Is The Modern Lease a Contract or a Conveyance?--A Historical Inquiry.

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I. INTRODUCTION

The area of residential leasing in landlord-tenant law is in need of reform. With uncustomary unanimity reformers from all branches of the legal profession agree on what forces have brought this need about. The “assumptions” of leasing,¹ they say, are “derived from feudal property law.” Thus, its doctrines are “bedeviled by their antiquity,” reflecting the felt needs of a “rural and agrarian” society.² With this same unanimity, reformers look to contract law, specifically the sale of goods, to cure leasing’s ills. We are urged to shift the conceptual basis of a lease from conveyance to contract.³

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¹The term lease may signify many different types of ownership, from a fee simple in lands to an estate at will in a car. For the purposes of this Article, “lease” means a term of years in real property.


³See generally material cited note 2 supra.
This Article argues that, contrary to the conventional wisdom, current landlord-tenant law is modern, commercial, and already grounded in contract doctrine. Real property analysis of leasing disputes does occur, but it is insignificant compared to leasing's dominant contract basis. Moreover, it originated in the nineteenth century to resolve a selected group of leasing problems (primarily associated with the then recent emergence of multiple-occupancy leasing) for which contract law provided inapt analogies. Therefore, the landlord-tenant reformers' battle cry, "from conveyance to contract," is illusory, and the basis of the movement that is occurring and should occur must be reconceptualized.

That modern leasing law is neither feudal, agrarian, nor grounded in real property doctrines is to be expected. The ancient "special rules" governing real property transactions applied to freehold estates. Modern leasing estates (the term of years, periodic tenancy and tenancy at will) are all nonfreehold, and thus exempt from the "special rules." For example, leases for a term, unlike freehold leases, could commence in futuro and descend as personality.

Also, until the nineteenth century, legal thought was channeled in procedural, not current substantive, categories. Often, the law did not vary with the res, but with the writ. Thus, Lord Coke held that rent could not be reserved when incorporeal hereditaments were leased for life. His reasons were that of the two remedies for unpaid rent, distress could not be made on anything incorporeal, and that debt did not lie on freehold leases. But rent could be reserved when incorporeal hereditaments were leased for a term. For here, debt lay on the "contract." In sum, as long as legal classifications were mainly freehold and nonfreehold, or procedural in nature, one should not expect that distinctions were drawn between contracts and nonfreehold leases.

Moreover, the late eighteenth and early nineteenth century was a period of fundamental legal transformation. Much of the current law was then set in its modern, commercial footing. Leasing did not pass through unscathed.

5. 3 W. Blackstone, Commentaries 231-32. Debt on a lease for life was allowed by statute in 1709. See An Act for the Better Security of Rents, 8 Ann, c. 14, § 4 (1709).
7. See Horwitz, The Historical Foundations of Modern Contract Law, 87 HARRY L. REV.
But, the keys to perceiving the unity of modern leasing and contract law lie within contract doctrine itself. First, current contract law is not particularly consumer oriented, and in the nineteenth century it was even less so: at that time judges enforced, not policed, the will of the parties as expressed in the document. Second, contract has always served a property function. Until the nineteenth century the preeminent function of the contract doctrine was "transferring title to a specific item." With the economic revolution of the nineteenth century, the title function of contract declined, but it continued to play a role, particularly in the sale of goods contract. Modern leasing law was then forged with specific reference to such contracts.

This Article will demonstrate the view of the foundations of leasing law mentioned above. The first section explores the cases on a single, but often litigated, point: the tenant's liability for rent when the premises have been damaged by fire. The second section discusses the origins of the doctrines most frequently cited as illustrations of leasing's real property basis. The final section redevelops the role of property law in adjudicating leasing disputes.

II. An Exemplar: Tenant's Liability for Rent After Nonnegligent Damage by Fire to the Leased Premises

Lessor-lessee conflict regarding a tenant's liability usually involves leases of structures, buildings, or rooms therein. In many states, the current law is governed by statutes under which lessees have no further rent liability if they surrender possession after a fire renders the structure uninhabitable. But we are not so interested in these statutes as in the common law which they overlay. The common law is well stated in the American Law of Property:


8. In this Article modern contract law and current contract law are distinguishable concepts. Professor Horwitz has demonstrated that contract doctrine underwent a major transformation in the early nineteenth century. He finds the origin of "modern" contract law at that time. See Horwitz, Contract, supra note 7. The adoption of the Uniform Commercial Code in the 1960's marks another transformation. The significance of the recent changes have not yet been assessed. However, several doctrines relevant to this Article were altered. Therefore, with deference to Horwitz's locutions, modern contract law refers to 1800-1960. Current contract law refers to 1960-present.

9. Horwitz, Contract, supra note 7, at 917.
10. Id. at 918, 920.
11. 1 A.L.P., supra note 2, § 3.103, at 398.
Absent a statute, a tenant is not relieved from paying rent by the destruction of a building on leased premises, although the building may be the principal subject matter of the lease. . . . The American courts have made an exception to this rule where the lease is of rooms in a building or of a building without land. . . . [T]his exception . . . is not made in England.12

This same treatise states that the general rule of continued rent liability stems from viewing a lease as "a conveyance of an interest in land and not a contract." The American exception to continued liability is an illogical departure from this "theory."13 However, a review of all cases, in England and the United States, establishing the rule14 and its exception,15 and all collateral precedent contributing to either,16 clearly establishes that the rule of continued liability derives from a three hundred year old view of a lease as a contract, and the American exception stems from a nineteenth century decision to treat multiple-occupancy leases as a conveyance.17 These cases contradict the orthodox belief in the ancient, agricultural origin of current leasing doctrine.

First, with one possible exception,18 the leases involved in the

12. Id. at 396-98.
13. Id. Two sources, dating from 1928 and 1936 are cited for this proposition. Id. at n.4.
15. Graves v. Berdan, 29 Barb. 100 (N.Y. Sup. Ct. 1859), aff'd, 26 N.Y. 498 (1863); Womack v. McQuarry, 28 Ind. 103 (1867); Ainsworth v. Ritt, 38 Cal. 89 (1869).
17. Prior to the seventeenth century, the medieval view of rent as an intangible thing determined many questions of leasing law, as did analogies to the law of freehold estates. But, by the seventeenth century the contract theory of leasing had risen to dominance. See 7 W. Holdsworth, History of English Law 250-74 (1926). The preseventeenth century precedents served as the authoritative foundation for the nineteenth century's selective treatment of leases as conveyances. See notes 65-72 & accompanying text infra.
formative era of the law on this point are not agricultural. They are commercial, involving a drugstore, inn, restaurant, shipyard, wharf, warehouses and factories. Some cases reflect complex relationships between the parties. The effect of the availability of insurance is a much debated issue. Clearly, the legal rules were worked out with judicial attention focused on business, rather than agricultural, tenancies.

Second, although Paradine v. Jane, the case usually cited as the origin of the proposition that the lessee’s liability for rent continues after destruction of the demise, may be viewed as ancient, the current rule was not in fact established until the modern era. Resolution of the issue passes through three stages. Prior to the eighteenth century, the issue never arose, probably because it was viewed as settled in favor of continued liability by the ancient law of waste which held the tenant responsible for all fire damage caused by “mischance.” Only after an early eighteenth century statute ended this liability did lessees begin questioning whether their rent liability continued. Law courts, under the authority of Paradine, held it did, but the chancery courts specified. No case subsequent to 1646 can even be suspected of involving an agricultural lease.

19. See cases cited in notes 4-6 supra.
20. In Fowler v. Bott, 6 Mass. (6 Tyr) 63 (1809), the lessor covenanted to build the leased chocolate factory. In Leeds v. Cheetham, 57 Eng. Rep. 533 (V.C. 1827), the lessor and lessee both covenanted to repair parts of the demised cotton factory, their respective duties varying with the place, time and cause of disrepair.
22. The general lack of residential leases should also be noted.
24. But note that the general reasoning in Paradine, “as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses,” has modern appeal. In any event, if Paradine is ancient, it is ancient contract law. Id. at 898. See notes 43-48 & accompanying text infra.
25. As the American exception is not even hinted until 1832, see notes 62-63 & accompanying text infra, it is obviously modern and will not be treated further herein.
27. An Act for the Better Preventing Mischiefs that May Happen by Fire, 6 Ann., c. 31, § 6 (1707).
28. The dispute in Paradine did not arise out of a destruction of the demised premises. Rather, a hostile army during the English Civil War had expelled the lessee from the demise and prevented him from occupying it.
29. See, e.g., Monk v. Cooper, 93 Eng. Rep. 833 (K.B. 1727); Belfour v. Weston, 99 Eng. Rep. 1112 (K.B. 1786). But see the statement in Brown v. Quilter, 27 Eng. Rep. 402 (Ch. 1764) that what law had in mind was cross-actions (necessitated by the rule of independent cove-
offered relief. Thus, the eighteenth century rule, in effect, was that the tenant's liability for rent ceased after injury to the premises by fire.

Between 1796 and 1827 the earlier equity precedents were overruled. Not only do these reversals coincide with the emergence of modern contract law, but the decisions reflect both in result and rationale, modern contract law's rejection of substantive justice in favor of the will of the parties. It follows, therefore, that equitable nonintervention is a thoroughly modern position. Hence, the current rule is of modern origin, temporally and conceptually.

We are primarily interested in American law. Certainly the early American cases have the same result as the older English law decisions and, indeed, cite them as authority. But this should be taken as agreement, not slavish devotion to past precedent. For this was the "golden era" of American law, and the judges realized they had a creative role. Thus, a court which declared the tenant liable for continued rent after destruction by fire "as conclusively settled in England and the United States, if authority can settle anything," still felt it proper to resort to general reasoning.

