

1970

# Constitutional Law: Cause of Action Dismissed if Plaintiff Fails to Waive Privilege against Self-Incrimination

Minn. L. Rev. Editorial Board

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Editorial Board, Minn. L. Rev., "Constitutional Law: Cause of Action Dismissed if Plaintiff Fails to Waive Privilege against Self-Incrimination" (1970). *Minnesota Law Review*. 2979.  
<https://scholarship.law.umn.edu/mlr/2979>

## Case Comments

### Constitutional Law: Cause of Action Dismissed if Plaintiff Fails to Waive Privilege Against Self-Incrimination

Plaintiff, Nancy Christenson, commenced an action for divorce alleging cruel and inhuman treatment on the part of her husband. She sought temporary and permanent custody of her three minor children, alimony, support money, property division and attorney's fees. Defendant, Otto Christenson, denied plaintiff's charges and entered a counterclaim seeking an absolute divorce and custody of the three minor children. He alleged cruel and inhuman treatment and adultery on the part of the plaintiff. Pursuant to Rules 26 and 36 of the Rules of Civil Procedure for District Courts, defendant sought information with respect to plaintiff's alleged misconduct by way of deposition and request for admissions. Plaintiff refused both upon cross-examination and in the requests for admissions to divulge any information concerning her alleged misconduct. Her reasoning was that the answers and/or admissions might be self-incriminating and were therefore privileged under the fifth amendment to the United States Constitution<sup>1</sup> and also under the Constitution of the State of Minnesota, article 1, section 7.<sup>2</sup> Defendant made a Rule 37 motion for an order to compel plaintiff to respond or in the alternative to dismiss plaintiff's complaint in the event of her refusal to comply with the order. The district court denied defendant's motion. On appeal, the Supreme Court reversed, *holding* that although the plaintiff could not be compelled to waive her privilege against self-incrimination, she could be compelled to dismiss her cause of action unless the privilege was waived and a response given to the deposition questions and the request for admissions. *Christenson v. Christenson*, 281 Minn. 507, 162 N.W.2d 194 (1968).

The court, viewing *Christenson* as a case of first impression in Minnesota,<sup>3</sup> relied heavily on authority from other jurisdic-

---

1. U.S. CONST. amend. V provides that in a criminal case no person shall be compelled to be a witness against himself. Judicial decisions have extended this protection to civil proceedings. See note 3 *infra* and accompanying text.

2. MINN. CONST. art. I, § 7 provides "No person shall be . . . compelled in any criminal case to be a witness against himself." As with the federal guarantee, this protection has been judicially extended to civil cases. See note 3 *infra* and accompanying text.

3. *Christenson v. Christenson*, 281 Minn. 507, 510, 162 N.W.2d 194, 196 (1968). The reader will note that the analysis of *Christenson* is not

tions. It cited extensively a divorce case decided by the Missouri Supreme Court, *Franklin v. Franklin*.<sup>4</sup> In *Franklin*, the plaintiff refused to answer certain interrogatories on the ground that her answers might tend to incriminate her. The Missouri court held that one seeking affirmative relief could not invoke the privilege against self-incrimination and at the same time petition the court for the requested relief. Plaintiff was compelled either to answer the interrogatories or to have her pleadings stricken.<sup>5</sup> The court also pointed to other types of civil cases from other jurisdictions which had adopted reasoning similar to that in *Franklin*.<sup>6</sup>

The *Christenson* court cited as controlling, *Brown v. United States*,<sup>7</sup> wherein the United States Supreme Court held the rule applicable in criminal cases—that one who takes the stand in his own behalf cannot invoke the privilege against self-incrimination upon cross-examination with respect to matters made relevant by his direct examination—applicable to civil cases also. The analogy is, of course, that a plaintiff by seeking affirmative relief and then failing to comply with pre-trial discovery proceedings places himself in the same situation as the plaintiff who takes the stand in his own behalf and then refuses to testify upon cross-examination. However, it should be noted that the holding in *Brown* is limited to matters made relevant by plaintiff's direct examination. It is only as to these matters that plaintiff may not invoke the privilege. Thus, in order to follow the *Christenson* court's analogy to *Brown*, it must be assumed that the filing of a

---

preceded by a synopsis of the historical background of the privilege against self-incrimination. Since treatises have been written on the subject and any treatment herein would of necessity be superficial, it has been intentionally omitted. It suffices to state that the privilege is guaranteed by the fifth amendment to the United States Constitution and that this privilege is made applicable to the states through the due process clause of the fourteenth amendment. The privilege is also guaranteed by article 1, section 7 of the Minnesota Constitution. Although both the federal and state guarantees refer specifically to criminal proceedings, it has also been extended to civil cases. See, e.g., *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Graham v. United States*, 99 F.2d 746, 749 (9th Cir. 1938).

