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Implied Warranties in Leases: The Need for Change

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IMPLIED WARRANTIES IN LEASES: THE NEED FOR CHANGE

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"Caveat emptor" as it is applied to leases under which the lessee may use the demised premises for an express purpose is the focal point of this article. The rule denies the lessee relief, either as a defense or as a cause of action, for additional costs of repair or construction if the premises are structurally unfit for the expressed purpose or if changes must be made in the premises to conform to local codes relating to that purpose. Mr. Skillern discusses the development of the rule in these situations, the limited remedies which are available to a lessee, and the inadequacies of these remedies in modern leasing transactions. He urges that changes in the nature of leasing transactions necessitate that courts or legislatures consider implying warranties of fitness for a particular purpose and of conformity to building codes in such leases. Mr. Skillern concludes by analyzing the nature of the proposed warranties, the prerequisites for their implication, and the new remedies which would be available if they were breached.

INTRODUCTION

LAW under the doctrine of stare decisis may become imbued with legal principles which were practical when first developed but which become inadequate at a later date to meet the demands of the situations they were designed to encompass. The doctrine of *caveat emptor* as applied to leases epitomizes such an anachronism. In the early development of cases concerning real property leases, the courts applied the strict limitations of property law and determined that no implied covenants regarding fitness of the premises for a purpose or habitation existed in a lease. The parties were expected to express in the document exactly what the state of the premises would be at time of possession as well as any other facts which the landlord might guarantee to the tenant as to the condition of the premises.

However desirable such principles were when developed, today with the growth of urban development causing an increase in leasing transactions, and the development of unimproved land through leases requiring construction, these principles are unrealistic and impractical. Not only do the parties frequently intend a particular (and often exclusive) use of the premises, but also that the landlord prepare the

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premises for the tenant's use. Under these circumstances, the tenant should be allowed a remedy under the lease when the premises cannot be used for the express purpose or can be so used only at additional cost. A study of *caveat emptor* as it has been applied in specific cases shows its inadequacy in leasing cases.

The general rule of *caveat emptor* has been succinctly stated in *Ph. Chaleyer, Inc. v. Simon.*[1] The court, discussing an implied warranty defense, stated, "It has been recently held that a lessor does not impliedly covenant that the demised premises are suitable for the use which he is aware is intended by the lessee."[2] Although government wartime regulations prohibited the lessee from engaging in the business stated in the lease, he was not allowed to rescind the agreement.

Caveat emptor also prevents the lessee from interposing unfitness as a defense to an action for rent. An Indiana case[3] involving the lease of lands on which the lessee wanted to build a drive-in theater is typical of this principle. The court in awarding rent to the lessor said,

> There is no implied warranty that leased premises are fit for the purposes for which they are let. . . . The rule of caveat emptor applies in the relation of landlord and tenant unless material representations constituting fraud are specifically alleged, or there is a showing of a fiduciary relationship between the parties.[4]

The rule has also been applied to a situation where the lessee could not occupy the leased premises because the building would not support his equipment. In *Soresi v. Repetti,*[5] the building required structural changes before the lessee could install his heavy equipment. The court disposed of the unfitness defense summarily, saying, "[T]he tenant has the duty to examine the premises to determine its adaptability for the desired use."[6]

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[1] 91 F. Supp. 5 (D.N.J. 1950). *See also* 2 R. POWELL, REAL PROPERTY ¶ 225 [2] (recomp. ed. 1966); 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952), and cases cited therein, where the principle is expressed:

> There is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adapted to the purpose for which leased. The tenant, then, cannot use such unfitness either as a defense to an action for rent or as a basis for recovery in tort for damages to person or property. (Footnotes omitted.)

Accord, Davidson v. Fischer, 11 Colo. 583, 19 P. 652 (1888).

[2] 91 F. Supp. 5, 7 (D.N.J. 1950).