The rule, too, is not without foundation in policy. It secures, on the part of the tenant, that carefulness and vigilance which is necessary to the safety of the owner's property whilst he is out of possession, and whilst it is under the absolute control of one who has only a temporary interest


32. Horwitz, Contract, supra note 7, at 917-18, 936-46. In South Carolina, the only state where the equitable conception of contract survived well into the nineteenth century, see id. at 946 n.154, so did the rule of nonliability for rent upon inability to enjoy demise. See Ripley v. Wightman, 4 McCord 447 (S.C. 1828), limited by, Coogan v. Parker, 2 S.C. 255 (1870).

33. Horwitz, Contract, supra note 7, passim. Compare the interventionist Brown v. Quilter, 27 Eng. Rep. 402 (Ch. 1764) ("The justice of the case is so clear, that a man should not pay rent for what he cannot enjoy . . . .") with the noninterventionist Leeds v. Cheetham, 57 Eng. Rep. 533, 535 (V.C. 1827) ("With respect to the equity which the [lessee] alleges to arise from the [lessor's] receipt of the insurance money, there is no satisfactory principle to support it . . . . [U]pon what principle can it be that the [lessee]'s situation is to be changed by that precaution on the part of the [lessor], with which the [lessee] had nothing whatever to do?"). Both Brown and Leeds involved insurance with Leeds directly overruling that earlier precedent.

34. See material cited in note 6 supra.

35. White v. Molyneux, 2 Ga. 124, 126 (1847).
in it. If the destruction by fire would excuse the payment of rent, then might the tenant, so far as pecuniary interest is concerned, become careless to protect it. The owner would be left to rely upon the tenant's sense of moral obligation, which unfortunately is not, in all men, so just or so strong as to constrain them to do right. Indeed there are men to be found base enough to burn down a house, to get rid of the payment of rent, if their interest might thereby be subserved. The contrary of this rule would therefore operate in restraint of renting.\textsuperscript{36}

Would not the jurists who departed from English precedent when the demise was part of a multiple-unit structure\textsuperscript{37} have done the same with regard to single-unit structures, if the established rule was not in accord with modern principles? In sum, the current law is not received, but is established in, the nineteenth century.

Third, and most important, the decisions establishing the rule (and thus imposing onerous liability on the tenant) are not grounded in real property law. They are contract decisions. As stated in \textit{Paradine v. Jane},\textsuperscript{38} the precedent from which the rule at law derives, rent liability continues because

\begin{quote}
when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.\textsuperscript{39}
\end{quote}

In \textit{Hare v. Groves},\textsuperscript{40} the case which brought an end to equitable relief, the court regarded the issue as contractual.

The present question is obviously one of that description upon which a Court of Equity ought peculiarly to pause. The question is of great importance . . . and it acquires additional consequence, because it calls upon a Court of Equity to fix the boundaries to its own power and jurisdiction in interfering in the contracts of individuals.\textsuperscript{41}

\textsuperscript{36} \textit{Id.} at 128.
\textsuperscript{38} 82 Eng. Rep. 897 (K.B. 1646).
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} 145 Eng. Rep. 1007 (Ex. 1007).
\textsuperscript{41} \textit{Id.} at 1009.
In dismissing the lessee's bill, the court further stated:

[T]he question turns upon the effect of a covenant entered into by parties fully competent to a contract concerning the subject of the demise . . . .

Finally, the American cases followed the authority of English precedent because this established rule of law determines the construction and operation of the contract relied on . . . . When words of the same import are used, as were employed in the contracts upon which the decisions cited . . . . were made, the intentions of the parties must be understood in conformity to those decisions, even admitting the supposed hardship of the case.

And they reiterated the underlying contractual reasoning:

[I]t is competent for a party, in his contract, to stipulate against payment in case of fire . . . . and having failed to do so, he cannot take advantage of his laches. . . . And, as in all other express, unconditional contracts, both parties must abide their solemn act.

Confirming that a tenant's continued liability for rent after destruction of the premises is grounded in contract law is the fact that such liability is in harmony with applicable contract principles in each era of contract doctrine. At law, until the midnineteenth century, only one major substantive distinction was made between duties imposed by law (tort) and duties that were self-imposed (contract): acts of God or the Public Enemy excused the former but not the latter. It was reasoned that the party could express the conditions, if any, that excuse his self-imposed duties. Contracts were enforced as written. Thus, Paradine's result and reasoning is a

42. Id. at 1011.
43. Fowler v. Bott, 6 Mass. (6 Tyng) 63, 68 (1809).
44. White v. Molyneux, 2 Ga. 124, 128 (1847).
45. That the equity decisions not only reflect, but vary with changes in, contract principles should already be apparent. See notes 31-33 & accompanying text supra.
particular application of one of contract law’s, indeed the legal system’s, most basic principles.

The primary economic function of contract, in the premodern era, was to transfer title to personal property. Contract meant sale of goods. An aspect of this “title theory of contractual exchange” is stated by Blackstone:

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor . . . . And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10L., and B pays him earnest or signs a note in writing of the bargain, and afterwards, before delivery of the horse, or money paid, the horse dies in the vendor’s custody, still he is entitled to the money, because by the contract the property was in the vendee.

Paying the purchase price for a dead horse is certainly analogous to paying rent for a burned-out building.

Despite its decline in importance, the survival of the title theory throughout the modern era of contract law carries the analogy to the present day. Modern contract doctrine limits payment for undelivered, destroyed goods to cases where the goods are identified to the contract. Leased real property is usually so identified.

In any event, destruction usually occurs after the tenant takes posses-

49. Horwitz, Contract, supra note 7, at 920.
50. 2 W. Blackstone, Commentaries.
51. It is often felt that the analogy is broken by the fact that lessees pay in installments and purchase a limited interest. The installment point is insubstantial because all goods, when bought, may be paid for in installments, and their destruction does not affect the vendee’s obligation to continue payments. As for the limited interest point, usually what is meant by it is that a lessee cannot do whatever he wishes with the premises. In short, he cannot commit waste. But at common law, unless the lease provided otherwise, the lessee could waste the premises. In line with contract principles, the analysis was that against lessees for life or years, there lay no prohibition against waste at the common law, because they came in by act of the lessor, and he might have provided upon the making of the lease against waste to be done, and he that might and would not provide for himself, the common law would not provide for . . . .

2 Coke’s Institutes* 145.

In the thirteenth century statutes were enacted which reversed this aspect of the common law and granted remedies against waste to lessors who had not so provided. Id. at 145, 299. Thus, the disparity in the vendee’s and lessee’s position does not result from differing common law conceptions of lease and contract. It results from statutes which overlie part of otherwise identical common law conceptions.

52. See, e.g., Uniform Sales Act § 19, Rule 1 and § 22.
53. See, Becar v. Flues, 64 N.Y. 518, 520 (1876).
sion, and, currently, risk of loss follows receipt of the goods.\textsuperscript{54}

The analogy to contract (sale of goods) law, indicated by the language of the opinions and forged by the "title" theory of contract, is not spurious. The sale of goods is the paradigm, the core analogy, of modern landlord-tenant law. As stated in \textit{Fowler v. Bott},\textsuperscript{55} where the lessee refused to pay rent after the leased "chocolate mill" burned down:

The supposed hardship of the case has been urged upon the attention of the Court, as an argument for the [lessees]. The answer to this argument is, that a lease for years is a sale of the demised premises for the term . . . . The rent is in effect the price, or purchase money, to be paid for the ownership of the premises during the term; and their destruction, or any depreciation of their value . . . [is] entirely the loss of the purchaser.\textsuperscript{56}

It is obvious that modern commercial contract analysis is the basis of the rule of a tenant's continued rent liability after destruction by fire. Real property analysis is conspicuously absent:\textsuperscript{57} such analysis does not begin to emerge until the second quarter of the nineteenth century. When it does appear, its function is to avoid undesirable

\textsuperscript{54} \textit{Uniform Commercial Code} § 2-509.

\textsuperscript{55} 6 Mass. (6 Tyng) 63, 67 (1809).

\textsuperscript{56} \textit{See also} \textit{White v. Molyneux}, 2 Ga. 124, 128 (1847) ("The contract is an executed one, the tenant is in the position of a purchaser of the premises for the term."); \textit{Hare v. Groves}, 145 Eng. Rep. 1007, 1011 (Ex. 1796) ("The lessee is owner of the house during the lease, the lessor after its expiration."). If the use of the locution "sale" in \textit{Fowler}, or "contract" in \textit{White}, instead of conveyance (a locution which does not appear even once in the opinions under review in this section until 1832, \textit{see notes} 67-71 & accompanying text \textit{infra}) is not enough to indicate that goods, not realty, is the analogue—other cases, on other points, are more explicit. For example, in \textit{Becar v. Flues}, 64 N.Y. 518 (1876), where the decision turned upon the effect of a lease after execution but before entry by the lessee, the court declared: "[The lease] is like a sale of specific personal property to be delivered." \textit{Id.} at 520. \textit{See also} J.C. Meyer & Co. v. Smith, 33 Ark. 627, 632 (1878) (abandoned leasehold analogized to "goods bargained for and not taken."); \textit{Brown v. Bragg}, 22 Ind. 122, 123 (1864) (lease analogized to sale of a horse).

\textsuperscript{57} Real property analysis appears but once: Lord Northington's attempt to justify equitable intervention by analogy to the doctrine of "eviction of title." \textit{Brown v. Quilter}, 27 Eng. Rep. 402 (Ch. 1764). This analogy was severely criticized as specious in \textit{Hare v. Groves}, 145 Eng. Rep. 1007, 1011 (Ex. 1796), the case which, on the basis of contract, ended equitable relief.