4. 365 Mo. 442, 283 S.W.2d 483 (1955).

5. *Id.* at 445, 283 S.W.2d at 485 (1955).

6. Authority cited included another divorce case—*Annest v. Annest*, 49 Wash. 2d 62, 298 P.2d 483 (1956); a case where plaintiff was alleged to have purchased a judgment for the purpose of bringing suit on it, thereby violating the New York Penal Law—*Levine v. Bornstein*, 13 Misc. 2d 161, 174 N.Y.S.2d 547, *aff'd*, 7 App. Div. 2d 995, 183 N.Y.S.2d 868, *aff'd* 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1948); and a case involving an alleged federal anti-trust violation—*Independent Products Corp. v. Loews, Inc.*, 22 F.R.D. 266 (1958).

7. 356 U.S. 148 (1958).

cause of action by plaintiff is equivalent to direct examination and as such has made relevant her adulterous conduct if any.

If plaintiff had alleged adultery on the part of defendant as grounds for divorce, then the analogy between testimony on direct examination and the mere filing of civil action would seem proper. The statutory law of Minnesota provides that when a divorce action is brought and adultery is alleged as the grounds, the court may deny a divorce when it is proved that plaintiff has also been guilty of adultery under such circumstances as would have entitled the defendant, if innocent, to a divorce.<sup>8</sup> Thus, one could argue that a plaintiff whose cause of action is based on adultery on the part of the defendant waives his privilege against self-incrimination with respect to his own adultery at the pre-trial level by filing his complaint. However, the plaintiff in *Christenson* alleged cruel and inhuman treatment on the part of the defendant and made no reference to adultery. Therefore, the logical extension of the *Brown* analogy is that the mere filing of a divorce action by the plaintiff is the equivalent of his taking the stand and thereby waiving his privilege against self-incrimination with respect to all possible relevant facts. This, of course, would mean that the privilege against self-incrimination would be basically nonexistent for those seeking affirmative relief in a divorce action.

The court also cites *Wanek v. City of Winona*,<sup>9</sup> a Minnesota case in which the plaintiff in a personal injury case was required to submit to a physical examination or have his cause of action dismissed.<sup>10</sup> The *Wanek* decision holds that where plaintiff seeks recovery for personal injuries, he puts his physical condition in issue and thereby impliedly consents in advance to do justice—either submit to a physical examination or have his action dismissed. In the strict sense the analogy to *Wanek* is inappropriate as is the analogy to *Brown*. As discussed above, unless plaintiff places her alleged adulterous conduct in issue by merely filing a divorce action, the analogy is not sound. If the adulterous conduct becomes relevant in such a manner, presumably all other conduct becomes relevant in a similar manner and the privilege against self-incrimination would seem to be unavailable to one seeking affirmative relief if he wishes to pursue the action.

Although the analogies to *Brown* and *Wanek* may be un-

---

8. MINN. STAT. § 518.08(4) (1969).

9. 78 Minn. 98, 80 N.W. 851 (1899).

10. *Christenson v. Christenson*, 281 Minn. 507, 523-24, 162 N.W.2d 194, 204 (1968).

sound in the strict legal sense, the policy reasons compelling the holdings are similar. The court in each situation sought to elicit all relevant facts rather than be forced to rely on a version of the facts most favorable to one of the parties. In this respect the *Christenson* holding is in accord with *Brown* and *Wanek*, and in this sense it is defensible. One cannot argue with necessity for complete disclosure of all relevant facts as long as the parties are accorded adequate protection of their constitutional right.<sup>11</sup>

Had the Minnesota court relied solely upon the reasoning and decision in *Franklin* there would be less question as to limits which should be placed around the *Christenson* decision. If this were the only case cited, the *Christenson* holding could be limited to the statement that a plaintiff in a divorce case may not invoke the privilege against self-incrimination in pre-trial proceedings without having his pleadings stricken.<sup>12</sup> However, the decision is summed up as follows: "While plaintiff cannot be compelled to waive her privilege against self-incrimination, in this divorce action, as in any other civil action, she must either waive it or have her action dismissed"<sup>13</sup> (emphasis added). The clause "as in any other civil action" would seem to indicate that the decision is not limited to divorce matters. This assumption is buttressed by the fact that the court does not limit its authority to divorce decisions.