[3] Anderson Drive-In Theater, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

[4] *Id.* at 393, 110 N.E.2d at 508.

[5] Soresi v. Repetti, 76 A.2d 585 (D.C. Mun. Ct. App. 1950).

[6] *Id.* at 586. *See also* Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350 (1930) (structural changes at lessee's expense).

Tort actions are also prohibited by the rule.[7] In *Widmar v. Healey,*[8] the lessee was denied recovery for injuries resulting from a stove explosion which occurred due to frozen pipes. In dismissing the claim the court said, "In the absence of fraud or of a covenant, a lessor does not represent that the premises are tenantable and may be used for the purposes for which they are apparently intended."[9]

At this point certain fact situations which are outside the scope of this paper must be distinguished. The *Soresi* court denied the lessee relief for required structural alterations to the leased premises, which were under the control of the landlord, by adhering to a questionable application of *caveat emptor.* It is another matter when untenantability is caused by factors beyond the control of the lessor. Recovery has been denied a lessee in this situation too, but the application of *caveat emptor* seems more appropriate. For example, the New York courts have denied recovery to a lessee who could not occupy a building because of noxious gases originating from outside the building.[10] Although the defense in that case was an implied covenant of habitation, the court rejected it.[11] The court discussed the defense of implied warranty and concluded it was not available. The point is that the proposed implied warranty should not extend to defects beyond the control of the lessor. Nor would the doctrine of implied warranty cover those defects or contingencies which are foreseeable by the parties. A lessor is allowed to recover rent even though his lessee could not get a liquor permit and use the premises as contemplated.[12] Such a contingency is foreseeable, and no condition will be read into the lease. *Caveat emptor* should continue to

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[7] *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 1, at 267, and cases cited therein. *See also* Zatloff v. Winkleman, 90 R.I. 403, 158 A.2d 874 (1960).

[8] 247 N.Y. 94, 159 N.E. 874 (1928).

[9] *Id.* The court implies that recovery may have been allowed if the action had been brought on the theory of a covenant to repair. For a discussion of a lessor's tort liability for latent defects in the premises known to him or for liability when he undertakes repairs of demised premises, see Shaw v. Butterworth, 327 Mo. 622, 38 S.W.2d 57 (1931), and Holzhauer v. Sheeny, 127 Ky. 28, 104 S.W. 1034 (1907). *See also* Marx v. Standard Oil Co., 6 N.J. Super. 39, 69 A.2d 748 (1949), where the court states, "There is no implied covenant by a lessor that the demised premises are suitable for the use which he is aware is intended by the lessee. The lessor is not liable to the lessee or to invitees of the lessee for injuries received by them in accidents that may be attributed to the faulty planning or construction of the premises." *Id.* at 41, 69 A.2d at 749.

[10] Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889).

[11] The court held, "It is not open to discussion in this state, that a lease of real property only, contains no implied covenant of this character [habitation], and that . . . unless there has been fraud, deceit, or wrong-doing on the part of the landlord, the tenant is without remedy, even if the demised premises are unfit for occupation." *Id.* at 113, 23 N.E. at 127.

[12] Goodman v. Sullivan, 94 Ohio App. 390, 114 N.E.2d 856 (1952). *But see* Hyland v. Parkside Inv. Co., 10 N.J. Misc. 1148, 162 A. 521 (1932) (zoning ordinance prohibited use after possession — held, restricted use in lease is express guaranty).

control those cases in which the non-use is the result of a foreseeable problem or of a defect caused by one other than the lessor.[13]

It would be wrong to conclude that the doctrine of *caveat emptor* means a lessee is always without a remedy if he is unable to use the premises. Under contract law the tenant may rescind the lease if he can prove fraud or mutual mistake.[14] In such cases the burden is upon the lessee to show the statement, the materiality of the statement, and reliance. Frequently, as in the cases discussed here, this burden is too great.[15] The lessee usually does not receive a statement about the suitability of the land, but rather assumes this from the fact that the lease states the purpose and use of the demised premises.

