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The Realities of Contemporary Rental Agreements Require the Application of Implied Warranty of Habitability and Fitness as a Just and Necessary Implication from the Contractual Nature of a Lease of a Dwelling.

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LANDLORD-TENANT—IMPLIED WARRANTY OF HABITABILITY AND FITNESS—THE REALITIES OF CONTEMPORARY RENTAL AGREEMENTS REQUIRE THE APPLICATION OF IMPLIED WARRANTY OF HABITABILITY AND FITNESS AS A JUST AND NECESSARY IMPLICATION FROM THE CONTRACTUAL NATURE OF A LEASE OF A DWELLING. *Lemle v. Breeden*, 462 P.2d 470 (Hawaii 1969).

Plaintiff entered into a written lease agreement as lessee of a furnished dwelling house for a term of nine months. The plaintiff-lessee had ample opportunity to inspect the premises prior to signing the agreement. The lessee paid deposit and advance rent and took immediate possession of the dwelling. During the first night of occupancy, plaintiff found that the house was infested with rats, and the defendant-lessor's subsequent attempts to remedy the problem by employing exterminators failed. As a result, three days after occupying the dwelling, plaintiff vacated the premises and brought suit to recover the deposit and rent. The trial judge ruled for plaintiff on the basis of constructive eviction and breach of an implied warranty of habitability and fitness for use. Held—*Affirmed.* The realities of contemporary rental agreements require the application of implied warranty of habitability and fitness as a just and necessary implication from the contractual nature of a lease of a dwelling.

Transactions regarding the sale or lease of real estate have traditionally been surrounded with legal fictions resulting from the application of common law rules. The majority of these legal fictions no longer have any practical function, and when they are applied to contemporary property agreements, legal problems and lay confusion are usually the result.[1] A good example of such a legal fiction is the doctrine of constructive eviction as applied to the law governing landlord-tenant transactions.[2] The doctrine of constructive eviction was created by the courts to ease harsh results produced by the operation of *caveat emptor*.[3] The lease transaction was subjected to the limitations of *caveat emptor* primarily because property law traditionally regards the lease as a sale of the estate for a term. This "sale of the estate for a term" was based upon mutual promises between the parties; however, contrary to ordinary contract law, these promises were not regarded as mutually conditional and dependent.[4] The combination of *caveat emptor* and non-

1 Pound, *The Cause of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 403-408 (1906).

2 Simon, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 TEXAS L. REV. 1160, 1164 (1969).

3 Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 704 (1969).

4 3A CORBIN, CONTRACTS § 686 (1960); 6 WILLISTON, CONTRACTS § 890 (3d ed. 1962).

mutual dependency place an onerous burden on the prospective tenant to protect himself by the limited remedies of prior inspection and express warranty. If the tenant fails to protect himself by these remedies his sole relief is constructive eviction.[5]

Constructive eviction, due to its limited nature, has been a rather dubious relief for the tenant.[6] Therefore, in an attempt to do justice, the courts have turned to the doctrine of implied warranty.[7] Implied warranty is the antithesis of *caveat emptor*; consequently, its application in this field of law is a direct attack upon the applicability of *caveat emptor* in lease agreements.[8] This attack is not a recent development; for over one hundred years there has existed an accelerating trend in case and statutory law to eliminate the application of *caveat emptor* in property law.[9]

The doctrine of *caveat emptor* is predicated on the theory that all parties have an equal opportunity to acquire information and knowledge of the object of the transaction, and therefore, no affirmative duty to inform regarding defects exists. Justification for the doctrine is based upon the right of the vendee or lessee to a prior inspection and the protection of express warranty. Therefore, the sole duty upon the vendor or lessor is to make known latent defects that fall within the constructive knowledge rule. In the absence of express provisions to the contrary, he has no other affirmative duty in this field.[10]

The application of implied warranty of habitability and fitness for use is the exception rather than the general rule in property law.[11] It is widely accepted, however, that a short term lease of a furnished dwelling carries with it an implied warranty that the premises are habitable.[12] The exception arose when the courts recognized that the existence of certain facts and circumstances defeated the basic reasoning behind the application of *caveat emptor*. The fact that leased premises are furnished logically defeats the fiction that the landlord had no

5 *See* Perez v. Raybaud, 76 Tex. 191, 13 S.W. 177 (1890); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1285 (1960).

