THE LEASE AS A CONTRACT

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In a detailed analysis of the rights and obligations of the parties in a landlord-tenant relationship, the author first examines the traditional view of a lease as a conveyance rather than a contract. Recent modification of the basic common law rules of landlord and tenant by the Canadian courts and provincial legislatures, through the application of rules of contract law, leads the author to a consideration of the lease as a contract. In characterizing a lease simply as an agreement that the landlord will not substantially interfere with the tenant's possession, his analysis points up the limited nature of a landlord's obligations. The author concludes that a solution to the problem of the limited nature of a landlord's obligations therefore requires more than a simple application of contract principles to leases, and that legislative extension of those obligations in particular areas is required.

I. THE PROBLEM

A. *Introduction*

In the late 1930's, a landlord in England, preparing premises for occupation by new tenants, removed a gas-fire, but failed to put a tap on the gas pipe. As a result, there was nothing to prevent the gas from escaping into the room. The new tenants moved into the premises on their wedding night and were asphyxiated by the gas. The husband died; the wife became very ill, but recovered. She sued the landlord, but the court held that she had no cause of action.[1]

In the mid-1960's, a company leased certain premises in Edmonton to be used for the purpose of building trailers. Prior to entering into the lease, the manager had indicated to the owner of the land that the company wanted the land for this purpose and the owner had stated that he could see no problem in such a use. After the company had commenced its operations on the land, it was informed by the City that its activities were contrary to the zoning by-laws. Unable to use the property, the company vacated. The owner sued for rent from the time the premises were vacated until the time they were again leased and was successful in his action.[2]

A man entered into a lease of an apartment suite in Toronto to commence October 1, 1939. The landlord agreed to provide hot water and to provide sufficient heat for the premises from October 15 to May 1 in each year. At the end of November, having been provided with neither heat nor hot water, the tenant vacated the premises and they remained vacant until the following April. The landlord sued and recovered damages for rent from the time the tenant vacated to the time the premises were relet.[3]

In England, in the early part of the last century, a man rented a cotton factory under a twenty-one year lease. Five years after the lease had commenced, the factory was destroyed by fire. The landlord collected in-

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1. *Davis* v. *Foots* [1940] 1 K.B. 116 (C.A.).
2. *Crescent Motor Company Ltd. and Pike* v. *North-West Tent & Awning Co. Ltd.* (1970) 72 W.W.R. 694 (Alta. D.C.).
3. *Johnston* v. *Givens* [1941] 4 D.L.R. 634 (Ont. C.A.).

surance money, and effected minor repairs. The factory, however, was left in such a state that the walls would not support the equipment. In an action by the tenant, the court held that the landlord was not required to repair the factory, that the landlord was entitled to retain the insurance money and that the tenant remained liable for the rent throughout the remainder of the term of the lease.[4]

In England at the turn of the last century, a company was leasing certain premises which it in turn leased to another company. The new lease was for a term of 10½ years and was entered into when the head lease had a term remaining of only 8½ years. Upon the expiry of the head lease, the sub-tenants were evicted by the head landlord. The sub-tenants sued their landlords for failing to provide the premises throughout the term of the lease and failed.[5]

These cases are examples of the application of four basic rules of the common law of landlord and tenant:

1. *There is no implied covenant in a lease that the premises will be suitable for the use intended by the tenant.*

As expressed by Parke, B. in *Hart* v. *Windsor*:[6]

> [T]here is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. . . . It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning.

The effect of this rule is that a landlord is under no duty to ensure that the premises will be *physically* suitable for the tenant's purposes at the commencement of the term,[7] nor is he under a duty to repair or maintain the premises throughout the term.[8] This is the case even when the terms of the lease restrict the tenant's obligation to repair the premises.[9] An exception to this general rule exists in the case of furnished premises, where a covenant is implied that the premises will be suitable for habitation at the commencement of the term.[10] This exception does not, however, extend to a covenant that the premises will remain habitable throughout the term.[11]

There is no implied covenant in a lease that the premises will be *legally* suitable for the proposed use of the tenant. The tenant therefore remains liable for the rent despite a prohibition on use, even if the prohibition on use arises from a defect in the landlord's title[12] and even if such is the only use permitted under the lease.[13]

The rule that there is no implied covenant by the landlord that the premises will be suitable for the tenant's proposed use has been explained

4. *Williams* v. *Broadhead* (1827) 1 Sim. 151, 57 E.R. 535 (Ch.).
5. *Baynes & Co.* v. *Lloyd & Sons* [1895] 2 Q.B. 610 (C.A.).
6. (1843) 12 M. & W. 68, 87, 88, 152 E.R. 1114, 1122 (Ex.).
7. *Id.*
8. *Arden* v. *Pullen* (1842) 10 M. & W. 321, 152 E.R. 492 (Ex.).
9. *Id.*.
10. *Wilson* v. *Finch Hatton* (1876-1877) 2 Ex.D. 336; *Smith* v. *Marrable* (1843) 11 M.&W. 5, 152 E.R. 693. (Ex.).
11. *Gordon* v. *Goodwin* (1910) 20 O.L.R. 327 (Ont. C.A.).
12. *Jones* v. *Lavington* [1903] 1 K.B. 253 (C.A.).
13. *Hill* v. *Harris* [1965] 2 Q.B. 601 (C.A.).

on the basis that a lease is essentially a conveyance rather than a contract. As stated by Belzil D.C.J. in *Crescent Motor Company Ltd. and Pike* v. *North-West Tent & Awning Co., Ltd.*:[14]

> In brief, it appears to me from a review of the authorities that leases of real property and contracts for the sale of land, being both primarily grants of an estate in land, are governed by the same principle of law applicable to rescission for breach of implied conditions as to fitness or for misrepresentation. On the proper circumstances and although the Latin terminology does not fit, the maxim *caveat emptor* applies to a lease.

2. In general, *covenants in a lease are independent of each other*, so that a breach of a covenant by one party will not excuse non-performance of the covenant of the other party.[15] Williston[16] cites three reasons for this rule: firstly, because a lease is primarily considered as a conveyance; secondly, because the rules relating to leases were settled before the law relating to mutually dependent covenants was developed;[17] and thirdly, because leases were generally found in detailed documents where the parties could be expected to expressly provide for dependency of covenants if such was their intention.

3. *The doctrine of frustration does not apply to leases.*[18] As explained by Megarry and Wade:[19]

> In general, the doctrine does not apply to executed leases; for a lease creates an estate which vests in the lessee and cannot be divested except in one or other of the ways enumerated above [expiry, forfeiture, surrender, merger, etc.]. In other words, the lessor's principal obligation is executed when he grants the lease and puts the tenant into possession. The doctrine of frustration can apply only to obligations which are executory and which can therefore be rendered impossible of performance by later events.

4. *In the absence of an express covenant of quiet enjoyment, the landlord is not liable for interference with the tenant's posession by one claiming under a title superior to that of the landlord.*[20] The usual form of an express covenant of quiet enjoyment is similarly qualified.[21]

Each of the first three of these principles is explained on the basis that a lease is essentially a conveyance rather than a contract. The intention of this paper is to examine that explanation and to suggest a relationship between the first three principles and the fourth principle.[22]

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14. (1970) 72 W.W.R. 694, 699. *See* Grimes, "Caveat Lessee" (1968) 2 *Val. U.L.R.* 189.
15. *Supra* n. 3 at 637.
16. *Williston on Contracts* (3d ed. 1962) §890.
17. For a general discussion of the development of the law relating to dependency of covenants, *see* Stoljar, "Dependent and Independent Covenants" (1957) 2 *Sydney L.R.* 217.
18. R. Megarry & H. Wade, *The Law of Real Property* (4th ed. 1975) 673; E. Williams, *Canadian Law of Landlord and Tenant* (4th ed. 1973) 5, 6; *Woodfall's Law of Landlord and Tenant* (28th ed. 1978) §1-2055.
19. *Supra* n. 18 at 673. *See Cricklewood Property & Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.* [1945] A.C. 221, 233, 234, *per* Lord Russell.
20. Woodfall, *supra* n. 18 at §1284.
21. *Id.* at §1289.
22. Another principle of the law of landlord and tenant associated with the view of a lease as a conveyance is that the landlord is not required to mitigate his damages when the tenant vacates the premises prior to the end of the term: *Highway Properties Ltd.* v. *Kelly, Douglas & Co., Ltd.* [1971] S.C.R. 562, 572. This principle, however, is not linked to the qualified nature of the covenant of quiet enjoyment and is beyond the scope of this paper.

B. *Historical Explanation*

The conclusion that a lease is viewed by the common law as a conveyance of an estate in land rather than as a contract is traditionally explained in historical terms. The lease had its origins in the 12th century as a means of avoiding the rules against usury, with the debtor leasing his property to the creditor. The profits from the land would repay the loan and provide a profit for the creditor.[23] The lease assumed a further role in the late 13th century. Prior to 1290, it was common for a landowner to subinfeudate land at a rent in order to produce a regular income. The Statute of Quia Emptores[24] deprived the landowner of his right to subinfeudate and the husbandry lease was a natural alternative to obtain essentially the same results.[25] Agricultural leases thereby grew in popularity. From the 13th through the 16th centuries, the common law developed remedies protecting the interests of the tenant against third parties.[26] By 1500, the tenant was regarded as the owner of an estate in the land.[27] In this context, the lease came to be viewed as a conveyance of an estate in the land, a view which has remained to the present day. As expressed in a recent decision of the Supreme Court of Canada: "[T]he 'estate' element has resisted displacement as the pivotal factor under the common law, at least as understood and administered in this country...."[28]

This view of the nature of a lease has come under considerable criticism, a typical example of which is found in a report of the Ontario Law Reform Commission: "Concepts rooted in an agricultural economy of a by-gone day provide little logical relevancy for today's landlord and tenant realities."[29] The criticism has been particularly strong with respect to the rule that a tenant remains liable for the rent notwithstanding that the premises are rendered unsuitable for his intended use, either by default of the landlord or by an event outside the control of either party. For example, in the case of *Johnston* v. *Givens*,[30] the tenant was held liable for the rent on residential premises through the winter, notwithstanding that the landlord's default on the covenant to provide heat had rendered the premises uninhabitable. Referring to this case and the authority relied upon therein, Ferguson J. stated in *Macartney and Loma Industrial Products Ltd.* v. *Queen-Yonge Investments Ltd.*:[31]

> It seems to me, with respect, to be surprising to find that case applied to the breach of a covenant to supply heat in a country where premises are uninhabitable in winter without heat.... A right to damages, I may suggest, is cold comfort to a shivering tenant.

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23. J. Baker, *An Introduction to English Legal History* (2d ed. 1979) 252.
24. *Quia Emptores Terrerum* (1290) 18 Edw. I.
25. J. Baker, *supra* n. 22 at 253; S. Milsom, *Historical Foundations of the Common Law* (1969) 100. Milsom discounts the explanation of Plucknett (T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956) 573-574 that the growth of the popularity of husbandry leases resulted from a shortage of labour following the Black Death in 1348 and 1349.
26. *See infra*, p. 243.
27. Hicks, "The Contractual Nature of Real Property Leases" (1972) 24 *Baylor L.R.* 443, 450; R. Megarry & H. Wade, *supra* n. 18, 45-46.
28. *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.* [1971] S.C.R. 562, 569.
29. *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968).
30. [1941] 4 D.L.R. 634 (Ont. C.A.).
31. [1961] O.R. 41, 49-50 (H. Ct.).

Acting upon these criticisms, the Canadian legislatures and courts have indicated that in certain respects the application of these rules to modern leases is undesirable and should be amended.[32]

C. *Provincial Legislative Reform*

Dealing with the problem in general, Saskatchewan,[33] New Brunswick[34] and Prince Edward Island[35] have all provided that with respect to residential tenancies, the relationship of landlord and tenant is one of *contract only* and does not create an interest in the land in favor of the tenant. The British Columbia Residential Tenancy Act[36] provides that, with respect to an agreement comprising more than 2 residential premises for a term exceeding 3 years, no estate passes to the tenant unless certain regulatory approval is first obtained. The rationale for such a provision was set out in the Sinclair Report[37] dealing with reform of landlord and tenant legislation in New Brunswick — to reinforce the specific provisions applying the law of contract to leases, such as those dealing with frustration and dependency of covenants.[38]

With the exception of Nova Scotia, all of the common law provinces in Canada now provide that the doctrine of frustration is to be applied to residential leases.[39] However, only in the new Alberta legislation and in the unproclaimed Ontario legislation is there an explanation of what constitutes frustration of a residential tenancy.

Similarly, in all of the common law provinces except Nova Scotia, there are now provisions for dependency of covenants in residential leases.[40] Most provinces provide that the common law rule respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party is applicable to residential tenancy agreements.[41] The new Alberta legislation takes the form of specific remedies for breaches and substantial or significant breaches of the

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32. "There has, however, been some questioning of this persistent ascendency of a concept that antedated the development of the law of contracts in English law and has been transformed in its social and economic aspects by urban living condition and commercial practice." *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.*, *supra* n. 28 at 569, *per* Laskin, J.

33. Residential Tenancies Act, S.S. 1973, c. 83, s. 6(1).

34. Residential Tenancies Act, S.N.B. 1975, c. R-10.2, s. 11(1).

35. Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 91(1).

36. S.B.C. 1977, c. 61, s. 9(11).

37. A. Sinclair, *Survey of Landlord and Tenant Law* (Law Reform Division, Department of Justice, New Brunswick, 1973) 86.

38. For a criticism of such a provision, *see* Alberta Institute of Law Research and Reform, *Residential Tenancies* (1977) 52.

39. Residential Tenancies Act, S.B.C. 1977, c. 61, s. 9(3); Landlord and Tenant Act, 1979, S.A. 1979, c. 17, s. 32; Residential Tenancies Act, S.S. 1973, c. 83, s. 12; Landlord and Tenant Act, R.S.M. 1970, c. L.70, as am. by S.M. 1970, c. 106, s. 90; Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 88; Residential Tenancies Act, 1979, S.O. 1979, c. 78, s. 57 (unproclaimed); Residential Tenancies Act, S.N.B. 1975, c. R.-10.2, s. 11(2); Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 9(3); Landlord and Tenant (Residential Tenancies) Act, S.N. 1973, Vol. 1, No. 54, s. 10.

