THE REPAIR OBLIGATIONS OF LANDLORDS AND TENANTS: A PLEA FOR REFORM

> 'Very little is happening in the law of landlord-tenant. Quite literally this body of law is static, and the few concerned, far from being buoyed up by hope, are oppressed by the apparent futility of efforts at reform.'[1]

INTRODUCTION

The landlord-tenant relationship in Australia is assuming an increasing importance in society in view of the declining incidence of home ownership. A comparison of the statistics obtained from the 1966 and 1971 censuses shows that although the number of owners of houses and self-contained flats is increasing, their rate of increase is being outstripped by increases in the number of tenants. For example, in Victoria, whereas in 1966 81.9% of private houses were owned and only 16.2% were rented, by 1971 ownership of private houses had declined to 78.9% and tenancies had risen slightly to 16.3%. The change in the nature of occupancy is more marked in the case of self-contained flats. Whereas in 1966 20.9% of flats were owned and 77.1% were rented, by 1971 the relevant figures were 16.5% and 78.5% respectively.[2] This pattern is repeated in the other five States.[3] On account of the recent slump in home purchase due to high interest rates and lending restrictions imposed by banks and other financial institutions, one can speculate that the 1976 census will reveal a more pronounced swing away from home ownership.

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1 Quinn and Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of of the Past with Guidelines for the Future* (1969-70) 38 Fordham L Rev 225 at 250.

2 Australian Bureau of Census and Statistics, 1971 Census of Population and Housing, *Summary of Dwellings, Victoria,* at 2.

3 In South Australia, for example, whereas in 1966 77.0 per cent of private houses were owned and only 21.3 per cent were rented, by 1971 ownership of private houses had declined to 73.8 per cent and tenancies had risen to 22.3 per cent. In the case of self-contained flats, whereas in 1966 19.3 per cent were owned and 78.6 per cent were rented, by 1971 the relevant figures were 12.5 per cent and 82.0 per cent respectively. See the Australian Bureau of Census and Statistics, 1971 Census of Population and Housing, *Summary of Dwellings, South Australia,* at 2.

In view of the increasing number of tenancies of residential premises, it is surprising that little attention has been paid by the various law reform bodies or the media to an examination of the adequacy of the existing landlord and tenant law. Certain piecemeal studies and suggestions for reform have been made: for example, the Western Australian Law Reform Commission has recently undertaken a study on security deposits,[4] the New South Wales Government established in 1961 a Royal Commission to investigate the desirability of reforming its rent control legislation,[5] and in 1970 the Queensland Law Commission issued a report on the law of forfeiture.[6] However, no comprehensive study of the rights and duties of landlords and tenants has yet been made by any of the various State law reform bodies.

One area of landlord and tenant law largely devoid of consideration for reform in Australia has been the law relating to the repair obligations of the parties. The lack of attention to this aspect of the law is especially surprising in view of the fact that disputes over liability for effecting repairs constitute a large proportion of the total number of disputes that arise between landlords and tenants. According to the Rent Controller of New South Wales[7] and the Secretary of the Victorian Rental Investigation Bureau,[8] disputes over repairs are the most common source of contention between the parties after security deposits. The result of the lack of attention to the law on repairs is the survival of the common law rules as to liability for repairs in every State except Queensland.

The purpose of this article is to examine the deficiencies of the present law on repairs to rented premises and to suggest appropriate reforms to the existing duties of the parties and procedures for enforcement.

The only exception to this general pattern is that there has been an increasing incidence of ownership of self-contained flats in New South Wales.

4 Western Australia Law Reform Commission, Project No 41 (1975).

5 Royal Commission of Inquiry on the Landlord and Tenant (Amendment) Act 1948.

6 Queensland Law Reform Commission, *Report on the Law Relating to Relief from Forfeiture of Leases and to Relief from Forfeiture of an Option to Renew and Certain Aspects of the Law Relating to Landlord and Tenant* (1970).

7 Interview with Mr J Morgan, Rent Controller: 27 September 1973. Mr Morgan retired on 31 December 1973 and was replaced in office by Mr A Schulstad.

8 Interview with Mr S K Gogel, Secretary of the Victorian Rental Investigation Bureau: 1 October 1973. Mr Gogel died in December 1973 and was replaced in office by Mr A H Clark.

THE PRESENT LAW

The prevailing principle adopted by the common law is that of *caveat emptor*. Under this principle it is conclusively presumed that the tenant has examined the premises, has noted any defects, and has agreed to accept the premises in spite of the defects. The fact that the tenant may not have inspected the premises or may not have noticed any less obvious defects is regarded as irrelevant.[9] Thus, at common law, the landlord has no general liability towards the tenant to do repairs during the term of the lease or to put the premises into repair at the commencement of the lease, however poor the state of repair might be. As Erle CJ said in an oft-quoted *dictum* in *Robbins v Jones*: 'There is no law against letting a tumbledown house.'[10] The landlord assumes a duty to repair only if his lease contains a covenant to that effect, and this is seldom the case: none of four current Victorian standard forms of lease or tenancy agreement examined by the writer contain such a covenant.[11] Common law was prepared to place the landlord under an obligation to repair in only two situations. Firstly, a warranty of fitness is implied where a lease is entered into before the building of the premises is complete.[12] Secondly, and more importantly, there is the anomalous implied condition, established in *Smith v Marrable*,[13] that in the case of furnished premises the premises are fit for human habitation at the commencement of the lease.

Smith v Marrable involved a lease of a furnished summer house to one Sir Thomas Marrable for six weeks. After only one week's occupation, Sir Thomas vacated the premises on the ground that the premises were infested by bugs, and refused to pay the balance of the rent owing. Park B held that authority existed for the proposition that although slight grounds would not suffice, serious reasons might exist that would justify a tenant's quitting at any time. *Hart v Windsor*,[14] a case involving a similar fact-situation, arose the following year. In this case Parke B stated that he was now satisfied that the

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9 See Note, *The Fitness and Control of Leased Premises in Victoria* (1969) 7 Melbourne U L Rev 258.

10 (1863) 143 ER 768, 776 (CP).

11 The four documents examined were the 1958 Copyright Lease, the Real Estate and Stock Institute of Victoria Tenancy Agreement, the L R Reed & Co Pty Ltd Tenancy Agreement and the W B Simpson and Son Tenancy Agreement.

12 Miller v Cannon Hill Estates Ltd, [1931] 2 KB 113.

13 (1843) 11 M & W 5; 152 ER 693 (Exch).

14 (1843) 12 M & W 67; 152 ER 1114 (Exch).

two cases he relied upon in reaching his decision in *Smith v Marrable* could not be supported. However, instead of holding that *Smith v Marrable* was wrongly decided he distinguished it on the fact that that case involved furnished premises while the premises in the case at bar were unfurnished.[15] Later cases further limited the application of *Smith v Marrable* to situations where the defect existed at the commencement of the tenancy.[16]

Thus, the origin and development of the implied condition of fitness for human habitation in the case of furnished premises can be traced to a decision by Parke B in 1843 which he himself had come to regret by the following year. The usefulness of this doctrine as a vehicle for preserving health standards and providing justice for tenants has been recognized by many judges. McCardie J once commented:

> Not only is the implied warranty on the letting of a furnished house one which, in my view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted.[17]

Despite its usefulness, however, neither the Australian nor the English courts have attempted to enlarge the doctrine in *Smith v Marrable* into an implied condition of habitability for all residential premises. This can be seen from an examination of the latest Australian authority on the point, *Pampris v Thanos*.[18] In this case, the furniture in a lease of a furnished house included a refrigerator. Owing to its defective wiring the tenant's wife suffered an electric shock on touching the refrigerator, seven months after the commencement of the lease. The tenant claimed damages based on a breach of the implied condition that the premises were reasonably fit for habitation. The court held that the rule as to fitness for habitation does not extend to furniture or appliances and re-affirmed that the doctrine only applies to furnished premises and only to defects occurring at the commencement of the lease.

The common law rules specifying the obligations of the tenant are equally unsatisfactory, resting on the doctrine of waste and the implied covenant to use the premises in a tenant-like manner. Both these doctrines are vague and uncertain in their application, and it seems

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15 (1843) 152 ER 1114, at 1122.
16 Collins v Hopkins [1923] 2 KB 617; Wilson v Finch Hatton (1877) 2 Ex D 336.
17 Collins v Hopkins [1923] 2 KB 617, at 620.
18 [1968] 1 NSWR 56 (NSW Sup Ct CA).

certain that without legal assistance a typical landlord or tenant would have no knowledge or understanding of them.

Although all tenants are liable under voluntary waste if they commit a positive act occasioning injury to the land,[19] their liability under permissive waste if they fail to keep the property in a satisfactory state of repair depends on whether they are tenants for a term of years or periodic tenants, and within this latter category whether they fall under the sub-category of weekly, monthly or yearly tenants. It is unclear from the authorities whether a tenant for a term of years[20] or a tenant from year to year[21] is liable for permissive waste. However, it is settled law that monthly or weekly periodic tenants are not liable under that heading.[22]

The obligations which fall under the implied covenant to use the premises in a tenant-like manner have been a source of contention for

19 In New South Wales, the Imperial Acts Application Act 1969, s 32 states:
'(1) A tenant for life or lives or a leasehold tenant shall not commit voluntary waste.'
In Victoria and South Australia, the doctrine of waste is based on the Statute of Marleberge (1267), 52 Henry III, c 23, and case law. The Statute of Marleberge stipulates that a tenant for a fixed term of years is liable for voluntary waste. Marsden v Heyes Ltd [1927] 2 KB 1 held that a tenant from year to year is liable for voluntary waste. Regis Property Co Ltd v Dudley [1959] AC 370 and Warren v Keen [1954] 1 QB 15 held that tenants from month to month and week to week, respectively, are also liable for voluntary waste.

20 Lord Coke considered that a tenant for a term of years was liable for permissive waste (2 Co Inst 145) and the same view was expressed in Yellowly v Gower (1855) 11 Exch 274, Davies v Davies (1888) 38 Ch D 499, and Reihana Terekuku v Kidd [1886] NZLR 4 SC 140.
The editors of HALSBURY'S LAWS OF ENGLAND have accepted that this seems to be the better opinion (Vol 23, 3rd ed 568). Brooking and Chernov also accept that the better view is that a tenant for a term of years is liable for permissive waste (TENANCY LAW AND PRACTICE—VICTORIA (1972) at 112). The authors of WOODFALL ON LANDLORD AND TENANT doubt the correctness of this early view and say that 'there must be considerable doubt whether a tenant for years would be found liable for permissive waste if the matter were thoroughly tested at the present day'. Vol 1 26th ed (1960) at 750.