One other arguable intrusion of real property ideas occurs in \textit{Paradine v. Jane}, 82 Eng. Rep. 897 (K.B. 1646). \textit{Paradine} cites Richard Le Taverner's Case, 73 Eng. Rep. 123 (C.P. 1544), a case which contains the idea that when leased property is partially destroyed "the entire rent shall issue out of the remainder." But the citation seems to be for the result, not the rationale.
applications of the dominant contract theory of leasing.\textsuperscript{58}

A problem of the contract theory of leasing is its application to multiple-occupancy structures. Under contract theory, the lessee's exclusive right to possession survived destruction of the premises; he is owner for the term "for better or for worse," unless a jury can be convinced he had abandoned his interest.\textsuperscript{59} Payment of the rent or continued occupation, for example, belies a finding of abandonment. Accordingly, the tenant has a powerful position in planning any reuse of the site. As long as the leased property is for single occupancy, allowing the lessee this power is not likely to impede redevelopment. Even though neither the lessee nor the lessor is obligated to rebuild, both the lessee (who profits immediately) and the lessor (who profits eventually) have interest in restoration. Often it is in the parties' individual interests to negotiate a mutually beneficial plan and cost allocation for expeditious reconstruction.\textsuperscript{60} But in a multiple-occupancy structure, the transaction costs (a product of recognizing a number of lessee's interests) could prove quite large.\textsuperscript{61} Thus, the contract theory of leasing threatened efficient redevelopment of multiple-occupancy structures.

In 1832, the first destruction by fire case involving a multiple-occupancy structure, \textit{Winton v. Cornish},\textsuperscript{62} was decided. It did not directly involve a tenant's liability for rent. The case will be reviewed here, however, since it clearly evidences judicial awareness of the litigation's instrumental impact, and the simultaneous shift to a property based style of analysis. The case also founded a collateral line of precedent which was used in the multiple-occupancy

\textsuperscript{58} Such a use of real property theory was foreshadowed in Brown v. Quilter, 27 Eng. Rep. 402 (Ch. 1764). \textit{See} discussion of \textit{Brown} in note 57 supra.


\textsuperscript{60} The terms of the agreement vary with such factors as the profit to the lessee from immediate redevelopment, the profit to the lessee from relocating, the profit to the lessor from having a repaired site ready for reletting at the end of the current term, the cost to the lessor from depreciation of structures built before the end of the current term. Thus, in a short-term lease, although the lessee would not rebuild, he could induce the lessor to redevelop immediately by offering him a sum greater than the cost from depreciation less the profit from having a site ready at the end of the current term. The lessee would offer this sum if it were less than the profit from immediate redevelopment less the profit from relocating.

\textsuperscript{61} Transaction costs include such expenses as gathering people together to dicker, and "freeloaders." \textit{See} G. CALABRESI, \textit{The Cost of Accidents} 134-40 (1970); Coase, \textit{The Problem of Social Cost}, 3 \textit{J. Law \\& Econ.} 1, 15-19 (1960). In some situations where all would benefit from redevelopment, it may not be in anyone's individual interest to assume leadership in bringing one about. \textit{See} M. OLSON, \textit{The Logic of Collective Action} (1971).

\textsuperscript{62} 5 Ohio 477 (1832).
liability for rent cases that followed.

In Winton, a fire had destroyed a multiple-story, multiple-occupancy building in Cincinnati. After the fire, the lessee of the cellar enclosed the space he had leased and continued in possession. The lessor brought an action for ejectment. The court noted the social issues of the case, stating:

Whole rows of two, three, and four-story buildings, in the most important parts of a city, are sometimes at once destroyed by fire. Can the lessees of cellars . . . cover themselves and prevent entry of their landlords to reconstruct the houses? Can the lessees of basement stories of public buildings . . . when the edifices are destroyed by fire, roof the basement story and prevent the agents of the public from entering to reconstruct the edifice?  

The court upheld a directed verdict ejecting the tenant.

For our purposes it is important that the court's technical analysis did not speak of contracts and horses. For the first time on the American frontier a court spoke of grants and land:

The owner of the land can convey it, or the profits of it, for such terms and in such parcels as he thinks proper. He can grant the right to take all the minerals underneath, or those twenty feet below the surface only; to dig all the turf, inhabit a cave, if there is one, to occupy a room in the third story . . . or the cellar . . . . By such grants the land does not pass. When the mineral or turf is exhausted, the grantee has no right even to enter the premises. When the cave is destroyed by a convulsion or otherwise, there is nothing that was granted remaining. It is so of the rooms or cellar of a house . . . .

This case marked the first time Lord Coke was cited. The result and approach of Winton has been followed uniformly in the United States.  

Twenty-five years later, the first suit for rent after destruction by fire of a multiple-occupancy structure was litigated. In Graves v. Berdan, a multiple-occupancy multiple-story commercial struc-

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63. Id. at 479.
64. Id. at 478.
65. Id.
67. 29 Barb. 100 (N.Y. Sup. Ct. 1859), aff'd, 26 N.Y. 498 (1863).
ture, located in downtown Brooklyn, burned down. Graves, the lessor, put up a new structure on the site, but the new structure occupied none of the space Berdan had formerly leased. Graves sued Berdan for rent accruing after the fire. The New York Supreme Court distinguished the English precedent that supported the lessor's claim, 68 and held for the tenant. Citing Winton and its progeny the court wrote:

The peculiar character of the payment which the defendant undertakes to make, in the present [case] . . . occasions a distinction between these and ordinary contracts. This is a covenant to pay rent, which is defined as a certain profit issuing yearly out of lands and tenements corporeal, in retribution for their use . . . . When therefore, the estate out of which the rent issues is gone, and the tenement has absolutely ceased to exist, the rent must terminate. 69

On appeal, the judgment was affirmed over strong dissent. The dissenters spoke contract.

In a case where a lessee binds himself, by express covenant, to pay the rent during the term, and there is no exception in the lease of casualties by fire, notwithstanding the house should be burnt down by accident, he is bound to pay, for the simple reason that he is bound himself by an express covenant to do so. But it is said that another principle controls where the demised premises (as in this case) consists of rooms in a building and not the whole building . . . . The contract of the lessee, it is claimed, is distinguishable from ordinary contracts by the peculiar character of the payments he undertakes to make, that is to pay rent [which issues out of the estate]. . . . But even if] no estate, in legal contemplation remains, out of which rent can issue, still the tenant having covenanted to pay the rent, would be liable on his covenant. No legal distinction, growing out of the peculiar character of the payment to be made, can be taken to relieve him from his express undertaking to pay. 70

But the majority answered:

In Rolle's Abridgment, 236, it is said that if the sea break

69. 29 Barb. at 102.
70. 26 N.Y. at 502-504.
in and overflow a part of the demised premises, the rent shall be apportioned for though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term . . . . The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachment of the sea, mentioned in Rolle's Abridgment; and the established rule for the abatement or apportionment of the rent, should be applied in the former as well as in the latter case. The same reason exists for application in both cases.\textsuperscript{71}

The majority's reasoning is as absurd as it is anachronistic. Still, it only highlights the fact that a nineteenth century resuscitation of feudal rent analysis carved an exception out of the contract based general rule of the tenant's continued liability for rent after damage by fire.\textsuperscript{72}

\textsuperscript{71} Id. at 500; accord, e.g., Womack v. McQuarry, 28 Ind. 103 (1867); Ainsworth v. Ritt, 38 Cal. 89 (1869). An argument from Rolle's Abridgement, 236, was attempted by lessee's counsel in Monk v. Cooper, 93 Eng. Rep. 833 (K.B. 1727). At that time it was rejected by the court.

\textsuperscript{72} After this review of the "fire" cases, one should be amused at the use made of them by "lawyer's history." Both Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1648), and Graves v. Berdan, 26 N.Y. 498 (1863), are cited in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 n.34 & 35 (D.C. Cir. 1970). Paradine is cited for the proposition that the assumed importance of land in early leaseholds leads to continued rent liability after destruction of a building. But Paradine is not reasoned that way, see note 24 & accompanying text supra; and, moreover, it does not support such a statement. For in Paradine a hostile army occupied the premises. Thus, the lessee's loss was total, \textit{i.e.}, use of the land, as well as the structures, was denied. Graves, on the other hand, is cited to represent nineteenth century "recognition that the factual assumptions of the common law were no longer accurate." But Graves was one of the first cases to assume the importance of land as a basis of the "fire" rule, and did so in order to reach a result that Javins finds commendable.
III. Doctrine Most Often Cited as Products of the Real Property Theory of Leases

A. Independence of Covenants

Absent facts or written expressions indicating a contrary intention, lease covenants are generally construed as independent obligations: one party's breach does not excuse the other party's performance. For example, the lessee is obligated to continue rent payments after the lessor has breached his covenant to provide heat, assuming there is such a covenant. Should the temperature plummet, and the tenant purchase an electric heater, deducting this expense from his rent payment, the landlord has the right to summarily evict him. This is considered a harsh result of an obnoxious doctrine. We are told it would not happen if leases were treated as contracts, where covenants are generally dependent. Additionally, it is claimed that leases are treated differently partly because a lease is regarded as a conveyance by the common law, partly because the law governing leases has been dealt with in connection with the law of real estate, and became settled before the law of mutually dependent promises became established, and partly no doubt because leases have ordinarily been elaborately written documents in which the parties might be supposed to have expressed their intent with considerable fullness.

But, to the contrary, the independence of lease covenants emerges from the "law of mutually dependent promises." And regardless of its origins, the independence of lease covenants would accomplish "perfect justice," were it not for the nineteenth century legislation on summary proceedings for possession of real property.

Prior to 1773, the common law knew no constructive conditions of exchange. In the absence of express conditions, all covenants were independent. But the introduction of the constructive condition principle did not render all covenants dependent. The principle allowed classification of covenants into three relations: concurrent,

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73. See, e.g., Truman v. Rodesch, 168 Ill. App. 304 (2d Dist. 1912).
74. Under recent cases, cited in note 127 infra, this can no longer occur. Of course, these cases explain their new law as resulting from treating the lease as a contract instead of as a conveyance.
75. 2 S. Williston, The Law of Contracts § 890 (1920) [hereinafter cited as Williston, Contracts].
76. See note 96 & accompanying text infra.
dependent, and independent. In the succeeding century, the application of this tripartite system to particular cases was a frequently litigated and clouded issue. In settling these cases, courts were wont to declare that

[judges have often perplexed themselves and others, by endeavoring to ascertain determinate and arbitrary rules under which to class all covenants. After repeated failures in such efforts to settle rules, it seems now to be generally conceded, that the safest and best course is, to ascertain what was the intention of the parties from the instrument they have executed, and then to give it such a construction as will carry this intention into effect . . . The form of the covenant, or the manner in which the several stipulations to be performed by either party, are stated in the agreement, is of very little importance; because Courts frequently construe covenants to be entirely independent, even in cases where a dependence is indicated by express words.