40. S.B.C. 1974, c. 45, s. 61 (1) (e), as rep. by S.B.C. 1977, c. 61, s. 81.

41. Residential Tenancies Act, S.B.C. 1977, c. 61, s. 10(1); Residential Tenancies Act, S.S. 1973, c. 83, s. 13; Landlord and Tenant Act, R.S.M. 1970, c. L-70, as am. by S.M. 1970, c. 106, s. 91; Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 89; Residential Tenancies Act, S.N.B. 1975, c. R-10.2, s. 11(3); Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 91(2); Landlord and Tenant (Residential Tenancies) Act, S.N. 1973, Vol. 1, No. 54, s. 12.

tenancy agreement,[42] while the new Ontario legislation[43] provides specific remedies for specific breaches of the obligations of both the landlord and the tenant.

Finally, all of the common law provinces except Alberta approach the problem of *caveat lessee* with respect to residential tenancies by providing an obligation on the lessor to maintain or repair the premises so as to keep them in a state fit for habitation throughout the term.[44] The Alberta legislation provides only that the premises must be fit for habitation at the commencement of the term.[45]

D. *Judicial Approach*

The trend towards recognition of the undesirability of the view of a lease primarily as a conveyance can also be seen in the decisions of Canadian courts respecting the rights of a landlord upon abandonment of the premises by the tenant and respecting the application of the doctrine of frustration to leases.

The traditional approach was applied to the rights of a landlord upon abandonment of the premises by the tenant by the Ontario Court of Appeal in *Goldhar* v. *Universal Sections & Mouldings Ltd.*[46] In that case, the tenant vacated the premises, having alleged breaches of the lease by the landlord. The premises sat vacant for several months and were then re-let at a rent lower than that paid by the original tenant. The landlord sued for the differential in the rent over the remainder of the term of the original lease. It was held at trial that the breaches by the landlord were not of such a nature to justify the tenant vacating the premises and that the rent obtained by re-letting the premises was at fair market value. The Court of Appeal held that a lease was primarily a conveyance of an interest in the land and that the rules of property rather than contract were to be applied. By re-letting the premises on his own behalf, the landlord effected a surrender of the lease and the tenant's estate in the land was brought to an end. There being no estate on the part of the tenant, it was not liable for the rent through the rest of the term. The landlord was not required to mitigate his losses, but by doing so, he lost his right to damages.

This decision was considered and over-ruled by the Supreme Court of Canada in *Highway Properties Ltd.* v. *Kelly, Douglas & Co., Ltd.*[47] That case involved a lease of premises in a shopping centre for fifteen years with a term commencing on October 1, 1960. The lease provided that the premises were to be used for the purposes of a supermarket and that the tenant was to carry on business in the premises continuously throughout

42. Landlord and Tenant Act, 1979, S.A. 1979, c. 17, ss. 20, 23, 29, 30.

43. Residential Tenancies Act, 1979, S.O. 1979, c. 78, ss. 28-42 (unproclaimed).

44. Residential Tenancies Act, S.B.C. 1977, c. 61, s. 26 (1) (b); Residential Tenancies Act, S.S. 1973, c. 83, s. 16, conditions 2, 3, 4; Landlord and Tenant Act, R.S.M. 1970, c. L-70, as am. by S.M. 1970, c. 106, s. 98(1); Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 96(1); Residential Tenancies Act, 1979, S.O. 1979, c. 78, s. 28(1) (unproclaimed); Residential Tenancies Act, S.N.B. 1975, c. R-10.2, s. 3(1)(b); Residential Tenancies Act, S.N.S. 1970, c. 13, s. 6, condition 1; Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 102(1); Landlord and Tenant (Residential Tenancies) Act, S.N. 1973, Vol. 1, No. 54, s. 12.

45. Landlord and Tenant Act, 1979, S.A. 1979, c. 17, s. 14(c).

46. (1963) 36 D.L.R (2d) 450.

47. [1971] S.C.R. 562. For a further discussion of this case, *see* Catzman, (1972) 50 *Can. Bar Rev.* 121.

the term. As the shopping centre was generally unsuccessful, the tenant ceased to carry on business and vacated the premises in March, 1962. This had an adverse effect on the rest of the shopping centre. The landlord served notice on the tenant that it was attempting to re-let the premises and that it would be seeking damages for breach and wrongful repudiation of the lease. The premises were then subdivided and re-let in 1965. The landlord sued for damages for loss of rent and for loss resulting from the failure of the tenant to carry on business through the term of the lease. The trial judge[48] and the majority of the judges of the Court of Appeal[49] denied damages on the basis of the *Goldhar* case.[50] The Supreme Court of Canada reversed. It agreed that as rent at common law issues out of the land, it ceases when the estate in land ceases. However, this was an action for damages and not for rent as such. The basis of the decision was stated in the following terms:[51]

> It is no longer sensible to pretend that a commercial lease such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

It should be noted that while the Court directed the application of contract principles to leases, it did not deny that a lease creates an estate in land in favour of the tenant. This should be contrasted with the direction of the legislatures in Saskatchewan, New Brunswick, Prince Edward Island and British Columbia with respect to residential tenancies.[52]

Similar developments have taken place with respect to the application of the doctrine of frustration to leases. The case of *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*[53] involved a 99-year lease for the purpose of constructing a shopping centre. Subsequent war-time restrictions prevented building and the tenant claimed that its obligation to pay rent had been terminated by frustration. The House of Lords unanimously concluded that even if frustration could be applied to a lease, it would not apply in this case as the restrictions were only of a temporary nature. However, their Lordships went on to discuss the general issue. Lord Russell and Lord Goddard took the traditional position, that frustration applies when the venture of the parties cannot be carried out and that the venture of the parties to a lease is the vesting of an estate in the tenant. Viscount Simon, on the other hand, was of the opinion that the mere fact that a lease is more than a contract and amounts to an estate should not preclude the application of the doctrine of frustration to leases. Lord Wright pointed out that a lease may be avoided or dissolved under the express terms of the lease, thereby terminating the estate in land and expressed the view that there was no reason that a lease could not be similarly dissolved by operation of law. Lord Porter's views were guarded: " . . . exceptional circumstances might conceivably arise which would be plausibly put forward as a cause

48. (1967) 60 W.W.R. 193.
49. (1968) 1 D.L.R. (3d) 626.
50. *Supra* n. 46.
51. [1971] S.C.R. 562, 576, *per* Laskin J.
52. *Supra* n. 33, 34, 35.
53. [1945] A.C. 221.

of frustration and until it is necessary to pronounce definitely one way or the other I prefer to reserve the point".[54]

Subsequent cases in England have continued to refuse to apply the doctrine of frustration to leases.[55] However, the Ontario Court of Appeal in *Capital Quality Homes Ltd.* v. *Colwyn Construction Ltd.*[56] concluded that it could be so applied. That case involved an agreement to purchase a group of lots which formed part of larger lots under a registered subdivision plan. The intention of the purchaser, known to the vendor, was to construct houses on the lots and to sell each lot by way of a separate conveyance. After execution of the agreement but prior to closing, the legislation changed, requiring administrative consent to convey a lot within a lot under a registered subdivision plan. The purchaser sued for the return of the deposit paid, claiming that the agreement had been terminated by frustration. The Court of Appeal applied the doctrine of frustration notwithstanding the fact that an equitable estate in the land had already passed to the purchaser. It relied upon the views of Viscount Simon in the *Cricklewood* case[57] and concluded:[58]

> Each [leases and agreements for sale] is more than a simple contract. In the former an estate in land is created while in the latter an equitable estate arises. There does not appear to be any logical reason or binding legal authority which would prohibit the extension of the doctrine to contracts involving land.

Surprisingly, the Court of Appeal did not make reference to the *Highway Properties* case.[59]

It therefore appears that both the Canadian legislatures and the Canadian courts have accepted the analysis that for historical reasons the lease has been viewed primarily as a conveyance of an estate in land and that this has resulted in the non-application of certain rules of contract to leases. The legislatures have indicated that with respect to residential tenancies, the common law in this respect is unsatisfactory. The courts have indicated a similar conclusion with respect to commercial tenancies. The response of both to the perceived problem has been a declaration that the rules of contract should be applied to leases. In this light, it is submitted that an analysis of the nature of a lease as a contract is warranted.

II. IN CONTRACT, WHAT IS A LEASE?

Three factors are essential to distinguish a lease from other forms of contractual arrangements dealing with interests in land: one party must grant to the other exclusive possession of certain land, this possession must be for a definite or potentially definite time period and the parties must intend to create a tenancy.[60] Within this framework, the parties are free to establish their own arrangement. Viewing the contract from the point of view of the landlord's obligations, however, there are several elements that arise by implication unless dealt with expressly. Those

54. *Id.* at 242.
55. *Denman* v. *Brise* [1948] 2 All E.R. 141 (C.A.); *Cusack-Smith* v. *London Corporation* [1956] 1 W.L.R. 1368 (Q.B.).
56. (1976) 61 D.L.R. (3d) 385.
57. *Supra* n. 53.
58. *Supra* n. 56 at 397.
59. [1971] S.C.R. 562.
60. *Hill & Redman's Law of Landlord and Tenant* (16th ed. 1976) 3, 16-17.

elements — the covenant of quiet enjoyment, the covenant of title and the covenant not to derogate from the grant — have thereby become common features of leases and help to provide a basis for analyzing the lease as a contract.

A. *The Implied Covenant of Quiet Enjoyment*

The covenant of quiet enjoyment is the basis for the right of the tenant to exclusive possession of the property. There is a conflict among the modern authorities as to the scope of this covenant and a historical tracing of this right of the tenant and the associated obligation of the landlord is therefore necessary.

1. *History*

Despite the common assertion that the law of landlord and tenant is a vestige of feudalism,[61] leases developed outside the framework of the feudal system. In the years immediately following the Conquest, the system of holding land was based on the personal relationship of the lord and the *freehold tenant.* The lord took the homage and fealty of the tenant creating a bond under which the lord was responsible for the maintenance and the protection of the tenant in exchange for the obedience and service of the tenant. The system suited the need of the lord to be able to provide a requisite number of Knights for the service of the King; land was used to purchase military service. The personal bond and holding of land for military service were essential characteristics of the feudal system.[62] The tenant's holding was denoted by the concept of seisin[63] and was protected, firstly as against the lord and later as against the rest of the world by the assize of novel disseisin.[64]

This is to be contrasted with the relationship of the landlord and the *leasehold tenant,* where this personal bond was absent. The leasehold tenant was therefore considered not to be seised of the land and was denied the actions associated with seisin.[65] His rights were enforced strictly as against the landlord in an action of covenant[66] and this action may have had its origins in the enforcement of leases.[67] As against the rest of the world, the leasehold tenant was unprotected. If evicted by the landlord, he could recover possession by the action of covenant; if evicted by a third party, the landlord would recover possession for the leasehold tenant. If unable to recover possession, the landlord was responsible for providing equivalent property.[68] It appears that this right of the leasehold

61. *Javins* v. *First National Realty Corporation* 428 F. 2d. 1071, 1074 (D.C. Cir. 1970); *Jaber* v. *Miller* 219 Ark. 59, 61-62 (1951); Sophie, "Landlord-Tenant: The Medieval Concepts of Feudal Property Law are Alive and Well in Leases of Commercial Property in Illinois" (1970) 10 *John Marshall J.* 338, 357; Friedman, "Leases — A Last Outpost of Feudalism" (1971) 26 *Record* 638.

62. R. Brown, *Origins of English Feudalism* (1973) 32.

63. S. Milsom, *Historical Foundations of the Common Law* (1969) 104.

64. *Id.* at 116-119.

65. II, F. Pollock and F. Maitland, *The History of English Law* (2d ed. 1898) 110; S. Milsom, *supra* n. 63 at 119.

66. II, F. Pollock and F. Maitland, *supra* n. 65 at 106-107.

67. *Id.*

68. *Id.*

tenant and corresponding obligation of the landlord extended even to tortious evictions of the leasehold tenant by third parties.[69]

Pausing here, it appears that in the early stages of the development of the law of landlord and tenant, the tenant was afforded none of the remedies against third parties which the freehold tenant possessed but that the landlord was required to provide the premises throughout the term to the tenant.

In about 1235, the courts developed the action of *Quare eiecit infra terminium* in favor of the tenant.[70] Bracton explained the effect of this action in the following terms:[71]

> Such persons, when they were ejected before the expiration of their term, once sued by writ of covenant, but because that writ did not lie between any persons, only between him who had given the land to farm and for a term and him who had accepted it, [because] the obligation of agreement could not bind others, and also because even between such persons the matter could hardly be determined without difficulty, by counsel of the court [a remedy] is provided the termor against any who have ejected him by this will.

However, despite the scope suggested by Bracton, this action did not lie against ejectors in general, but rather only as against ejectors who had purchased the land from the landlord.[72] The development of this wider protection took place through developments in the law of trespass. At some stage after Bracton, the tenant acquired the right of action of trespass for damages; at some later stage he acquired the writ of trespass *de ejectione firmae* for this purpose; and at some later stage still, he acquired the right to recover possession as well as damages.[73] By 1500, these rights were settled[74] and a tenant was regarded as the owner of an estate in land.[75] As the holder of an estate, the tenant was regarded as holding by tenure. "By a paradox of history the relationship of landlord and tenant, originally no tenure at all, is now the only tenure which has any practical importance."[76] The tenure, however, is non-feudal.[77]

Contemporaneously with the development of rights on behalf of the tenant against third parties to protect possession of the premises was a change in the scope of the obligations of the landlord to the tenant. By 1500, an action no longer lay in covenant against the landlord in the event of an eviction by a stranger with no interest in the land, although an action still lay for eviction by one with title paramount.[78] The reason given for

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69. T. Platt, *A Practical Treatise on the Law of Covenants* (1834) at *313.
70. II, F. Pollock and F. Maitland, *supra* n. 65 at 107.
71. III, S. Thorne, *Bracton on the Laws and Customs of England* (1977) 161.
72. II, F. Pollock and F. Maitland, *supra* n. 65 at 108.
73. *Id.* at 108-109.
74. *Gernes* v. *Smyth* (1500) 94 S.S. 181, n. 7; J. Baker, *supra* n. 23 at 253.
75. Hicks, *supra* n. 27 at 450.
76. R. Megarry & H. Wade, *supra* n. 18 at 46.
77. *Id.* The relationship, however, is close. By analogy with the rules of feudalism, a tenant is subjest to forfeiture if he sets up a title hostile to that of his landlord: *Doe d. Ellerbrock* v. *Flynn* (1834) 1 C.M. & R. 136, 149 E.R. 1026 (Ex.); *Wisbech St. Mary Parish Council* v. *Lilley* [1956] 1 W.L.R. 121 (C.A.).
78. Platt, *supra* n. 69, *313, citing *Anon.* (1444) 22 Henry 6, 52 (B) p. 16 and *Anon.* (1535) 26 Henry 8, 3 (B), 11 Fitz, N.B. 145k.

this change in the law was that the tenant had been provided with another remedy — the action of trespass directly against the wrong-doer.[79]

There is some confusion with respect to the next stage in the development of tenant's rights and landlords' obligations and this confusion remains to the present date. The problem relates to the liability of the landlord arising from an implied covenant of quiet enjoyment in the event of the eviction of the tenant by one claiming under a title superior or paramount to that of the landlord.