21 The authors of WOODFALL ON LANDLORD AND TENANT held the view that, on the authorities, tenants from year to year were not generally liable for permissive waste (p 750). Brooking and Chernov also considered that they were probably not liable (TENANCY LAW AND PRACTICE—VICTORIA (1972) at 112).
The editors of HALSBURY'S LAWS OF ENGLAND and STATUTES OF ENGLAND on the other hand, considered that the weight of opinion indicates that tenants from year to year are liable for permissive waste to a limited extent: HALSBURY'S LAWS OF ENGLAND, Vol 23, 3rd ed 569; HALSBURY'S STATUTES OF ENGLAND Vol 18 3rd ed 404-5.

22 Regis Property Co Ltd v Dudley [1959] AC 370, and Warren v Keen [1954] 1 QB 15.

many years. The only serious attempt to define the limits of this covenant was made in *Warren v Keen* by Lord Denning:[23]

> But what does 'to use the premises in a tenant-like manner' mean? It can, I think, best be shown by some illustrations. The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, where necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently, and he must see that his family and guests do not damage it: and if they do, he must repair it. But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it.

Although this judicial explanation is useful to the legal profession, its significance for the resolution of disputes between landlords and tenants who do not take legal action is minimal as the *dictum* would generally be unknown by the public at large. Indeed, despite Lord Denning's explanation, the precise ambit of the implied covenant is still unsettled. Other courts have referred to an obligation of the tenant to 'keep the premises wind and watertight', and an obligation to make 'fair and tenantable repairs'.[24] Although it is generally assumed that these phrases are synonymous with 'tenant-like manner', this has not been settled.[25]

The significance of these common law rules on the liability of the tenant to repair has been reduced in recent years by the almost invariable use in the case of residential tenancies of standard forms of lease and tenancy agreement. While each of four standard forms of lease and tenancy agreement examined by the writer is silent on the duty of the landlord to repair, each imposes a heavy duty on the tenant exceeding that imposed by the common law.

For example, the only clause in the tenancy agreements of the Real Estate and Stock Institute (Vic.) and L. R. Reed & Co. Pty. Ltd. relating to repair duties reads as follows:

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23 [1954] 1 QB 15, 20 (CA).

24 See for example Leach v Thomas (1835) 7 C & P 327; Wedd v Porter [1916] 2 KB 91 (CA); and Gregory v Mighell (1811) 18 Ves 328, at 331.

25 The authors of HALSBURY'S LAWS OF ENGLAND believe that it is doubtful whether the tenant's liability extends beyond the duty to use the premises in a tenant-like manner (3rd ed at 569).

> 5. The Tenant agrees to keep the premises in the same repair and condition as at present fair wear and tear and damage by storm or accidental fire or flood excepted and shall not permit any act or thing that might block or otherwise affect or damage the sewerage electric lighting power heating gas or telephone connections pipes or fittings. The Tenant also agrees to properly keep and attend to the lawn garden and shrubberies belonging to the premises and not to obstruct nor damage any passageways lifts or other places used by the Tenant for access to or the better enjoyment of the premises nor to erect any television antenna on the premises without the prior approval of the Landlord and he shall make good any damage caused to the premises as a result of the erection of any such antenna.

The equivalent clause in the W. B. Simpson & Son Tenancy Agreement states:

> 2. THE Tenant agrees with the Landlord that the Tenant will during the continuance of this tenancy:—
> (a) Keep and at the end or sooner termination of this tenancy deliver up the Property with all the Landlord's buildings fences floors improvements (if any) fittings and fixtures in good substantial and tenantable repair order and condition (fair wear and tear and damage by fire storm tempest or inevitable accident only excepted) and the glass unbroken and secure in the frames and all gas and electric current fittings locks keys doors sanitary fittings and drains in good order and the whole of the interior and exterior of the Property undefaced and properly cleansed.
> (b) Maintain in good order and keep clear all sewerage fittings and drains.
> (c) Repair and make good any damage caused by any unlawful or attempted unlawful entry to the Property.

Finally, clause 1(f) of the 1958 Copyright Lease provides:

> 1. The Lessee doth hereby covenant with the Lessor—
> . . .
> (f) from time to time and at all times during the term to well and sufficiently and substantially repair cleanse maintain mend and keep as at present the demised premises and all additions made thereto defects of a structural nature and damage by fair wear and tear act of God inevitable accident and accidental fire always excepted and the demised premises and things so repaired cleansed maintained amended and kept and the said furniture fixtures and other chattels . . . at the end or sooner determination of the said term quietly to yield up unto the lessor; . . . .

THE PROPOSED NEW DUTIES

The writer believes that a fundamental re-appraisal of the existing repair obligations is necessary. As shown above, the common law duties have arisen in a piecemeal fashion and contain many anomalous and obscure principles.

The most glaring deficiency in the law on repairs is that the landlord is not placed under a duty to make repairs in any circumstances. This situation has arisen because of the aura of respect hitherto attached to the doctrine of *caveat emptor*. This doctrine made sense in England at the time of its formulation several centuries ago, when leases were primarily of agricultural land and the use of standard form leases was unknown, but should have no relevance in today's society. The rationale of *caveat emptor,* that a tenant should be able to spot any defects in the premises on inspection, does not accord with reality. Many defects would only be discovered by a structural engineer or professional building inspector, and in view of the short-term interest that a tenant of residential premises possesses, it is unrealistic to expect him to seek and pay for this type of professional advice.

Thus, any realistic re-assessment of the repair obligations of landlords and tenants involves an abandonment of the doctrine of *caveat emptor*. The doctrine has long been discredited in the United States. For example, in *Pines v Perssion,* the Supreme Court of Wisconsin stated:

> The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.[26]

Furthermore, the doctrine has already been abandoned in Australia in many areas of law, especially in the recent spate of consumer protection legislation. In Victoria, for example the operation of *caveat emptor* has been seriously eroded by the Motor Car Traders Act 1973, which gives increased protection to purchasers of second-hand motor vehicles, and the Consumer Affairs Act 1972 which, *inter alia,* gives increased protection to the public in the area of door-to-door sales and unordered goods and services.

It is submitted that in future the primary responsibility to repair residential premises should be placed on the landlord. Unless the damage is caused wilfully or negligently by the tenant or his invitees, the writer believes that it is unfair to expect the tenant to pay for repairs. It should be remembered that the value of the landlord's

26 (1961) 14 Wis 2d 590, 111 NW 2d 409 at 412-3.

reversionary interest in the property clearly outweighs the possessory interest of the tenant, especially as tenants seldom have a lease exceeding one year in duration.[27] The landlord will ultimately reap the benefit of any improvements made by the tenant without at present being under any duty to reimburse the tenant for his expenses. Thus, while it is reasonable to expect the tenant to look after the premises in a tenant-like manner and to repair damage caused wilfully or negligently by himself or his invitees, it is not reasonable to expect him to make structural repairs.

METHODS OF ACHIEVING REFORM

Judicial Innovation

In view of the fundamental nature of the proposed reforms, it may be thought that the only method of achieving the desired goal would be by legislation. However, it is the opinion of the writer that much of the unfairness in the existing law could be alleviated by a more innovative and progressive approach by the judiciary than has occurred in the past.

Various courts in the United States have attempted to adapt the landlord and tenant law to meet the needs of the twentieth century by applying normal contractual principles, such as frustration, mutuality of covenants and mitigation of damages, which previously have been declared inapplicable to landlord and tenant law, by implying conditions and covenants where equity seems to demand it, and by extending the established principles of real property law by applying the fiction of constructive eviction. While it is recognized that it would be a major innovation for the courts to declare a lease to be subject to contractual remedies, and would be a step which Australian courts may not wish to adopt without the sanction of legislation, the problems inherent in the present law on repairs could be alleviated merely by the extension of the *Smith v Marrable* doctrine into an implied condition of fitness for human habitation applicable to all types of residential rented accommodation and no longer limited to defects existing at the commencement of the lease. This would involve

27 A field study of 242 tenants of private accommodation in the inner Melbourne suburbs of Fitzroy and Collingwood undertaken jointly by the writer and the Fitzroy Ecumenical Centre and commissioned by the Australian Commission of Enquiry into Poverty revealed that only 8 tenants (3.3 per cent of the sample) had leases exceeding one year in duration. See A J Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship,* Appendix I (AGPS: Canberra 1975).

a relatively minor departure from the *status quo* and, it is submitted, would represent a relatively modest use of judicial law-making powers.

Various justifications have been used by the United States courts for extending the doctrine of *Smith v Marrable* into a generally applicable condition of habitability. In addition to the need for the courts to recognize the social desirability of adequate rented housing, as stressed in *Pines v Perssion*,[28] the fact that the landlord usually has a greater knowledge of the condition of the premises than the tenant and the inequality of bargaining power between the two parties were the reasons given by the New Jersey Supreme Court in *Reste Realty Corporation v Cooper*[29] for implying in all cases a condition of habitability.

In addition to these arguments based on policy considerations, some courts have used the existence of a local housing code to justify the implication of a warranty of habitability commensurate with the standards specified in the code. In *Javins v First National Realty Corporation*,[30] the landlord sued for possession because of the failure of the tenant to pay the rent. The tenant defended the action by proving several violations of the District of Columbia Housing Regulations. The United States Court of Appeals for the District of Columbia Circuit held this evidence admissible and stated that a municipal housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. A similar result was reached in *Lund v MacArthur*.[31] In this case the tenant vacated the premises soon after the commencement of the lease on the ground that violations of the city electrical code existed, and defended the ensuing action for unpaid rent on the basis that the violation constituted a breach of the implied warranty of habitability. The Hawaii Supreme court upheld the existence of an implied warranty of habitability, stated that the code was the measure of the warranty, and instructed the trial court to determine on the facts if the violations of the code constituted a breach of the warranty.[32]

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28 (1961) 14 Wis 2d 590, 111 NW 2d 409. See Recent Decisions, *Landlord and Tenant—Application of Implied Warranty* (1961-2) 45 Marquette L Rev 630.

29 (1968) 53 NJ 444, 251 A 2d 268.

30 (1970) 428 F 2d 1071, cert denied (1970) 400 US 925. See Margolis, *Plotting the Long-Overdue Death of Caveat Emptor in Leased Housing,* (1971) 6 U San Francisco L Rev 147; Note, *Implied Warranty of Habitability in Housing Leases* (1972), 21 Drake L Rev 300; and Recent Cases *Landlord and Tenant Law—Warranty of Habitability Implied by Law in Leases of Urban Dwellings* (1971) 24 Vanderbilt L Rev 425.

31 (1969) 51 Hawaii 473, 462 P 2d 482.