Recent Supreme Court decisions such as *Malloy v. Hogan*,<sup>14</sup> *Griffin v. California*<sup>15</sup> and *Spevack v. Klein*<sup>16</sup> raise serious questions with respect to the constitutionality of the *Christenson* decision. In *Malloy* the Court held that the fifth amendment applies to the states through the fourteenth amendment and emphasized the right of a person to remain silent and to suffer no penalty for his silence.<sup>17</sup> *Spevack* states that the "penalty" referred to in *Malloy* is not limited to fine or imprisonment and cites *Griffin* for the proposition that a penalty consists of any-

---

11. See notes 20-23 *infra* and accompanying text.

12. It should be noted that in order to achieve equitable consistency the defendant who interposes a counterclaim for divorce would have to be held to the same standard. He also seeks affirmative relief and should not be allowed to invoke the privilege without having his pleadings stricken. A contrary decision would lead to inequitable results.

13. *Christensen v. Christenson*, 281 Minn. 507, 524, 162 N.W.2d 194, 204 (1968).

14. 378 U.S. 1 (1963).

15. 380 U.S. 609 (1965).

16. 385 U.S. 511 (1967).

17. 378 U.S. 1, 8 (1963).

thing which makes the assertion of the fifth amendment privilege "costly."<sup>18</sup> Since these cases were not civil actions,<sup>19</sup> it is questionable whether the holdings should apply to the instant case. In a civil case such as *Christenson* it is the plaintiff himself who has instituted the action seeking equitable relief and he does not face either imprisonment or a fine. It may be that in such a situation the court is justified in forcing him to waive his privilege if he wishes to retain his action. Such a holding would promote the disclosure of all relevant facts prior to trial and reduce the amount of gamesmanship that might otherwise take place during the trial. Also, the court may draw a distinction between one who takes the affirmative step of approaching the court, asking that justice be done and one who is defending himself in an action initiated by the petition of another party. With respect to the plaintiff seeking affirmative relief, the court may be justified in putting to proof his "clean hands." However, it cannot be denied that having one's pleadings stricken is a "costly" penalty to pay for the assertion of a constitutional guarantee.

The constitutionality of compelling a waiver of the privilege could well be a moot issue if the person testifying in order to preserve his cause of action is accorded immunity from prosecution. In the instant case the testimony of the plaintiff could theoretically have led to her prosecution for adultery under Minnesota law.<sup>20</sup> Both the United States Supreme Court and the Minnesota Supreme Court have allowed testimony to be compelled where statutory immunity from prosecution exists and provides equivalent protection to the privilege itself.<sup>21</sup> A reading of the general immunity statute of Minnesota and the ac-

---

18. 385 U.S. 511, 515 (1967).

19. In *Malloy* the petitioner who was on probation for a gambling misdemeanor refused to answer certain questions concerning his activities put to him by a court-appointed referee on the grounds that the answers might incriminate him. The Court reversed his contempt citation and commitment to prison. In *Griffin* the Court held that the prosecutor in a criminal action could not comment to the jury on the defendant's failure to testify as to certain facts because such facts might be incriminating. Such comment violated his fifth amendment rights. In *Spevack* the Court held that an attorney could not be disbarred for failure to produce records which might incriminate him in a disciplinary proceeding.

20. MINN. STAT. § 609.36 (1969) provides a penalty for adultery of imprisonment for not more than one year or to payment of a fine of not more than \$1,000 or both.