That these sentiments were pronounced in a case in which the document under review was a lease, should undercut the conventional wisdom which necessitates our believing that leases were never subjected to the modern tripartite system. In fact, the independence of lease covenants results from a vigorous application of one branch of the contract principle of constructive conditions, i.e., the doctrine of substantial performance.

Arising within four years of the introduction of the dependency principle, the doctrine declares that a "breach of a separate collat-

78. See, e.g., T. Platt, On Covenants 71-72 (1829).
79. Hill v. Bishop, 2 Ala. 320, 322 (1841). See also Butler v. Manny, 52 Mo. 497, 506-507 (1873). McCullogh v. Cox, 6 Barb. 386 (N.Y. Sup. Ct. 1849). In Lunn v. Gage, 37 Ill. 13 (1865), the court stated that the lease covenants under review would have been construed as dependent because of the "intention of the parties and good sense of the case" if the case had arisen before entry by the lessee. But as it had arisen after entry, the covenants were construed as concurrent. Id. at 28. See also Stifter v. Hartman, 225 Mich. 101, 195 N.W. 673 (1923).
80. Professor Horwitz suggests that the doctrine of substantial performance was selectively enforced in the nineteenth century according to economic and social policy. See Horwitz, Contracts, supra note 7, at 953-56; and the comments of the dissenting judge in Obermyer v. Nichols, note 82 infra. Perhaps application of the doctrine here stems from those motives. But my point is more limited; whatever the motivation, it is nineteenth century contract law.
eral promise of minor importance will not justify refusal by the other party to perform, if the main promise to him has been or is being substantially performed. Part performance can render covenants independent which theretofore have been dependent. The basis for the substantial performance doctrine is unjust enrichment: the injustice of a party enjoying beneficial part performance without any payment just because he has not received all that was bargained for. And, the construing of covenants as dependent defeats any recovery by the breaching party.

Thus, in Obermyer v. Nichols, a case wherein the lessee occupied the demised grist mill and house for a year but refused to pay any rent because the lessor breached his covenant to finish certain improvements by the fifth month, the trial judge charged the jury that

the [lessee] having enjoyed the mill and premises, all other covenants on the part of the [lessor] were minor and subordinate, and not going to the essence of the contract, nor the whole of the consideration, so as to defeat the rent in-toto . . . .

On appeal this instruction was upheld, one judge commenting:

Every man's feelings would revolt that a tenant should be suffered to receive the profits of a valuable mill and tract of land for a whole year, without making any compensation therefore to the owner, on the ground that he did not make some trifling repairs according to his contract.

To the same effect is the case of McCullogh v. Cox, where the lessor was allowed to sue for rent even though he had breached various covenants, one of which was to have the premises fixed up as a

81. 2 Williston, Contracts, supra note 75, at § 841.
82. Id. at § 818. Thus, it seems incorrect to say that contract covenants are generally dependent. The statement should be limited to wholly executory contracts.
83. 6 Binn. 159 (Pa. 1813).
84. Id. The jury was also charged to treat lessee's attempted defense as a counterclaim. For the importance of such treatment, see notes 94-100 & accompanying text infra.
85. Id. at 163. Lessor's point on appeal was the question whether the lessor's covenant was "essential to the contract" should have been left to the jury. The lone dissenter, who believed that "[i]t is of the utmost consequence in point of morals, that the contracting parties should be held to a strict performance," agreed. He would have left the question to the "yeomanry of the country" because "[f]ew judges have been tenants, more have been landlords, and this is not a matter I would leave to them . . . ." Id. at 173, 174.
86. 6 Barb. 386 (N.Y. Sup. Ct. 1849).
"genteel grocery" at the commencement of the term. One judge noted:

The contract was executed . . . . [T]he [lessees] went into possession, and occupied the premises. Any breach, therefore, by the [lessors] is not in bar. . . . The subject matter is not wholly worthless, nor have the [lessees] returned the property.87

It should be noted that the general independency of covenants in leases, resulting from the part performance doctrine, could also be of use to lessees. In Tracy v. Albany Exchange Co.,88 a lessor attempted to excuse his breach of a covenant to renew on the grounds that lessee's rent payments, more than $2,000 over two years, were fifty-seven dollars in arrears. The court held the covenants to be independent and allowed the lessee to recover. Another lessor's attempt to resist an action on his covenant to pay for valuable improvements failed when his excuse was that the lessee failed to pay taxes and rent for the last year of a nine year lease.89

The analysis of one court is exceedingly interesting, as it would allow a lessee to insist upon the lessor's performance of his covenants even when the lessee has substantially breached the rent covenant.90 The lessee's consideration is not the payment of rent, but the promise to pay it in future installments. Upon breach of that promise, the lessor can terminate the tenancy, and thereby end his right to receive further payments.91 But if he does not terminate, and continues to enjoy the lessee's consideration (the right to receive future payments), he remains liable on his counterpromises. Otherwise, he would be unjustly enriched.

In sum, the general independency of lease covenants is a product of modern contract law's departure from strict adherence to the literal expression of contract terms, both as to time (the constructive conditions principle) and quality (the part performance doctrine) of performance.

Although a part performer was not precluded from his action on his counterpromise, his partial breach rendered him liable in

87. Id. at 392; see also Hill v. Bishop, 2 Ala. 320 (1841).
88. 7 N.Y. 472 (1852).
89. Butler v. Manny, 52 Mo. 497 (1873).
91. But the right to damages survives termination. See notes 120-22 & accompanying text infra.
damages. In partial performance situations, therefore, both parties had rights of action: the part performer for his counterpromise, the part recipient for his damages. In the second quarter of the nineteenth century, common law recoupment became the favored device for settling these disputes in one action. A study of recoupment is important to our topic in two respects. First, the emergence of recoupment illustrates the absence of any notion that leases and contracts are different. Second, knowledge of recoupment reveals the role of nineteenth century legislation in imposing onerous liabilities on lessees.

In the eighteenth century, recoupment was limited to cases in which plaintiff's fraud tainted the contract on which the main action was founded. The only other joinable counterclaim was a statutory set-off, but set-off was limited to liquidated damages (a sum certain). Until 1830, the rule in New York permitted limited recoupment and set-off. Thus, in Tuttle v. Tompkins, when a lessor sued for rent accrued, the court rejected the defendant-lessee's attempt to introduce evidence of an unliquidated claim arising from the lessor's promise to pay for improvements. Both court and counsel annotate their arguments with contract and lease cases intermixed.

The following year, in a contract case, the New York courts expanded recoupment by eliminating the fraud requirement. This allowed counterclaiming an unliquidated sum. In the succeeding line of cases reaffirming the decision as to contracts and applying it to leases, lease cases cite contract decisions, and contract cases cite lease decisions, without qualm. In one contract case allowing an expanded recoupment, the court felt compelled to rebut the precedential impact of two recent, and arguably adverse, lease decisions. The court did so in a manner which courts usually go to great lengths to avoid, stating:

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92. M'Allister v. Reab, 4 Wend. 483, 488 (N.Y. Sup. Ct. 1830) (argument of counsel); aff'd, 8 Wend. 109, 125 (Ct. of Err. 1831) (dissenting opinion).
93. 2 Wend. 407 (N.Y. Sup. Ct. 1829).
94. M'Allister v. Reab, 4 Wend. 483 (N.Y. Sup. Ct. 1830), aff'd, 8 Wend. 109 (Ct. of Err. 1831).
96. Id., passim.
The principle of allowing parties to adjust the whole controversy in one action has not been applied with entire uniformity [referring to the leasing cases]. . . . The truth is, that the doctrine, although founded in the plainest principles of justice, is not of long standing; and while it was in a forming state, it may well have happened that the rule should sometimes be overlooked by both court and counsel. But the principle is now too firmly settled to be shaken by a few straggling cases . . . .

It is of extreme significance that although no New York case had yet applied the new recoupment in a lease dispute, the court did not intimate that the adverse decisions involved leases, to which different rules apply.

The second respect in which a study of recoupment is important is that the expanded doctrine, by settling part performance disputes in one litigation, should have avoided the obvious harshness implicit in the general independency of lease covenants. With the right to recoup, the question before the court becomes: viewing the entire contract, is there a net amount owed? Thus, despite the independence of lease covenants, should the lessor breach his covenant to provide heat, the lessee can deduct from the rent payments his damages or the cost of securing an alternate supply of heat.

Despite recoupment, however, the general independence of lease covenants has developed into an obnoxious doctrine, one which, for example, prevents the lessee from “repairing and deducting.” This resulted from superimposing the nineteenth century summary proceeding for possession of real property over the part performance doctrine. Typically, these proceedings do not permit presentation of any counterclaims. The simple question before the court is whether rent is owed. The issue is whether something excuses performance of the rent covenant, not whether something reduces the amount due. Only a defense, e.g., breach of a dependent

98. The first reported application to leases is Whitbeck v. Skinner, 7 Hill 53 (N.Y. Sup. Ct. 1844).
99. See, e.g., Obermyer v. Nichols, 6 Binn. 159 (Pa. 1813); Wright v. Lattin, 38 Ill. 293, 296 (1866); Myers v. Burns, 35 N.Y. 289 (1866). Of course, the lessee can sue affirmatively. Buck v. Rogers, 39 Ind. 222 (1872). And with the development of statutory counterclaims, lessees can collect a positive award as defendant in a suit for rent.
100. H. Tiffany, THE LAW OF LANDLORD AND TENANT 1766-67 (1910) [hereinafter cited as TIFFANY]. Neither can equitable defenses be presented. Id. 1777-78.
Modern Lease covenant, is relevant; not a counterclaim, e.g., breach of an independent covenant. This exclusion of counterclaims, not the independence of lease covenants, is the modern anomaly.