32 See also Lemle v Breeden (1969) 51 Hawaii 426, 462 P 2d 470.

Although the system of municipal housing codes specifying in detail the rights and duties of owners and occupiers does not exist in Australia, there would seem to be no logical reason why the rationale in *Javins v First National Realty Corporation* and *Lund v MacArthur* could not be applied to a breach of the Australian State Housing Regulations.[33] The fact that the housing regulations are in general less precise and all-embracing than the American housing codes should not be fatal to the implementation of this suggestion.[34]

In spite of the lack of logic in the present limitation of *Smith v Marrable* to furnished premises, and the relatively minor nature of the reform that would be necessary to alleviate the injustice in the present law on repairs, the past record of the Australian courts in modifying other aspects of the landlord-tenant law to accord with changing times justifies scepticism whether any reform in the law of repairs will be forthcoming in the absence of legislation. For example, although the doctrine of constructive eviction was first recognized by New York State courts as long ago as 1826,[35] and is now universally recognized by courts in the United States, it has never been applied in Australia.

The contractual doctrine of mutuality of covenants has similarly made no headway in landlord-tenant law in Australia. In *Re De Garis and Rowe's Lease*,[36] the lease contained a covenant by the tenant not to sublet without first obtaining the consent of the landlord, and a covenant by the landlord that he would repair or rebuild the premises within four months of the destruction of the premises by fire. The Supreme Court of Victoria held that the covenants were independent and that the landlord could not use the fact of the tenant's breach of covenant as an excuse not to rebuild.

In addition, the Australian courts have consistently rejected the application of the contractual doctrines of mitigation of damages[37]

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33 See for example Housing (Standards of Habitation) Regulations 1969, made pursuant to the Housing Improvement Act 1940-1973 (SA). See also Housing (Standards of Habitation) Regulations 1974, made pursuant to the Substandard Housing Control Act 1973 (Tas).

34 For example, unlike the US Housing Codes, there are no regulations concerning external stairs, adequate ventilation, sanitation, the provision of a water heater and adequate heating facilities, the provision of fly screens, or the necessity for protection against housebreakers in the South Australian Housing (Standards of Habitation) Regulations 1969.

35 Dyett v Pendleton (1826) 8 Cow 727 (NY).

36 [1924] VLR 38.

37 The Supreme Court of the Northern Territory recently rejected the application of mitigation of damages in landlord-tenant law in Maridakis v

and frustration to the landlord-tenant relationship. The major authority on the latter issue is the decision of the High Court of Australia in *Minister of State for the Army v Dalziel.*[38] In this case the Commonwealth, acting under wartime powers conferred on it by the National Security (General) Regulations, requisitioned premises being rented by a weekly tenant. It was held that as the tenant was not evicted by title paramount he remained liable to pay rent according to the terms of the lease despite the fact that he was dispossessed. Williams J stated that the doctrine of frustration does not apply to leases.[39]

Thus, as regards landlord and tenant law, it is clear that the Australian courts have ignored the caution of Mr Justice Douglas 'that continuity with the past is only a necessity and not a duty'.[40] Possibly a partial excuse is the sparsity of appellate cases in this area of the law:

> Little of the vast iceberg of residential landlord-tenant law is discernible from written court opinions because the cost of appeals has outweighed the amounts at stake in litigation. In the past, any appeals that were taken were usually 'grudge' suits, where emotions caused monetary values to be overlooked.[41]

However, as shown in *Minister of State for the Army v Dalziel,* the High Court has failed to take advantage of such opportunities as have presented themselves to modify the law in response to changing times.

Because of the slow or negative response of the Australian courts to the introduction of changes in landlord-tenant law by judicial fiat, the writer believes than any changes in the law on repairs should be effected by legislation.

BY THE INTRODUCTION OF LEGISLATION

(a) *Redefining the Landlord's Duty to Repair*

Before legislation can grant any relief to a tenant, it is clear that the landlord must be under a well-defined obligation to do necessary

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Kouvaris (1975) 5 ALR 197. However, the principle of mitigation of damages now applies to landlord-tenant law in Queensland by virtue of a very recent statutory amendment: see Residential Tenancies Act 1975 (Qld), s 16.

38 (1943-44) 68 CLR 261.

39 Ibid at 302.

40 Cited by McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant* (1924-25) 23 Michigan L Rev 211 at 221-2.

41 Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code* (1969-70) 21 Hastings LJ 369 at 376.

repairs. In order to accord with the proposed new duties suggested above, it is submitted that rather than requiring landlords to repair only uninhabitable premises or (even less) to repair only certain fixtures, the standard fixed by the law should be to maintain 'a good state of repair'.

The simplest method of reform would be to place a statutory covenant of habitability on the landlord. This could take the form of a separate section in the relevant State legislation, and if a statutory standard form of residential lease is ever introduced, could be included as one of the clauses.

New South Wales and Queensland already have legislation to ensure that the premises are in a satisfactory state of repair at the commencement of the lease. *The Landlord and Tenant (Amendment) Act* 1948-1969 (NSW), s 39 reads:

> A person shall not let a dwelling-house which to his knowledge is, at the date of letting, not in fair and tenantable repair.

This section meets the suggested standard of repair in that 'fair and tenantable' would presumably be interpreted as synonymous with 'a good state of repair'. Unfortunately, however, this section is limited both in scope, in that it does not provide a remedy where the premises fall into disrepair after the commencement of the lease, and in application, in that it applies only to prescribed premises, which constitute less than one-sixth of all rented premises in New South Wales.[42]

In Queensland, these limitations have been avoided. Section 7 of the *Residential Tenancies Act 1975* states in part:

> Notwithstanding any agreement between a landlord and tenant, in every tenancy agreement entered into after the commencement of this Act there shall be implied obligations—
> (a) on the part of the landlord—
> . . .
> (ii) to provide and, during the tenancy, maintain the dwelling-house in good tenantable repair and in a condition fit for human habitation;
> . . .

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42 The Rent Controller estimated in 1973 in a submission to the Australian Commission of Enquiry into Poverty that only 40,000 out of the approximate total of 240,000 residential rented premises in New South Wales remained subject to the rent control provisions of the Landlord and Tenant (Amendment) Act 1948-1969 (NSW).
The registration of leases with the Rent Controller pursuant to s 5A of the Landlord and Tenant (Amendment) Act and the voluntary quitting of some tenants of controlled premises mean that this 40,000 figure is declining each year.

(iv) to comply with all lawful requirements in regard to health and safety standards with respect to the dwelling-house; . . . .

Although this legislation is clearly preferable to its New South Wales counterpart, it is still not drafted in such a way as to guarantee that all rented housing is in a satisfactory state of repair. Although the issue has yet to be resolved, it might be possible for a landlord to circumvent the Queensland legislation by arguing that the tenant had prior knowledge of the state of disrepair before entering into the lease.[43]

It is submitted that the statutes in effect in Manitoba and Ontario, and the one proposed in a *Model Residential Landlord-Tenant Code* in the United States[44] are preferable to the Queensland legislation. The identically-worded legislation enacted in Manitoba and Ontario states:[45]

> A landlord is responsible for providing and maintaining the rented premises in a fit state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

Section 2-203 of the U.S. *Model Residential Landlord-Tenant Code* provides:

> The landlord is under an express obligation to the tenant . . . to make all repairs necessary to keep the premises in as good condi-

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43 The Model Code was drafted by Julian H Levi, Philip Hablutzel, Louis Rosenburg and James White under a grant from the US Office of Economic Opportunity to the American Bar Foundation, which published the draft in 1969. It consists of 76 pages of draft legislation and comments, preceded by a 15 page introduction. It should be noted that a Uniform Residential Landlord and Tenant Act was drafted in the United States by the Commissioners on Uniform State Laws and approved by the National Conference of Commissioners on Uniform State Laws in 1972. Unfortunately the writer has been unable to obtain a copy of this Uniform Act in Australia. A brief description of the Act appears in Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities* (1973) 6 Indiana L Rev 741.

44 However, in the case of a tenant's covenant to repair, it has been decided that even though the covenant does not require the tenant to 'put' the premises into repair, but only requires him to 'keep' the premises in repair, the tenant cannot keep in a state of disrepair premises which are not in repair when he takes them, but must make the necessary repairs: see Payne v Haine (1847) 16 M & W 541, 153 ER 1304; Proudfoot v Hart (1890) 25 QBD 42.

45 Landlord and Tenant Act, RSO 1970, c 236, s 96 (1); Landlord and Tenant (Amendment) Act, Stats Man 1970, c 106, s 98 (1).

tion as they were, or ought to have been, at the commencement of the tenancy.

Although each of these alternatives has the merit of imposing a continuing obligation to repair throughout the duration of the tenancy, possibly the most effective solution of all would be to follow the British precedent and adopt a statutory condition of habitability in preference to a statutory covenant. The *Housing Act* 1957 (UK), s 6 provides that in any contract made for letting a house or part of a house for human habitation at a rent not exceeding Eighty Pounds a year in the administrative county of London and Fifty-two Pounds elsewhere, there shall be implied a condition by the landlord notwithstanding any stipulation to the contrary that the house is fit for human habitation at the commencement of the tenancy, and that he will keep it so throughout the tenancy.[46] This provision was later reinforced by the *Housing Act* 1961 (UK), s 32(1), which in the case of leases of dwelling-houses for a term of less than seven years creates an implied covenant by the landlord—

(a) to keep in repair the structure and exterior (including drains, gutters and external pipes); and
(b) to keep in repair and proper working order the installations in the house—
(i) for the supply of water gas and electricity, and for sanitation (including basins, sinks, baths and sanitary conveniences . . .), and
(ii) for space heating or heating water.[47]

The effect of creating a statutory condition rather than a statutory covenant is that in the event of a breach of a condition, the injured party can elect to terminate the agreement at common law without the need for statutory authorization. Thus, if the landlord offends against the *Housing Act* 1957 (UK), s 6, the tenant is entitled to terminate the lease, quit the premises and escape liability for any further payments of rent.

As the writer will propose later that the tenant should be allowed to quit the lease in the event of the landlord failing to repair the premises, it is suggested that the creation of a statutory condition is to be preferred to the creation of a statutory covenant. It is further

46 Note that in Buswell v Goodwin [1971] 1 All ER 48, the Court of Appeal restricted the landlord's obligation to a case where a house is capable of being rendered fit for human habitation at reasonable expense.

47 The landlord must have prior notice of the defects to be remedied. See O'Brien v Robinson [1973] AC 912; McCarrick v Liverpool Corporation [1947] AC 219.

proposed that the conditions should apply in leases of all dwelling-houses, not just those let below a specified rent, as in the case of s 6 of the *Housing Act* 1957 (UK). The universal application of such a statutory condition would remove the need for the introduction of a further statutory covenant similar to the *Housing Act* 1961 (UK), s 32.