Rescission on the grounds of mutual mistake was recently granted by a California court.[16] The lease stated that the premises were to be used for a bar-restaurant. However, the building would not support the weight of a bar on the second floor. The court expressly found that no structural changes were required on the leased premises; instead they would have to be made on portions of the building under the control of the lessor. Moreover, it found that both parties thought the building, without modification, could be used for the intended purposes, and the necessary costs were not expected by either. The court allowed rescission because of the mutual mistake.

Another remedy, derived from property law, is constructive eviction.[17] One such case was *Panagos v. Fox*,[18] where the lessor had built a restaurant, barbecue, and dairy bar for the lessee. The building when completed had defective walls which would not withstand

[13] This situation must be distinguished from the facts in Economy v. S.B. & L. Bldg. Corp., 138 Misc. 296, 245 N.Y.S. 352 (1930), where the court allowed the lessee to recover advance rent when he was unable to obtain a cabaret license because the building was not fireproof in accordance with the local building code. This result was not based on an implied warranty of suitability even though there was an expressed purpose in the lease. The court held that the licensing authority had no discretion to waive the requirements of the building code, and "[t]he contract, therefore, was incapable of lawful performance when it was made, although it is not to be supposed that any illegality was contemplated by the parties to it." *Id.* at 297, 245 N.Y.S. at 354. Thus the illegality constitutes failure of consideration. The *Goodman* result, discussed at note 12 *supra*, is an example of the situation in which the licensing authority does have discretion. The court in *Economy* states that then "[i]f the tenant chose to take a lease without conditions under such circumstances, and so, to bind himself absolutely for the payment of rent, the court could not relieve him from his contract." *Id.* at 297, 245 N.Y.S. at 354.

[14] *See* Williams v. Puccinelli, 236 Cal. App. 2d 512, 46 Cal. Rptr. 285 (Dist. Ct. App. Cal. 1965).

[15] *See, e.g.*, Soresi v. Repetti, 76 A.2d 585 (D.C. Mun. Ct. App. 1950) (lessee-defendant claim of misrepresentation denied); Ph. Chaleyer, Inc. v. Simon, 91 F. Supp. 5 (D.N.J. 1950) (lessee's action to rescind denied).

[16] Williams v. Puccinelli, 236 Cal. App. 2d 512, 46 Cal. Rptr. 285 (Dist. Ct. App. Cal. 1965), which has been characterized by one writer as "an apt illustration of the conflict" between property and contract law principles in leases. Note, *A Contractual Approach to Real Property Leases — A Strike at Caveat Emptor*, 2 CALIF. WESTERN L. REV. 133 (1966).

[17] *See, e.g.*, Leonard v. Armstrong, 73 Mich. 577, 41 N.W. 695 (1889).

[18] 310 Mich. 157, 16 N.W.2d 700 (1944).

water. The lessee sued to recover his deposit because the building was untenantable for his purposes. Recovery was granted on the theory of constructive eviction which the court defined as "any disturbance of the tenant's possession by the landlord or by someone under his authority whereby the premises are rendered unfit for occupancy for the purposes for which they were demised, or the tenant is deprived of the beneficial enjoyment of the premises, if the tenant abandons the premises within a reasonable time."[19]

Rescission of a lease is not always a desirable remedy. Quite often a long term lease is involved, and the demised premises have been selected for reasons collateral to the issues which may be raised in the rescission action. Hence, the premises are still desired if the defects are corrected or the alterations necessary to enable the lessee to use the premises are made. The appropriate remedy is not rescission, but recovery of damages incurred due to the required changes. Thus damages in the amount of the cost of alterations or for any other harm is a more desirable solution for the lessee.