21. *Ullmann v. United States*, 350 U.S. 422 (1956); *State v. Ruff*, 176 Minn. 308, 223 N.W. 144 (1929).

companying Advisory Committee Comment indicates that the statute would be inapplicable to the instant case.<sup>22</sup> However, if immunity from prosecution were to be extended by the court even when the immunity statute is inapplicable, then the protection accorded would be as adequate as that provided by the privilege itself.<sup>23</sup>

The definition of "costly" in a civil action is not clear at this time and the constitutionality of the *Christenson* holding is an open question. Nevertheless, there seems to be little question that the dictum in *Christenson* would extend its holding to all civil cases and thereby require one seeking affirmative relief to forego his privilege against self-incrimination at the pre-trial level or have his pleading stricken.

---

22. MINN. STAT. § 609.09(1) (1969) applies only to a criminal proceeding, paternity proceeding or proceeding in juvenile court. Subdivision 2 applies to every case not included in subdivision 1, but the Advisory Committee Comment indicates that it is meant to become operative when other statutes dealing with specific crimes grant immunity to a person compelled to testify with respect to those crimes. This inference is derived from the fact that subdivision 2, except for the introductory clause, is taken from MINN. STAT. § 610.47, the original immunity statute, which applied only to those cases outlined above.

23. It should be noted that immunity from prosecution does not protect the person's reputation from damage due to information which may be drawn out by his testimony. However, the privilege against self-incrimination is designed to protect a person from prosecution, and the immunity granted meets this objective.

## Landlord-Tenant Law: Demise of the No Repair Rule

The plaintiff-landlord brought an action in the District of Columbia General Sessions Court for possession of leased premises alleging the non-payment of that month's rent due under a written lease. The defendant-tenants involved admitted the non-payment of rent, but in defense offered to prove that the plaintiff had suffered 1500 violations of the District of Columbia Housing Code (D.C.H.C.), which had arisen during their tenancies and which directly or indirectly affected their premises, to go uncorrected. The trial court rejected this offer and entered judgment for the plaintiff. The District of Columbia Court of Appeals affirmed on the ground that plaintiff had no statutory, contractual or common law obligation to repair leased premises.<sup>1</sup> The United States Court of Appeals for the District of Columbia Circuit reversed, *holding* that under both common law and the D.C.H.C. there exists an implied warranty of habitability in leases of urban dwelling units, whose standards are measured by the D.C.H.C. and that violation of such warranty gives rise to a private cause of action in the injured tenant for ordinary contract remedies. *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

The common law<sup>2</sup> held that a lessor of property gave no implied warranty to the lessee with respect to the fitness or habitability of the demised premises and owed the lessee no duty to repair deteriorations occurring or appearing after the inception of the lease term.<sup>3</sup> Neither condition—premises unfit for human habitation *ab initio* or subsequent impairment or destruction of the premises—provided the tenant with a claim or defense against his landlord. The tenant could not abate his rent, recover damages or abandon his lease.<sup>4</sup> This rule went so far as to make protection extended by law to third parties or strangers against nuisances or concealed, latent defects on the leased prop-

---

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

2. Although the present case was decided in the District of Columbia, citation of authorities will be focused on Minnesota. The common law of the two jurisdictions is substantially identical in the landlord-tenant area.

3. DUNNELL'S MINN. DIG. §§ 5368, 5393 & 5397 (3d ed. 1953) and cases cited; Annot., 4 A.L.R. 1453 (1919), 13 A.L.R. 818 (1921). This will be referred to as the no warranty - no repair rule.

4. DUNNELL'S MINN. DIG. §§ 5459 & 5460 (3d ed. 1953). *See, e.g.*, Annot., 26 A.L.R. 1265 (1923), 64 A.L.R. 900 (1929). *Compare Kitchen v. Landy*, 215 App. Div. 586, 214 N.Y.S. 241 (1926).



erty unavailable to the tenant against his landlord.<sup>5</sup> Under some very narrow, hence marginally useful, circumstances, the defense of recoupment was available to the tenant.<sup>6</sup>

These consequences flowed from the common law's conceptualization of a lease as a conveyance of an interest in realty. Such conveyances theretofore had occurred in agrarian rural England where the lessee *was* acquiring an interest in land, and was capable of protecting his own interests. The caveat lessee rule fairly reflected the intentions and expectations of the parties. Another possible source of the no warranty-no repair rule was the ancient doctrine of waste. The law expanded the lessor's right to enjoin waste of the demised property to the extent of imposing upon the lessee the duty of keeping the property in good repair.<sup>7</sup>