(b) *Redefining the Tenant's Duty to Repair*

Although the writer has already proposed that the primary responsibility to maintain the premises in a good state of repair should be imposed on the landlord, in that his reversion is usually of far greater value than the leasehold interest of the tenant, nevertheless some obligation must be imposed on the tenant to care for the premises in a proper manner.

The best solution would seem to be to express the obligation to use the premises in a tenant-like manner in a statutory form, and to abolish the doctrine of waste in relation to leases of residential premises. The following form of legislation, similar to the present legislation in force in Ontario, Nova Scotia, Newfoundland, British Columbia and Manitoba,[48] could well be adopted by each Australian State. The proposed section would read:

> The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the

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48 Landlord and Tenant Act RSO 1970, c 236, s 96 (2); Residential Tenancies Act, Stats NS 1970, c 13, s 6 (1) statutory condition 3; Landlord and Tenant (Residential Tenancies) Act, Stats Nfld 1973, No 54, s 7 (1) statutory condition 2; Landlord and Tenant (Amendment) Act, Stats BC 1970, c 18, s 49 (2); Landlord and Tenant (Amendment) Act, Stats Man 1971, c 35, s 10. In Queensland, the Residential Tenancies Act 1975, s 7 states:

> Notwithstanding any agreement between a landlord and tenant, in every tenancy agreement there shall be implied obligations—
> (b) on the part of the tenant—
> (i) to care for the dwelling-house and fixtures, fittings, goods and chattels let therewith in the manner of a reasonable tenant;
> (ii) to repair, within a reasonable time, damage to the dwelling-house or fixtures, fittings, goods and chattels let therewith caused by the wilful or negligent conduct of the tenant or persons coming into or upon the dwelling-house with his consent; . . . .

This legislation would seem to be inferior to the legislation of the five Canadian provinces inasmuch as no attempt has been made in the Queensland legislation to define the vague phrase 'in the manner of a reasonable tenant'. This would appear to be a synonym for 'tenantlike manner' and will merely perpetuate the difficulties caused to common law in its application. See supra n 23-25 and accompanying text.

premises by him, and for maintaining ordinary health, cleanliness, and sanitary standards throughout the premises.

In addition to clarifying the duty of the tenant, the writer believes that this legislation would strike a fair counterbalance to the proposed legislation imposing a duty of repair on the landlord.

(c) *Enforcing the Legal Duty to Repair*

If a tenant fails to carry out repairs which he expressly covenanted to perform, or if he commits waste or breaches the implied covenant to use the premises in a tenant-like manner, the only remedy available to the landlord at common law is to sue for damages. From the landlord's point of view this is unsatisfactory, for if the repairs required are extensive, the tenant might well be tempted to quit the premises without notifying the landlord of his whereabouts. In some instances the tenant may lack the funds to undertake the repairs and so be effectively judgment-proof. However, the use in modern times of security deposits has largely alleviated this problem. Thus, provided that security deposits are not outlawed by any future legislation, no alterations to the existing means of enforcement of the tenant's obligations to repair should be necessary.

The position of the tenant is not so favourable, however. Merely imposing a duty to repair on the landlord is ineffective unless adequate remedies are made available to the tenant to enable him to enforce this legal duty against a landlord who refuses to repair or is dilatory. Unlike the landlord, the tenant never has the benefit of a security deposit. At present, even if a landlord has covenanted in his lease to repair the premises, the only sanction available to the tenant is to sue the landlord for damages. In view of the transitory nature of the interest of the tenant in the premises, and in view of the legal expenses and time delay before the case is heard, this is an unrealistic solution to the problem. Many more effective solutions are being employed in various other common law jurisdictions, and it is instructive to examine these individually.

OVERSEAS SOLUTIONS

(a) *Allow the Tenant to Quit the Lease*

In the event that the proposal to introduce a statutory condition of habitability (as under the *Housing Act* 1957 (UK), s 6) is adopted, there would be no point in introducing legislation permitting the tenant to quit the lease, as he would possess this right at common

law. However, in the event that a statutory covenant is introduced, the right of the tenant to quit the lease, if it is to be allowed at all, would need to be provided by legislation.

A useful piece of draft legislation covering this matter is section 2-204 of the U.S. *Model Residential Landlord-Tenant Code*:

> If the landlord fails to perform [his duty to repair] at the beginning of the tenancy, the tenant is authorized to terminate [the lease] without liability, or having entered, to vacate during the first week of occupancy.
> In case of failure to repair conditions that arise after the beginning of tenancy . . . [i]f the adverse effects of the conditions are serious enough, the tenant can terminate without liability for future rent and vacate the premises. If the condition was caused wilfully or negligently by the landlord, the tenant may also recover damages, including reasonable expenditures to obtain substitute housing . . . .

Although this remedy is inadequate on its own, in that many tenants would not wish to quit the premises, nevertheless it could be usefully employed as one of a number of alternative remedies available to the tenant. In addition to the *Housing Act* 1957 (UK), s 6, the *Smith v Marrable* principle is a further precedent for enacting an equivalent to s 2-204 of the *Model Code*: there is no logical reason why the principle that tenants of furnished premises which are unfit for human habitation at the commencement of the lease can quit the premises without liability cannot be extended to cover all tenancies, furnished or unfurnished, where repairs are required at any time during the currency of the lease.

(b) *Allow the Tenant to Deduct a Portion of the Rent According to the Extent of the Disrepair*

It has been proposed in the U.S. *Model Residential Landlord-Tenant Code* that a fixed scale of permitted deductions should be enacted, to enable a tenant who is obliged to live in premises needing repairs to withhold of his own initiative a certain percentage of the rent until the repairs are done, in order to bring pressure to bear on the landlord to repair without unnecessary delay.

The following Rent Abatement Guidelines have recently been advanced in the United States:[49]

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[49] Bruno, *Rent Abatement: A Reasonable Remedy for Aggrieved Tenants* (1971) 2 Seton Hall L Rev 357, at 366.

Defects	*% Decrease in Rental Value per day*
No heat during cold weather	100
No water	100
No hot water	50
Rats and roaches	100
Extensive leaks	50
Inadequate security	50
Peeling paint and wallpaper	15
Holes in walls	15
Holes in ceilings	15
Holes in floors	10
Defective windows	10
No window locks	20
Loose-fitting windows or doors	10
Non-functioning stove	50
Faulty electrical fixtures	25
Unlit halls and treacherous common passage ways	25
Faulty plumbing—each fixture	25
Inoperative elevator	10 per floor

The guidelines have already been adopted by judicial fiat in the United States. In *Academy Spires Inc v Brown*[50] the landlord leased an apartment in a high-rise building to the tenant. The tenant refused to pay the rent because of a lack of painting, wall cracks, water leaks, a lack of heat, no garbage disposal and no elevator service. The tenant defended an action for possession based on his breach of covenant to pay the rent on the basis that the rent should be reduced by 25 per cent because of the defects. The Court upheld the principle whereby the tenant could deduct a portion of the rent where the premises were in a state of disrepair and relied on the guidelines contained in the Model Code when assessing the amount of rent abatement.

The major advantage of the use of guidelines is that there would be no need for either party to hire an expert appraiser to testify as to the amount of damages resulting from a particular type of breach of the covenant to repair.

An alternative procedure would be to insist that the tenant apply to the court for permission to reduce the rent, and to give the court complete discretion as to the amount of the reduction permitted. This is the procedure stipulated by the *Tenancy Act* 1955 (NZ), s 47(1)(d):

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50 (1970) 111 NJ Super 477, 268 A 2d 556.

> The tenant may at any time by notice in writing require the landlord to effect any specified repairs or renovations to the premises that are reasonably necessary as aforesaid. If the landlord does not comply with any such notice within thirty days after the date of service of the notice, the tenant may apply to the Court for an Order requiring the landlord to effect the repairs or renovations, and the Court shall have jurisdiction to make such order as in its discretion it thinks fit, including jurisdiction to suspend or reduce the rent of the premises for any period during which the landlord makes default in complying with the order.

If this procedure were adopted the required legislation could be drafted more simply, as follows:—

> When rented premises are in a state of disrepair, any affected tenant may petition the court for an order abating any portion or the entirety of the rent due to the landlord until the conditions which cause the defective tenancy are corrected.

(c) *Allow the Tenant to Withhold the Whole Rent*

This remedy has been widely adopted in the United States and can take several different forms. In jurisdictions where rent withholding is legal, the tenant is usually required to pay the rent into court or into an escrow account established at a bank, and this payment is a defence to an action brought by the landlord to evict the tenant or for arrears of rent. This procedure is in effect in, *inter alia,* Massachusetts, Michigan, New York, Pennsylvania and Nova Scotia.[51] The Nova Scotian statute states simply:

> [The Residential Tenancies Board] shall have power . . . (e) to accept rent payable by the tenant and hold the same in trust pending performance by a landlord of any act the landlord is required by law to perform.

The following District of Columbia legislation would seem preferable to the Nova Scotian legislation, however, since the rights and obligations of each party are expounded in detail:

> There shall be deemed to be included in the terms of any lease . . . covering a habitation a covenant that the owner . . . will maintain the habitation in compliance [with the terms of the statute]. If the owner or licensee has notice of conditions . . . which render such habitation . . . unsanitary, and fails to remedy

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51 Mass Gen Law, c 111, s 127F (1971), Mich Comp Laws Ann, s 125. 530-534 (Supp 1969); NY Real Prop Actions Law, s 755 (McKinney Supp 1971); Pa Stat Ann, tit 35, s 1700-1 (Purdon Supp 1971); Residential Tenancies Act, Stats NS 1970, c 13, s 11 (3).

> such conditions within a reasonable time, the owner shall not be entitled to the rent until such time as the habitation shall be made safe and sanitary: provided that
> (a) such conditions are not caused by wilful or negligent acts of the tenant . . . ;
> (b) the landlord has not . . . been denied access to the premises;
> (c) the tenant pay rents due into an escrow account . . . ;
> (d) prior to withholding his rent, the tenant notifies the owner of his intention to withhold and, within ten days of such notice, gives the location and number of the escrow account.[52]

If rent withholding is to be introduced as a remedy, a number of minor decisions will have to be made. Firstly, it must be decided whether the landlord should be given a period of grace during which to make the necessary repairs before the tenant is entitled to withhold the rent, and if so, for how long. Reason indicates that a reasonable period must be allowed for the landlord to assess the needed repairs and obtain quotations. New York allows the landlord six months,[53] but 60 days would seem to be a more reasonable period when it is remembered that it is seldom that a residential lease extends beyond a one year duration. Although many jurisdictions, for example, Pennsylvania and Massachusetts, do not provide for a period of grace and allow the tenant to withhold his rent immediately, denying the landlord access to the rent may well mean that he cannot afford to make the desired repairs.