The remedy of constructive eviction is frequently unavailable because the lessee usually can use the premises for some purpose so that the premises are not deemed untenantable. Typically he is denied the particular use he intended. The remedy is also undesirable because it terminates the lease. Constructive eviction also is not an adequate solution in those situations where only a portion of the leased premises are unusable.

In addition to the foregoing remedies for the lessee, one exception has been grafted onto the general rule of *caveat emptor.* A lease is not enforced against those lessees coming within its provisions. The exception was first stated in *Smith v. Marrable,*[20] where the court said there is an implied condition of habitation in the letting of a furnished house. This broad statement was qualified in later cases.[21] The exception was limited to situations in which a furnished dwelling was leased for a short and definite duration of time. The warranty implied was that the premises were habitable. Thus, where the basement was filled with water,[22] the home infected with insects,[23] or vermin[24] the warranty of habitability was breached and the tenant could properly quit the premises.

[19] *Id.* at 161, 16 N.W.2d at 702.

[20] 11 M. & W. 6, 152 Eng. Rep. 693 (Ex. 1843).

[21] In two other cases in 1843 the English courts were asked to apply the rule as stated in *Smith.* The limitations discussed later were found to be facts in *Smith* and prerequisites to the exception. Sutton v. Temple, 12 M. & W. 52, 152 Eng. Rep. 1108 (Ex. 1843); Hart v. Windsor, 12 M. & W. 66, 152 Eng. Rep. 1114 (Ex. 1843).

[22] For development of the exception see 11 BOSTON U.L. REV. 119 (1931), and authorities cited therein.

[23] *See, e.g.,* Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). *But see* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947).

[24] *E.g.,* Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931).

The exception is apparently accepted universally in the United States.[25] It has, however, always been strictly limited in application.[26] It has not been extended to letting unfurnished dwellings.[27] It has been recognized in leases for periods of the summer,[28] a "season,"[29] eight months,[30] and one year,[31] but apparently for no period longer than one year. The basis of the exception is that the tenant has no time to investigate as *caveat emptor* requires. Both parties know that immediate occupancy for a specific purpose is desired, and the lessee frequently is from out of town and is unable to inspect the house, especially when the lease is for a short period of time.[32]

The remedies granted under the contract theory of implied warranty have been rarely applied to leases. Few cases have been found which allow a lessee recovery on this basis. In one such case, *J. D. Young Corporation v. McClintic,*[33] the lessee sued to cancel the lease because the building which was prepared by the lessor was defective and not complete at time of occupancy. The court held there is an implied warranty in the lease of a building under construction or to be constructed that it will be suitable for the lessee's purposes expressed in the lease if progress has not reached a stage permitting inspection of the premises.[34] Another case, *Woolford v. Electric Appliances, Inc.,*[35] involved the lease of a stall under con-

[25] The American cases are reviewed in 11 BOSTON U.L. REV. 119 (1931).

[26] *See* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947), where the court said, "When the defendant let for the summer a furnished house at the seashore, he impliedly agreed that the house was reasonably suitable for immediate use and occupancy by the tenant. . . . [But] a condition that the premises are fit for habitation 'is implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later . . . .'" *Id.* at 632-33, 70 N.E.2d at 794-95 (citations omitted). *See also* Hacker v. Nitschke, 310 Mass. 754, 756, 39 N.E.2d 644, 646 (1942), where the court states about *Ingalls* that "[t]his is a departure from the general rule and should be confined within narrow limits." *See also* 11 BOSTON U.L. REV. 119 (1931), where the author states that in applying the exception to the rule of *caveat emptor* the American courts did so only insofar as the warranty extended to the chattels, furnishings, or goods which were incorporated into the real property lease; *caveat emptor* was still the rule if the defect of the furnished premises was structural or related to the real property. *Cf.* Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).

[27] Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).

[28] Smith v. Marrable, 11 M. & W. 6, 152 Eng. Rep. 693 (Ex. 1843).

[29] Ingalls v. Hobbs, 156 Mass. 349, 31 N.E. 286 (1892).