It is clear from the discussion above that the landlord initially was liable to the tenant in the event of eviction by title paramount. However, *Andrews' Case*[80], decided in 1590, suggested that the landlord's liability at that stage was limited to his own acts:

> Gawdy and Fenner, Justices, were of the opinion, that upon a lease for years by indenture by *demisit, et ad firmam tradidit*, that a covenant lieth against the lessor if he enters: but if a stranger enters, it lieth not without an express warranty; for in covenant against the lessor, upon these words he shall recover the term itself.

As will be seen, however, this decision is not as clear as it might at first seem.

Sheppard's Touchstone of Common Assurances,[81] first published in 1628 is inconsistent on this issue. At one point,[82] it states that the implied covenant assures quiet enjoyment "against the lessor and all that come in under him by title, during the term". At another,[83] it states that: "The covenant in law upon the words, demise or grant, also for the quiet enjoying of the thing demised is general against all persons that have title during the term. . . . " At still another,[84] it takes an intermediate position by stating that " . . . the lessee shall quietly hold and enjoy the thing demised against all persons, at least having title under the lessor . . . ".

In the case of *Hart* v. *Windsor*[85], decided in 1843, Baron Parke stated that it was clear that the implied covenant of quiet enjoyment did extend to eviction by title paramount, citing as authority the first two passages from *Sheppard's* referred to above, despite their inconsistency.

The issue of whether the implied covenant of quiet enjoyment extends to eviction by title paramount continued to be debated in a series of cases at the turn of the last century. The debate was closely linked to the debate over whether the covenant of quiet enjoyment was to be implied at all in certain leases.

The first of this series of cases was *Baynes & Co.* v. *Lloyd & Sons*[86] involving eviction of a sub-tenant by the head landlord after the termina-

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79. *Hayes* v. *Bickerstaff* (1669) Vaughan 118, 124 E.R. 997 (C.P.): "By covenant in law, the lessee is to enjoy his lease against the lawful entry, eviction, or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason the law is solid and clear because against tortious acts the lessee hath proper remedy against the wrong doers."
80. (1590) 9 Eliz. Dyer. 258, 78 E.R. 469 (Q.B.).
81. *Sheppard's Touchstone of Common Assurances* (7th ed. 1820).
82. *Id.* at 165.
83. *Id.* at 166-167.
84. *Id.* at 160.
85. (1843) 12 M.&W. 68, 152 E.R. 1114 (Ex.).
86. [1895] 2 Q.B. 610 (C.A.).

tion of the head lease but during the term of the sub-lease.[87] The sub-lease did not include an express covenant of quiet enjoyment, nor was the word "demise" used. The Court of Appeal analyzed a number of authorities and concluded that in the absence of the word "demise", no covenant of quiet enjoyment could be implied in a lease. It determined that even if there were a covenant of quiet enjoyment in the lease there was a considerable conflict of authority as to whether it would extend to eviction by title paramount. In support of the proposition that it did not so extend, it cited *Andrew's Case*[88] and the first passage referred to above from *Sheppard's Touchstone*,[89] criticizing the reliance on the other passage by Parke B. in *Hart* v. *Windsor* for the contrary conclusion. Unlike its discussion with respect to the existence of the covenant, the Court's discussion as to its scope did not involve the presence or absence of the word "demise" in the lease. In the end, the Court decided that even if a covenant could be implied and whatever its scope, it terminated with the termination of the interest of the sub-landlord. The first aspect of the *Baynes* decision was criticized by the Court of King's Bench several years later in *Budd-Scott* v. *Daniell*.[90]

The lease in that case contained no express covenant of quiet enjoyment and used the word "let" rather than "demise". The action was brought for interference by the landlord. Each of the judges concluded that the Court of Appeal had been in error in concluding from the authorities cited that the implied covenant arose only upon the use of the word "demise". Reflecting the views of Cockburn C.J. in *Hall* v. *City of London Brewery Co.*,[91] Lord Alverstone stated:[92]

> Apart from authority it would certainly seem, on principle and in common sense, that when one person agrees to give possession of his house for a time to another, that ought to carry with it an agreement that he, the landlord, and those claiming through him, will not dispossess the tenant during that time. Therefore, unless there is some special meaning attached to the word "demise", the good sense of the thing would seem to be that, upon an agreement to let, a covenant or contract was to be implied that the landlord and those claiming under him would not disturb the possession of the tenant.

The Court determined that it was not bound by *Baynes & Co.* v. *Lloyd & Sons* and implied a covenant of quiet enjoyment in the lease.

Several months later, in *Jones* v. *Lavington*[93] the Court of Appeal faced a fact situation similar to that in *Baynes & Co.* v. *Lloyd & Sons*, involving interruption by title paramount with a lease which did not include an express covenant of quiet enjoyment and which used the word "let" rather than "demise". The case was decided on the authority of *Baynes & Co.* v. *Lloyd & Sons*, Collins M.R. stating: "[W]hether or not any contract is to be

87. In this case, the term of the sub-tenant exceeded that of his landlord, so that the landlord reserved no reversion. Although the point seems not to have been raised, under such circumstances the sub-lease would act as an assignment, the estate of the sub-landlord would terminate and the relationship of landlord and tenant between the sub-landlord and the sub-tenant would not arise: Woodfall, *supra* n. 18, §1-0005, §1-1743; Law Commission, *Codification of the Law of Landlord and Tenant, Report on Obligations of Landlords and Tenants* (Law Com. No. 67, 1975), 12-13.

88. (1590) 9 Eliz. Dyer. 258, 78 E.R. 469 (Q.B.).

89. *Supra* n. 81.

90. [1902] 2 K.B. 351.

91. (1862) 2 B. & S. 737, 121 E.R. 1245 (Q.B.).

92. [1902] 2 K.B. 351, 355, 356.

93. [1903] 1 K.B. 253 (C.A.).

implied out of the use of the word 'let', there certainly is not to be implied out of it a contract against the act of persons not claiming under the lessor, and that is enough to decide this case."[94] It is unclear whether his Lordship intended to suggest that the covenant would extend to interference by title paramount if the word "demise" were used rather than the word "let". It is submitted, however, that he was doing no more than purporting to apply *Baynes & Co.* v. *Lloyd & Sons* and that his decision should be read in that light.

In 1908, the Chancery Division considered the issues of the existence and the scope of the implied covenant of quiet enjoyment in *Markham* v. *Paget*.[95] That case involved a lease with no express covenant of quiet enjoyment which used the word "let" rather than "demise" and an interference with possession by persons claiming through the landlord. After a review of the authorities, Swinfen Eady J.[96] concluded, notwithstanding the decision in *Baynes & Co.* v. *Lloyd & Sons*, that the implied covenant of quiet enjoyment arose from the mere relationship of landlord and tenant and not from the specific use of the word "demise". In his opinion, this conclusion was "the only view consistent with common sense".[97] Although it was not necessary for a decision in the case, his Lordship went on to consider the analysis in *Baynes & Co.* v. *Lloyd & Sons* of the scope of the implied covenant of quiet enjoyment. Referring to *Woodfall's Landlord and Tenant*,[98] he pointed out that prior to the *Baynes* decision it had been generally thought that the implied covenant did extend to interruptions by title paramount. The only case that the Court of Appeal had cited as authority for the proposition that it did not so extend was *Andrews' Case*, the report of which is cited in full above.[99] Swinfen Eady J. referred to the discussion of *Andrews' Case* in *Platt on Covenants*[100] to the effect that it was in reference to tortious entries by the landlord and by strangers. In his Lordship's view, the case was authority for the proposition that an action would lie on the covenant for a tortious entry by the landlord, but not for a tortious entry by a stranger. It did not involve the consequence of lawful entry by one with title paramount as assumed by the Court of Appeal. Finally, his Lordship pointed out that although the issue of the scope of the implied covenant had not been determined by the *Baynes* case, the Court of Appeal had purported to rely on *Baynes* on this issue in its decision in *Jones* v. *Lavington*. Had it been necessary to decide the issue, his Lordship stated that he would have been bound by the latter decision.

2. *The Modern View of the Implied Covenant of Quiet Enjoyment*

Presently, there can be little doubt that despite the views of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons*, the covenant of quiet enjoy-

94. *Id.* at 257. This case involved a restriction upon the use of the premises enforced by a person holding title paramount. It could also have been decided on the basis that the lease included no implied covenant that the premises would be suitable for the tenants use as in *Hill* v. *Harris* [1965] 2 Q.B. 601 (C.A.).

95. [1908] 1 Ch. 697.

96. It is interesting to note that his Lordship had been counsel for the landlord in *Baynes & Co.* v. *Lloyd & Sons*.

97. *Supra* n. 95 at 716.

98. (18th ed. 1908.)

99. At p. 244.

100. T. Platt, *supra* n. 69, *318-*319.

ment is implied in a lease from the mere relationship of landlord and tenant.[101] It is submitted that it is inconsistent for a contract which does not include such a covenant to be considered a lease. If the landlord does not covenant, at least for himself, that he will not interfere with the tenant's possession, it is difficult to see how the contract can be said to be one granting exclusive possession of the land to the tenant, which is one of the essential elements of a lease.[102]

The issue of whether this implied covenant extends to interference by title paramount is less clear. Prior to *Baynes & Co.* v. *Lloyd & Sons*, the prevailing view seems to have been that the covenant did so extend (although the correctness of this view and in particular, the correctness of the decision in *Hart* v. *Windsor* is not free from doubt.) The Court of Appeal in *Baynes* did not determine the issue — it merely noted that there was a considerable conflict of authority and cited authority for both sides of the issue. As pointed out by Swinfen Eady J. in *Markham* v. *Paget*, the authority cited by the Court of Appeal to suggest that the covenant did not extend to interference by title paramount was questionable. However, the Court of Appeal seemed to have felt that the issue had already been decided and based their decision in *Jones* v. *Lavington* accordingly.

There is a conflict between the English and Canadian writers as to whether *Jones* v. *Lavington* applies to the implied covenant of quiet enjoyment generally or whether it is restricted to it factual context, where the word "demise" is not used in the lease. In the view of Woodfall,[103] Hill and Redman,[104] Megarry and Wade,[105] Lamont,[106] and the English Law Commission,[107] the covenant is qualified and does not extend to interference by title paramount. In the view of Williams[108] and H.D. Guthrie, in a Special Lecture of the Law Society of Upper Canada,[109] the covenant is qualified only if the word "demise" is not used in the lease.

It is submitted that the former view is correct. The Court of Appeal in *Jones* v. *Lavington* did no more than refer to their decision in *Baynes & Co.* v. *Lloyd & Sons*. In that case, the Court drew a distinction between those leases using the word "demise" and those using other words to denote leasing only in the context of the existence of an implied covenant and not in the context of its scope. While the only English cases that have determined that the covenant is qualified have involved leases where the word "demise" is not used, none have expressly drawn a distinction with respect to this point on that basis. If there is no logic in basing the existence of the implied covenant on the use of the word "demise",[110] there is similarly no logic in determining whether it is qualified on that basis.

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101. *Kenny* v. *Preen* [1963] 1 Q.B. 499 (C.A.); Woodfall, *supra* n. 18, §1-1283.
102. *Supra* n. 60.
103. *Supra* n. 18, §1-1284.
104. *Supra* n. 60 at 197.
105. *Supra* n. 18 at 678.
106. D. Lamont, *Residential Tenancies* (3d ed. 1978) at 29.
107. *Supra* n. 87 at 9.
108. *Supra* n. 18, §85.9.
109. Guthrie, "The Covenant of Quiet Enjoyment", in *The Lease in Modern Business*, Law Society of Upper Canada Special Lectures (1965) 29.
110. *Budd-Scott* v. *Daniell* [1902] 2 K.B. 351, 355-356.

This problem has been confused by the recent decision of the British Columbia Court of Appeal in *Horse & Carriage Inn Ltd.* v. *Baron*.[111] That case involved tortious interference with possession by the landlord. The Court cited Woodfall[112] to the effect that the implied covenant of quiet enjoyment is qualified, but applied the qualification to tortious acts of the landlord rather than to interference by title paramount. In fact, Woodfall[113] suggests the contrary conclusion with respect to tortious acts by the landlord by citing *Andrews' Case.*

It should be noted that in Ontario, by the Conveyancing and Law of Property Act,[114] a covenant of quiet enjoyment is implied in a lease in the form found in the Short Form of Conveyances Act.[115] To the extent that this is applicable,[116] the statutory implied covenant is clearly qualified and does not extend to interference by title paramount.

In summary, the implied covenant of quiet enjoyment arises from the relationship of landlord and tenant. While the landlord was initially liable for interference with possession, whether lawful or unlawful, by himself or by strangers, with the development of independent rights on behalf of the tenant against third parties, the landlord ceased to be liable for tortious interference by strangers. At the turn of the last century, it was determined that the landlord was not liable for eviction by title paramount, so the covenant appears now only to relate to interference by the landlord himself or those lawfully claiming under or through him.

3. *Duration of the Implied Covenant*

In addition to the question of the scope of the implied covenant of quiet enjoyment, there is some controversy over the duration of the covenant. It is generally stated that the implied covenant extends no longer than the landlord's interest in the property.[117] Hence, in the event of a sublease, the term of which is longer than the term of the head lease and in the event of eviction of the sub-tenant by the head landlord upon termination of the head lease, no action will lie on the covenant against the sub-landlord by the sub-tenant.[118]

Such a result could equally be explained by the rule that the implied covenant does not extend to interruption by title paramount. However, a distinction is to be drawn between the two rules in the event of interference by one claiming through the landlord after the termination of the interest of the landlord. The decision of the Saskatchewan Court of Appeal in *Eagles Hall Association of Swift Current, Limited* v. *Bertin*[119] involved just such a fact situation. In that case, the tenant was evicted by the mortgagee of the property following foreclosure resulting from default of the landlord. The mortgage had been executed by the landlord

111. (1975) 53 D.L.R. (3d) 426.