Changing social conditions, population distributions and housing practices began to make the application of the no warranty-no repair rule harsh and unjust in a variety of new circumstances. Courts began to carve exceptions to the strict rule in those cases where prevailing social expectations and underlying conditions demanded modification. One of the first exceptions was the so-called "furnished dwelling" rule. In short term leases of furnished dwellings intended for immediate occupancy and use as a dwelling, the law implied a warranty running from landlord to tenant that the premises were fit for their intended use, namely, that they were habitable.<sup>8</sup> A tenant could obtain a rescission of his lease in cases where he was able to prove deceit by the landlord in the landlord's failure to disclose a known, concealed hazard or condition which rendered the demised premises uninhabitable.<sup>9</sup> Another exception to the no warranty-no repair rule was found to exist where the landlord retained control over areas used by tenants and others in common and not leased to individual tenants.<sup>10</sup> In such cases, the landlord was held to have reserved such areas for the benefit of all tenants, and to be under an implied obligation to all persons

---

5. *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719 (1949).

6. Such circumstances consist of an actual, substantial and wrongful interference by the landlord with the tenant's enjoyment of the demised premises to the tenant's injury, which interference arises out of the same contract or obligation under which the landlord sues.

7. 428 F.2d at 1077 n.30.

8. *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892).

9. *Ryberg v. Ebnet*, 218 Minn. 115, 15 N.W.2d 456 (1944); *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719 (1949).

10. Cf. *Washington Chocolate Co. v. Kent*, 28 Wash. 2d 448, 183 P.2d 514 (1947).

using such areas to "exercise ordinary and reasonable care to keep the same in repair."<sup>11</sup> The remedy for the tenant was to abandon the lease and vacate without liability. This relief is characterized as the constructive eviction doctrine. The doctrine grew from the landlord's duty to refrain from interfering with his tenant's use and enjoyment of the leased premises. The doctrine was not limited to common areas—a constructive eviction consists of any substantial impairment of the beneficial enjoyment of the demised premises caused or allowed to exist by the landlord.<sup>12</sup> Thus, when vermin or water is allowed to enter an apartment from areas within the lessor's building but beyond the domain of the tenant, the landlord is usually held responsible. Some showing of a duty of the landlord must still be made by the tenant. The landlord's failure to correct the condition constitutes a constructive eviction entitling the tenant to renounce his lease and vacate without liability.<sup>13</sup> This is the tenant's only remedy and it must be exercised within a relatively short time following the eviction. Minnesota courts have extended the doctrine to include a case where the landlord's failure to protect a tenant from a continually noisy neighbor drove the tenant from her apartment.<sup>14</sup> Other than the listed exceptions, the lessor was not held to an implied warranty that the premises leased were or would continue to be fit for habitation. A scattered handful of cases have held to the contrary, but these represent a distinct minority view and do not constitute a trend, except to the extent that some of the more recent cases have expanded the constructive eviction rule to apply to incursions arising after the inception of the lease term.<sup>15</sup> In the instant case the court of appeals, in an

---

11. DUNNELL'S MINN. DIG. § 5369(4) (3d ed. 1953).

12. Ray Realty v. Holtzman, 119 S.W.2d 981, 984 (Mo. 1938).

13. See DUNNELL'S MINN. DIG. § 5425 (3d ed. 1953). See, e.g., Liefman v. Percansky, 186 Minn. 427, 243 N.W. 446 (1932); Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931); Viehman v. Boelter, 105 Minn. 60, 116 N.W. 1023 (1908) (tenant has reasonable time to vacate); Rea v. Algren, 104 Minn. 316, 116 N.W. 580 (1908) (failure to make agreed repairs); Rosenstein v. Cohen, 96 Minn. 336, 104 N.W. 965 (1905) (decay of building). Cases from other jurisdictions include: Smith v. Greenstone, 208 S.W. 628 (Mo. 1918); Vromania Apts. Co. v. Goodman, 123 S.W. 543 (Mo. 1909); Batterman v. Levenson, 102 Misc. 92, 168 N.Y.S. 197 (1917); Streep v. Simpson, 80 Misc. 666, 141 N.Y.S. 863 (1913).