[30] Young v. Povich, 121 Me. 141, 116 A. 26 (1922).

[31] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). For criticism of the one year period as too long a period for application of the exception, see 45 MARQ. L. REV. 630 (1962).

[32] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[33] 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd on other grounds,* 66 S.W.2d 677 (Tex. Comm'n App. 1933).

[34] J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930). *See also* Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904) (implied warranty in building under construction); Hardman Estate v. McNair, 61 Wash. 74, 111 P. 1059 (1910) (implied warranty premises to be arranged for tenant).

[35] 24 Cal. App. 2d 385, 75 P.2d 112 (1938).

struction in an open market at the time of leasing. When finished, the refrigeration in the stall was inadequate to preserve meats which the lessee offered for sale. The court held that under circumstances where there is construction to enable the lessee to put the premises to a particular use, a warranty that the construction will be adequate to permit the use is implied in the contract. Here the refrigeration unit was for one purpose — to enable the lessee to keep meats for sale. Since the unit was inadequate, the lessee recovered on an implied warranty that the stall as constructed would be reasonably suited for the intended purpose.[36]

It is important to note that in each of these cases *caveat emptor* was rejected because there was no way to inspect the final fitness of the premises under construction. The remedy in this situation is analogous to the recent decisions rejecting the rule of *caveat emptor* in the purchase of a new home and instead allowing recovery on the implied warranty theory.[37] The rationale under both circumstances resembles that applied to the lease of a furnished home for a short period of time. In these cases the lessee had little or no opportunity to inspect the premises and hence could not be penalized for what he could not observe. The warranty seems to be implied in the contract to construct and not in the lease agreement. Only one case has been discovered in which the theory of implied warranty was recognized on leased premises not under construction.[38]

Several reasons exist for extending the contract theory of implied warranty concerning the condition of demised premises to leases. In addition to the changes already mentioned in the nature of leasing transactions,[39] other reasons exist for not strictly applying *caveat emptor* to those transactions today. The lessee and lessor are not on a basis of equal knowledge regarding the premises. The owner of a building will usually be notified of building code violations present

[36] *Id.*

[37] *E.g.*, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). For a discussion of implied warranties in newly completed homes see Bearman, *Caveat Emptor in Sales of Real Property — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961). The application of the implied warranty to the builder-vendor of a newly completed home is a logical extention of its application to a contract of sale of a home under construction. Carpenter v. Donohoe, *supra* at 83, 388 P.2d at 403.

[38] Hyland v. Parkside Inv. Co., 10 N.J. Misc. 1148, 162 A. 521 (1932). The court held a lessee who was unable to use the demised premises due to a zoning ordinance passed after possession could recover advance rent. The court said, "In this lease the landlord specifically restricted the use to one purpose, and we think this was an express guaranty of the fitness of the premises for that particular purpose. To hold otherwise would be an absurdity. A lease for a single purpose is void if that purpose is unlawful." *Id.* at 1149, 162 A. at 521. Not only is finding an express warranty under such circumstances against the weight of authority, but also the court cited no authority for the proposition that the warranty is present in a lease even though no remodeling or further construction on the demised premises is necessary. *Accord*, 1 AMERICAN LAW OF PROPERTY § 3.45, at 269 (A.J. Casner ed. 1952).

[39] Text preceding note 1 *supra.*

on his premises and also of special regulations regarding his land.[40] The lessee will not, without special investigation, know of these violations, nor will he know of structural defects in the building itself. It is not unreasonable to attribute knowledge of these facts to the lessor. He should be able to alert the lessee to them or easily discover if the use intended by the lessee is structurally feasible. To protect the lessee in these leasing transactions it is necessary to consider and apply a limited doctrine of implied warranties in leases.