112. *Woodfall's Landlord and Tenant* (20th ed. 1921) at 838.

113. Woodfall, *supra* n. 18, §1-1287 (note 7).

114. R.S.O. 1970, c. 85, s. 23 (1), (1), (iii).

115. R.S.O. 1970, c. 435, Schedule B. (3).

116. *See* n. 128, *infra.*

117. *Adams* v. *Gibney* (1830) 6 Bing. 656, 130 E.R. 1434 (C.P.); *Penfold* v. *Abbott* (1862) 32 L.J.Q.B. 67; *Baynes & Co.* v. *Lloyd & Sons* [1895] 2 Q.B. 610 (C.A.); Woodfall, *supra* n. 18, §1-1289; Hill & Redman, *supra* n. 60 at 197.

118. *Baynes & Co.* v. *Lloyd & Sons, id.*.

119. [1922] 1 W.W.R. 374.

himself and the lease contained no express covenant of quiet enjoyment. The Court concluded that the covenant did not cease with the landlord's interest in the land, as his interest had terminated through his own default.[120] In his judgment, McKay J.A. further concluded that the principle was not that the covenant terminated with the landlord's title, but only that the covenant did not extend to eviction by title paramount. To reach this conclusion, he relied upon the decision of Lord Coleridge C.J. in *Schwarz* v. *Locket*.[121] It is submitted that the Saskatchewan Court of Appeal erred in reaching this latter conclusion.

The *Schwartz* case, decided in 1889, involved eviction of the sub-tenant by the superior landlord after the termination of the sub-landlord's interest. In a short judgment, Lord Coleridge C.J. decided the case on the basis that the covenant did not apply to eviction by a superior landlord, relying upon *Woodfall on Landlord and Tenant*. It is submitted that Lord Coleridge C.J. meant only that no action arising from eviction by the superior landlord would lie because of the termination of the sub-landlord's estate.

As discussed above,[122] prior to the decision of the Court of Appeal in 1895 in *Baynes & Co.* v. *Lloyd & Sons*[123] it had been thought that the implied covenant did extend to eviction by title paramount and both the 13th and 14th editions of *Woodfall*, published in 1886 and 1889 respectively, are consistent with this view.[124] Further, both of these editions provide: "A covenant in law, i.e. an implied covenant, ceases with the estate of the lessor, and does not necessarily continue during the whole term to be granted."[125] To have been consistent with the state of the law as understood at the time and to have been consistent with the authority cited, the basis of the decision must have been the termination of the estate of the landlord. However, even if the basis for the decision in *Schwartz* v. *Locket* was that the implied covenant did not apply to eviction by title paramount, the court did not exclude as an alternative ground the principle that the covenant would not survive the termination of the landlord's estate.

It is therefore submitted, notwithstanding the *Eagles Hall* case, that the principle that the implied covenant terminates with the interest of the landlord predates the principle that it does not extend to eviction by one holding title paramount,[126] and that the two principles are independent.[127]

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120. *But see Bellamy* v. *Barnes* (1879) 44 U.C.Q.B. 315 (Ont. C.A.) discussed *infra* at pp. 254-255.

121. (1889) 38 W.R. 142 (Q.B.)

122. At p. 247.

123. [1895] 2 Q.B. 610 (C.A.)

124. (13th ed. 1886), 674; (14th ed. 1889), 695.

125. (13th ed. 1886), 676; (14th ed. 1889), 696.

126. *Adams* v. *Gibney* (1830) 6 Bing. 656, 130 E.R. 1434 (C.P.), relying upon *Swan* v. *Stransham and Searles* (1567) 3 Dyer 257 (b) (K.B.), 73 E.R. 570, the report of which provides: "[T]he covenant in law ends with the estate and interest of the lessee . . . ". It should be noted that in quoting this passage from *Swan*, the court in *Adams* used the word "lessor" rather than "lessee". The court in *Adams* also cited as authority *Sheppard's Touchstone*, *supra* n. 81 at 160. However, *Sheppard's Touchstone* suggests that the rule is unclear: "[I]n this case [an implied covenant of quiet enjoyment] . . . . the lessee shall quietly hold and enjoy the thing demised . . . at least during the lessor's life, and, (as some think,) during the whole term . . . ".

127. *Baynes & Co.* v. *Lloyd & Sons* [1895] 2 Q.B. 610, 617. (C.A.)

B. *The Implied Covenant of Title*

From the results in the cases mentioned applying these two principles, it is apparent that the landlord does not impliedly covenant that he has title to grant the lease for its full term.[128] There is, however, an implied covenant in a lease not containing an express covenant of quiet enjoyment that the landlord has some title to the property and that the landlord will put the tenant into possession of the premises at the commencement of the term.[129]

In England, this covenant arises "by the very force of the liability which is imposed on a lessor under the covenant of quiet enjoyment"[130] and "it operates from the moment when the demised term starts to run".[131] The simplicity of this position results from the abolition of the doctrine of *interesse termini* by the 1925 Law of Property Act.[132] The position in Canada is more complex, as the doctrine of *interesse termini* has only been abolished in certain jurisdictions and with respect to certain tenancies. It has been abolished with respect to all tenancies in Alberta,[133] and with respect to residential tenancies in each of the other common law provinces with the exception of Nova Scotia.[134] To the extent that the doctrine of *interesse termini* is applicable, it is necessary to distinguish between the rights of a tenant who has not obtained possession and one who has obtained possession.

At common law, a tenant who has not obtained possession of the premises does not have an estate in the land; he has only an *interesse termini* or interest in a term. Such a tenant cannot maintain an action on the covenant of quiet enjoyment, nor can he bring an action in trespass.[135] Therefore, to the extent that the covenant of title is part of the covenant

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128. *Eg., Baynes & Co.* v. *Lloyd & Sons, id.; Adams* v. *Gibney* (1830) 6 Bing. 656, 130 E.R. 1434 (C.P.). It should be noted that pursuant to the Conveyancing and Law of Property Act, R.S.O. 1970, c. 85, s. 23 (1), which incorporates the provisions of The Short Form of Conveyances Act, R.S.O. 1970, c. 435, Schedule B, (1), (4), a conveyance (including a lease) is deemed to include covenants that the grantor has "good right, full power and absolute authority to convey the said lands" and that the lands are free of all encumbrances. However, this applies only when the grantor is expressed to convey as beneficial owner, a form not commonly used in a lease. *See* R. Megarry & H. Wade, *supra* n. 18 at 678 and Guthrie, *supra* n. 109 at 30.

129. Hill & Redman, *supra* n. 60 at 198.

130. *Miller* v. *Emcer Products Ltd.* [1956] 1 Ch. 304, 321 (C.A.), *per* Romer L.J.

131. *Id.*

132. 15 Geo. 5, c. 20, s. 149.

133. Landlord and Tenant Act, 1979, S.A. 1979, c. 17, s. 53(1). Section 14(a) provides a statutory covenant that residential premises will be available for occupation by the tenant at the commencement of the tenancy and section 30 provides remedies for breach of this covenant.

134. Residential Tenancy Act, S.B.C. 1977, c. 61, s. 9(2); Residential Tenancies Act, S.S. 1973, c. 83, s. 11; Landlord and Tenant Act, R.S.M. 1970, c. L-70, as am. by S.M. 1970, C. 106, s. 89; Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 87; Residential Tenancies Act, 1979, S.O. 1979, c. 78, s. 5(8) (unproclaimed). Section 5 (9) of this latter Act provides a remedy in damages in the event the tenant is not permitted to occupy the premises at the commencement of the tenancy. Residential Tenancies Act, S.N.B. 1975 (2d), c. R-10.2, s. 10; Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 93; Landlord and Tenant (Residential Tenancies) Act, S.N. 1973, Vol. 1, No. 54, s. 8.

135. *Wallis* v. *Hands* [1893] 2 Ch. 75, 85-96. It is submitted that the criticism of this case by Romer L.J. in *Miller* v. *Emcer Products Ltd.* [1965] 1 Ch. 304 (C.A.) must be read in the light of the abolition of the doctrine of *interesse termini* in Great Britain. In this regard, *see* Russell, "Landlord's Covenant for Quiet Enjoyment" (1976) 40 *Convey.* (N.S.) 427, 435.

of quiet enjoyment,[136] it provides no relief to the tenant who has been unable to obtain possession. A tenant with an *interesse termini* does have the right to sue another in possession of the premises for ejectment.[137] In addition, it was determined in *Coe* v. *Clay*[138] that he has a right of action for damages against the landlord for failing to deliver up possession of the premises. The court was of the opinion in that case that a landlord agrees to give possession to the tenant and not merely a right of action as against one in possession of the premises.

A tenant who has obtained possession of the premises has an action on the covenant of quiet enjoyment. Notwithstanding the qualified nature of that covenant, an action will lie in the event of eviction by title paramount if the landlord had no title whatsoever to the premises.[139] It is interesting to note that a tenant under an agreement to lease has wider rights in this respect than a tenant under a lease, as the former contains an implied covenant that the intended landlord has title to grant the lease.[140]

To the extent that the doctrine of *interesse termini* does not apply, the effect of the implied covenant for title has been summarized by the Law Commission in the following terms:[141]

> So far as the implied covenant is a covenant for the landlord's title it is not a covenant that he is entitled to grant the term he purports to grant, but only that he is entitled to grant some term. It does not warrant that the premises are free from restrictive covenants nor that they may be legally used for any purpose, even though let for such use. However, it does include a covenant to put the tenant into possession whether there is a formal lease, an agreement or an oral letting.

C. *Implied Covenant not to Derogate from the Grant*

Whether one sells or leases land to be used for a particular purpose, he cannot act so as to render the land unfit for that purpose — what he gives with one hand he cannot take away with the other.[142] In its application to leases, the rule is the following:[143]

> [W]here a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way that it is ordinarily carried on. . . .

This rule applies notwithstanding the fact that the landlord does not covenant that the premises are fit for the use intended.[144]

There are difficulties in considering this rule as a matter of contract, as it is binding on purchasers from the grantor of the land adjoining the demised premises as well as on the grantor himself.[145] Rather, it appears

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136. *Line* v. *Stephenson* (1838) 4 Bing. N.C. 678, 132 E.R. 950 (C.P.) *aff'd.* (1838) 5 Bing. N.C. 183, 132 E.R. 1075 (Ex. Ch., *per* Alderson B. in argument; *Miller* v. *Emcer Products Ltd.*, *supra* n. 135.
137. *Cleveland* v. *Boice* (1862) 21 U.C.Q.B. 609 (Ont. C.A.).
138. (1829) 5 Bing. 440, 130 E.R. 1131 (C.P.). *See also Jinks* v. *Edwards* (1856) 4 W.R. 303 (Ex.).
139. *Forrest* v. *Greaves* [1923] 3 W.W.R. 658 (Sask. K.B.).
140. *Stranks* v. *St. John* (1867) L.R. 2 C.P. 376. *See* Russell, *supra* n. 133 at 428.
141. Law Commission, *supra* n. 87 at 9-10.
142. *Birmingham, Dudley & District Banking Co.* v. *Ross* (1888) 38 Ch. D. 295, 313; R. Megarry & H. Wade, *supra* n. 18 at 820.
143. *Aldin* v. *Latimer, Clark, Muirhead & Co.* [1894] 2 Ch. 437, 444, *per* Stirling J.; *Clark's-Gamble of Canada Ltd.* v. *Grant Park Plaza Ltd.* [1967] S.C.R. 614, 625.
144. Scane, "The Relationship of Landlord and Tenant" in *The Lease in Modern Business*, Law Society of Uper Canada Special Lectures (1965) 1, 9.
145. Elliott, "Non-Derogation from Grant" (1914) 30 *L.Q.R.* 244, 249, 250.

to grant certain property rights to the tenant over the neighboring land, often described as easements or quasi-easements.[146]

D. *The Express Covenant of Quiet Enjoyment*

As with any contract, it is clearly possible for the parties to a lease to agree upon their own specific terms. However, the covenant of quiet enjoyment is generally expressed in a standard form, limited to interference by the landlord and those claiming under him. For example, the Ontario Short Forms of Leases Act[147] provides:

> And the lessor doth hereby covenant with the lessee, that he paying the rent hereby reserved and performing the covenants hereinbefore on his part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruptions or disturbance from the lessor, or any other person or persons lawfully claiming by, from or under him.

This qualified form of a covenant of quiet enjoyment does not extend to interference by title paramount[148] or to unlawful acts by one other than the landlord.[149] Despite the apparently broad scope of the covenant, purporting to apply to any interruption by the landlord or those claiming through him, it does not apply to an interference if such was not a reasonably foreseeable consequence of the act of the landlord or those claiming through him.[150]

The express covenant of quiet enjoyment differs from the implied covenant in two ways. Firstly, the covenant does not terminate with the estate of the lessor, so that an action will lie against the landlord in the event of interference by the landlord or one claiming through him after the estate has ended.[151] Secondly, the express covenant excludes the implied covenant of quiet enjoyment and to the extent that the covenant of title is considered to be part of the covenant of quiet enjoyment, it is excluded as well.[152] In the case of *Miller* v. *Emcer Products Ltd.*,[153] it was argued that the express covenant did not exclude the obligation of the landlord to put the tenant into possession of the premises. This obligation, as shown by the case of *Coe* v. *Clay*,[154] is implied notwithstanding the operation of the doctrine of *interesse termini* which prevents an action on the covenant of quiet enjoyment before possession is taken and hence, it was argued, must exist outside the covenant. It was further argued that where there is an express covenant of quiet enjoyment, the maxim *expressio unius est exclusio alterius* operates only to exclude the implied covenant, leaving the *Coe* v. *Clay* obligation intact. The Court of Appeal held that the express covenant excludes any obligation to put the tenant into possession. It was of the opinion that to the extent that *Coe* v. *Clay* was based on the operation of the doctrine of *interesse termini*, the basis for that decision

146. *Id.*; R. Megarry & H. Wade, *supra* n. 18 at 820.

147. R.S.O. 1970, c. 436, Schedule B. *See* E. Williams, *supra* n. 18 at 357 for a list of similar legislation in other provinces.