14. Colonial Court Apts., Inc. v. Kern, 282 Minn. 533, 163 N.W.2d 770 (1968).

15. Smith v. Marrable, 11 M & W 5 (U.K. 1843); Buckner v. Azulai, 59 Cal. Rptr. 806 (1967); Bonner v. Beecham, 2 CCH Pov. L. Rptr. ¶ 11,098 (Colo. 1970); Lund v. MacArthur, 462 P.2d 482 (Hawaii 1969); Lemle v. Breedon, 462 P.2d 470 (Hawaii 1969); Ryberg v. Ebnet, 218 Minn. 115, 15 N.W.2d 456 (1944); Delamater v. Foreman, 184 Minn. 428,

opinion by Judge Wright, held that the no warranty-no repair rule was no longer operative in leases of urban dwelling units. The holding was based alternatively upon a review of the common law and upon an interpretation of the D.C.H.C.<sup>16</sup>

In holding the no repair rule obsolete under common law, the court relied on three considerations. First, neither the presuppositions nor underlying circumstances of the old rule were present in leases of urban dwellings. The *res* of the agreement is no longer a transfer of an interest in land, but rather a sale of shelter and ancillary services.<sup>17</sup> The modern tenant, moreover, lacks the tenure, skill and capital which made the no repair rule reasonable in the sixteenth century. The court referred to common law recognition of these factors in the different rules imposed on innkeepers<sup>18</sup> and in the exceptions to the general no repair rule outlined above. Second, consumer protection principles applicable in other commercial transactions are equally applicable to the urban housing business. Where landlords sell housing on a contractual basis, as a business enterprise, tenants must rely on the skill and *bona fides* of the landlord to sell dwellings of merchantable quality.<sup>19</sup> This is particularly true in most urban housing markets where suitable housing is not widely available, landlords occupy a position of dominance and printed form leases constitute contracts of adhesion.<sup>20</sup> The tenant who is obligated to continue paying the same or increased rentals is entitled to expect the preservation of the initial condition of the premises.<sup>21</sup> Third, the nature of the urban housing industry, which creates the need outlined above for consumer protection,

---

239 N.W. 148 (1931); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Barnard Realty Co. v. Bonwit*, 139 N.Y.S. 1050, 1051 (1913); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 412 (1961).

16. 428 F.2d at 1072, 1077, 1082.

17. The court included such services as heat, light, utilities, sanitation and maintenance.

18. Innkeepers in England, like modern urban landlords, sold shelter and ancillary services for defined, usually short, terms. They were generally held to a much higher duty to their tenants than lessors of realty. See 40 AM. JUR. 2D, *Hotels, Motels, and Restaurants* §§ 1, 56, 81, 82, 87, 91, 95, 100 & 115-119 (1968).

19. Compare, UNIFORM COMMERCIAL CODE §§ 2-314 & 2-315 (1962 Official Text).

20. See *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

21. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. 1968), held that violations of the D.C.H.C. at the inception of the lease rendered the contract illegal and void. Why should a different rule obtain for subsequent deterioration of the demised premises?

also demands abrogation of the no repair rule<sup>22</sup> for broader reasons. Substandard housing has an obvious deleterious effect on the community at large in addition to that on the unfortunate occupants. Slum housing breeds frustration and crime, as well as being an eyesore and health menace. Thus, the community interest coincides with the tenant's with respect to the no repair rule. Each of these considerations was held to require that the implied, continuing warranty of habitability be nonexcludable by contract.<sup>23</sup> This is the first case to establish this important principle without equivocation or qualification.<sup>24</sup> Both the Michigan and Rhode Island statutes allow waivers of the statutory warranty in leases for terms exceeding one year. This largely vitiates the right nominally given by the statutes.<sup>25</sup>

The court alternatively concluded that the D.C.H.C., although silent regarding private remedies, created an ongoing duty of the landlord to comply with the Code.<sup>26</sup> This duty extends to the tenant as well as the community and may be relied upon and enforced by the tenant. The court invoked the established principle of law that contracts are deemed to incorporate prevailing law.<sup>27</sup> Thus, leases covered by the Code are deemed to incorporate the D.C.H.C., and the landlord's duty is measured by the requirements of that Housing Code.