6 Simon, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 TEXAS L. REV. 1160, 1164 n. 29 (1969).

7 Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969); Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969); Buckner v. Azulai, 59 Cal. Rptr. 806 (App. Super. Ct. L.A. 1967); Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961); Delamater v. Foreman, 239 N.W. 148 (Minn. 1931); Young v. Povich, 116 A. 26 (Maine 1922); Ingalls v. Hobbs, 31 N.E. 286 (Mass. 1892); Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843); Collins v. Barrow, 174 Eng. Rep. 38 (Ex. 1831).

8 Humber v. Morton, 426 S.W.2d 554, 557 (Tex. Sup. 1968).

9 *Cf.* Humber v. Morton, 426 S.W.2d 554 (Tex. Sup. 1968); Pines v. Perssion, 111 N.W. 2d 409 (Wis. 1961). Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CAL. L. REV. 670 (1966); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

10 Schoshinski, *Remedies of the Indigent Tenant: Proposal for a Change*, 54 GEO. L.J. 519 (1966).

11 Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 704 (1969).

12 *E.g.*, Ingalls v. Hobbs, 31 N.E. 286 (Mass. 1892).

knowledge of the intended use of the premises. Since the lease is short term, there is no justification for the idea that the tenant may change his intended use. It also evidences the tenant's intent to take immediate possession, which limits his right to a prior inspection.[13] The exception is based on pure logic and the realities surrounding the landlord-tenant agreement. Ironically, for some illogical reason (except in isolated instances) the exception has not been extended to cover any long term lease of dwellings, or any lease of unfurnished dwellings.[14] Its sole expansion has been in areas of multidwelling apartments,[15] and possibly into very specific situations partially governed by the lease agreement.[16]

In the instant case, the Supreme Court of Hawaii was faced with the classic fact situation for application of the short term exception. After a scholarly discussion of the exception and implied warranty in general, the court concluded that the exception was artificial—that it in no way clarified or solved the problems found in modern landlord-tenant controversies. The court then focused its attention to the heart of the problem, *i.e., caveat emptor,* and found that it had no theoretical or practical value in modern urban realities, and that it was no longer applicable.[17] The court then attacked the doctrine of constructive eviction declaring:

> The doctrine of constructive eviction, as an admitted judicial fiction designed to operate as though there were a substantial breach of a material covenant in a bilateral contract, no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available.[18]

Justification for such sweeping decisions can be found in a number of legal trends regarding common law.[19] The *Lemle* case based its decision primarily on the growing theory that law must take into consideration its pragmatic relative nature. The court declared:

> [I]t appears to us that no search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist.

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13 Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches,* 54 CAL. L. REV. 670, 673-678 (1966).

14 *Id.*

15 *E.g.,* Delamater v. Foreman, 239 N.W. 148 (Minn. 1931).

16 Earl Millikin, Inc. v. Allen, 124 N.W.2d 651 (Wis. 1963); Young v. McClintic, 26 S.W.2d 460 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds,* 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved).

17 Lemle v. Breeden, 462 P.2d 470, 473 (Hawaii 1969).

18 *Id.* at 475.

19 *Cf.* Lesar, *Landlord and Tenant Reform,* 35 N.Y.U.L. REV. 1279 (1960); Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society,* 46 J. URBAN L. 695 (1969); Simon, *Tenant Interest Representation: Proposal for a National Tenants' Association,* 47 TEXAS L. REV. 1160 (1969).