148. *Harrison, Ainslie & Co.* v. *Lord Muncaster* [1891] 2 Q.B. 680, 684 (C.A.); *Bellamy* v. *Barnes* (1879) 44 U.C.Q.B. 315 (Ont. C.A.).

149. *Jones* v. *Refectory Steak House Ltd.* (1975) 54 D.L.R. (3d) 465 (B.C.S.C.).

150. *Harrison, Ainslie & Co.* v. *Lord Muncaster* [1891] 2 Q.B. 680, 686, 689, 692.

151. *Evans* v. *Vaughan* (1825) 4 B. & C. 261, 107 E.R. 1056 (K.B.).

152. *Line* v. *Stephenson* (1838) 4 Bing. N.C. 678, 132 E.R. 950 (C.P.), *aff'd* (1838) 5 Bing. N.C. 183, 132 E.R. 1075 (Ex. Ch.).

153. [1956] 1 Ch. 304 (C.A.).

154. (1829) 5 Bing. 440, 130 E.R. 1131 (C.P.).

had been eliminated by abolition of the doctrine. It was also of the opinion that *Coe* v. *Clay* had been based on a restricted view of the circumstances under which a covenant of quiet enjoyment would be implied, a matter which had been settled by *Markham* v. *Paget*.[155] It would therefore appear that in Canada, at least to the extent that the doctrine of *interesse termini* has been abolished in certain jurisdictions and with respect to certain types of tenancies, an express covenant of quiet enjoyment will eliminate any implied covenant to give possession and any implied covenant of title.

The effect of an express covenant of quiet enjoyment upon the obligation of the landlord not to derogate from his grant is related to the issue of whether this obligation is a matter of contract. In *Grosvenor Hotel Company* v. *Hamilton*,[156] the Court of Appeal determined that an action for breach of covenant arising from damage to the demised premises by the actions of the landlord on adjoining premises would not lie where the lease contained an express covenant of quiet enjoyment. It did hold, however, that the landlord could not derogate from his grant, with the right of the tenant being described by Davey L.J. as being "in the nature of an easement not to have anything done which disturbs the stability of the property".[157]

The express covenant of quiet enjoyment, then, is wider than the implied covenant in that it extends throughout the term of the lease, but narrower in that it excludes any implied covenant of title or implied covenant to provide possession of the premises. Both the express and implied covenants exclude interference by title paramount and in both cases the landlord is restricted in the use he may make of the adjoining lands. The position of the landlord under a lease with an express covenant of quiet enjoyment is graphically described by Woodfall in the following passage:[158]

> This covenant varies somewhat in its phraseology, but it may be laid down as an almost universal rule that, however framed, it may be safely entered into by the lessor who never had any title whatever to the demised premises or any part thereof. . . .

An analysis of the contractual obligations of a landlord would not be complete without at least a brief discussion of the type of conduct amounting to a breach of the covenant of quiet enjoyment. It should initially be noted that the covenant does not place an obligation on the landlord to protect either the "quiet" or the "enjoyment" of the tenant as these words are generally understood. The word "quiet" does not mean an absence of noise, but rather "without interference, without interruption of possession"[159] and the word "enjoyment" refers to the "exercise and use of the right [of possession] and having full benefit of it, rather than to deriving pleasure from it".[160] The essence of the covenant, then, is that the landlord "impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term".[161]

155. (1980) 1 Ch. 697. *See supra*, p. 246.
156. [1894] 2 Q.B. 836 (C.A.).
157. *Id.* at 841-842.
158. Woodfall, *supra* h. 18, §1-1289 (footnotes omitted.).
159. *Jenkins* v. *Jackson* (1888) 40 Ch. D. 71, 74, *per* Kekewich J.
160. *Kenny* v. *Preen* [1962] 1 Q:B. 499, 511 (C.A.), *per* Pearson L.J.
161. *Id.*

In its most basic sense, the covenant acts to prohibit positive acts by the landlord which physically interfere with the tenant's use of the premises, such as erecting a gate to restrict access to the premises.[162] However, it may also extend to omissions by the landlord where the consequence of the omission interferes with the tenant's use of the premises if the landlord was under a duty to act.[163] Further, it was suggested by Pearson L.J. in *Kenny* v. *Preen*[164] that even in the absence of direct physical intervention with use of the premises, there may be a breach of the covenant by a "deliberate and persistent attempt by the landlord to drive the tenant out of his possession of the premises by persecution and intimidation".

A breach of the covenant of quiet enjoyment may also occur in another sense where the landlord acts in such a way as to substantially interfere with the tenant's rights with respect to the property. For example, in *Edge* v. *Boileau*,[165] the landlord breached the covenant by demanding that the sub-tenants pay their rent to him rather than to the sub-landlord and threatening legal proceedings in default of such direct payment.

The limited nature of the obligation of the landlord under either an express or an implied covenant of quiet enjoyment is illustrated by an examination of cases where eviction of the tenant arises through the default of the landlord. Consistent with the trend noted earlier of diminishing obligations on the part of the landlord,[166] the earlier cases held the landlord to a higher standard. In the case of *Stevenson* v. *Powell*[167] decided in 1612, it was determined that the landlord was in breach of the covenant of quiet enjoyment where he failed to pay the rent under the head lease and the tenant was evicted by the superior landlord. However, in the 1892 decision of the Court of Appeal in *Kelly* v. *Rogers*,[168] the opposite result was reached. In that case, the sub-landlord failed to repair as required by the head lease and the sub-tenant was evicted as a result. In his reasons for dismissing the sub-tenant's action on the covenant of quiet enjoyment, Fry L.J. stated: "It is quite true that the lessor's superior landlord did enter by reason of the default of the lessor, but that default does not make the superior landlord claim by, through or under the lessor of the plaintiff."[169]

The decison of the Saskatchewan Court of Appeal in *Eagles Hall Association* v. *Bertin*[170] has already been discussed.[171] The court held there that when the landlord defaults under a mortgage made by him and the tenant is evicted by the mortgagee, an action will lie on the implied covenant as the mortgagee claims through the landlord. This should be contrasted with the decision of the Ontario Court of Appeal in *Bellamy* v.

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162. *Andrews* v. *Paradise* (1724) 8 Mod. 318, 88 E.R. 228 (K.B.).
163. *Booth* v. *Thomas* [1926] Ch. 397 (C.A.); *Cohen* v. *Tannar* [1900] 2 Q.B. 609, 614 (C.A.).
164. [1962] 1 Q.B. 499, 513.
165. (1885) 16 Q.B.D. 117 (D.C.).
166. *Supra* at pp. 243-249.
167. (1612) 1 Bulst. 182, 80 E.R. 871 (K.B.).
168. (1891-4] All E.R. 974.
169. *Id.* at 976.
170. [1922] 1 W.W.R. 374.
171. *Supra* at pp. 248-249.

Barnes,[172] which involved a default by the landlord under a mortgage made by the landlord's predecessor in title to the premises, followed by eviction of the tenant by the mortgagee. It was held that no action lay on the covenant of quiet enjoyment, as the claim of the mortgagee was not by, from or under the landlord, but rather the landlord's predecessor in title. It would therefore appear that the covenant of quiet enjoyment does not extend to eviction by title paramount even where the eviction arises through the default of the landlord. Canadian legislation in this area has approached the problem by providing relief from forfeiture for the tenant rather than by providing a remedy as against the landlord.[173]

E. *What is a Lease?*

A lease is not only a conveyance, it is also a contract.[174] Having analyzed the nature of the landlord's obligations under a lease, it is now possible to attempt to characterize the nature of a lease as a contract. A lease is clearly not an agreement by one with a sufficient interest in the property to place another in possession of the property and to protect that possession against all others. While this might have been a rough summary of the nature of the landlord's covenant in its early stages, the landlord ceased to be liable for the tortious acts of third parties by the beginning of the sixteenth century. Nor is a lease an agreement to place another in possession of the property and to protect that possession against others with lawful claims. Eviction or interference by title paramount is excluded by the wording of the standard covenant of quiet enjoyment and since the beginning of this century seems to have been excluded from the implied covenant. In the absence of specific clauses to that effect, a lease which includes an express covenant of quiet enjoyment is not even an agreement that the landlord has some title to the property or that the tenant will be able to obtain possession of the premises. In this light, it cannot be said that a lease is an agreement to provide a right to possession of the premises throughout the term.

Rather, the contract would appear to be in the nature of an agreement that the landlord (and others claiming through him) will not act so as to substantially interfere with the tenant's possession of the premises. When the rights of the tenant are separated into those arising through the contract and those arising outside of the contract, the lease appears substantially as an agreement by the landlord not to interfere with those rights of the tenant which arise outside of the contract. This conclusion is based on the analysis that once an estate has vested in the tenant, the contractual rights of the tenant against the landlord effectively are little more than the property rights of the tenant against strangers.

Having recognized that a lease is a contract, the Supreme Court of Canada has suggested that the rules of contract should logically be applied to leases.[175] Legislative reform addressing the problem commonly characterized as the traditional view of the contract as a conveyance has in part adopted this suggestion as the solution.[176] However, the Supreme

172. (1879) 44 U.C.Q.B. 315.

173. *See* E. Williams, *supra* n. 18 at 531 for a list of such legislation.

174. *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.* [1971] S.C.R. 562, 576.

175. *Id.*

176. *See supra*, pp. 238-239.

Court of Canada has also recognized that this characterization of the problem may be inadequate: "A common characterization of the problem in this appeal is whether it is to be resolved according to the law of property or according to the law of contract; but, in my opinion, this is an oversimplification."[177] If the characterization of the problem is incorrect, it may be that the solution based on that characterization is inadequate. The test is the application to a lease of the rules of contract respecting implied terms, dependency of covenants and frustration.

III. APPLICATION OF CONTRACT RULES TO A LEASE

A. *Implied Terms*

As discussed above,[178] the rule that a lease carries with it no implied covenant of fitness of the premises for the use intended by the tenant has been attributed to the view of a lease as a conveyance. However, applying to a lease the rules of contract for implying terms appears to place the tenant in no better position. It should be remembered that in the absence of an express covenant of quiet enjoyment, the law will imply such a covenant from the relationship of landlord and tenant[179] and much of the analysis of the nature of the lease as a contract was based upon that implied covenant. The inquiry as to whether a covenant of fitness for intended use should reasonably be implied in a lease contract is therefore in part an analysis of whether the latter covenant reasonably arises from the former.

The classic case on the power of a court to imply terms in a contract is the 1889 decision of the Court of Appeal in *The Moorcock*.[180] In that case, Bowen L.J. stated:[181]

> . . . I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. . . .
>
> The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, *leaving the law to raise such inferences as are reasonable from the very nature of the transaction.* [emphasis added]

In a lease which does not expressly provide that the premises will be suitable for the intended purpose of the tenant, is such a clause necessary to give efficacy to the transaction? Does such a clause reasonably arise from the very nature of the transaction? If the transaction has been properly characterized as merely an agreement by the landlord not to interfere with the tenant's possession, both of these questions would appear to be answered in the negative. Given that the nature of the transaction is not to ensure that the tenant will be able to use the premises at all throughout the term, it seems difficult to conclude that the landlord must impliedly ensure that the tenant will be able to use the premises for a particular purpose throughout the term. It would therefore appear that

177. [1971] S.C.R. 562, 564.

178. At pp. 235-236.

179. *Markham* v. *Paget* [1908] 1 Ch. 697.

180. (1889) 14 P.D. 64 (C.A.). For a criticism of the fact that this case has come to be regarded as the leading authority in the area, *see* R. McElroy & G. Williams, *Impossibility of Performance* (1944) 199.

181. *Id.* at 68, 70.

while the doctrine of *caveat lessee* may be attacked as simply a result of the view of a lease as a conveyance rather than a contract, the effect of this doctrine is consistent with the application of contract rules respecting implied terms to a lease.

The approach of the Canadian legislatures with respect to the problem of physical suitability of premises for residential use has been to impose a statutory obligation on the landlord to keep the premises in such a state of repair as to be suitable for habitation by the tenant.[182] In every common law province except Alberta,[183] this obligation applies throughout the tenancy, which seems somewhat incongruent with the qualified nature of the covenant of quiet enjoyment.

B. *Discharge of Obligations*

1. *Discharge for Breach and Frustration*

As already noted,[184] there has been substantial criticism of the rules that covenants in a lease are in general viewed as independent and that the doctrine of frustration does not apply to leases. The criticism has been particularly strong in relation to the consequence that the fact that premises are rendered unsuitable for the use of the tenant — either through the operation of external factors or the default of the landlord — does not relieve the tenant of his obligation to pay rent throughout the term of the lease. Frustration and discharge for breach are aspects of the same problem: "In what event will a party to a contract be relieved of his undertaking to do that which he has agreed to do but has not yet done."[185] These two aspects may therefore be conveniently discussed together.

The issue of when a party will be relieved of his obligations as the result of the default of the other has been discussed in terms of whether the obligations of the parties are dependent or independent,[186] whether the obligation that has been breached is a condition precedent,[187] and whether the obligation that has been breached is a condition or a warranty.[188] It can be viewed in the context of the effect of the breach on the obligations of the party not in default or in the context of the rights of the party in default. To use the terminology of dependent and independent covenants, if the obligation upon which the party has defaulted and the obligations of the party not in default are dependent, the breach will relieve the party not in default of his obligations and correspondingly will deprive the party in default of his action for failure of the other to carry out these obligations.

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182. *See* n. 43, 44, *supra.*
183. The obligation in Alberta applies only at the commencement of the tenancy: Landlord and Tenant Act, 1979, S.A. 1979, c. 17, s. 14 (c).
184. *Supra* at 237-238.
185. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 66 (C.A.), *per* Diplock L.J.
186. *Cehave N. V.* v. *Bremer Handelgesellschaft m.b.H., The Hansa Nord* [1975] 3 W.L.R. 447, 453.
187. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd., supra* n. 185 at 67.
188. *Id.* at 69.

In *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*,[189] Diplock L.J. set out the test for determining whether an event will relieve a party of his obligations under the contract:[190]

> . . . [D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

His Lordship stressed that the key element of this test is not the obligation that has been breached, but the event to which the breach gives rise.[191] It is difficult to know in many instances whether the breach of the obligation will relieve the other party of his outstanding obligations until the consequences of the breach are known.[192]

With respect to the issue of frustration, until the mid-nineteenth century, English law did not recognize that one could be relieved of his obligations as the result of an event which did not constitute a default by the other party.[193] The rationale for this position was explained in the 1647 case of *Paradine* v. *Jane*,[194] the report of which provides:

> . . .[W]hen the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract. Therefore, if the lessee covenants to repair a house, although it is burnt by lightning or thrown down by enemies yet he ought to repair it.