Secondly, once the rent withholding has begun, should the court permit money to be paid out of the escrow account for the repairs? Although there is the danger that the landlord may use the money he obtains for other purposes, unless the money is available to him he may not be able to afford the repairs. The relevant section of the Massachusetts statute is suggested for adoption here:

> The court may direct the clerk by written order to disburse all or any portion of the rental payments received by him to the respondent for the purpose of effectuating the removal of the violation. The court may also direct the clerk to make such other disbursements of the rental payment to the respondent or to any other person as in the judgment of the court will permit the owner to maintain the property.[54]

Finally, if the landlord does not repair the premises within a reasonable period, should the rent be returned to the tenant? It is

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52 DC Housing Regs, s 2902.2 (1970).
53 NY Multiple Dwelling Law, s 302-a (McKinney Supp 1971).
54 Mass Gen Laws Ann, c 111, s 127F (1971).

suggested for two reasons that the rent be returned to the tenant: firstly, the threat of losing the rent for ever would be a powerful inducement for the landlord to make the repairs; and secondly, it is unreasonable to insist that the tenant pay full rent for substandard premises. Sixty days after the rent is first withheld would seem to constitute a reasonable period.

(d) *Allow the Tenant to Petition the Court to Permit or Compel Other Tenants of the Same Landlord to Withhold Their Rents*

This possible remedy is primarily designed for multi-unit dwellings in need of repair. The advantage of permitting such a remedy is that it greatly increases the pressure on the landlord to effect the necessary repairs. Whereas the temporary loss of the rent from one tenant of a block of flats by rent withholding may be an irritant, no greater financial loss is inflicted on the landlord than if one of the flats happened to become vacant, but the threat of the temporary loss of the rent of several or all of the tenants could well induce the landlord to repair without further delay.

One problem under this heading is whether the court should be allowed to compel other tenants to withhold their rents or merely authorize them to do so. Although compulsion would greatly increase the effectiveness of the remedy and reduce the amount of effort required from those tenants active in trying to organize the rent strike, the writer believes that it would be undesirable to force a tenant against his will into confrontation with his landlord.

If this reform were introduced into Australia, the appropriate legislation could be drafted as follows:

> When any one unit in a multi-unit rented building is in a state of disrepair, any affected tenant may petition the court to grant authority to any or all tenants in the building, whether or not affected by the state of disrepair, to withhold their rents until such time as the conditions causing the defective tenancy are corrected.

(e) *Allow a Group of Tenants to Petition the Court to Compel Other Tenants of the Same Landlord to Withhold Their Rents*

Under article 7A of the New York *Real Property Actions and Proceedings Law,* one-third of the tenants in a multi-unit dwelling may bring an action against the landlord if the premises are in need of repair or unfit for human habitation. The court is empowered to order the rents of all the tenants in the building to be deposited with the clerk of the court as they become due.

Possible legislation of this nature could be considered as an alternative to the suggestion explained in point (iv) above.

(f) *Allow the Tenant to Do the Repairs Himself and Deduct the Cost from the Rent*

Five jurisdictions in the United States have adopted 'repair and deduct' statutes.[55] The Californian legislation contains two sections on the duties of the parties to repair. The first section states that a landlord must, in the absence of a contrary agreement, put his building in a habitable condition and repair all subsequent dilapidations that make it untenantable.[56] The second section states that if the landlord fails to repair a dilapidation within a reasonable time after receiving notice of its existence, the tenant can repair the violation and deduct the cost from his rent as long as the cost does not exceed one month's rent, or he can vacate the premises without incurring further obligations.[57]

This method has the advantage of speed in that it is in the interests of the tenant to have the repairs done as soon as possible, and if the financial means is given to him by the introduction of a 'repair and deduct' section in the relevant statutes, he will not likely delay. Provided the landlord is notified of the intention of the tenant to organize the repairs himself and is given a few days' grace in which to carry out the repairs, no injustice will be caused.

It should be noted that California places a maximum limit of one month's rent that can be deducted by the tenant, however extensive the disrepair. This clause is also included in the Montana legislation, but there is no limit stipulated in South Dakota, North Dakota or Oklahoma. Provided that the safeguards already mentioned are adopted there would seem to be no valid reasons for limiting the amount of rent that can be deducted. Any specific maximum figure would be most undesirable in view of the effects of inflation.

If it is decided to introduce this remedy into Australia, the following form of legislation, similar to that in effect in South Dakota, Oklahoma and Louisiana, could well be adopted:

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55 California, Montana, North Dakota, Oklahoma, and South Dakota. Cal Civ Code, ss 1941-2 (1954) as amended (West Supp 1971); Mont Rev Code Ann, s 42-201 (1947); ND Cent Code, s 47-16-12 to -13 (1960); Okla Stat Ann, tit 41, ss 31-32 (1954); SD tit 43, ss 32-8, -9 (1967).

56 Cal Civ Code, s 1941 (West 1954).

57 Ibid at s 1942 as amended (West Supp 1971).

> If the landlord fails to fulfil his obligations to keep the premises in good repair, the tenant must give notice of such failure to the landlord. If notice cannot be effected after reasonable attempts or if the landlord fails to fulfil his obligations within five (5) days of such notice, the tenant may cause the needed repairs or replacements to be made and may deduct the cost thereof from future rent payment.

Even if this remedy were not expressly permitted by legislation, it is possible that it would be allowed at common law. In a recent English case, *Lee-Parker v Izzet*,[58] the question was raised whether certain tenants had a right of set-off or a lien for the cost of repairs which the mortgagor, in breach of his covenant as a landlord, had failed to carry out, or whether they had a lien based on their relationship with the mortgagor as vendor for the value of any permanent improvement effected by the repairs. Goff J held that irrespective of the rules of set-off, the occupiers had a right at common law to recoup themselves out of future rents for the cost of repairs in so far as those repairs fell within the covenants of the landlord, provided that he was in breach of covenant and provided that he was first given due notice. The court chose to rely on *dicta* in the ancient case of *Taylor v Beal*.[59] It remains to be seen whether Australian courts would be prepared to follow this English precedent.

An alternative to allowing the tenant to deduct from the rent the cost of needed repairs on his own initiative would be to allow a court or other tribunal with which the tenant had deposited his rent to authorize the repair and deduct the expenses from the rent money. This is the procedure recently established in Manitoba by s 119(7) of the *Landlord and Tenant (Amendment) Act 1970*.[60] This subsection reads:

> Where under this section a landlord is requested to make reasonable repairs to residential premises occupied by a tenant and the time for appeal . . . has expired or an appeal taken by the landlord is unsuccessful and the landlord fails or refuses or neglects or continues to fail, refuse or neglect to make the repairs, the rentalsman[61] shall make or cause the repairs to be made and pay the costs thereof from the moneys retained by him . . . and forward any surplus moneys to the landlord.

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58 [1971] 1 WLR 1688 (Ch D).

59 (1591) Cro Eliz 222, 78 ER 478.

60 Stats Man 1970, c 106.

61 The office of rentalsman was established in Manitoba by the Landlord and Tenant (Amendment) Act, Stats Man 1970, c 106, s 85. Under s 85 (3) of this Act, the functions of the rentalsman are (a) to advise landlords and tenants

(g) *Allow Government Agencies to Apply Sanctions Against the Landlord*

It has always been considered fundamental in landlord-tenant law that because of the contractual nature of the relationship, any action against a landlord should be brought by the tenant himself. This principle has been breached in recent years, *inter alia,* by the power given to the Housing Commission of Victoria to place a repair order on the premises under the *Housing Act* 1958 (Vic), s 56,[62] the power given to the South Australian Housing Trust to impose rent control on substandard premises under Part VII of the *Housing Improvement Act* 1940-1973 (SA),[63] and the power given to the Victorian Rental Investigation Bureau to recommend to the Governor-in-Council that the premises be declared subject to Part V of the *Landlord and Tenant Act* 1958 (Vic).[64] Even in these cases, however, the Rental Investigation Bureau will not act until the tenant files a complaint, and the Housing Commission usually relies on the tenant to inform it of defects in the premises.

This principle, that actions must be initiated by the tenant, has been ignored in the recently enacted *Social Welfare Law* of New

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in tenancy matters, (b) to receive complaints and mediate disputes between landlords and tenants, (c) to disseminate information for the purpose of educating and advising landlords and tenants concerning rental practices, rights and remedies; and (d) to receive and investigate complaints of conduct in contravention of legislation governing tenancies.

62 Section 56(1) reads:

> Where the Commission after making due inquiries and obtaining all necessary reports is satisfied that any house or the land on which any house is situate does not comply with the regulations made under this section the Commission may declare the house to be—
> (a) unfit for human habitation; or
> (b) in a state of disrepair.

For a discussion of the effectiveness of this legislation, see Bradbrook, op cit n 27, ch 6.

63 Under section 52, where the Housing Trust is satisfied that premises are undesirable or unfit for human habitation it may serve a notice on the owner stating that after the expiration of one month (to allow him time to make representations to the Trust) the house will be declared substandard. The Trust may then publish the declaration in the Gazette, and after the expiration of a further month may fix the maximum rental per week which shall be lawfully payable in respect of the premises (section 54).
For a discussion of the effectiveness of this legislation, see Bradbrook, op cit n 27, ch 6.

64 See Bradbrook, *The Law Relating to the Residential Landlord-Tenant Relationship: An Initial Study of the Need for Reform* (1974) 9 Melbourne UL Rev 589 at 627-636 for a discussion of the operation of Part V of the Landlord and Tenant Act 1958 (Vic).

York. Section 143(b), commonly referred to as the 'Spiegel law', reads:

> (1) Wherever a recipient of public assistance and care is eligible for or entitled to receive aid in the form of payment toward rent . . . such payment may be made directly by the public welfare department to the landlord.
> (2) Every public welfare official shall have power to and may withhold the payment of any such rent in any case where he has knowledge that there exists or is outstanding any violation of law in respect of the building containing the housing accommodation.

Although no portion of social assistance payments in Australia is allocated specifically for rent[65] and no money is paid directly to the landlord by the Department of Social Welfare, it would be possible to institute a system similar to that in New York whereby if the department found that a welfare recipient was living in substandard rental accommodation part of the social assistance payments could be withheld from the tenant. In this event, the tenant would be told not to pay the rent and the landlord would be informed that the rent would be withheld until satisfactory repairs were made. The tenant would be immune from eviction for non-payment of rent during the time the welfare money was withheld.