The court concludes that the tenant's contractual obligation to pay rent is conditioned upon performance by the landlord of duties owed to the tenant—one of which is substantial compliance with the Housing Code. Breach of such duty justifies, according to the judgment of the trier of fact regarding the substantiality of the breach, an abatement or suspension of rent until cured.<sup>28</sup> The opinion fails, however, to elaborate any standards to guide the fact finders in this inquiry.

The *Javins* decision does not constitute a substantial departure from an established rule of law. The court's logic in refusing to apply the no repair rule to leases or urban apartments is

---

22. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. 1968) had already eliminated the no warranty rule in the District of Columbia, insofar as the D.C.H.C. defines habitability.

23. 428 F.2d at 1081-82.

24. *Buckner v. Azulai* was an aberration and the result was reached very circuitously. Other cases spoke in terms of the intent of the parties, which clearly comprehends a waiver of the right or the remedy.

25. MICH. COMP. LAWS ANN. § 554.139 (Supp. 1970); R.I. GEN. LAWS ANN. § 34-18-16 (1969). The Michigan statute is noted in 15 WAYNE L. REV. 836 (1969).

26. 428 F.2d at 1081.

27. See 17 AM. JUR. 2D, *Contracts* § 257 (1968).

28. 428 F.2d at 1083.

sound. The rule made good sense, and reasonably reflected the underlying circumstances and fair expectations of the parties, in rural land leases and commercial leases of whole properties, and continues to do so today. So limited, the no repair rule is fair and should continue to be enforced. But for the same reasons, the rule is inappropriate in the context of leases of urban dwelling units, producing as it has harsh and inequitable results without redeeming reason. The court's analogy to *Henningson*,<sup>29</sup> which established the implied warranty of fitness in sales cases, moreover, is well taken. The discussion of policy and purpose in the *Henningson* opinion is equally persuasive in the *Javins* context, and provides a rational and humane basis for the rule which emerges from the present case. Similarly, the judicial recognition of a private cause of action based on a housing code is neither unique<sup>30</sup> nor undesirable. Recognition of this right of action has such beneficial effects as furthering the scope and degree of enforcement of a salutary housing code, providing concrete and readily ascertainable standards of habitability and equalizing the relative positions of tenants and landlords.<sup>31</sup>

Nor is the *Javins* decision an exercise in judicial creativity—legal precedents do exist for the decision reached by the circuit court. In *Smith v. Marrable*,<sup>32</sup> the court, in a case involving a short term lease of an urban dwelling, ruled that such written leases, if silent on the subject, carried an implied legal obligation that the premises be fit for habitation. The statement of the rule is broader than the customary furnished dwelling exception. A concurring opinion would have imposed strict liability on a landlord who without knowledge leased a house infected with a lethal disease. In *Barnard Realty Co. v. Bonwit*<sup>33</sup> the no warranty rule was limited to those trivial conditions ordinarily controllable by housewives. Otherwise, on the basis of reasoning anticipating that in *Javins*, the *Barnard* court held that the tenants "ought not to be compelled to pay rent for an apartment in which they could not live."<sup>34</sup> The Minnesota Supreme Court,

---

29. *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

30. Compare the judicially sanctioned private remedy under the federal securities laws, which are as silent as the D.C.H.C. about such a right.

31. The threat of abuse by tenants of such a right of action should be no greater here than in any other area where a socio-economically disadvantaged class has been given effective legal protection.

32. 11 M & W 5 (U.K. 1843).

33. 155 App. Div. 182, 139 N.Y.S. 1050 (1913).

34. *Id.* at 183, 139 N.Y.S. at 1051.

along similar lines of thought, reached a comparable conclusion—that the lessor of an urban apartment gives an “implied covenant that the premises will be habitable.”<sup>35</sup> In *Ryberg v. Ebnet*<sup>36</sup> the Minnesota Court listed fitness for the intended use, i.e., habitability, as one of several bases for shifting the responsibility for maintenance of an apartment to the landlord.

The remedy given in these early cases was that of a constructive eviction—the tenant was held entitled to abandon the lease and vacate the premises without liability. This remedy has its inherent drawbacks. In the cases where the need for decent housing is the most urgent, this remedy is the least effective, since the tenant is merely given the right to search for another substandard apartment, and the landlord is free to rerepent the unimproved apartment to another helpless tenant. This situation serves only the interests of the slumlord.