However, in the 1863 case of *Taylor* v. *Caldwell*,[195] the court determined that an event other than the default of one of the parties could bring the obligations of the parties to an end, starting the development of the doctrine of frustration.

2. *"Substantially the Whole Benefit"*

In its present form the test as to whether an event will frustrate a contract is the same as the test of whether an event will terminate a party's obligations when it arises from the default of the other party.[196] The difference between the two lies in the consequences arising from the event — if it arises from the default of the party, he cannot rely on it to relieve him of further performance; if it arises from the default of neither party, both are relieved of further undertakings.[197] The test of whether an event will lead to frustration of the contract has also been stated in terms of

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189. [1962] 2 Q.B. 26.

190. *Id.* at 70. A restriction in the application of this test in favour of the classification of terms as conditions or warranties in order to provide greater certainty was suggested in *Maredelanto Compania Naviera SA* v. *Bergbau-Handel G.m.b.H. The Mihalis Angelos* [1970] 3 All E.R. 125, 138 (C.A.) *per* Megaw L.J. However, the *Hongkong Fir* test was reaffirmed in *Cehave N.V.* v. *Bremer Handelgesellschaft m.b.H., The Hansa Nord*, *supra* n. 186. *See* Reynolds, "Discharge of Contract by Breach" (1976) 92 *L.Q.R.* 17.

191. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, *supra* n. 185 at 69.

192. *Id.* at 70.

193. *Id.* at 67.

194. (1647) Aleyn 26; 82 E.R. 897 (K.B.).

195. (1863) 3 B. & S. 826; 122 E.R. 309 (Q.B.).

196. "This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract. . . . "; "The test whether the event relied upon has this consequence [relieving a party of performance] is the same whether the event is the result of the other party's breach of contract or not . . . ": *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, *supra* n. 185 at 66, 69 *per* Diplock L.J.

197. *Id.* at 66.

whether the event alters the fundamental nature of the contract,[198] strikes at the root of the agreement[199] or renders the obligation radically different from that which has been undertaken by the contract.[200]

In order to ascertain what constitutes "substantially the whole benefit which it was the intention of the parties as expressed in the contract that [one of the parties] should obtain as the consideration"[201] it is necessary to consider the words of the contract construed in the light of the surrounding circumstances.[202] Substantial benefit is not a matter of the expectations of the party,[203] nor is it a matter of the motives of the party for entering into the contract.[204] Thus, to use an obvious example, a party might enter into a contract to purchase goods with the expectation and for the reason of making a profit on their resale. If the market price of the goods were to fall, the purchaser could not be said to have been deprived of the substantial benefit of the contract and thereby to be relieved of his obligation to pay simply because his expectations were not realized.

Applying these principles to a lease, it is tempting to conclude that substantially the whole benefit it is intended that the tenant is to receive is the estate in the land. The interest that the tenant acquires in the land and his rights as against third parties arise from the characterization of the contract as a lease, but do not arise from the terms of the contract itself. This alone may be sufficient reason for not regarding the estate as substantially the whole benefit. In addition, however, this view leads to the conclusion that the lease is primarily a conveyance of an estate in land, which leads back to the view of the lease as a conveyance and not a contract. To avoid the consequences of this view, it is necessary to consider the substantial benefit the tenant is intended to receive in terms of the obligations of the landlord following the conveyance of the estate in the land and throughout the term of the lease.

In the absence of express covenants by the landlord that the premises will be suitable for the proposed use of the tenant, it seems reasonable to conclude that the receipt of premises suitable for use is not the substantial benefit the tenant is intended to receive. Although the tenant might enter into the lease for the reason and with the expectation that the premises would suit his needs, the source of the substantial benefit the tenant is intended to receive is to be found in the words of the contract, not in the expectations or motives of one of the parties. If the parties have not expressly set out this benefit, it seems reasonable to look to the benefits which arise naturally from the obligations of the landlord. Therefore, in the absence of express obligations relating to suitability for use, such will not be the substantial benefit the tenant is intended to receive.

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198. *Tsakiroglou & Co. Ltd.* v. *Noblee & Thorl G.m.b.H.* [1962] A.C. 93, 115.

199. *Cricklewood Property & Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.* [1945] A.C. 221, 228.

200. *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956) A.C. 696, 728, 729.

201. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd., supra* n. 185 at 66.

202. *Id.* at 68; *Davis Contractors Ltd.* v. *Fareham U.D.C., supra* n. 200 at 720, 721; *Denny, Mott & Dickson, Ltd.* v. *Fraser (James B.) & Co., Ltd.* [1944] A.C. 265, 274, 275.

203. "[I]t by no means follows that disappointed expectations lead to frustrated contracts.": *Davis Contractors Ltd.* v. *Fareham U.D.C., supra* n. 200 at 715, *per* Visount Simonds.

204. *Bell* v. *Lever Bros., Ltd.* [1932] A.C. 161, 226, *per* Lord Atkin, dealing with the related issue of mistake; B. Coote, *Exception Clauses* (1964) at 96.

Contrary to this analysis, the case of *Krell* v. *Henry*[205] seems to suggest that the expectations of one party may form the basis of the substantial benefit the tenant is intended to receive under the contract even though the contract contains no obligation on the part of the other party from which such a benefit would naturally arise. In that case, the parties had entered into a contract under which the defendant was to be allowed to use certain rooms belonging to the plaintiff on two specific days. Although not stated in the contract, the defendant's purpose in taking the rooms was to watch the coronation processions of King Edward VII which were to pass by the rooms on the specified dates. The King fell ill, the processions were cancelled and the defendant was sued for the price he had agreed to pay. The Court of Appeal held that the taking place of the processions along the proclaimed route on the proclaimed dates formed the foundation of the contract and that the contract had been frustrated by the cancellation of the processions.

To the extent that the foundation of the contract corresponds to the more modern concept of the substantial benefit a party is intended to receive under the contract, this case would seem to suggest that suitability of the premises for the intended use of the tenant might be considered as the substantial benefit under a lease. There are several reasons, however, for doubting this conclusion.

In the first place, this case should be used together with *Herne Bay Steam Boat Company* v. *Hutton*,[206] another decision of the Court of Appeal delivered five days earlier than *Krell* v. *Henry*. That case also involved the cancellation of the coronation proceedings. The defendant had agreed to hire the plaintiff's ship for the expressed purpose of taking passengers to view a review of the fleet by the King. When the review was cancelled, the plaintiff sued to recover the price the defendant had agreed to pay. The Court of Appeal held that the purpose of the plaintiff did not constitute the foundation of the agreement and that the doctrine of frustration did not apply. Vaughan Williams L.J. stated that this case was analogous to the case of a contract where a man arranges to hire a cab to take him to the races: if the races were postponed, he would not be relieved of his obligations.

In *Krell* v. *Henry*, his Lordship used the same example of hiring a cab to go to the races. He concluded that the facts in that case differed from this example in two ways — firstly, that the cab would have no special qualifications for the purpose and any other cab would do as well and secondly, that the purpose of the hirer would be of no particular concern to the cab driver, whereas the coronation procession was the basis of the contract as much for the plaintiff as for the defendant. As to the first point, there is no indication in the report that these were the only premises from which the defendant could view the procession or that other premises along the route would not have done as well. It may be questioned in addition why this should have been the basis for determining whether the defendant's purpose was the foundation of the contract. As to the second point, it is difficult to understand why the purpose of the

205. [1903] 2 K.B. 740 (C.A.).
206. [1903] 2 K.B. 683 (C.A.).

defendant was the concern of the plaintiff in this case and not in the *Herne* case.[207]

In the second place, the decision in *Krell* v. *Henry* was doubted by Viscount Finlay in *Larrinaga and Company, Limited* v. *Societe Franco-Americaine des Phosphates de Medulla Paris*[208] and in *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*,[209] Lord Wright stated: "The authority is certainly not one to be extended."[210] In this light it would appear safe to conclude, notwithstanding *Krell* v. *Henry*, that the expectation of the tenant under a lease that the premises will be suitable for his purposes does not lie at the foundation of a lease and is not the substantial benefit a tenant is to receive under the contract in the absence of express covenants that the premises will be suitable.

Even if the contract does include express obligations on the part of the landlord that the premises will be suitable for the tenant's purposes in certain aspects (such as a covenant to heat or to repair), that does not necessarily mean that provision of premises suitable for the proposed use of the tenant will be viewed as the substantial benefit under the contract. This is particularly the case in light of the limited nature of the landlord's obligation under the covenant of quiet enjoyment.

In a lease, the tenant is not assured of the right to possession of the premises throughout the term; this is not a benefit to be received under the contract. From this it can be argued that even if a tenant has been deprived of the premises themselves, he has not been deprived of the substantial benefit under the contract. It would be anomalous to conclude that a tenant who has been deprived of heat, rendering the premises unsuitable for his purposes, has been deprived of the substantial benefit under the contract whereas a tenant who has been deprived of the premises themselves has not. However, it is possible to counter this argument with the argument that a continued right to possession on behalf of the tenant rests at the foundation of the landlord's obligation not to interfere with that right to possession.[211] The issue is unsettled.

The limited nature of the landlord's obligation under the covenant of quiet enjoyment is relevant in another sense. A lease with an express covenant of quiet enjoyment and an express covenant to heat is a contract firstly not to interfere with the tenant's possession of the premises and secondly to heat the premises. The two are essentially unrelated and it is difficult to say that deprivation of the benefits naturally flowing from the obligation to heat would deprive the tenant of substantially the whole

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207. In the *Herne Bay* case, Stirling L.J. pointed out that the object of the hirer was not only to view the naval review, but also to cruise round the fleet. His Lordship concluded that the existence of the naval review was not the foundation of the contract, reaching this conclusion "the more readily" because the object of the voyage was not limited to the naval review. Vaughan Williams L.J. was of the opinion that neither of the objects lay at the foundation of the contract, Romer L.J. spoke of viewing the naval review and the cruise around the fleet as a single object. It is submitted that this aspect does not explain the difference between the decision in this case and the decision in *Krell* v. *Henry*.

208. (1923) 39 T.L.R. 316 (H.L.).

209. [1935] A.C. 524 (P.C.) (N.S.).

210. *Id.* at 529. The criticisms of *Krell* v. *Henry* in these two cases are themselves criticized in a note by Landon in (1936) 52 *L.Q.R.* 168. Mr. Landon's criticism is in turn criticized in a note by Gordon in (1936) 52 *L.Q.R.* 324.

211. *See infra*, p. 262.

benefit under the contract while he continued to receive the benefits arising from the other obligation. This may be contrasted with a lease with an extended covenant of quiet enjoyment where the obligations could be connected to form the obligation to provide heated premises to the tenant throughout the term.

3. *Applying the Test*

In this light, the issues of frustration and discharge by breach in a lease may now be considered. In the case of *Cricklewood Property & Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*,[212] Viscount Simon considered the circumstances under which the doctrine of frustration might be applied to a lease. He concluded that such circumstances would be very rare and went on to state:[213]

> Where the lease is a simple lease for years at a rent, and the tenant, on the condition that the rent is paid, is free during the term to use the land as he likes, it is difficult to imagine an event which could prematurely determine the lease by frustration — though I am not prepared to deny the possibility if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea.

Viewing a lease as an agreement by the landlord not to interfere with the tenant's possession of the land, it is arguable that destruction of the land itself removes the foundation of the landlord's obligation and deprives the tenant of the substantial benefit of the contract. However, an event which merely renders the premises unsuitable for the purposes of the tenant — such as the destruction of a house on the land — would not result in frustration of the contract, as use for a purpose by the tenant is not fundamental to the contract. This would appear to be the case whether or not the tenant is restricted to a particular use of the premises, as such a restriction does not render the landlord liable to ensure that the premises are suitable for such a purpose.[214]

Viscount Simon continued his analysis in the *Cricklewood* case by suggesting that frustration might more easily apply in the case of a lease where the tenant was not only restricted in the use of the premises but also obligated to use the premises in a particular way such that the landlord obtained a benefit from such use. He cited as an example a lease which required the tenant to build a particular structure on the land; in the event of subsequent legislation prohibiting such construction, the lease would be frustrated. (Another example would appear to be the type of lease considered in the *Highway Properties* case,[215] where the tenant was obligated to carry on its business as a supermarket throughout the term, this use being important to the success of the rest of the shopping centre.)

What distinguishes these examples from other leases? Both are contracts involving leases and another agreement: the first involves a lease and an agreement to construct a building, the second involves a lease and an agreement to carry on a business. In each of the additional agreements, use by the tenant in a particular manner is the substantial obligation of the tenant and the substantial benefit of the landlord. Suitability for use

212. [1945] A.C. 221.
213. *Id.* at 229.
214. *Hill* v. *Harris* [1965] 2 Q.B. 601 (C.A.).
215. [1971] S.C.R. 562.

lies at the foundation of these additional agreements, which are inseverable from the leases.[216]

An example of this analysis is provided by the case of *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.*[217] In that case, the respondents had agreed to purchase all their needs for a certain type of wood from the appellants and to facilitate this trading, agreed to lease certain lands to the appellants with an option to purchase under certain circumstances. War regulations then rendered this trading impossible. The substance of the case related to the right of the appellants to exercise their option to purchase, but in his decision, Lord Wright stated: "It was not difficult to conclude that this letting was to be concurrent with the trading operations which it was intended to enable and would fall with them when they were frustrated. . . ."[218]

In conclusion, it would appear that in a simple lease, where use of the premises by the tenant may be restricted but is not required, an event which renders the premises unsuitable for his purposes will not frustrate the contract.

Turning to the issue of discharge by breach, even under the view of a lease as a conveyance, it is well established that a breach of the landlord's covenant of quiet enjoyment to the extent of eviction relieves the tenant of his obligation to pay rent.[219] An eviction need not result in the physical expulsion of the tenant; rather, it is "something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises"[220] which results in the tenant vacating the premises. So far as it goes, this rule would appear to be consistent with the application of the *Hongkong Fir* test. If a lease is viewed as an agreement not to interfere with the tenant's possession, an act by the landlord amounting to an eviction would appear to deprive the tenant of substantially the benefit it was intended he should have under the contract.