It is said that the summary proceeding's exclusion of counterclaims is "a concomitant of the inflexible and highly technical common law pleading system." But the rise of modern summary proceedings, particularly the exclusion of counterclaims, post-dates the expansion of recoupment and the collapse of common law civil practice. Moreover, nineteenth century summary proceedings are part of a more general movement in the law of forfeiture.

In the eighteenth century, the legal system "abhorred a forfeiture." Law courts limited forfeitures in a variety of ways. With limited exception, rights of re-entry had to be expressly reserved. To perfect a forfeiture for nonpayment of rent, the lessor had to meet several strict, technical requirements, such as making demand for rent "before sunset of the day on which the rent is due." Even when a forfeiture occurred at law, Equity freely granted relief to the tenant. Legislation designed to strengthen the lessor's position was limited in scope. The common law "niceties" precedent to bringing an ejectment for the nonpayment of rent were done away with only when half-year's rent was in arrearage and there was insufficient distress on the premises. Statutes granted rights of entry only for waste and in summary proceedings. And, summary proceedings were limited to situations where the rent reserved was equal to three-fourths the yearly value of the premises, was half-year in arrearage and the tenant had abandoned the premises leaving insufficient distress behind.

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102. Expanded recoupment was generally established by the midnineteenth century. The earliest intimations of exclusion of counterclaims in summary proceedings are Wahrburton v. Doble, 38 Cal. 619 (1869); Borden v. Sackett, 113 Mass. 214 (1873); Abrams v. Watson, 59 Ala. 524 (1877). Contra, Barnum v. Keeler, 33 Conn. 209 (1869) (dicta), where the court stated that a recoupment at least equal to the rent due would bar summary dispossession.
103. Tiffany, supra note 100, at 1354. The exceptions were tenant's disclaimer, on record, of his tenancy, or tortious feoffment.
104. Id. 1371-73.
105. Sanders v. Pope, 33 Eng. Rep. 108 (Ch. 1806), and cases cited therein.
106. An Act for the more effectual preventing of Frauds committed by Tenants, 4 Geo. 2, c. 28, § 2 (1731).
107. Statute of Gloucester, 6 Edw. 1, c. 5 (1278).
108. An Act for the more effectual securing the Payment of Rent and preventing Frauds by Tenants, 11 Geo. 2, c. 19, § 16 (1738).
In the nineteenth century, however, only law courts continued to disfavor forfeitures. In fact, by integrating recoupment and counterclaims with ejectment actions, law courts poured new wine into old bottles. But Equity, concluding that "anciently, [Equity] corrected men's contracts without any foundation," virtually abandoned its jurisdiction to intervene. Equitable relief continued only when forfeiture was for nonpayment of rent; and one feels that jurisdiction survived only because it had been recognized in a statute enacted to limit its scope.

Legislative changes were equally dramatic. The common law requirements of demand for rent were dropped entirely. Express reservation of the right of entry became unnecessary in cases involving the breach of rent covenant. Some states even abrogated the express reservation requirement for all breaches so that, effectively, the scope of summary proceedings was greatly enlarged. Some of these dramatic changes in the law of forfeiture may be explained by reference to movements in contract law and civil practice. But others, including the exclusion of counterclaims from summary proceedings are not. Indeed, they are counter to these movements. The exclusion of counterclaims is a product of unique legislation, and it seems a product of nineteenth century economic and social policy because the lessor's position receives a unique degree of protection. Whether this protection represents a hidden economic subsidy for real estate capital, or social protection from its consumers, it is a product of nineteenth century contract law and legislation.

B. Mitigation of Damages

When a tenant wrongfully abandons the premises, the vast

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112. TIFFANY, supra note 100, at 1359.
113. Id. 1742, 1752, 1755, 1772. A few states have statutorily provided for this. Cf., ILL. STAT. ANN., ch. 57 § 2(4) (1972). In most others the standard provision allowing summary proceedings against holdovers was construed to permit the same result. Cf., Niles, Conditional Limitations in Leases in New York, 11 N.Y.U.L.Q. Rev. 15 (1933).
114. The exclusion of counterclaims makes two actions bloom instead of one, counter to the thrust of modern civil practice.
115. Unlike most other contractors, the lessor's cash flow cannot be legitimately interrupted without a prior judicial determination. The exclusion of counterclaims from summary proceedings is, therefore, the key stone in cash flow protection.
majority of jurisdictions allow the lessor to collect full rent after it accrues, even where the premises could have been relet as a means of minimizing damages. As the mitigation principle emerged in contract law in the midnineteenth century, it may be supposed that this comparatively young principle was stonewalled by leasing's ancient real property orientation. On the contrary, it was integrated into leases to the same extent that the mitigation principle was integrated into contract law. For under modern contract doctrine the duty to mitigate is not universal: until the recent adoption of the Uniform Commercial Code (UCC) when goods identified in the contract were wrongfully rejected, a survival of the "title" theory permitted the vendor "to sit complacently still" making no attempt at resale and still collect the full contract price. And even under the UCC, the duty to mitigate ceases after delivery.

Prior to the adoption of the UCC, the contract remedy doctrine had been the "election of remedies." That is, when title to goods had already passed to the vendee (for example, absent special agreement, when the contract was for specific goods in a deliverable state), who then rejected and refused to pay, the vendor could maintain an action either for damages or the contract price. The mitigation principle, in the form of a duty to make reasonable efforts at resale, was logically inconsistent with a right to the contract price and did not apply. Rather, the duty to mitigate attached to damage actions.

Thus, as a lease is usually for specific premises, when a tenant wrongfully abandons the premises and refuses to pay rent the lessor has his election of remedies. In other words,

when a tenant abandons the premises without just cause and refuses to pay rent, the landlord may either treat the

117. Clark v. Marsiglia, 1 Denio 317 (N.Y. Sup. Ct. 1845), is regarded as the seminal case.
118. Whatever the reason, the absence of the mitigation principle is often cited as a product of the feudal, real property basis of leasing. See A. Casner & W. Leach, Cases and Text on Property 367 (2d ed. 1969); J. Levi, P. Hablutzel, & J. White, Model Residential Landlord-Tenant Code 5 (tent. draft 1969).
119. Compare Uniform Commercial Code § 2-709(1)(a) with § 2-709(1)(b).
120. See, e.g., Dustan v. McAndrew, 44 N.Y. 72, 78 (1870). The common law, allowing action for the price where title has passed, was codified in the Uniform Sales Act, see Uniform Sales Act § 63(1). Some states allowed recovery of the price even where title had not passed. See 3 Williston, Contracts, supra note 75, §§ 1365-69.
term as still subsisting and sue for the installments of the rent reserved as they accrue, or, treating the lease as terminated by the tenant’s breach, re-enter and sue for damages for the breach.\textsuperscript{121}

In the event that the lessor should choose to sue for damages, the mitigation principle would attach so that “his damages are measured, not by the amount of rent reserved, but by the difference between that amount and the rental value of the premises to the end of the term.”\textsuperscript{122}

The earliest recognition of the lessor’s right to allow the premises to lie vacant appears in passing statements made in cases where he had relet.\textsuperscript{123} However, in the first case where the lessor had not relet, \textit{Becar v. Flues},\textsuperscript{124} the court firmly grounded the absence of a duty to mitigate in sale-of-goods law. There were two issues in \textit{Becar}: the first involved the lessee’s death after agreeing to lease but before the term commenced; and the second involved the lessor’s refusal of an alternate tenant. Nevertheless, the lessee had to pay all the stipulated rent after it accrued for the reason that the lease “is like a sale of specific personal property to be delivered. In such a case title passes to the vendee and of course he is liable for the purchase money.”\textsuperscript{125}

\textbf{C. Implied Warranties}

Until recent case law reform,\textsuperscript{126} warranties\textsuperscript{127} were not usually implied into leases. Therefore, absent an express covenant, the habitability of the premises was generally the tenant’s risk. If the premises were unfit for use at the time of leasing or became so at any time during the term, the lessee had no recourse against the lessor.\textsuperscript{128} We are told that this doctrine originates from the view of a

\textsuperscript{121} Brown v. Hayes, 92 Wash. 300, 303, 159 P. 89, 91 (1916).
\textsuperscript{122} Id.
\textsuperscript{123} See, e.g., Schuisler v. Ames, 16 Ala. 73 (1849); J.C. Myer & Co. v. Smith, 33 Ark. 627 (1878).
\textsuperscript{124} 64 N.Y. 518 (1876).
\textsuperscript{125} Id. at 520.
\textsuperscript{127} The term warranty may be used with reference to title or quality. In this Article, warranty refers to quality: merchantability and fitness for a particular purpose. Warranty of title is implied into both contracts and leases.
\textsuperscript{128} See, e.g., A.L.P., supra note 2, at § 3.45; TIFFANY, supra note 100, at §§ 86-87; Annot., 4 A.L.R. 1453 (1919).
“lease as a conveyance of realty,” which therefore makes it “subject to the same general rule applied to the sale of a freehold interest.”

It is also supposed that if leases were treated as contracts, this doctrine would disappear for the reason that “implied warranties have become widely accepted and well established features” of contract law. But neither belief is well founded. Instead, the nonimplication of warranties in leases is rooted in both the sale of goods contract and the general reasoning about leases. Therefore, absent novel applications of the unconscionability doctrine, the use of modern contract principles will offer precious little reform.