A CRITIQUE OF THE OVERSEAS SOLUTIONS

In determining which of the numerous overseas solutions listed above are worthy of adoption in Australia, the writer believes that the following principles should be applied:

1. The tenant should not be permitted to employ self-help measures. It is submitted that self-help measures are usually undesirable not only because they subject the landlord to the whims of vexatious tenants, but also because a tenant trying to protect himself in this manner can never be certain of the justifiability of his action.

2. No tenant should be forced against his will into a confrontation with his landlord.

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65 It should be noted, however, that the Australian Department of Social Security pays a supplementary assistance for rent to those pensioners who satisfy the means test. Up to $4 a week extra may be paid to a single pensioner or a married couple ($2 each) paying rent or lodging. Income must be under $5 a week (single) or $10 a week (married couple combined), or assets must be under $3,000 (single) or $6,000 (married couple combined). These limits are lower for a pensioner with both income and assets. (Brochure of the Australian Department of Social Security, Age Pensions, April 1974).

3. All remedies provided by the law should apply uniformly against all defaulting landlords.

Following these principles, the writer believes that the most appropriate remedy for a tenant against a landlord who breaches his covenant to repair would be the right to apply to the relevant court for permission to pay the rent to the court and so withhold the rent from the landlord until the necessary repairs are effected. In addition, following the procedure under s 119(7) of the Manitoba *Landlord and Tenant (Amendment) Act,* if the landlord fails to comply with an order of a court to effect repairs within a reasonable period, the court should be permitted to authorize the completion of the repair work and deduct the cost from the withheld rent. Thirty days is suggested as a reasonable period, although this should be extended if the landlord can show he has made a *bona fide* attempt to comply with the court order but has been prevented from completing the repair work owing to circumstances beyond his control (for example, a shortage of materials or labour).

Finally, the writer advocates that the tenant should be entitled to quit the lease in the event that the premises are unfit for human habitation at the commencement of the lease or fall into that condition during the term of the lease. Although this last proposal can be criticized in that it is a form of self-help, and so offends against principle (1) above, its adoption can be justified by the emergency situation that would need to exist before it could be invoked. As the tenant would not be entitled to employ this remedy unless the premises were in an extreme state of disrepair, sufficient to class as unfit for human habitation, it could be used only in real emergency situations. It would seem unreasonable to demand that the relatively few tenants who might find themselves in these dire circumstances wait for a remedy until the matter has been heard by the court and until the thirty days allowed for compliance with the repair order has expired. Extreme circumstances require an extreme remedy.

It is the opinion of the writer that all the other overseas solutions should be rejected. The arguments against allowing the use of self-help by the tenant should lead to a rejection of the proposals that the tenant be allowed of his own initiative to withhold the rent or to 'repair and deduct'.

The Rent Abatement Guidelines can be attacked on two grounds. Firstly, it would be difficult to secure agreement as to the relative gravity of each defect and the corresponding percentage deduction that should be applied, and secondly, the rigidity of the guidelines

would lead to unjust results: for example, 'holes in walls' could consist of enormous cavities or tiny cracks, yet the percentage deduction would be the same in both cases.

The proposals to allow a tenant or group of tenants to permit or compel other tenants of the same landlord to withhold their rent seems both unnecessary and undesirable. They are unnecessary in that the proposals for reform advocated above are adequate to cover all contingencies, and undesirable in that they could be employed only against landlords who owned more than one rented dwelling; thus, the remedies would not apply uniformly against all defaulting landlords.

Finally, there remains the 'Spiegel law' solution of allowing government agencies to apply sanctions against the landlord. It has been reported that the remedy has been effective in parts of New York State. For example, in Binghampton, New York, before the court there declared it unconstitutional, the Welfare Commission withheld rent in 81 cases, and the number of conforming landlords rose from six to 47 monthly.[66] Nevertheless, it would seem unwise to adopt such a proposal. Not only would it be undesirable to force a tenant into a confrontation with his landlord against his will by withdrawing part of the tenant's welfare money, but more importantly, the possibility of such a sanction being applied in the future might lead some landlords to refuse to accept tenants receiving welfare payments. Such a result would be likely to reduce the stock of rental accommodation available to poor tenants.

CONCLUSION

This article has focussed on the specific problem of repairs to rented housing and the need for a fundamental re-assessment of the rights and duties of landlords and tenants in this area of law. However, the obvious antiquity and the need for reform of the present law on repairs should not blind us from questioning the validity of the principles which form the basis of the whole body of landlord and tenant law.

It is submitted that the above examination of the law on repairs throws doubt on the wisdom of the continued application of two principles which have hitherto been regarded as fundamental in landlord and tenant law.

Firstly, the common law principle of freedom of contract is appropriate to landlord and tenant law in that the parties to the contract

66 Wald, LAW AND POVERTY (1965) at 16.

of lease have grossly unequal bargaining strengths. It is generally recognized and accepted as the rationale of much of the recent consumer protection legislation that consumers can be trapped into making unwanted or undesirable purchases by 'high pressure salesmanship' on the part of some vendors of consumer products, and that it is unrealistic to argue that consumers are on an equal footing with retailers in the negotiation of the contract. However, it is not yet generally recognized that a tenant is at an equal disadvantage: invariably he will be expected to sign a standard form of lease or else look for alternative accommodation.[67] Thus in reality the terms of the lease are dictated by the landlord or estate agent, and the principle of freedom of contract is illusory and unrealistic in this context.

A review of the various clauses contained in currently used standard forms of lease and tenancy agreement would seem to justify the contention of two commentators that present standard forms of lease are not based on freedom of contract, but tyranny of contract.[68] Taking the Victorian W. B. Simpson & Son Tenancy Agreement and 1958 Copyright Lease as examples, the tenant's covenants outnumber the landlord's covenants by as many as 19 to two in the former lease, and 11 to one in the latter lease. In the words of the Australian Council of Social Service:

> Landlord-tenant relations are mainly spelt out in terms of landlord rights and tenant duties. Leases currently in use show up this uneven division clearly. The only duty of the landlord in many cases is to ensure quiet possession, while the duties laid on the tenant are spelt out in meticulous detail.[69]

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67 The poor bargaining position of the tenant of residential premises has been noted and discussed by many legal commentators. See for example Mueller, *Residential Tenants and their Leases: An Empirical Study* (1970-71) 69 Michigan L Rev 247; Clough, *Pennsylvania's Rent Withholding Law* (1968-69) 73 Dickinson L Rev 583; Arbittier, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract* (1963) 111 U Pennsylvania L Rev 1197; and Note, *Exculpatory Clauses in Leases of Realty in Pennsylvania* (1953-54) 15 U Pittsburg L Rev 493.

68 Casner A J and Leach W B, CASES AND TEXT ON PROPERTY (1969) 560. The absurdity of the principle of freedom of contract in the context of landlord-tenant problems has been recognized by *inter alia* the American Bar Foundation. See the Model Residential Landlord-Tenant Code, s 2-203, comment, at 46. (Tent Draft 1969):

> Since the landlord occupies an impregnable bargaining position, it may be assumed that any responsibility placed on the landlord which can be waived, will be waived.

69 Australian Council of Social Service, *The ACOSS Evidence Poverty* (Sydney 1973) at 260.

Secondly, in future the landlord and tenant law relating to residential premises must diverge from that relating to commercial premises. Although traditionally the same laws have been applied to the renting of commercial premises as to residential premises, it is submitted that a fundamental distinction should be drawn between the two. The reason for the similarity of treatment appears to be that at law a lease is regarded as an estate in land and the use to which the land is to be put and the bargaining capacity of the parties are regarded as irrelevant. Although it has already been shown that the principle of freedom of contract is inappropriate in the case of residential premises, it must be recognized that the principle is reasonable in the case of commercial premises, where it may sensibly be argued that each party has a roughly equal bargaining strength. Indeed, to give tenants of commercial premises similar protection to that designed to protect consumers may well unfairly prejudice the position of the landlord. One can speculate that the application of their decisions in the commercial sphere may in the past have deterred some judges from adopting contractual principles or extending the doctrine of *Smith v Marrable* when hearing cases involving residential accommodation.

If the rationale of these two fundamental changes is accepted, it follows that the suggested reform of the law of repairs should be viewed not as an end in itself but rather as a part of a wider reform of all aspects of the landlord and tenant law.

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THE REFUGEE CORPORATION

The upheavals in the world since 1945, first as a result of the Soviet conquest of Eastern Europe and later as a result of war and disturbance in the so-called Third World, have caused many individuals to flee their homes. Less appreciated, at least in Australia, is the problem of the corporate refugee. Yet that problem has touched our shores too.

The internationally most celebrated corporate refugee is the Carl-Zeiss Stiftung, whose case led to litigation around the globe, including Australia.[1] The facts of this case have been exhaustively discussed elsewhere,[2] but they do serve as a good illustration of the problem involved.

The Carl-Zeiss Stiftung is a foundation under German law created in the city of Jena in 1889 to carry on certain optical and glass works, founded by Carl Zeiss and Ernst Abbe. At that time Jena formed part of the Grand Duchy of Saxe-Weimar-Eisenach, a principality within the German Empire. The commercial activities of the Stiftung were carried on by boards of management operating from Jena, appointed under the charter of the Stiftung by a state department of the Grand Duchy. The Grand Duchy disappeared as a political entity after the Revolution of 1918 and the supervision over the activities of the Stiftung was exercised by whatever authority was in charge of education in the area in which Jena was situated. In July 1945 Jena became part of the Soviet zone of occupation and subsequently of the German Democratic Republic. Before the Soviet Army took over administration from the United States Forces who had originally occupied Jena, all members of the boards of management were persuaded by the Americans to withdraw with them to the town of Heidenheim in Württemberg in West Germany. There they continued the commercial activities of the Carl-Zeiss Stiftung, successfully claiming ownership and control over all assets of the foundation situated in what later became the Federal Republic of Germany. The state authorities in Württemberg subsequently authorized the transfer of

1 In the Matter of an Application by Carl-Zeiss Pty Ltd (1969) 122 CLR 1.
2 See Bernstein, *Corporate Identity in International Business: The Zeiss Controversy* (1972) 20 Amer J of Compar Law 299.

the seat of the Stiftung itself from Jena to Heidenheim even though the authorities in Jena did not give the consent required by the German Civil Code. In the meanwhile the local authorities in East Germany, as the alleged successors of the relevant state department of the Grand Duchy, purported to appoint new boards of management. The commercial activities of the Stiftung in Jena were eventually nationalized and carried on by state enterprises using the name of Carl-Zeiss. But the Stiftung remained in existence. There were thus two entities each claiming to be the sole lawful continuation of the original Carl-Zeiss Stiftung.