It is, however, arguable that the rule should be wider and that the tenant should be relieved of his obligation to pay rent in the event of a breach by the landlord having the effect of substantially disturbing the tenant's possession. It would not extend, however, to situations where the tenant does not vacate the premises as the result of the breach.[221] If the breach by one party is of such a nature that the party not in default may be relieved of his obligations, the party not in default has an option to

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216. It may be that this concept of a benefit for each of the parties arising from an anticipated set of facts lay behind the decision in *Krell* v. *Henry* [1903] 2 K.B. 740. In that case, Vaughan Williams L.J. referred to the coronation processions as being "the basis of the contract as much for the lessor as the hirer . . . ", contrasting that with the hiring of a cab where the purpose of the hirer would be of no concern to the driver. However, this conclusion remains difficult to understand on the facts of the case.

217. [1944] A.C. 265. *But see Total Oil Great Britain Ltd.* v. *Thompson Garages (Biggin Hill) Ltd.* [1972] 1 Q.B. 318 (C.A.).

218. [1944] A.C. 265, 277.

219. *Morrison* v. *Chadwick* (1849) 7. C.B. 266, 137 E.R. 107 (C.P.).

220. *Upton* v. *Townend* (1855) 17 C.B. 30, 64-65, 139 E.R. 976, 991 (C.P.).

221. For a contrary opinion, *see Lemle* v. *Breeden* 51 Hawaii 426, 435 (1969) where the Supreme Court of Hawaii considered that a claim that a tenant could not claim uninhabitability and at the same time continue to inhabit was an "absurd proposition, contrary to modern urban realities".

continue the contract (and sue for damages) or to be relieved of his future obligations under the contract.[222] If he elects the latter, the party not in default is liable for damages for the breach, but is relieved of his outstanding obligations.[223] Therefore, if a tenant is relieved of his obligations because of a breach by the landlord, the landlord is relieved of his outstanding obligations under the covenant of quiet enjoyment and it is inconsistent for the tenant to remain in possession.[224]

In the event of a breach of a covenant by the landlord respecting suitability of the premises for the intended use of the tenant, the tenant will not be relieved of his obligations unless suitability for use can be viewed as the substantial benefit and unless the effect of the breach is sufficiently serious. It therefore appears that the application of rules of contract respecting discharge by breach to a lease yields essentially the same results as those under the traditional view of a contract as a conveyance.

Under the common law, eviction of the tenant by one acting under title paramount relieves the tenant of his obligation to pay rent. An eviction by title paramount is not a breach of contract by the landlord[225] so that this result cannot be explained in terms of discharge by breach. The effect of eviction might be considered as analogous to destruction of the land, under the argument that as the tenant no longer has a right of possession to the property, the basis of the landlord's agreement not to interfere with the tenant's possession of the property has been removed. On this basis, discharge by eviction by title paramount might be explained in terms of frustration.

But what if the eviction by title paramount arises from the act or default of the landlord? Such an eviction does not amount to a breach by the landlord of his obligations under the lease,[226] but the event which arguably frustrates the contract arises from the act of the landlord and "the essence of 'frustration' is that it should not be due to the act or election of the party".[227] The landlord is therefore prevented from relying on his own act to discharge his future obligations — "this is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong"[228] — but the tenant has the option to terminate the contract.[229] It seems inconceivable that a court would rule that a tenant remains liable for rent notwithstanding eviction by title paramount. Perhaps the result can be rationalized as falling within the *Hongkong Fir* test without being characterized as either discharge by breach or frustration.

222. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 66; W. Anson, *Anson's Law of Contract* (25th ed. 1979) at 523.

223. W. Anson, *id.* at 525.

224. *See* the discussion of *Re Quann et al and Pajelle Investments Ltd.* (1975) 70. R. (2d) 769 (Co. Ct.) to the contrary at 266-267, *infra.* In addition, the decision of the Court of Appeal in *Total Oil Great Britain Ltd.* v. *Thompson Garages (Biggin Hill) Ltd.* [1972] 1 Q.B. 318 should be noted as to the effect of repudiation where a lease is regarded as the conveyance of an estate and not as a contract.

225. *Supra,* p. 248.

226. *Supra,* pp. 254-255.

227. *Maritime National Fish, Limited* v. *Ocean Trawlers, Limited* [1935] A.C. 524, 530 (P.C.) (N.S.).

228. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 66, *per* Diplock, L.J.

229. *Maritime National Fish, Limited* v. *Ocean Trawlers, Limited, supra* n. 227 at 530.

In *Clary* v. *Lake Superior Corporation*,[230] the rule that the liability of the tenant to pay rent ceases upon eviction by title paramount was explained on the basis that enjoyment of the land was the consideration for which the tenant was obliged to pay rent so that eviction resulted in failure of consideration. If this paper has correctly characterized the basic obligation of the landlord in terms of non-interference with possession as opposed to providing the premises to the tenant throughout the term, this explanation is subject to question.

Another possible explanation for the tenant being relieved of his obligation to pay rent following eviction by title paramount is based on the traditional view that rent issues out of the land. When the tenant's estate in the land ceases, the rent also ceases. However, the decision of Laskin J. (as he then was) in *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.*[231] suggests that this explanation is invalid. He concluded that while rent as such may cease upon termination of the tenant's estate, the tenant may remain liable for damages for breach of his covenant to pay rent. The essential element in relieving the tenant of his obligation to pay rent would therefore appear not to be the mere termination of the tenant's estate, but rather the circumstances under which the estate comes to be terminated.

From this analysis, it would appear that the application of rules of contract respecting discharge of obligations — whether by breach, by frustration or by eviction by title paramount — does not substantially advance us past the state of the law under the view of a lease as a conveyance. If that state of the law is viewed as unsatisfactory, the solution to the problem must be more than a simple application of contract doctrines.

4. *Legislative Solution*

To deal with the problem of discharge by breach in the area of residential tenancies, legislation in British Columbia,[232] Saskatchewan,[233] Manitoba,[234] New Brunswick,[235] Prince Edward Island[236] and Newfoundland[237] has followed the wording found in the Ontario Landlord and Tenant Act:[238]

> Subject to this part, the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements.

Referring to this legislation, Lamont states: "It will remain for the parties or the courts to determine what is meant by a material covenant. Surely breaches of covenants to heat or repair will in future relieve the tenant from having to continue to pay rent."[239]

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230. (1908) 11 O.W.R. 381 (Ont. S. Ct.); *aff'd* (1908) 12 O.W.R. 6 (Ont. Div. Ct.).
231. [1971] S.C.R. 562.
232. Residential Tenancy Act, S.B.C. 1977, c. 61, s. 10(1).
233. Residential Tenancies Act, S.S. 1973, c. 83, s. 13.
234. Landlord and Tenant Act, R.S.M. 1970, c. L-70, as am. by S.M. 1970, c. 106, s. 98 (1).
235. Residential Tenancies Act, S.N.B. 1975, (2d) c. R-10.2, s. 11 (3).
236. Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 91(2).
237. Landlord and Tenant (Residential Tenancies) Act, S.N. 1973, Vol. 1, No. 54, s. 12 (1).
238. Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 89.
239. D. Lamont, *supra* n. 106 at 49.

The use of the phrase "material covenant" is unfortunate, in that it suggests that it is possible to determine in advance whether a particular term, if breached, will result in discharge of the obligations of the other party.[240] The test of whether the obligations will be discharged is the effect of the breach rather than the nature of the term breached.[241] If the effect of a breach of covenant to heat or to repair is to render the premises unsuitable for habitation, the issue is whether suitability for habitation is the substantial benefit the tenant is to receive under the contract. This issue must be considered in the light of the legislation in most common law provinces[242] imposing an obligation on the landlord to keep the premises in a state of repair suitable for habitation. If this statutory obligation is considered to be an implied term of the contract,[243] the first obstacle to concluding that suitability for use is the substantial benefit under the contract has been overcome. However, the limited scope of the covenant of quiet enjoyment continues to present difficulties in reaching this conclusion.

The effect of this form of legislation was considered in the case of *Re Quann et al and Pajelle Investments Ltd.*,[244] where the landlord was in breach of the statutory covenant to repair the premises. O'Connell Co. Ct. J. determined that thic covenant, arising by statute, was material, without considering the effect of the breach of such a covenant and without considering whether such an effect deprived the tenant of the substantial benefit it was intended that he could receive under the contract. Such an interpretation is consistent with the use of the phrase "material covenant" and would appear to place residential tenancies in a specialized category similar to that occupied by the law relating to sales of goods where legislation classifies terms in advance as conditions or warranties.[245] If this interpretation is followed, the law respecting discharge by breach with respect to residential tenancies will develop outside the mainstream of the present rules of contract notwithstanding that the separation of landlord and tenant law from the rules of contract is commonly criticized. Further, to the extent that rules of contract respecting discharge by breach are applied to commercial leases, the rules will differ from those applied to residential leases.

As to the rights of a tenant upon breach of a material covenant by the landlord, it was determined in *Brahmsgate Investments Ltd.* v. *Finn*[246] that the tenant could terminate tenancy, but that he could not refuse to pay rent while remaining in possession of the premises. This would appear to be an application of the contractual rules respecting discharge by breach.[247] However, in the *Quann* case, O'Connell Co. Ct. J. reached the

240. For further criticisms of this form of legislation, *see* Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 123-238; British Columbia Law Reform Commission, *Report on Landlord and Tenant Relationships: Residential Tenancies* (1973) 98.

241. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, *supra* no. 228 at 68, 69; Greig, "Condition — or Warranty?" (1973) 89 *L.Q.R.* 93, 105. *See* n. 190, *supra.*

242. *Supra*, p. 239.

243. *Re Quann and Pajelle Investments Ltd.* (1975) 70. R. (2d) 769, 788, 789 (Co. Ct.).

244. (1975) 7 O.R. (2d) 769 (Co. Ct.).

245. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, *supra* n. 228 at 69, 70; Greig, *supra* n. 24 at 96-99.

246. [1973] 3 O.R. 188 (Co. Ct.).

247. *See supra*, pp. 263-264.

opposite conclusion.[248] In his view, the tenant could only terminate the tenancy for breach of a statutory obligation byan application to the court and prior to such an application, the tenant was entitled to remain in possession and withhold the rent. If this is accepted as the proper interpretation of the legislation, then there exists a conflict between the legislation and the common law which it purports to apply.

To deal with the problem of frustration of residential leases, legislation in British Columbia,[249] Saskatchewan,[250] Manitoba,[251] Ontario,[252] New Brunswick,[253] Prince Edward Island[254] and Newfoundland[255] has followed the same pattern as legislation to deal with the problem of discharge by breach — a simple direction that the law of frustration should apply to leases of residential premises. An example of this form of legislation is found in the Ontario Landlord and Tenant Act:[256] "The doctrine of frustration of contract applies to tenancy agreements and The Frustrated Contracts Act applies thereto."

The operation of this section was considered in the decision of *Caithness Caledonia Ltd.* v. *Goss.*[257] The facts in that case involved a residential lease which included an express covenant by the landlord that the premises were fit for habitation. Because the premises were located over a laundromat and because the air conditioner in the premises did not work, the premises became very hot in the summer months. The tenant, however, remained in possession. In the winter, the tenant was transferred to a different city and vacated the premises. The landlord sued for the rent owing to the end of the term of the lease. The court considered the legislation dealing with discharge by breach and with frustration and concluded that because of the intolerable heat, there had been a "partial frustration" of the contract. It awarded an abatement of rent for the summer months equal to the rent claimed for the balance of the term. It is submitted that this is not a case dealing with discharge of obligations, either

248. (1975) 7 O.R. (2d) 769, 787-788. This case should be compared with *Javins* v. *First National Realty Corporation* 428 F. 2d 1071 (D.C. Cir., 1970) where a similar conclusion was reached. In that case, the court implied a covenant of habitability and determined that a breach of this covenant of habitability would be a defence to an action for possession by the landlord for non-payment of rent. The influence of this decision upon the *Quann* decision is suggested by the following passages from the cases: "When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance . . . ": *Javins*, 1074; "In our day and age, the urban lease of an apartment in a substantial building gives to the tenant a package of goods and services. These goods and services include not only walls and ceilings but adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and maintenance, the rights guaranteed to the tenants under the provisions of s. 96 (1) of the Landlord and Tenant Act.": *Quann*, 783-784.

249. Residential Tenancy Act, S.B.C. 1977, c. 61, s. 9 (3).

250. Residential Tenancies Act, S.S. 1973, c. 83, s. 12.

251. Landlord and Tenant Act R.S.M. 1970, c. L-70, as am. by S.M. 1970, c. 106, s. 90.

252. Landlord and Tenant Act, R.S.O. 1970, c. 236, s. 88.

253. Residential Tenancies Act, S.N.B. 1975 (2d), c. R-10.2, s. 11 (2).

254. Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 91(3).

255. Landlord and Tenant (Residential Tenancies) Act, S.N. 1973, Vol. 1, No. 54, s. 10.

256. *Supra* n. 252.

257. [1973] 2 O.R. 592 (Co. Ct.)

by breach or by frustration. Rather, the breach by the landlord of the covenant to provide habitable premises gave to the tenant a right to damages to offset the landlord's claim for rent.

In summary, there appears to be considerable confusion in both the form and the application of the statutory solution to the problem of discharge by breach and by frustration in the area of residential tenancies.

IV. RETHINKING THE PROBLEM

By traditional analysis, a lease is primarily a conveyance of an estate in land.[258] Once the landlord has placed the tenant in possession of the premises, thereby creating an estate in the land, his primary obligations have been executed. As a consequence, the doctrine of *caveat lessee* applies, with the further consequence that there is no implied covenant on the part of the landlord that the premises are suitable for the use intended by the tenant. Covenants of the landlord and the tenant are in general treated as independent, so that a breach of covenant by the landlord which renders the premises unsuitable for the tenant's use does not relieve the tenant of his obligation to pay rent. As the contract is regarded as executed, the doctrine of frustration does not apply and the tenant is not relieved of his obligation to pay rent even if the premises are destroyed. To whatever extent this state of the law was acceptable in the days when the leased lands were used primarily for agricultural purposes,[259] it has come to be regarded as unacceptable by the courts and the legislatures under present circumstances when the lands are used primarily for residential and commercial purposes. The solution adopted has been to treat the lease as a contract under which both of the parties have continuing obligations even after the conveyance of the estate in land.