Implied warranties in the current sale of goods and leasing law are remarkably similar. Both arise as exceptions to the general rule of caveat emptor that emerged in and dominated nineteenth century contract law. Even today, the caveat emptor heritage sets boundaries around the implication of warranties in both contracts and leases. In the sale of goods, no warranties are implied against patent defects when the purchaser inspects or has an opportunity to do so. And, therefore, because lessees usually have an opportunity to inspect, they have no warranty against patent defects. Again, in the sale of goods the warranty of fitness for a particular purpose is not implied against latent defects unless “the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.” Lessees do not usually so rely. Finally, in the sale of goods a warranty is now implied against all latent defects which offend minimum standards of quality. Lessors, however, are held to warrant similar latent defects only when they “know or should have known” about them.

Thus, the present gulf between implied warranties in contracts and leases pertains exclusively to latent defects in minimum quality

133. The importance of inspection to the application of the general rule is illustrated by its exceptions: when the lease is accepted before the premises are completely constructed or altered; and short-term leases of vacation dwellings. See A.L.P., supra note 2, at § 3.45; Tiffany, supra note 100, at § 86(e). But see Foisey v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).
136. A.L.P., supra note 2, at § 3.45.
that lessors/vendors had no reason to know of. But, prior to the UCC, these implied warranty considerations arose only when goods were "bought by description."\textsuperscript{137} Leaseholds are not selected by description. In short, the present chasm was opened by the recent adoption of the UCC and is rapidly being closed.\textsuperscript{138}

The parity of implied warranties in sales contracts and leases is more than coincidental as can be seen from a review of the seminal cases excluding warranties of tenantability from leases. The leading precedents establishing the rule of nonimplication are a celebrated string of English cases\textsuperscript{139} in which \textit{Sutton v. Temple}\textsuperscript{140} is the climacteric.

The context of \textit{Sutton} is complex in that the "perplexed" law of sale-of-goods warranties is heavily involved. The reason for this is that in the early nineteenth century, the English bench, rejecting recent trial court precedent, installed caveat emptor as a major premise in sales-of-goods contracts.\textsuperscript{141} But exceptions began to emerge. By 1843, while implied warranties were generally excluded from a sale of specific goods, they were included in certain instances, such as in the sale of "unascertained [goods] which [were] to be selected or manufactured by the seller for a particular purpose."\textsuperscript{142}

Also involved in \textit{Sutton} was the law of implied warranties in personal property leases. There, due to the usual brevity of such leases,\textsuperscript{143} the influence of treatise writers well versed in other systems of commercial law,\textsuperscript{144} and a general dearth of adjudicated cases, the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} \textit{Uniform Sales Act} § 15(2). Williston defines a sale by description as "cases where identification of the goods . . . depends upon the description." 1 S. Williston, \textit{The Law Governing Sale of Goods} § 224 (1948) [hereinafter cited as \textit{Williston, Sales}]. Llewellyn wrote "description required compliance with the class or species described." Llewellyn, \textit{On Warranty of Quality, and Society}, 36 Colum. L. Rev. 699, 726 (1936). An example of a sale by description is the sale of all "heavy gauge widgets" in the vendor's warehouse.
\item \textsuperscript{138} See cases cited note 126 supra.
\item \textsuperscript{140} 152 Eng. Rep. 1108 (Exch. of Pleas 1843).
\item \textsuperscript{141} Horwitz, \textit{Contract, supra} note 7, at 945-46.
\item \textsuperscript{144} See, \textit{e.g.}, W. Jones, \textit{Essay On the Law of Bailments} (2d ed. 1798); J. Story, \textit{Commentaries on the Law of Bailments} (1840).
\end{enumerate}
\end{footnotesize}
civil law of caveat venditor had been adopted. 145

Further complicating matters was the conflict among then rec-
cent cases concerning the effect of uninhabitability on residential
leases. At the trial level, judges had been charging juries that unin-
habitability justified a tenant’s abandonment and refusal to pay
further rent. 146 But twice appellate courts, reasoning from the rule
of a tenant’s continued rent liability after destruction by fire, had
ruled the opposite way. 147 Consequently, in Smith v. Marrable, 148
when the Exchequer of Pleas unanimously upheld a jury charge
implying a warranty of habitability into a five-week lease of a fur-
nished upper class resort cottage, there must have been quite a stir.
Moreover, before ruling affirmatively, the major opinion stated the
issue broadly as

whether . . . a person who lets a house must be taken to
let it under the implied condition that it is in a state fit for
decent and comfortable habitation, and whether he is at
liberty to throw it up, when he makes the discovery that it
is not so. 149

Ten months later, Sutton v. Temple 150 brought the issue of
implied warranties once more before the Exchequer. This time the
issue was posed in even more general terms as “whether a contract
or condition is implied by law, on the demise of land, that it shall
be reasonably fit for the purpose for which it is taken.” 151 This time
the court answered negatively, which all but overruled Smith v.

145. An example of the effect of the absence of common law decisions is Story’s conclu-
sion that the personal property lessee’s liability for rent “is extinguished by the loss or
destruction of the thing by any inevitable casualty . . . .” J. STORY, COMMENTARIES ON THE
LAW OF BAILEMENTS § 418 (1832). He admits that
[the] principles stated in the few last sections, are derived altogether from the civil
law. The common law does not furnish any direct recognitions of them. But it may
be safely affirmed, that they are so consonant with general justice, and with the
nature of the contract, that, in the absence of any controlling authority they may be
used as fit guides to assist our general reasoning. Id. § 420.
The few prenineteenth century English personal property leasing decisions proceeded upon
146. See the Nisi Prius cases cited in note 139 supra.
492 (Exch. of Pleas 1840).
149. Id. at 694. One judge, Lord Abinger, C.B., however, defined the issue more nar-
arrowly as “a man who lets a ready furnished house.” Id.
151. Id. at 1112.
For the reason that Sutton then remained the controlling case in the matter for over one hundred years, it is appropriate to analyze its facts and reasoning. In Sutton, the lessee let twenty-four acres of land for the purpose of pasturing cattle. Shortly after taking possession, one-fourth of the animals died. Upon examination it appeared that the animals had been poisoned by paint particles "which had evidently been spread on the land with the manure in the preceding spring." Thereupon, the lessee abandoned the premises and refused to pay rent when it came due. As a result, the lessor sued for the rent. At trial "[t]here was no evidence to shew that the [lessee] was aware of the state of the eddih at the time of the letting." The jury found that the cattle died from paint poisoning. The trial judge then directed that damages be awarded for the time in which the lessee actually occupied. Both parties appealed: the issue was all or nothing.

On appeal, the lessor's claim was unanimously upheld: no warranty was implied. In reaching this result real property doctrine was mentioned only once. The lessee's counsel attempted to bar the lessor's claim by analogizing his case to an eviction, but neither opposing counsel nor any judge (all four of whom delivered opinions) thought this contention sufficiently meritorious to require even adverse comment. Instead, contract cases dominated the discussion.

In argument, both parties relied heavily on sale of goods decisions. Lessor's counsel, with prompting from the bench, pointed out that no warranty of fitness for a particular purpose was implied in a sale of specific chattels; and Smith v. Marrable was "distinguishable" since it was "like the case where a party orders goods which he has never seen." Lessee's counsel responded:

It is assumed on the other side that this was a contract for . . . certain specific land known to the [lessee]; whereas it is only a contract for the use of eatage of a certain number of acres of land, no further defined than as . . . being situate in a particular parish. The [lessee] does not select the

154. Id. at 1109.
155. Id. at 1111.
156. Id. at 1109.
157. 152 Eng. Rep. 1110 (emphasis supplied). The court found additional grounds for distinguishing Smith: by analogy to personal property leasing, and contract law sales by description. See id. at 1111.
particular eddish, but the bargain he makes is, that he shall have furnished to him twenty-four acres of eddish, which shall be fit and wholesome food for his cattle.\textsuperscript{158}

Thus, both parties agreed upon the authority of contract law here, but lessee sought to come in under two established exceptions to that law's general maxim of caveat emptor: where the seller selects unascertained goods for the buyer;\textsuperscript{159} or sells food.\textsuperscript{160}

The court, too, spoke contract. Lord Chief Baron Abinger said:

I take the rule of law to be, that if a person contract for the use and occupation of land for a specified time, and at a specified rent, he is bound by that bargain, even though he took it for a particular purpose, and that purpose be not attained . . . . Here the [lessee] is to pay \$40 for a given portion of the year, and nothing is stipulated as to his getting any benefit by the occupation of the land.\textsuperscript{161}

But the court was more deeply involved in instrumental reasons. An implied warranty was thought to be disadvantageous. One judge noted:

A great number of cases have already been put to shew the inconvenience of such a doctrine; I will put another. . . . [I]f a man took land on a building lease, and it were long afterwards discovered that there was a running sand under-neath, which would make it impossible to build upon the spot intended, and which could not be removed but at ruin-ous expense, it is nevertheless to be presumed . . . . according to the [lessee's] argument, that there was to be an implied warranty that there was no running sand at that particular place, and the lessor must be held responsible.\textsuperscript{162}

Within a few months, a unanimous court held that Sutton governed interpretation of residential leases.\textsuperscript{163} Smith v. Marrable was reduced to a narrow exception.\textsuperscript{164}

\begin{itemize}
  \item \textsuperscript{158} Id. at 1110.
  \item \textsuperscript{159} See material cited in note 142 supra.
  \item \textsuperscript{160} See 1 Williston, The Law of Sales §§ 241-42 (1901).
  \item \textsuperscript{161} 152 Eng. Rep. at 1112. But see Parke, B.'s comment that the contract cases have "no direct bearing upon the present case." Id. at 1114. Parke grounds nonimplication of warranties in general reasoning about leases (the unforeseeable consequences of such a doctrine). So though he seems to deny the relevance of contract doctrine, he is far from drawing the rules of nonimplication from real property principles.
  \item \textsuperscript{162} Id. at 1113-14.
  \item \textsuperscript{163} Hart v. Windsor, 152 Eng. Rep. 1108.
  \item \textsuperscript{164} That Sutton v. Temple marked a large swift reversal in judicial thinking is illus-
After so full, and recent, a consideration of implied warranties in leases in England, most American jurisdictions adopted the rule of nonimplication without discussion. A cite to the English cases was all that was offered. A few jurisdictions, though, did explore the issue. And they, too, refused to imply a warranty and grounded themselves in contract law.