Conceptually, an implied, continuing warranty of habitability is only an affirmative manner of expressing in terms of the tenant's right the duty imposed on the landlord by the constructive eviction doctrine. A constructive eviction consists of the landlord causing or allowing a substantial interference with the beneficial enjoyment of the subject of the lease. This definition clearly subsumes those defects in an apartment which render it uninhabitable. Such defects, moreover, be they infestations of vermin, utility or sanitation system breakdowns or physical deterioration, are necessarily under the control of the landlord and beyond that of the tenant as required by the constructive eviction doctrine. Courts also had already expanded the doctrine in many cases to include encroachments arising during the term of the lease.<sup>37</sup> The recognition, therefore, of a continuing warranty or covenant of habitability is not a new right, but a rephrasing in affirmative terms of a previously existing right of the tenant.

The warranty of habitability, like the apartment lease from which it arises, is a contractual creature. Breach of this contract should entitle the tenant to the ordinary panoply of contract remedies, including, but not limited to, rescission.<sup>38</sup> The breakthrough in remedies allowed to tenants came in 1961 in *Pines v.*

---

35. *Delamater v. Foreman*, 184 Minn. 428, 430, 239 N.W. 148, 149 (1931).

36. 218 Minn. 115, 15 N.W.2d 456 (1944).

37. See note 15 *supra* and accompanying text.

38. This is the civil law view. See 428 F.2d 1075 n.13 and authorities cited.

*Perssion*.<sup>39</sup> The landlord's breach of duty measured by the applicable housing code was there held to justify a rent abatement. This approach has slowly spread to other jurisdictions,<sup>40</sup> culminating with the *Javins* decision which brings together the principles inherent but not always explicit in the other cases.<sup>41</sup> The *Javins* opinion also stated in a dictum that one of the contract remedies available to a wronged tenant was the injunction to secure specific performance of the implied covenant. This remedy is novel, but does follow from the premise of the contractual nature of the urban dwelling lease.<sup>42</sup> It may be expected that recognition of ordinary contract remedies in cases of constructive evictions which cause uninhabitability, limited as in *Javins*,<sup>43</sup> will occur in an increasing number of jurisdictions.<sup>44</sup>

---

39. 14 Wis. 2d 590, 111 N.W.2d 412 (1961).

40. *Buckner v. Azulai*, 59 Cal. Rptr. 806 (1967); *Bonner v. Beecham*, CCH Pov. L. Rptr. ¶ 11,098 (Colo. 1970); *Lund v. MacArthur*, 462 P.2d 482 (Hawaii 1969); *Lemle v. Breedon*, 462 P.2d 470 (Hawaii 1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Sayko v. Bishop*, CCH Pov. L. Rptr. ¶10,789 (N.Y. 1969).

41. *Compare Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (tenant held entitled to deduct cost of necessary repairs, provided notice is given or attempted, rather than have to vacate; rent abatement not allowed).

42. See, e.g., *Lipkin v. Burnstine*, 18 Ill. App. 2d 509, 152 N.E.2d 745 (1958); *Fazzio v. Riverside Realty Co.*, 232 La. 794, 95 So. 2d 315 (1957); *Galland v. Shubert Theatrical Co.*, 124 Misc. 371, 208 N.Y.S. 144, *rev'd on other grounds*, 220 App. Div. 704, 221 N.Y.S. 437 (1925). But see, e.g., *Burt v. Seven Grand Corp.*, 340 Mass. 124, 129, 163 N.E.2d 4, 7 (1959) (injunction favored in dicta); *Feigenbaum v. Brink*, 66 Wash. 2d 125, 131, 401 P.2d 642, 646 (1965) (same).

43. Violations of the Housing Code not the fault of the tenant which substantially affect the tenant's apartment or common areas. Violations need not be verified or certified by city housing inspectors. 428 F.2d at 1080. *Accord Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 494 (D.C. 1969).

44. Unanswered, but important questions in Minnesota involve the effect of the Minnesota statute (Minn. Stat. § 507.16 (1969)) which holds that there is no implied warranty in conveyances of realty, with leases of less than three years specifically excepted. This could be the basis of a similar warranty in Minnesota. However, there remains the question of what is to be the measure of such a warranty in those many communities which have no housing code. Courts presumably could fashion the parameters of such a warranty given time and the inclination.

