tenant could not assert a landlord's breach of the warranty of habitability until he or she notified the landlord of defects, and allowed the landlord a reason-

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155. This obligation is imposed by the common law warranty of habitability and by statute. See *supra* notes 4, 42.

156. Love, *supra* note 34, at 105. California law provides that a landlord may enter a dwelling unit to make necessary or agreed repairs. CAL. CIV. CODE § 1954 (West Supp. 1982).

157. Although some defects will be obvious to tenants, this should not negate the landlord's responsibility to inspect. Generally, a tenant does not possess the expertise to adequately conduct an inspection. For example, a tenant has no way of ascertaining if the plumbing, heating and wiring systems are defective. *Pines v. Persson*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961); see *supra* text accompanying note 39. Additionally, the lessor, not the lessee, is advised of building code regulations and violations. Skillern, *supra* note 4, at 397-98. The lease agreement could require the landlord to conduct annual inspections and perform a yearly certified maintenance. See Grigsby, *supra* note 102, at 536-37. The landlord and tenant may agree to shift the burden of repair or improvement onto the tenant in return for reduced rent. *Fair v. Negley*, 257 Pa. Super. at 61, 390 A.2d at 246 (Spaeth, J., concurring). The enforceability of such an agreement would depend on a showing of a good faith understanding between parties of equal bargaining power that such improvements will in fact be made. *Id.*; see also *supra* note 47.

158. See *supra* note 58.

159. See *supra* text accompanying note 149.

160. See 29 Cal. 3d at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

161. See *Green*, 10 Cal. 3d at 635, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

able time to repair.<sup>162</sup>

*C. Change in Ownership and a Tenant's Claim of Breach*

The *Knight* court held that it was improper to read Civil Code section 823<sup>163</sup> as a jury instruction in a suit involving a breach of the implied warranty of habitability where the tenant did not seek recovery for damages caused by the previous owner nor retroactive rent reductions for any period before the change of ownership.<sup>164</sup> The defective conditions existed when the new landlord acquired ownership of the building and the obligation to maintain habitable premises was immediately imposed on the new landlord.<sup>165</sup> The rent withheld by the tenants was claimed due by the new landlord. Because the tenants had an independent claim against the new landlord, the case did not fall within the purview of section 823.

Dicta in *Knight* suggested, however, that section 823 might be applicable to situations where a tenant does cross-complain against a new landlord for damages caused by a former owner or does claim retroactive rent reductions for any period before the change of ownership.<sup>166</sup> In *Standard Livestock*, the court interpreted section 823 as follows:

The remedy which a lessee of premises has against the lessor, or his assigns, for an accrued or already created breach of any agreement in the lease passes to the lessee's assigns, and may be asserted by the latter against the lessor or his assigns. The two exceptions expressed in the section are that accrued remedies for already ripened breaches of covenants against encumbrances or relating to the title or possession of the premises do not so pass but remain with the original lessee. But neither of these exceptions nor in fact the section as a whole has any reference to breaches of the lease which have not occurred, nor to remedies therefor which have not arisen prior to the assignment of the lease. The assignment of a lease when le-

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162. See *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 987, 363 N.E.2d 626, 628 (1977) (in action for breach of implied warranty of habitability, court held that tenant need not give landlord notice and chance to repair) (citing *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (court recognized that implied warranty of habitability may be raised as a defense and did not impose requirement of notice and chance to repair)). But see *Berman & Sons, Inc. v. Jefferson*, 396 N.E.2d 981, 986 (Mass. 1979) (court upheld notice requirement for purposes of determining date from which rent abatement began, but did not require that tenants allow landlord a reasonable time to repair).

163. See *supra* note 22.

164. 29 Cal. 3d at 56-57, 623 P.2d at 274, 171 Cal. Rptr. at 713.