Assuming, as we now must, that each of the two German states are independent and sovereign entities though bound together by ethnic and historical ties, what is the effect in Australian law: how must we face the situation? Are we confronted with one true successor, the other being an imposter? In that case we must ask ourselves the further question of which is the true successor. Or are we faced with the destruction of the old entity and the emergence of two new entities each given by a local territorial law control over the assets of the old corporation within its domain? Or can we imagine a situation of two true successors but each with a different territorial ambit? In the last two cases we must determine which entity is entitled to the assets in the forum.

THE TRADITIONAL RULE

It has always been said that a corporation cannot change its applicable law. Treating the place of the incorporation as equivalent to the domicile of origin, Macnaughten J in *Gasque v Internal Revenue Commissioners* said:[3]

> The domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence.

The three major English textwriters on conflict of laws maintain the general proposition that the domicile of the corporation is unchangeable.[4]

Despite this, it is quite clear that where both the law of the existing domicile and of the new domicile permit the transfer of incorporation,

[3] [1940] 2 KB 80 at 84.

[4] Dicey-Morris, CONFLICT OF LAWS, 9th ed at 703; Cheshire, PRIVATE INTERNATIONAL LAW, 9th ed at 198, and Graveson, CONFLICT OF LAWS, 7th ed at 223, although Dicey-Morris adds the important qualifying words: 'merely of its own volition'.

it will be recognized in Australia. The law of New South Wales, for instance permits the transfer of incorporation of companies into the state. It is provided in the *Companies (Transfer of Domicile) Act* 1968-1972 (NSW) that a company incorporated in a foreign country may be registered as a New South Wales corporation provided the transfer of its domicile from its original place of incorporation is authorized in accordance with the law for the time being in force in that place.[5] If the Commissioner for Corporate Affairs is satisfied that this condition has been fulfilled he may then register the company as a company incorporated under the New South Wales *Companies Act*.[6] Upon the issue of the certificate of incorporation the company is to be deemed to be a company duly incorporated under the Companies Act with all the powers of a company as such but with full continuity of all its rights, powers, authorities, duties, functions, liabilities or obligations.[7]

A third country in the common law world would recognize such a transfer with its consequent continuity of legal personality. There is no direct authority on the point in England or Australia, but the issue did arise in two New York cases during World War II. By a war emergency law enacted shortly before the involvement of the Netherlands in World War II, companies incorporated in the metropolitan territory of that Kingdom were permitted to transfer their registered office to other parts of the Dutch Empire. A number of companies took advantage of this law to transfer their registered offices to the Netherlands Antilles in the West Indies. After their invasion of Holland, the German military authorities appointed managers to control the assets of the companies concerned. The companies were entitled to funds in New York, and both the German controlled companies in Holland and the original boards of management now resident in the Netherlands Antilles claimed them. The New York courts recognized the claims of the management based in the Antilles as the lawful continuation of the original corporation.[8]

The *Convention Concerning Recognition of the Legal Personality of Foreign Companies, Associations and Foundations* concluded on 1 June 1956 at The Hague makes provision in art 3 in the following terms:

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5 Companies (Transfer of Domicile) Act 1968-1972 (NSW), s 6.

6 Ibid, s 8.

7 Ibid, s 9.

8 Koninklijke Lederfabriek Oisterwijk NV v Chase National Bank of the City of New York (1941) 30 NYS 2d 518; Anderson v NV Transandine Handelmij (1941) 31 NYS 2d 194.

> The continuing existence of legal personality shall be recognized in all contracting states in the case of a change in the registered office from one contracting state to another, if that continuing existence is recognized in the two states concerned.

Although this Convention has not yet come into force, it does indicate that the above stated principle is generally acceptable.

In *Carl-Zeiss Stiftung v Rayner & Keeler (No. 3)*, Buckley J said:[9]

> A corporation cannot, I think, of its own volition, and apart from its proper law, abandon one domicile and adopt another as a natural person can. Its primary domicile must be under that law under which it was incorporated. It must, however, I think be at least theoretically possible that by operation of the proper law for the time being of a corporation, another system of law may be substituted as the proper law of the corporation.

The last sentence is intriguing: it gives primacy to the law of the existing domicile. But this creates logical and practical difficulties if the law of the alleged new domicile does not accept the transfer. Assume, for instance, that the law of the New Hebrides permits the transfer of incorporation into Western Australia, but Western Australia has no provision similar to that of New South Wales. Should a New South Wales (or Western Australian) court recognize the corporation as a Western Australian entity even though it cannot be registered as a corporation with continuing personality under Western Australian law? A possible solution might be to apply the doctrine of *renvoi* and say that the corporation remains primarily a New Hebrides corporation, but by virtue of New Hebrides law it is now governed by the *Companies Act* of Western Australia. It might be possible to apply by this stratagem those parts of the Western Australian *Companies Act* which relate to the powers and organs of the company, but clearly one could not make applicable simply by this fiction provisions of the Act imposing public duties such as those relating to the issue of a prospectus, debentures, etc. The doctrine of *renvoi* is not very popular among conflict writers nowadays, and it is doubtful whether it should be extended to this situation.

Fortunately we are not likely to be plagued by this situation, for the reverse situation is much more likely to occur. Assume, for instance, that a corporation originally incorporated in the colony of Utopia, now the Utopian People's Republic, seeks to escape nationalization of its

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[9] [1970] Ch 506 at 544.

assets by establishing its headquarters elsewhere. Utopia is not likely to consent to any transfer but the country of refuge allows the company to re-establish itself as a local company with continuous legal personality.

The inference from Buckley J's remarks is that in such a case our courts would not recognize the transfer. What little authority there exists, supports this statement. In *Banco de Bilbao v Sancha,*[10] a somewhat comparable situation occurred. In that case the plaintiff bank was a company constituted under the law of Spain, having its corporate home in Bilbao. It had a branch in London. Until 1937 the affairs of the bank were conducted by a board of directors elected by the shareholders in accordance with the articles regulating the bank. In that year the members of the old board were displaced by order of the local Republican authorities in a manner, it was found, which was not in accordance with the law of Spain. In June 1937 Bilbao was occupied by rebel forces under General Franco. It appeared from a certificate issued by the Foreign Office on 17 February 1938 that the government set up by General Franco after the capture of Bilbao was recognized by the British Government as being the government which exercised de facto control over Bilbao. At the same time the British government recognized the Republican government of Spain as the de jure government of the whole of Spain, including the area over which it recognized General Franco's government as exercising de facto administrative control. The effect of this certificate was that General Franco's government had to be recognized as possessing legislative control over Bilbao from June 1937 onwards. In August 1937 the President of the Spanish Republic issued a decree that the registered office of all companies which had been established in Bilbao should be deemed to be transferred to either Valencia or Barcelona. At the same time he purported to ratify the dismissal of the original board by the local authorities and its replacement by a board favourable to the Republican cause.

The Court of Appeal, acting on the certificate of the British government, that General Franco exercised de facto control over Bilbao, denied recognition to the Spanish Republican government as being entitled to exercise effective legal control over that part of Spain. Hence the laws purporting to affect the plaintiff bank which had been made by the Republican government of Spain at the time it was no longer in de facto control of Bilbao, had to be disregarded. In conse-

10 [1938] 2 KB 176.

quence the original board was recognized as entitled to control the London branch.

The effect of the Court's refusal to recognize the authority of the Republican government over Bilbao was to split Spain in fact into two states. The case can therefore be regarded as authoritative for the proposition that the change of domicile to Valencia over which the Republican government still exercised de facto control in August 1937 was ineffective because the law in force in Bilbao at the time did not permit it.[11]

A similar view was taken by the House of Lords in *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*.[12] This litigation arose out of the fact that both the West German Carl-Zeiss Stiftung and the East German Stiftung, each claiming to be the sole legitimate successor of the original Stiftung, were using the name and title of Carl-Zeiss in respect of their trademarks in the United Kingdom. When the East German Stiftung authorized solicitors in England to commence proceedings to assert its right to the trademarks against the West German Stiftung, the latter challenged the power of the East German body to instruct solicitors in the name of the Stiftung. The House of Lords rejected that challenge. Their Lordships all concluded that the question of whether the original Stiftung continued to exist in the shape of the East German Stiftung was a matter for the law in force at the place where it had originally been established.[13]

Perhaps the clearest instance of deference to the law of the existing domicile is found in the United States decision in *NV Suikerfabriek Wono-Aseh v Chase National Bank of the City of New York*.[14] The plaintiff company had been incorporated in 1899 under the laws of the former Netherlands East Indies. Prior to the outbreak of World War II the plaintiff company bought certain securities in the United States which were lodged with the Chase Manhattan Bank. In 1940, in pursuance of exchange controls imposed by the Netherlands East Indies government, the securities were transferred into the name of the Escompto Bank NV, a bank also incorporated in the Netherlands East Indies and at the time of the action continuing in existence as an Indonesian corporation.

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11 Ibid, per Clauson LJ at 195, 196; see also National Trust Co Ltd v Ebro Irrigation and Power Co Ltd [1954] 3 DLR 326.

12 [1967] AC 853.

13 See especially Lord Reid, ibid at 920 and Lord Wilberforce at 972.

14 (1953) 111 F Supp 833.

After the independence of Indonesia was recognized in 1949, the company purported in August 1950 to change its incorporation to Suriname which had remained a part of the Netherlands. The consent of the Indonesian government was not sought or obtained. This was done purportedly under the Dutch law referred to earlier, permitting the transfer of incorporation from one part of the Dutch Empire to another in case of impending war or international emergency. In 1950, of course, Indonesia was no longer part of the Dutch Empire, nor was Dutch territory involved in war or international emergency. Nevertheless the Governor of Suriname accepted the purported transfer of incorporation and issued a certificate incorporating the company under the laws of Suriname. Although the learned judge was dubious about the validity of this action under Dutch law, he did accept that this created a Suriname corporation of the same name as the original Netherlands East Indies corporation. The plaintiff corporation then claimed the release to it of the assets held by the Chase National Bank which in its turn impleaded the Escompto Bank which then appeared to defend the action on behalf of the Indonesian exchange control authorities.

In essence the claim of the plaintiff was that the assets held by the defendant were now vested in it as a Suriname corporation and consequently were no longer within the scope of the Indonesian exchange control laws. That argument was denied by the court, which concluded that the corporation had no power to effect a de jure transfer of incorporation without the consent of the Indonesian government.[15] It must be remembered that in 1950 the Indonesian government had not yet embarked on the wholesale expropriation of Dutch interests which were to occur later in that decade and that it was seeking merely to maintain currency exchange controls which had been imposed by its colonial predecessor. The case can therefore be distinguished from other genuine 'refugee' situations.

A SUGGESTED NEW RULE

It can be seen that our courts so far have held to the rule of the 'one true corporation' governed by the law of the existing domicile. It is submitted that rigid adherence to this approach is unrealistic where the company has been plundered or expropriated by the government of the country of its incorporation. It has been abandoned in other

15 Ibid, at 843.

countries such as the Federal Republic of Germany which, unlike Australia, has acutely suffered from the problem of the refugee corporation.