This solution, while a necessary first step, is not sufficient. In a comment in the *Canadian Bar Review*[260] on the *Highway Properties* case,[261] it was stated that: "The Supreme Court of Canada has now armed the modern combatant in landlord-and-tenant litigation with modern weapons." The weapons may be modern, but the parties have not been provided with ammunition.

It is submitted that the traditional analysis fails to take into account the trend towards diminishing the contractual obligations of the landlord which paralleled the development of property rights on behalf of the

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258. *Goldhar* v. *Universal Sections and Mouldings Ltd.* (1963) 36 D.L.R. (2d) 450, 453 (Ont. C.A.).

259. Grimes, *supra* n. 14 at 193: "Leases, at least long term, were largely agricultural. The parties were on an equal bargaining level and conditions were visible. Actual tillers of the soil were either on a sharecropper basis of little political force or were agricultural laborers where deplorable economic conditions were notorious but accepted. The dissatisfied lessee could always default. Thus the law saw no necessity of placing a protective cloak around the lessee either for economic or social reasons." It is submitted, however, that the acceptability of this state of the law even when the lands are to be used for agricultural purposes must be seriously questioned. For example, in *Sutton* v. *Temple* (1843) 12 M. & W. 52, 152 E.R. 1108 (Ex.), the defendant tenant was held to be liable for the rent on land leased for grazing purposes, notwithstanding the fact that a number of his cattle had been poisoned by paint that was present in the grass.

260. Catzman, (1972) 50 *Can. Bar Rev.* 121, 128.

261. [1971] S.C.R. 562.

tenant. In analyzing the lease as a contract, the limited nature of the landlord's obligation becomes apparent. Prohibition of the tenant's use of the premises by one holding title paramount is not a breach of the landlord's obligation,[262] nor is eviction of the tenant by one holding title paramount.[263] If the lease includes an express covenant of quiet enjoyment, there is no implied obligation on the part of the landlord to ensure that the tenant will be able to gain possession of the premises.[264] The limited nature of the landlord's basic obligations logically restricts the implication of an obligation that the premises will be suitable for the tenant's use throughout the term. As the rules of contract relating to discharge by breach and by frustration are based upon a party being deprived of substantially the whole benefit that it was intended that he should obtain[265] and as this benefit is determined by the words of a contract construed in the light of the surrounding circumstances,[266] the absence of any obligation of the landlord as to suitability of the premises for the tenant's purposes together with the limited scope of the covenant of quiet enjoyment restricts the application of the doctrines of discharge by breach and by frustration.

The limited nature of the landlord's obligations may be regarded as undesirable in its own right. In the view of the Law Commission, the tenant under all leases should have the right to quiet enjoyment of the premises without disturbance from the landlord or any person lawfully asserting a right either through the landlord or by title paramount.[267] Such a reform would alter the nature of the contract from an agreement not to interfere with possession to an agreement to provide the right to possession throughout the term. It would open the way for an extension of the landlord's obligations to include a covenant of suitability for use and as such would be a step towards providing the tenant with the necessary ammunition.

As already discussed,[268] the present rule respecting eviction by title paramount in the absence of an express covenant of quiet enjoyment rests on a shaky foundation. A Canadian court would face little difficulty in concluding that the implied covenant extends to eviction by title paramount.

In overcoming the rule that the implied covenant of quiet enjoyment terminates when the estate of the landlord terminates, a court would face greater difficulties. It has been argued that the Saskatchewan Court of Appeal in *Eagles Hall Association of Swift Current, Limited* v. *Bertin*[269] erred in concluding that the rule was no more than the application of the rule that the implied covenant of quiet enjoyment does not extend to eviction by title paramount.[270] The only other way for a court to overcome the

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262. *Jones* v. *Lavington* [1903] 1 K.B. 253 (C.A.).
263. *Supra*, pp. 248, 252.
264. *Miller* v. *Emcer Products Ltd.* [1956] 1 Ch. 304 (C.A.).
265. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 70. (C.A.).
266. *Supra*, n. 202.
267. *Supra*, n. 87 at 17.
268. *Supra*, p. 247.
269. [1922] 1 W.W.R. 374.
270. *Supra*, at pp. 248-249.

rule would appear to be by over-ruling four hundred years of precedents.[271]

A judicial extension of the landlord's obligation under an express covenant of quiet enjoyment also poses difficulties. The wording of such a covenant is almost invariably restricted to actions of the landlord and those claiming through him and the interpretation of the covenant to exclude eviction by title paramount has a long history. In the words of Lord Esher M.R. in *Harrison, Ainslie & Co.* v. *Muncaster:* "From the time that the effect of that covenant was first discussed before the Courts until now, it has been held . . . that it does not embrace the case of eviction by a title paramount."[272] To override the words used by the parties and extend the landlord's obligation would appear to necessitate legislation.

The position of a landlord under the covenant of quiet enjoyment in Canada should be compared with the position of his counterpart in the United States. In that country, the implied covenant of quiet enjoyment extends to include interference by one claiming through title paramount[273] and it seems likely that it would no longer be construed to terminate with the termination of the landlord's estate.[274] The extent of the obligation of the landlord under an express covenant of quiet enjoyment will depend upon the wording used and if restricted to actions of the landlord and others claiming through him, it will not extend to interference by one claiming through title paramount.[275] However, unlike Canada and Great Britain, the usual form of the covenant is not so restricted.[276] For example, the covenant of quiet enjoyment set out in Modern Legal Forms[277] provides:

> The lessors jointly and severally covenant that the lessee, upon paying the rentals and performing the covenants on its part to be performed hereunder, shall and may peaceably and quietly have, hold and enjoy the premises hereby leased during the term hereof.

To the extent that the obligation of the landlord in Canada and Great Britain is not extended, therefore, caution must be exercised in any reference to American authorities or writings relating to the implication of a covenant of suitability for use or to discharge of the tenant by breach or by frustration.

An extension of the covenant of quiet enjoyment to provide that the tenant shall have the right of possession to the premises throughout the term of the lease removes the obstacle to implying a covenant of suitability for use during the term. The implication of such a term in turn together with the extended obligation under the covenant of quiet enjoyment removes the obstacles to suitability for use being considered as sub-

271. *Swan* v. *Stransham & Searles* (1566) 3 Dyer 257a, 73 E.R. 570 (C.P.); *Adams* v. *Gigney* (1830) 6 Bing. 656, 130 E.r. 1434 (C.P.).

272. [1891] 2 Q.B. 680, 684 (C.A.).

273. 49 Am. Jur. *Landlord and Tenant* §330 (1970); 51C C.J.S. *Landlod and Tenant* §323 (2) (1968); 1 *American Law of Property* §3.48 (A.J. Casner ed. 1952); 3 M. Friedman, *Friedman on Leases* §29.201 (1978).

274. 3 M. Friedman, *supra* n. 273, §29.201.

275. *Groome* v. *Ogden City Corp.* 10 Utah 54, 37 P. 90 (1894).

276. 51C C.J.S. §323 (2), *supra* n. 273.

277. E. Belsheim, *Modern Legal Forms* (1962) §5224. This is similar to the covenant quoted in *Adrian* v. *Rabinowitz* 116 N.J.L. 586, 186A.29 (N.J.S.C. 1936). *See* 2 R. Powell & P. Rohan, *Powell on Real Property* (1977) §225(3).

stantially the whole benefit of the tenant under the contract. To the extent that the premises are rendered unsuitable for the purposes of the tenant by the default of the landlord, the tenant will be discharged from this obligation; to the extent that they are rendered unsuitable by factors other than the landlord's default, the contract will be frustrated. The solution to the problem seems simple. Unfortunately, it is not, because this analysis leaves unanswered the question of the extent of the landlord's obligation to provide premises suitable for the purposes of the tenant.

One aspect of such an obligation relates to the physical suitability of the premises for the purposes of the tenant. This in turn can be considered in terms of the time frame over which the obligation operates. For example, in Alberta, the landlord has a statutory obligation to ensure that residential premises will be habitable by the tenant at the commencement of the tenancy.[278] In Manitoba, the landlord has a statutory obligation to provide and maintain the premises in a state fit for habitation throughout the tenancy.[279] In addition, there is a broad range within which to define the nature of the landlord's duty. In Nova Scotia,[280] the landlord's obligation to keep residential premises in a state of repair fit for habitation is limited to the state of repair that existed when the tenant first acquired possession of the premises. In Saskatchewan,[281] the landlord must keep residential premises in a state fit for habitation regardless of the state of repair that existed prior to the time the tenant took possession and must keep all services and fixtures in a good state of repair. The duty could conceivably be extended to require the landlord to rebuild the premises (and to provide alternative premises or compensation throughout the period of reconstruction) in the event of destruction.

A second aspect of the landlord's obligation to ensure suitablity of the premises for the tenant's use relates to legal restrictions on use. At its least, this obligation might involve an assurance that there is no impediment in the landlord's own title prohibiting the proposed use by the tenant. In its report on the obligations of landlords and tenants, the Law Commission recommended that the landlord be liable in the event of enforcement of a restriction on the use of the premises by one with title paramount unless the tenant had notice of such a restriction at the time the tenancy was granted.[282] An extension of such an obligation would involve an assurance that there are no legal restrictions on the proposed use of the premises at the commencement of the tenancy. For example, in *Reste Realty Corporation* v. *Cooper*,[283] after discussing the inequality of bargaining power between landlord and tenant and the superior knowledge often held by the landlord, Francis J. stated: "These factors have produced persuasive arguments for re-evaluation of the *caveat*

278. Landlord and Tenant Act, 1979, S.A. 1979, c. 17, s. 14 (c).

279. R.S.M. 1970, c. L-70, as am. by S.M. 1970, c. 106, s. 98(1).

280. Residential Tenancies Act, S.N.S. 1970, c. 13, s. 6, Statutory Conditions 1,2. To similar effect, *see Javins* v. *First National Realty Corporation*. 428 F 2d 1071, 1079 (D.C. Cir., 1970): "Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection."

281. Residential Tenancies Act, S.S. 1973, c. 83, s. 16, Statutory Conditions 2, 3, 4.

282. *Supra* n. 87 at 17.

283. 53 N.J. 444, 452 (1969).

emptor doctrine and for the imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws." A further extension of such an obligation would involve an assurance that the premises would remain free from legal restrictions on the proposed use throughout the term of the lease.

A third aspect of the landlord's obligation to ensure suitability of the premises for the tenant's use relates to economic suitability of the premises. For example, in a lease of premises to a small store in a shopping centre complex, in the absence of express covenants, there might be implied an obligation on the part of the landlord not only that the premises are physically suitable for such use and not only that there are no legal restrictions on such use, but also that he will not act so as to reduce the economic viability of such use (for example, by constructing a superior and competing shopping centre with similar stores across the street.)

By the implication of a covenant or covenants of suitability for use, a foundation is laid for the determination that the provision of premises suitable for the proposed use of the tenant is substantially the whole benefit the tenant is intended to receive under the contract. If the effect of a breach of one of these covenants is sufficiently serious, the tenant will have the option of being discharged of his remaining obligations. He will also have the option of being discharged of his remaining obligations in the event of a breach of an express covenant which substantially affects the suitability of the premises for his proposed use. The contract will be frustrated in the event that the premises are rendered unsuitable for the proposed use as the result of the default of neither party.

While the obligation of the landlord respecting suitability for use lays the foundation for viewing the provision of suitable premises as substantially the whole benefit the tenant is to receive under the contract, the obligation and the benefit are not co-extensive. Consider, for example, covenants by the landlord in a lease of residential premises that there are no restrictions in his title respecting use for residential purposes and that he will provide sufficient heat to the premises in winter to make them habitable. Viewing the words of the contract in the light of surrounding circumstances, a court might conclude that possession of habitable premises was substantially the whole beneift that it was intended the tenant would receive under the contract. If the premises were then to be struck by lightning and destroyed by fire, the contract would be frustrated. The benefit the tenant is intended to receive is wider than the obligation of the landlord. Therefore, in addition to the scope of the implied covenant relating to suitability for use, the scope of the benefit the tenant is intended to receive, as inferred from these covenants, must also be considered. As a further example, consider the covenant by the landlord in the lease of premises in a shopping centre referred to above. Would the construction of a nearby competing shopping plaza by a third party which resulted in a decrease in business for the tenant frustrate the lease?

It is submitted that the nature and scope of implied obligations relating to suitability for the proposed use of the tenant, with the corresponding inferred benefit the tenant is intended to receive, may vary according to the nature of that purpose. The legislatures have already afforded different treatment for residential and commercial premises. Perhaps there

should be different treatment for long term and short term leases,[284] perhaps there should be different treatment on the basis of the relative bargaining power of each of the parties.[285]

V. CONCLUSION

By traditional analysis, the doctrine of *caveat lessee*, the independence of covenants in a lease and the rule that frustration does not apply to a lease are anachronisms, based on the view of the lease as a conveyance. These rules may have been sensible in the days when the intended use of the tenant was agricultural in nature, but they are out of step with the use of leases for residential and commercial purposes. This is particularly apparent in cases where the premises are unsuitable for the purposes of the tenant. If they are rendered unsuitable by the breach of an express covenant by the landlord, the tenant's only remedy is in damages; in any event the tenant remains liable for the rent throughout the term. The solution is to regard the lease as a contract as well as a conveyance and to apply the rules of contract relating to implied covenants, dependent covenants and frustration.

This solution, however, does not work. To achieve the desired results in a manner consistent with the application of rules of contract requires a legislative extension of the landlord's obligations under the covenant of quiet enjoyment. It also involves the implication of covenants respecting the suitability of the premises for the proposed use of the tenant which in turn involves the application of social policy, influenced by the nature of the proposed use and the relationship of the parties.

By the direction that leases are to be regarded as contracts as well as conveyances and the direction that rules of contract are to be applied to leases, the courts and legislatures have provided the tenant with modern weapons.[286] They have yet to provide them with ammunition or to carry out the difficult task of determining the circumstances under which the weapons may successfully be used.

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284. The Residential Tenancy Act, S.B.C. 1977, c. 61 does not apply to a lease of residential premises in excess of 3 years in property comprising more than 2 residential premises if the lease has been approved by the municipal council, the board of the regional district or the Minister of Municipal Affairs and Housing: s. 3 (2) (c). The Housing Act, 1961, 9 & 10 Eliz. 2, c. 65, s. 32 (Imp.) applies a covenant to repair in leases of dwelling houses of a term of less than 7 years. *See* Woodfall, *supra* n. 18, §1-1474.

285. Sophie, *supra* n. 61, 349-352.

286. *Supra* n. 260.