> We do not agree with Blackstone that "[t]he law of real property . . . is formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link of the chain endangers the dissolution of the whole." (Citation omitted) . . . The law of landlord-tenant relations cannot be so frail as to shatter when confronted with modern urban realities and a frank appraisal of the underlying issues.[20]

The doctrine of *caveat emptor* has been under attack in American jurisdiction since an early date. In *Wintz v. Morrison*,[21] involving the sale of personal property, the Texas Supreme Court noted the trend of nineteenth century decisions that limited the operation of *caveat emptor* in sales by application of implied warranty. Since the *Wintz* decision, the limitations placed on *caveat emptor* in the sale of chattels have rendered it virtually impotent.[22]

This attack on *caveat emptor* has not been limited to the sale of personal property, for recently there have been decisions regarding its application in the area of real estate. The leading case in Texas is *Humber v. Morton*,[23] which concerns implied warranty in the sale of new houses. In *Humber*, Justice Norvell declared: "The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices."[24] The Supreme Court of Texas reasoned that modern practices logically required the application of implied warranty of fitness in the sale of new homes. "If at one time in Texas the rule of caveat emptor had application to the sale of a new house by a vendor-builder, that time is now past."[25] This approach to implied warranty in the sale of new homes appears to be rapidly becoming the majority rule.[26] The majority of these decisions are reached by considering the logical and practical need for such change. The evidence of this concept can be seen by such statements as: "Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . ."[27]

The court in *Lemle* could see no logical or practical reason why such a concept could not operate equally well in the field of lease agreements. Their application of this concept to lease agreements is supported by

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20 462 P.2d at 475.

21 17 Tex. 372 (1856).

22 The Orgin Lecture delivered during Law Week at the University of Texas School of Law, May 1969. Green, *The Law Must Respond to the Environment*, appears in 47 TEXAS L. REV. 1327 (1969).

23 426 S.W.2d 554 (Tex. Sup. 1968).

24 *Id.* at 562.

25 *Id.* at 561.

26 *See* Humber v. Morton, 426 S.W.2d 554, 25 A.L.R.3d 372 (Tex. Sup. 1968).

27 Schipper v. Levitt & Sons, 207 A.2d 314, 325 (N.J. 1965). *See* Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964).

a number of authorities dealing with contemporary tenant problems.[28] In *Pines v. Perssion*, the Supreme Court of Wisconsin stated:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increase is too important to be rebuffed by that obnoxious legal cliché, caveat emptor."[29]

This approach to the perplexing problems of urban housing has as its stated goal laws that consider the realities of urban life and the reformation of rights and remedies to better govern these realities. For this reason the court in *Lemle* rejected the doctrine of constructive eviction because it can no longer protect the urban tenant.[30] The acute housing shortage in our urban areas has aggravated the inherent limitations of the doctrine of constructive eviction to such an extent that it has no practical value as a remedy for a large percentage of urban dwellers.[31] An advantage found in the application of implied warranties of habitability and fitness for use is the wide range of alternatives presented by the basic contract remedies. Constructive eviction, on the other hand, has limited application as an affirmative remedy for damages. This can be traced to a number of causes, the most important being the tenant's own financial problems, and the intricacies of proof and procedure that surround the action.[32] As a defense, constructive eviction is based on a failure of consideration. To insure its application against a suit by his landlord, the tenant must have the knowledge of Socrates, the patience of Job, and a very good lawyer.[33]

The traditional view of implied warranty of habitability is that the landlord warrants the fitness at the time the tenant takes possession.[34] The problem of subsequent defect raises a question regarding repairs.

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28 *See* Lemle v. Breeden, 462 P.2d 470, 474 n.2 (Hawaii 1969).

29 Pines v. Perssion, 111 N.W. 2d 409, 412-413 (Wis. 1961). *Accord*, Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969); Buckner v. Azulai, 59 Cal. Rptr. 806 (App. Dep't Super. Ct. L.A. 1967); Delamater v. Foreman, 239 N.W. 148 (Minn. 1931); Collins v. Hopkins [1923] 2 K.B. 617. *Contra*, Cameron v. Calhoun-Smith Distributing Com. 442 S.W.2d 815 (Tex. Civ. App.—Austin 1969, no writ).

30 Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969).

31 Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960); Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695 (1969).

32 *Id.*

33 Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 702-704 (1969); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1281-1284 (1960); Simon, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 57 TEXAS L. REV. 1160, 1164 (1969). *But see* Ravet v. Garlick, 190 N.W. 637 (Mich. 1922). In this case partial eviction as a defense was not waived by tenant's failure to abandon the premises.

34 *See* Simon, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 TEXAS L. REV. 1160 (1969).