The West German courts have responded to the confiscation of shares and assets of companies incorporated in Eastern Europe, which carried on business or owned assets in the West by creating the notion of the split corporation *(Spaltgesellschaft)*. The theory of the *Spaltgesellschaft* is that there are two continuations of the old corporation, each with its own territorial ambit.

In the words of Professor Kegel:

> The company is doubled: with operation for company assets in the state of expropriation the company has a new membership: with operation for company assets outside the state of expropriation the company continues to exist with its old members. Accordingly there are two organs (board of management, supervisory council, meeting of shareholders), two balance sheets inter alia.[16]

An example of the operation of the theory can be found in the decision of the Federal Supreme Court of Germany of 6 October 1960.[17] A co-operative incorporated in Czechoslovakia before 1945 possessed assets in West Germany. The shares of the members, who were ethnic Germans, were seized by the Czech government in 1945. As a result the co-operative became a state-owned entity with control over its assets in Czechoslovakia. The German Supreme Court held that the co-operative continued to exist in Germany as a separate *Spaltgesellschaft*. The Court treated it as a separate entity incorporated in Germany, but, so far as the German assets were concerned, with continuity of legal personality. There were thus two entities with the same name: a state owned entity in Czechoslovakia and a German entity composed of refugee shareholders. Each was a legitimate successor of the old corporation.

The *Spaltgesellschaft* is, of course, a defence mechanism against expropriation or extinction of the company abroad by confiscatory measures. Its rationale was explained by the High Court in Hamburg on 25 June 1959[18] when it refused to give effect to the expropriation of German shareholdings in a Dutch company:

> Private law has created the corporate structure as juristic person and the separation of its assets from the rights of the shareholders as a convenience for private legal relations . . . this structure

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16 *Internationales Privatrecht*, 3rd ed at 448 (my translation).
17 1960 BGH 33, 195.
18 WM 1959, 1100.

> cannot find application when it is used as justification for, and serves the purpose of, extending the operation of the confiscatory measures in the Netherlands of German assets to assets situated in the Federal Republic outside the territorial sovereignty of the Netherlands state.

Is a similar approach possible at common law? The decision of the House of Lords in *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*,[19] whilst it does not preclude as a matter of strict *ratio decidendi* such a view, certainly is in reasoning unsympathetic. Their Lordships proceeded on the basis that only one of the two Carl-Zeiss corporations could be the 'true successor'.

In the Australian *Carl-Zeiss* case,[20] Kitto J decided merely that the Stiftung in Jena was no longer entitled to maintain an Australian trademark in its name because its works had been expropriated and placed in the control of a state enterprise. There had therefore been no bona fide commercial use of the mark by the Stiftung. He was not asked to decide any entitlement to the trademark by the applicant West German corporation which only sought the removal of its registration in the name of the East German Stiftung. However, by implication he treated the Jena Stiftung as the continuation of the original Stiftung.

The courts of the United States have shown themselves more flexible. In *A/S Merilaid & Co v Chase National Bank*[21] the shareholders of an Estonian corporation fled the Soviet advance into Estonia. They held a general meeting of shareholders in Sweden at which they purported to re-elect the former directors of the company. In the meanwhile a Soviet sponsored Estonian government had purported to expropriate the shareholders in, and the assets of, the corporation. Koch J of the New York Supreme Court recognized the Swedish directors as representing the continuing corporation and, as such, entitled to the assets of the corporation which were situated in New York.

Unfortunately the reasoning by Koch J is very summary and it does not appear from the judgment whether the recognition was granted by virtue of pre-Soviet Estonian law,[22] Swedish law or an overriding public policy principle of the forum.

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19 [1967] AC 853.

20 In the Matter of an Application by Carl-Zeiss Pty Ltd (1969) 122 CLR 1.

21 (1947) 71 NYS 2d 377.

22 Cf A/S Tallina v Tallina Shipping Co (1946) LILR 245, where pre-Soviet Estonian law was applied in a similar situation.

In *Carl-Zeiss Stiftung v VEB Carl-Zeiss, Jena,*[23] Mansfield FDJ saw in this earlier decision authority for the proposition that:

> Where a juristic entity or personality created by one state has been recognized by other states, which permit it to 'do business' in their respective territories (owning property, making contracts, etc) so that it assumes a status as an international business organization, no sound reason appears, in fairness or logic, why termination of its existence in the creating state, and purported seizure of its assets without compensation, should require those other states where its property is located to treat its existence as terminated everywhere rather than assume sponsorship or recognition of the entity as continuing to exist within their borders. Permission to 'do business' would appear as a matter of international law, to carry the implied condition that the entity be treated as continuing for certain purposes within the state granting such permission.

The learned judge then went on to accept the West German Stiftung's contention that the original Jena Stiftung had successfully transferred its domicile to West Germany. In so holding he relied on s 67 of the German Civil Code which permits the authorities to intervene to reconstruct a foundation if its original purpose had been defeated. Bernstein[24] criticizes this reasoning as a misapplication of German law. This may well be true, but it does not, in my opinion, affect the basic premise on which his Honour proceeded: that the forum should not accept the destruction or subversion of an international corporation by the law of the place of its incorporation.

This principle is not alien to our law. Since the decision of the House of Lords in *Russian and English Bank v Baring Bros & Co,*[25] it has been accepted that a foreign corporation which has been dissolved in the place of incorporation may be treated as a continuing entity within the forum for the purposes of winding up as an 'unregistered company'. As Lord Atkin said in that case:[26]

> . . . if the municipal law choose, it may in defined conditions refuse to accept or may accept only under conditions either the creation or the destruction of a foreign juristic person.

What is more, English courts have not only refused to accept the total destruction of a foreign corporation but also the confiscation of the rights of shareholders. In *Re Banque des Marchands de Moscou*

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23 (1969) 293 F Supp 892 at 899.
24 Bernstein, op cit, at 304.
25 [1936] AC 405.
26 [1936] AC 405 at 428.

(Koupetschesky)[27] Roxburgh J directed that the surplus left of English assets owned by a Tsarist bank be distributed amongst its former shareholders according to the principle of Tsarist law whereby upon dissolution of the corporation its assets became the common property of its shareholders in proportion to the amount of their holdings. It is true that his Lordship justified this reference to Tsarist law on the ground that there was no evidence that Soviet law had abolished this rule in relation to assets of Russian corporations abroad. This is, of course, a fiction analogous to the fiction employed in the 1920s that Soviet law had not destroyed Tsarist companies.[28] The essence of Roxburgh J's decision is an unwillingness to accept the confiscation of shareholders' rights in relation to the assets of the company which are situated in the forum.[29]

The law, however, should not be based on fictions but on policies. If the underlying policy of our law is that we do not recognize a confiscation of the local assets of a foreign corporation either directly or indirectly through the seizure of its private shareholdings or the replacement of its management,[30] it follows that we must continue to give recognition to the entity which best represents the interests of the original shareholders in the forum.[31]

If this basic principle is accepted, the method of applying it should be as follows:

1. If the corporation has managed to re-establish itself in another country as did the Carl-Zeiss Stiftung in the West German state of Württemberg with the active encouragement of the local authorities there, the forum should, so far as assets within its territory are concerned, recognize the refugee corporation as a continuation of the original corporation but with its domicile and corporate law transferred to that of its new home. This would be in line with the decision of Mansfield FDJ in *Carl-Zeiss Stiftung v VEB Carl-Zeiss Jena.* The law of the new domicile must, of course, permit such a transfer. The

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27 [1958] Ch 182.

28 See Russian Commercial & Industrial Bank v Comptoir d'Escompte de Mulhouse [1925] AC 112.

29 A similar presumption that Soviet law did not affect the rights of shareholders in Tsarist companies abroad was made by Wright J in 1926 in AG Woronin Leutschig and Cheshire v Frederick Huth & Co reported in (1946) 79 LlLR 262 at 267.

30 The seizure by an ally of the shares held by the nationals of a common enemy is a different situation which cannot be regarded as contrary to public policy: Brown v Beleggings Societeit NV (1961) 29 DLR 2d 673.

31 Cf Bank of China v Wells Fargo Bank (1952) 104 F Supp 59.

old corporation, if it has not been dissolved in its homeland, would also be recognized as a true successor, but only as regards the assets of the original corporation within the territory of the original place of incorporation. Such a conclusion would not conflict with the *ratio decidendi* of the House of Lords in *Carl-Zeiss Stiftung v Rayner & Keeler (No 2)* where the only essential question was whether the Stiftung continued to exist in East Germany, not whether it was the sole continuation of the old Stiftung.

2. If the corporation has not managed to find a new corporate haven, eg because its foreign assets are situated in a country such as England or Western Australia which does not permit a transfer of domicile, at least without special statutory authorization, the continued existence of the old corporation can only be recognized for the purposes of its liquidation within the forum. This is already the law when the foreign corporation has been formally dissolved in its own country. But, it is submitted, that the result should not merely be made to depend on whether the foreign government has completely destroyed the legal personality of the corporation or has left its legal shell intact but nationalized its shareholding. When the Hungarian government did the latter in 1945, the United States Federal Court of Appeal Second Circuit responded in *Zwak v Kraus Bros & Co*:[32]

> It is clear that the Hungarian government could not directly seize the assets which have a situs in the stage of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extra-territorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do.

Consequently a claim by the nationalized corporation to recover assets situated in the forum should not be enforced by our courts just as the claim by the Nazi Commissar appointed in Austria to control the firm of Mr Frankfurther to debts owed to that firm by an English debtor was not enforced in *Frankfurther v WL Exner Ltd.*[33] Instead, the original corporate entity consisting of the original shareholders should be treated as dissolved in the forum and wound up accordingly. Only in this manner can justice be done to the claims of shareholders and creditors alike.[34]

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32 (1956) 237 F 2d 255 at 259.

33 [1947] Ch 629.

34 See F A Mann, *The Confiscation of Corporations, Corporate Rights and Corporate Assets and the Conflict of Laws* (1962) 11 LSLQ 471 at 495, who originally suggested this solution.

Again we finish up with two entities in succession to the original corporation. The state-owned corporation continues to be recognized in the forum as the lawful successor, so far as assets and, *semble,* debts situated in the country of incorporation and in countries which recognize the effect of the expropriation are concerned, but in the forum the corporation with its original composition continues, albeit in a state of liquidation. If there is a surplus it will be distributed as in *Re Banque des Marchands de Moscou (Koupetschesky)*, among the original shareholders or their assigns in accordance with the law under which the corporation operated before its expropriation.

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