Cleves v. Willoughby, the first and leading American authority, upheld a trial court’s exclusion of evidence that the demised house was “altogether unfit for occupation and wholly untenable” for the reason that “[t]he maxim caveat emptor applies to the transfer of all property, real, personal and mixed; and the purchaser generally takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject.” And in Davis’ Administrator v. Smith & Bradley, a latent (unobservable) defect in the main supports of the leased grist and saw mill caused the supports to “give way,” collapsing the building and destroying the machinery therein. No implied warranty was breached, because there is no pretense of any misrepresentation of concealment on the part of the lessor. The defect in the posts was an infirmity to which all timbers are subject, and their liability to such a defect was equally in the knowledge of both parties . . . . In a sale of a limited interest in any chattel, there is no implied warranty of soundness on the part of the vendor.

trated by Baron Parke’s admission, in Hart v. Windsor, that when he spoke for the court in Smith v. Marrable, defining the issue broadly and implying a warranty, his judgment was based upon decisions which theretofore “had not been questioned,” but nevertheless were “not law.” Id. at 1122. In short, he confessed error.

165. See, e.g., Dutton v. Garrish, 63 Mass. (9 Cush.) 89 (1851); Libbey v. Tolford, 48 Me. 316 (1861).

166. 7 Hill 83 (N.Y. Sup. Ct. 1845).

167. Id. at 86. Cleves is interesting for two other reasons. The lessee had not actually examined the premises. This court did not comment upon this fact, possibly because in New York caveat emptor was said to apply to sales of specified goods even when inspection was “impossible.” See Waring v. Mason, 18 Wend. 425, 433 (Ct. of Err. 1837).

Also, the possibility of implied warranties in leases could be raised in New York only because a statute reading “no covenant shall be implied in any conveyance of real estate” was held not to apply to leases. Tone v. Brace, 11 Piade 566, 569 (N.Y. Ch. 1845) (“Such a lease is not, in common parlance called a conveyance of lands, tenements or hereditaments.”) But a freehold lease is within the statute, Carter v. Burr, 39 Barb. 59 (N.Y. Sup. Ct. 1862). By the end of the century this distinction may have been forgotten. See Coffin v. City of Brooklyn, 116 N.Y. 159, 22 N.E. 227 (1889). For other states with similar statutes, see Tiffany, supra note 100, at 520-21.

168. 15 Mo. 467 (1852).

169. Id. at 470.
In sum, one party must bear the risk of unforeseen loss from latent defects of which neither party was aware. Nineteenth century courts, guided by contract law, imposed it on the lessee.

IV. THE ROLE OF PROPERTY LAW RECONSIDERED

As noted in the previous section discussing fire cases, the nineteenth century judges disinterred feudal rent doctrines for the purpose of escaping dysfunctional applications of contract principles. An examination of the most noted appearance of real property law in leasing disputes, the doctrine of constructive eviction, confirms much of this. The constructive eviction principle emerges in the nineteenth century. It, too, is a sharp break with the immediate past which limited eviction to instances of physical expulsion. And this break is presented as continuity through the anachronistic citation of feudal rent doctrine.

But the reason for real property law's appearance here seems, at first, to differ from the reason for its appearance in the fire cases. Constructive eviction emerges not because contract analogies are dysfunctional, but because they are nonexistent.

Certainly, there is at present an overlapping area in which constructive eviction and contract doctrines, such as failure of consideration, material breach or mutual dependency of covenants, could properly substitute for each other, i.e., when the lessor breaches an affirmative duty. Thus, when the lessor is obligated, either by covenant or statute, to provide heat, and breaches that obligation, both property and contract styles of analysis have been used. Yet the property style predominates. Since, to the modern commentator, cases involving breaches of this nature represent the “most significant” application of the constructive eviction doctrine, and as it is observed that “when that doctrine is liberally applied,” the result

170. See notes 51-72 & accompanying text supra.
173. The major authorities relied upon by the majority in Dyett v. Pendleton, 8 Cow. 727 (N.Y. Ct. of Err. 1826), are cases recited in Rolle's Abridgment (c. 1640) and Gilbert's Essay on Rents (1758). Id. at 730-32. Despite the eighteenth century date of the latter work, it “goes back to the first principles of the feudal law.” See 12 W. Holdsworth, History of English Law 370 (1938).
reached is not different from contract law, the conventional wisdom implies: With so many available and appropriate contract doctrines, leasing's employment of a real property based concept is more testimony to leasing's property basis.

It is curious, however, that this "most significant" use of the constructive eviction doctrine does not emerge until the principle is over fifty years old. In fact, courts, at first, denied that a constructive eviction could result from a breach of an express covenant. Therefore, the origin and importance of the constructive eviction doctrine is that it extends beyond this area of congruence.

Consider the following. Tenant (T), interested in retailing musical instruments and other associated goods, leases space from Lessor (L). The lease is for a five year term. T purchases his sales counters from Vendor (V). The purchase price is to be paid in installments over a five year period. At the time of the lease, the space adjoining T's area is used as the showroom of a high-grade furniture business. The two leaseholds are not physically partitioned by a wall. A year later, the furniture business is discontinued and L leases to another tenant (T') who converts his space into a meat market and grocery store. V sells T' his sales counters. As the purveying of music and meat, in the same space, are incompatible uses, L and V have both injured T in similar ways. How does this effect the status of T's agreements with L and V?

The lease with L is substantially affected. The real property

175. 1 A.L.P., supra note 2, § 3.51 at 281-82.
176. The earliest constructive eviction cases are from the first quarter of the nineteenth century, see note 171 supra. Among the earliest cases to apply the doctrine to breaches of lessors' express obligations are: Alger v. Kennedy, 49 Vt. 109 (1876); Lewis & Co. v. Chisolm, 68 Ga. 46-47 (1881); Tallman v. Murphy, 120 N.Y. 345, 24 N.E. 716 (1890); McCall v. N.Y. Life Ins. Co., 201 Mass. 223, 87 N.E. 582 (1909); Gibbons v. Hoefeld, 229 Ill. 455, 132 N.E. 425 (1921).
179. As the court wrote:
[Lessee] deals in musical instruments, inclusive of Victrolas and records, and it is well known that purchasers desire a demonstration. A selection from Chopin, on a Victrola, played to the accompaniment of a cleaver cracking bones on a butcher's block, might not detract from the sale of meat but would seriously interfere with the music business. . . . The carcass of a hog, hung by the heels, with opened body and bloody snout, may not look out of place in a butcher's shop, but wholly out of place and repulsive in the same room with a music store.

Id. at 190, 216 N.W. at 389.
based implied covenant of quiet enjoyment allows T to elect between terminating his tenancy or enjoining the new lease. And under either election he can collect damages. For

there goes with every rental of premises the right of beneficial enjoyment by the tenant for the purpose for which the premises are rented, at least to the extent disclosed to the lessor at the making of the lease. Such enjoyment the landlord may not destroy or seriously interfere with, in use by himself of permitted use by others, of any part of the premises occupied in conjunction therewith.

On the other hand, the contract with V is unaffected. It is difficult to conceive of any cause of action T has against V. It seems likely that V can sell to both lessees and insist that T continue his installment payments, indeed, even if V’s second sale is maliciously motivated to harm T.

The different treatment stems from the marketplace presuppositions of modern contract law. One implicit presupposition is that, as goods are fungible and vendors numerous, vendors are interchangeable. In the above example, if V had not made the second sale, an assumed V would have. However, relations between lessors and lessees do not take that form. No lessor but L could have so positioned an incompatible use. In short, the main use of the implied covenant of quiet enjoyment is with factual situations which are anomalous as contract cases.

The early constructive eviction cases evidence this assertion. The first American case, the landmark Dyett v. Pendleton, involved facts similar to our hypothetical: lessee’s residential use of part of a multiple-occupancy structure was incompatible with the lessor’s subsequent use of the remainder as a brothel. Similarly, Halligan v. Wade involved a lease of part of a building as a hotel, and two later leases of the remainder to a saloon and tin shop, both of which were lawful but noisy.

Other early cases involve additional fact patterns which are anomalous in the modern market economy. One common type involves a lessor’s interference with a lessee’s relation with his sub-

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182. See Holmes, Privity, Malice and Intent, 8 Harv. L. Rev. 3 (1894).
183. 8 Cow. 727 (N.Y. Ct. of Err. 1828).
184. 21 Ill. 470 (1859).
It is rare, in a national market economy, that a vendor
can even identify, much less interfere with, his vendee's vendee.
Indeed, since the somewhat apposite law of interference with busi-
ness relations did not truly develop until the twentieth century, nineteenth century judges had no coherent contract principles to
turn to. In order to resolve leasing's unique problems, nineteenth cen-
tury courts turned to feudal rent analysis rather than their contem-
porary property law. One example that they did not turn to their
contemporary property law is that from its outset, constructive evic-
tion necessitated redefining eviction. Another example is that, prior to the nineteenth century, the
common law contained two doctrines that protected the real estate
possessor's access to light and air (be he tenant in fee or for years).
One was the doctrine of prescriptive ancient lights; the other was
the doctrine of nonderogation by a grantor from his grant. By the
former, access over a period of time ripened into ownership of that
access; by the latter, a purchaser of part of a landowner's holding
received immediate protection. Under the latter doctrine, the con-
voyor could not at any time, build on his retained adjoining lots so
as to obstruct his purchaser's light and air. But nineteenth century
American courts, sensitive to the antidevelopmental impact of these
doctrines, refused to receive them into American law. Aside from
express agreement, no doctrine prevented American landowners
from obstructing their neighbors' and grantees' access to light and
air. A property based analogy, therefore, would lead us to expect
that American lessors could act in a similar fashion towards their
lessees. But the opposite is true. American courts uniformly held
that once there was a lease of part of a lot or building, a constructive