I. THE IMPLIED WARRANTY

The nature of the implied warranty in the lease would be that the leased premises are suitable for the purpose of the tenant and that they are built in conformity to the applicable local codes. Thus, the lessor would assure that the premises can immediately be put to the use intended by the lessee and that the lessee may do so lawfully. If the premises do not conform to the code regulations or are structurally defective, the lessor would have to make the necessary repairs or compensate the lessee for having them done.

The warranty is designed to protect a lessee in various situations, although the usual one is where the lessor has superior knowledge. It will provide a remedy when the lessor has a structually defective building which is incapable of being used as the lessee planned.[41] Frequently a lessor agrees to build on the premises to suit the tenant, and the lease provides that the construction shall conform to the building codes. But if the lessee is a restaurant owner, a special plumbing system may be required by the plumbing code even though it is not required by the building code to which the building would conform. If the building is adequate for the building code requirements, the lessor has met the express covenant, but the premises are not suitable for occupancy for the express purpose of the lease. The lessee must install new plumbing facilities in order to use the premises in accordance with the lease terms. Under the implied covenant that the premises conform to the code regulations applicable to the intended use, the lessee could recover from the lessor the costs of installing the additional system.

A. *Limitations*

These warranties should be limited in application and would not be implied in all leases. Certain prerequisites must be shown

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[40] *See* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 412 (1961), where the court discusses this point.

[41] The facts of Soresi v. Repetti, 76 A.2d 585 (D.C. Mun. Ct. App. 1950), and Anderson Drive-In Theater, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953), would bring both cases within the implied warranty theory.

before the implied warranties would be imposed. First, the lease must be for a stated purpose before the implied warranty of suitability should apply. If the purpose is known, the lessor is able to determine whether the building is structurally adequate for the expressed purpose. If the lessor is to build improvements on the premises for the lessee, he must check the necessary regulations to determine if his construction satisfies all local codes; he must also make the lessee aware of defects such as inadequate plumbing or electrical systems which may make the premises unsuitable for the intended use. Failure to do so will forfeit his right to recover his rent without penalty. However, if the purpose is not expressed in a lease, actual knowledge of the lessee's intended purpose should be sufficient to put the lessor on notice and bring the implied warranty into action. Thus, if a lease mentions no purpose but the parties only discuss a particular business of the lessee, the lessor should not be allowed to claim that the implied warranty is inapplicable because the purpose is not expressed. He should be held to have actual knowledge sufficient to enable him to ascertain the suitability of his building for that purpose.

A second limitation on the implication of these warranties is that the defects causing the unsuitability must be within the lessor's control. Thus, a dwelling rendered untenantable because of noxious gases arising from the neighborhood[42] would not fall within the implied warranty. The lessor should not be held accountable for faults which he has no power to alter. Nor can the warranty apply to cases in which the lessee before occupancy decides to alter his use.

The implied warranty of conformity with local code regulations must be limited to situations in which the untenantability of the premises is caused by violation of a specific code regulation relating to the intended use. Thus, if the code is applicable to drug stores, but not grocery stores, and the lease use is a grocery store, the warranty has not been breached even though use of the premises for the sale of drugs is not possible. The lessor can only be held to assure specific uses of the premises — not all uses. However, this warranty does not cover the situation in which the lessee knows he needs a particular permit to operate the intended business. If he is unable to get the required permit and thus cannot put the premises to the intended use, he cannot recover under this warranty. As under current law,[43] this example is a foreseeable contingency which the parties can anticipate and provide for in the lease. The implied warranty should not cover those contingencies which the parties can anticipate.

[42] Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889).

[43] Goodman v. Sullivan, 94 Ohio App. 390, 114 N.E.2d 856 (1952).

The implied warranties can only apply to defects which are latent and which make the premises unsuitable. Thus, the tenant cannot claim that the implied warranty of suitability has been breached if he leases land for a drive-in restaurant in a residential area in which business uses are prohibited. This fact is readily observable to him because zoning restrictions are a matter of public record.