165. See *supra* note 42.

166. See 29 Cal. 3d at 56-57, 623 P.2d at 274, 171 Cal. Rptr. at 713.

gally accomplished transfers to the assignee the right to the enforcement of every unbroken covenant which the lease contains, but does not transfer those ripened choses in action which come within the exceptions in . . . [section 823].<sup>167</sup>

If the tenant in an unlawful detainer action cross-complains against the landlord for damages arising from a breach of the implied warranty of habitability, the cross-complaint will only survive if the tenant has surrendered possession of the premises prior to trial.<sup>168</sup> Once the issue of possession is eliminated, the tenant would be able to seek recovery from the new landlord for damages caused by the previous owner. Section 823, as interpreted by *Standard Livestock*, expressly allows a lessee a claim against the lessor's assignee for "an accrued or already created breach of any agreement in the lease."<sup>169</sup>

The *Knight* court did not decide whether a tenant could claim retroactive rent reductions for any period before the change in ownership. The court did conclude, however, that a forfeiture of a tenant's rights under the implied warranty of habitability should not occur upon the "fortuitous circumstance of a change in ownership of the premises."<sup>170</sup> Although the court did not explain this observation, the implication is that the policy considerations underlying the warranty<sup>171</sup> protect a tenant from losing his or her rights when a change in ownership occurs.<sup>172</sup>

## VI. CONCLUSION: HABITABILITY AND BREACH OF THE IMPLIED WARRANTY AFTER *KNIGHT V. HALLSTHAMMAR*

The California Supreme Court, in *Knight*, prudently refused to dictate an immutable definition of "habitability." Expanding upon the *Green* court's basic premise that the implied warranty of habitability

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167. *Standard Livestock v. Pentz*, 204 Cal. at 629-30, 269 P. at 649-50. *Standard Livestock* is the only case interpreting the meaning of the language of section 823.

168. CAL. CIV. PROC. CODE § 1170 (West 1982) provides that "[o]n or before the day fixed for his appearance, the defendant may appear and answer or demur." To preserve the summary character of an unlawful detainer proceeding, the courts have interpreted this section as prohibiting the filing of a cross-complaint. *Erbe v. W & B Realty Co.*, 255 Cal. App. 2d 773, 778, 63 Cal. Rptr. 462, 465 (1967). Such pleadings are permitted, however, where the tenant has voluntarily surrendered possession of the premises before trial, and the issue of possession is thus removed from the case. *Id.*; *Heller v. Melliday*, 60 Cal. App. 2d 689, 696, 141 P.2d 447, 451 (1943).

169. See *supra* text accompanying note 167.

170. 29 Cal. 3d at 59, 623 P.2d at 276, 171 Cal. Rptr. at 715.

171. See *supra* text accompanying note 34.

172. It is beyond the scope of this casenote to discuss further the interrelation between § 823 and the implied warranty of habitability. As the court indicated, § 823 may not apply at all to the implied warranty of habitability. 29 Cal. 3d at 57, 623 P.2d at 274, 171 Cal. Rptr. at 713.

relates to conditions which concern the tenant's bare living requirements, *i.e.*, defective conditions materially affecting liveability, the *Knight* court attributed flexible standards to habitability.<sup>173</sup> In determining habitability, trial courts must consider applicable building and housing code standards, statutory requirements for a tenantable dwelling, and the fundamental precept that a dwelling must be fit for human habitation.

*Knight* further developed the doctrine of the implied warranty of habitability. A tenant can assert the landlord's breach of warranty without first allowing the landlord a reasonable time to repair any claimed defects in the premises. A tenant is not required to inspect the premises prior to occupancy, and awareness of defective conditions at the time the tenant takes possession of the residence will not constitute a waiver of the breach. The notice requirement is still a litigable issue, and a tenant who plans to withhold rent because of uninhabitable conditions would be wise to so inform the landlord.

*Mara J. Bresnick*

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173. *But see* *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1077 (court held that implied warranty of habitability is measured by standards set out in housing regulations). In *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973), the court implied both code-based and general warranty. Under Florida law, a tenant can raise as a defense a landlord's material noncompliance with the obligation to maintain the roofs, windows, screens, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition. FLA. STAT. ANN. §§ 83.51(1), 83.60(1) (West Supp. 1982). Under URLTA, *supra* note 5, § 2.104(a), the landlord must comply with the requirements of applicable building and housing codes and make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.