185. Levitzky v. Canning, 33 Cal. 299 (1887); Leadbeater v. Roth, 25 Ill. 478 (1861);
186. F. Pollock, The Law of Torts 251-32, 317-20 (6th Ed. 1901), illustrates the rudimen-
tary state of such law. Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909), is generally
regarded as the beginning of legal regulation of the area.
187. Other common constructive eviction fact patterns that are unlikely to arise in the
market economy: lessor retains part of the premises and deposits "filth" on tenant below,
Jackson v. Eddy, 12 Mo. 209 (1848); Edgerton v. Page, 20 N.Y. 281 (1859); and lessor removes
property from the demise after entry by lessee, Lewis v. Payne, 4 Wend. 423 (N.Y. Sup. Ct.
1830); Benett v. Bittle, 4 Rawle 338 (Pa. Sup. Ct. 1834).
188. See notes 170-74 & accompanying text supra.
189. Horwitz, The Transformation in the Conception of Property in American Law,
eviction occurred if the lessor further developed the unleased part he retained control over so as to obstruct his lessee's light and air.190

Although the courts did in fact turn to feudal rent analysis, that law served only as a springboard to enable the courts to work their will. Constructive eviction is a flexible doctrine. Its requirements of lessor responsibility and substantial detriment to beneficial enjoyment allow for a wide range of application.191 Moreover, the application of feudal rent analysis was selective. Nineteenth century courts found constructive evictions where feudal theory indicated they should not. Applying the feudal theory no suspension of rent occurs upon the deprivation of appurtenant rights because the rent does not issue from them but from the demised premises alone.192 Nonetheless, American courts allowed constructive evictions in such cases.193

Conversely, constructive evictions were denied where feudal theory indicated an eviction would lie. Part of feudal rent principles was the doctrine of partial eviction. By that doctrine, if the lessor should expel his lessee from a part of the demise, the lessee is discharged from his entire rent obligation. The rent is not apportioned, so "that no man be encouraged to injure or disturb his tenant in him possession, whom, by the policy of the feudal law he ought to protect and defend."194 But nineteenth century courts refused to apply this doctrine, and further refused to allow tenants to excuse nonpayment of rent unless, after lessor's substantial interference, they abandoned the premises.195

Yet, in seeming conflict, nineteenth century judges ruled that lessees could remain on the premises and claim a constructive evic-

190. Royce v. Guggenheim, 106 Mass. 201 (1870); Doyle v. Lord, 64 N.Y. 432 (1876). However, a lessor could develop an adjoining lot, if he owned one, even if he darkened his adjacent lessees' lights. Anderson v. Bloomheart, 101 Kan. 691, 168 P. 900 (1917); Royce, supra; Doyle, supra; Plamer v. Whitmore, 2 Sandf. 316 (N.Y. Super. Ct. 1849). As the courts point out, the neighboring lot could have been owned by another person, who, of course, could so develop it. Royce, supra, at 205; Doyle, supra, at 439. Hence, the market paradigm applies.


192. 2 Tiffany, supra note 100, at 1270. By feudal theory rent could not issue out of anything that could not be distrained upon. Gilbert's Essay on Rents (1758).

193. Id.


tion if the remedy they sought was injunction or damages. The reason for these seemingly contradictory positions is that the underlying concerns were not "feudal policy" but "unjust enrichment." As in Edgerton v. Page, when the lessor's acts rose to a constructive eviction, lessee could cease paying rent only if he relinquished possession because

[i]t would be grossly unjust to permit a tenant to continue in possession of the premises, and shield himself from payment of rent by reason of wrongful acts of the landlord impairing the value of use of the premises to a much smaller amount than the rent. . . . The moment it is conceded that the injury must be equal to the amount of the rent . . . . [i]t would then only be a recoupment to the extent of the injury.

When a lessee seeks an injunctive or monetary remedy he may remain in possession and still not be justly enriched. Thus, this nineteenth century policy reconciles the cases.

Now it is possible to harmonize the apparently diverse reasons for selective nonapplication of contract law in leasing disputes. It has been argued that "nonapplication" in the area adjudicated under the constructive eviction doctrine occurred because of unique leasing problems, and, therefore, contract analogies were inapposite. The same is true, in essence, of the nonapplication of contract law to multiple-occupancy premises destroyed by fire. For though disposal or rehabilitation of damaged property is not unique to leasing, a profusion of interested parties is. The law of the sale of goods assumes that title is vested in only one person at one given moment. Hence, the transaction costs associated with allowing lessees to control multiple-occupancy redevelopment are unique to leasing.

The reasons for nonapplication of contract law can further be unified by observing that most, but not all, constructive eviction cases involve multiple-occupancy premises (as did those "fire" cases in which real property analysis appeared). Between the signatory parties, such leases create relations of proximity and depend-

197. 20 N.Y. 281 (1859).
198. Id. at 284.
199. In the early constructive eviction cases, the lessor, often continued to occupy part of the premises. And it is from the retained space that the lessor would disturb the lessee.
ence unique in sale-of-goods contract experience. It is the emergence of multiple-occupancy leasing, in the nineteenth century, therefore, which created unique relations unsuited for contract analysis. The judges, then, turned elsewhere to settle these problems, namely to feudal law.

But as we have demonstrated, that law was selectively manipulated. Therefore, we may conclude that even the leitmotif in leasing which appears feudal, agrarian and real property based is, in essence, not so. It is nineteenth century, commercial and sui generis.

V. CONCLUSION

Leasing's reformers are faced with a problem. They wish to move the foundations of leasing law from real property to contract doctrine. But contract law already forms leasing's underpinnings. Moreover, it is contract law that demands or contributes to the very results which reformers decry. Property law, or at least property locutions, has, on the other hand, provided lessees' major relief from onerous liabilities.

To be sure, recent developments within contract law offer some needed improvement. The recent adoption of the UCC has transformed relevant contract doctrines: warranties have been expanded; unconscionability has been introduced. The development of the concept of installment sales offers an alternative contract analogy upon which to model the lease, one which should ameliorate some of the rigors of the absolute sale model. Finally, the recognition that the "social" facts have changed since modern contract law was first applied to leasing indicates that the same

See, e.g., Jackson v. Eddy, 12 Mo. 209 (1848); Dyett v. Pendleton, 8 Cow. 727 (N.Y. Ct. of Err. 1826).

200. Such dependence is illustrated by the multiple-occupancy tenant's reliance on the lessor to select compatible uses as neighbors, see notes 176-82 & accompanying text supra, or provide heat.

201. See notes 191-98 & accompanying text supra.

202. Most all the early constructive eviction cases involve demises for business uses.

203. Although drafted in the 1950's, most jurisdictions adopted the Uniform Commercial Code in the 1960's.

204. See notes 131-38 & accompanying text supra.


206. In Whitaker v. Hawley, 25 Kan. 674 (1881), one of the reasons advanced for terminating the lessee's liability for rent after destruction of the premises by fire was that "a lease is in one sense a running rather than a completed contract." Id. at 687. See also, Schoshinski, Remedies for the Indigent Tenant, 54 Geo. L. Rev. 519, 535 (1966).
doctrines will produce different results today. Indeed, all these developments underlie the current group of innovative cases. In short, leasing is moving, not from conveyance to contract, but from one type of contract to another.

However, problems raised by the current spate of cases illustrate anew that any contract based model for modern leasing is ultimately inappropriate. For example, are patent defects which exist prior to the execution of a lease within the implied warranty of habitability? Contract law intimates they are not: inspection negates implication of warranties against patent defects. Perhaps a more circuitous analysis counsels a different result: a minimum standard set by the legislature in the housing code (should there be one) which unconscionability prevents from being waived.

Though not raised by current litigation consider the following. When a vendor goes bankrupt, his trustee may disaffirm any executory contract. Should a bankrupt lessor of residential property's trustee have the same prerogative with regard to the unexpired portion of his leases?

Since modern leases are unique, the approach of the contract model to the issues is problematic. Multiple-occupancy is one factor and the lease's subject matter being a residence is another. The interests and relations involved in a lease of living space are different and of much greater significance than acquiring, for example, a pair of shoes. Contract law, it seems, is designed primarily for shoe-type exchanges.

The fact that aspects of modern leasing are ill-suited for contract analysis was recognized by nineteenth century jurists. Unfortunately, they presented their perceptions dressed in the verbiage

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207. The cases implying a warranty of habitability, cited in note 126 supra, contend that the new law results from treating the lease as a contract instead of as a conveyance. It has been shown, however, that the changes stem from recent expansion of contract warranties. On the other hand, Weaver v. American Oil Co., 257 Ind. 468, 276 N.E.2d 144 (1971), merely applies contract unconscionability doctrine to leases without mentioning that the analogous contract application, Henningsen v. Bloomfield Motors, Inc., 22 N.J. 358, 161 A.2d 69, dates from 1960.


210. Statute law, based on the common law, answers this question negatively as to all leases. See id. See generally Creedon & Zinman, Landlord's Bankruptcy: Laissez Les Lessees, 26 Bus. Lawyer 1391, 1398 (1971).

211. Some of the differences are touched upon in Note, 84 Harv. L. Rev. 729, 732-33 (1971).
of feudal rent doctrine. As feudal rent law had little acceptable substance to offer, it was handily manipulated: it did not interfere with that century's preferred path for legal development.

At present, the danger exists that current contract law, since it has immediate reform to offer, will be taken too seriously. Analogies to contract law will be offered instead of rigorous analysis of the reality of leasing. However, history has put us on notice that many aspects of modern leasing are sui generis. The lease, therefore, is neither a conveyance nor a contract.

212. That contract law is not analogous, and its application to leasing disputes is sometimes futile is also suggested by an analytical approach. See material cited in note 205 supra, and R. Posner, Economic Analysis of Law 262 (1972).