B. *Remedies*

The remedy for breach of the implied warranty of suitability or conformity to local codes must differ from the present law, *i.e.,* the lessee must be able to recover the cost of altering the demised premises to permit the intended use or to conform to the code provisions. Since he may want to remain in possession, he must be allowed a damage remedy. These additional costs should be recovered from the lessor in a lump sum as damages. If the defect is the proximate cause of personal injuries, damages should be recoverable for the harm resulting therefrom.

Another remedy for the lessee should be reformation of the lease. If only a portion of the leased premises is untenantable, or if a portion does not meet the local code requirements, then the lessee should be allowed to decide whether he can or cannot use the remainder of the leased premises. If he can use part of them, the lease should be reformed to cover only the area in use and then be terminated as to that which is unsuitable. At that time, the rent should be reduced in an equitable amount by deducting the value of the portion returned to the lessor from the total rent due. Reformation would thus enable the lessee to recoup his losses on partially adequate leased premises. It is an important remedy since leased areas are frequently designed for dual purposes such as a cafeteria in one area, kitchen in an adjacent one, or a bar on one floor of a building and a restaurant on another.

The final remedy should be rescission and cancellation of the lease. If the premises are totally unusable and unsuited for the intended purposes, the lease should be terminated. However, this remedy should be strictly applied, so that if the purposes of a lease and the premises demised are separable, the lessor may enforce the lease as to a suitable portion. For example, if the lease states that one lessee will maintain a lounge on one floor and a cafeteria on another, but the cafeteria cannot be put in the building, the lessor should be able to enforce the lease and compel the lessee to put in the lounge if it is economically feasible. In short, the lessee cannot declare a lease rescinded merely because the warranties are not met

as to a portion of the lease. This restriction is particularly pertinent if the lessee has been granted remedies for partial breaches of these covenants.

The remedies for the breach of the implied warranty of suitability or for conformity to local codes would fill the gaps in the current legal remedies. Reformation of the lease provides something less than complete termination of that contract. Damages enable the lessee to recoup his losses and yet not sacrifice the lease. These solutions are needed today because the lease is a long term arrangement which is entered into for multifarious reasons. It is no longer simply for the occupancy of a building suited for one and only one purpose; it may be intended to serve several functions. Today the improvements may be built by developers for particular lessees and with specific purposes in mind. The land may be desirable as a business location even in a suburban area, and even if one intended use fails. The building may be constructed to suit the lessee or for his business purposes.

II. Conclusion

Leasing law has been strict in applying the doctrine of *caveat emptor* to a lessee who finds the demised premises unsuitable for occupancy. The lessee has been held liable for rent of the premises even though the lease stated that the premises were to be used for a particular purpose. Under the rule of *caveat emptor* the courts have held that the lessee had a duty to inspect the premises to determine their suitability for his intended use. The only exception to this rule was the case of a short term lease of a furnished dwelling.

As the lease law evolved, the lessee was provided relief if he could prove fraud or misrepresentation, mutual mistake, or constructive eviction. However, this relief took the form of cancellation or termination of the lease and allowed no recovery for damages or additional expenses of the lessee. In a few other cases the lessee was allowed relief on the theory of implied warranty that the premises being prepared would be suitable for the lessee's purpose. The warranties in those cases arose from the contract to construct or remodel and from the fact the work had not progressed far enough to allow adequate inspection. In each of them the lease was signed prior to construction of the leased premises.

Modern leasing transactions necessitate reevaluation of the doctrine of *caveat emptor* as applied to leases. The lessee no longer has as much knowledge of the premises as the lessor. Building code regulations or violations are made known to the lessor, not to the lessee. The lessor is in a better position to know of latent structural defects in a building which might go unnoticed by the inspecting

lessee since the plans and specifications of the building are not in the latter's possession.

The nature of leases also warrants reevaluation of this rule. Developers more and more frequently seek to obtain leases on an area of land before building. The lessee usually invests much time and money in determining that the area has good income potential and in preparing the leased space for his business. He cannot afford to discover after occupancy that a specific local code regulation regarding his business has not been met in construction of the building. The additional cost to correct the defect is unexpected. He does not want to cancel the lease, since he has built up good will and potential for his business in this area in anticipation of a long term lease. He needs the remedy which an implied warranty theory provides.

Moreover, the lessee, especially the small businessman, cannot accomplish the inspection which *caveat emptor* requires. He rarely will be familiar with wiring or plumbing, for example, and will not know if these systems are adequate. Nor can he afford to hire a professional engineer to investigate the site and make tests to determine the structural suitability of the building and land. The costs of this expert would be prohibitive, and yet *caveat emptor* requires the man who wants to engage in the laundry business to know that the building can support his heavy equipment. Such information is available to the lessor who can in turn inform the potential lessee of the physical suitability of the premises and of costs required by the lessee to adapt the premises to the use. The lessee must still inspect for patent defects such as broken windows, cracks in the wall, or unclean premises; he cannot recover under this theory for defects which a reasonable inspection would uncover, and the latter remains a question of fact.

Under circumstances in which the premises are unsuitable for an express use because of structural defects or local code violations, the lessee should be allowed relief against the lessor on a contractual theory of implied warranty. If a lease expresses a use or if the lessor knows of the intended use, the lessor should be held to impliedly covenant that the premises are fit for the use and conform to all local code regulations regarding the use. The warranty would be breached only if the defect is the cause of the unsuitability of the premises or if the code violation directly relates to the intended use. The warranty should not extend to defects which are beyond the lessor's ability to control or remedy. Contingencies which are foreseeable at the time of the lease should also be excepted from operation of the warranties.

The implied warranty of suitability for purpose and of con-

formity to local codes regarding the purpose would provide the lessee with a remedy less stringent than that available under current leasing law. Remedies now available frequently involve fact situations which would be covered by an implied warranty, but require proof of fraud, mistake, constructive eviction, or breach of the implied warranty of quiet enjoyment to allow relief to the lessee.[44] The relief under the theory of implied warranties would stop short of cancellation of the lease, *i.e.,* damages, proportionate reduction of rent, or reformation of the lease. Not only are these remedies more consistent with the intent of the parties, but they also enable the lessee to remain in possession under the lease.

The application of an implied warranty theory to leases gives recognition of the changes in leasing transactions today. The theory acknowledges that a lease is in essence not only a demise but also a sale, in the commercial sense, of an interest in land and, more importantly, is a contractual relationship.[45] The implied warranty suggested here would conform more closely to the intentions of the parties as well as to actual business expectations.

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[44] Suit for the breach of implied warranty of quiet enjoyment has been occasionally utilized to seek a remedy for situations where the premises are unsuitable. *See, e.g.,* Croskey v. Shawnee Realty Co., 225 S.W.2d 509, 513-14 (K.C. Ct. App. Mo. 1949), where the court, quoting from Shaw v. Butterworth, 327 Mo. 622, 628, 38 S.W.2d 57, 60 (1931), determined,

> "In the absence of a covenant or promise, the tenant must take the premises in the condition in which he finds them, for to a mere contract of letting the rule of caveat emptor is relevant. An implied covenant on the part of the landlord that the premises are suitable for the purposes for which they are rented, or that they are in any particular condition, does not arise from the mere renting of premises."

[45] This idea is not meant to suggest that the court must find the leasing agreement was a "sale" before the implied warranties should be enforced. The warranties should be the basis of a cause of action by decisional or statutory law and should be allowed when the limitations discussed previously are present. The action should not depend upon the presence of technicalities such as a "sale," or the formal requirements in the law of sales for implying warranties. The basis of the action is the leasing agreement under the conditions outlined above — not the fact that a "sale" occurred.