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# Property—A Warranty of Habitability is Implied by Operation of Law into Leases of Urban Dwelling Units

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# RECENT CASE

PROPERTY — A WARRANTY OF HABITABILITY IS IMPLIED BY OPERATION OF LAW INTO LEASES OF URBAN DWELLING UNITS

The plaintiff-landlord brought an action for possession against the defendant-tenants for non-payment of rent. The tenants admitted that they had not paid the rent. They alleged numerous violations of the Housing Regulations as an equitable defense or a claim by way of recoupment or set-off in an amount equal to the rent claim, as provided by Rule 4c of the Landlord and Tenant Branch of the District of Columbia Court of General Sessions.[1] The Landlord and Tenant Branch of the District of Columbia Court of General Sessions rejected the tenants' contention that the landlord was under a contractual duty to maintain the premises in compliance with the Housing Regulations for the District of Columbia. The District of Columbia Court of Appeals affirmed.[2] On appeal, the United States Court of Appeals for the District of Columbia reversed. *Held,* a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units, and breach of this warranty gives rise to the usual remedies for breach of contract. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied,* 39 U.S.L.W. 3227 (U.S. Nov. 24, 1970).

At common law a lease contained no implied warranty that the premises were fit for occupancy.[3] The tenant took the premises as they were and assumed all risks as to their condition.[4] The lessor was under no obligation to warrant the present or future condition of the leased premises or to repair the premises at the beginning of the term and had no obligation to make any repairs during the tenancy.[5] The rationale for these rules appears to be threefold. First, the covenants of the common law lease were viewed as being completely independent. If a landlord covenanted to maintain the leased structure, his failure to perform had no effect on the tenant's obligation to pay rent.[6] The breach of a covenant in a lease simply gave rise to an

1. Reported in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970), *cert. denied,* 39 U.S.L.W. 3227 (U.S. Nov. 24, 1970).

2. Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Mun. Ct. App. 1968), *aff'g sub nom.* District of Columbia Court of General Sessions.

3. 1 AMERICAN LAW OF PROPERTY, § 3.45, at 267 (Casner ed. 1952); *e.g.,* Gade v. National Creamery Co., 324 Mass. 515, 87 N.E.2d 180 (1949).

4. 2 R. POWELL, THE LAW OF REAL PROPERTY § 2.33, at 300 (1967); *e.g.,* Civale v. Meriden Housing Authority, 150 Conn. 594, 192 A.2d 548 (1963).

5. *E.g.,* Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952); Kessler v. Grasser, 300 Ky. 89, 187 S.W.2d 1012 (1943); Irish v. Rosenbaum Co., 348 Pa. 194, 34 A.2d 486 (1943).

6. RESTATEMENT OF CONTRACTS § 290 (1932). *See also* Richard Paul, Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945); Osso v. Rohanna, 187 Pa. 280, 144 A.2d 862 (1958).

independent suit or counterclaim for damages and it did not suspend the performance of any of the other covenants. Second, the concept of caveat emptor shaped the background of the law concerning the condition and maintenance of leased premises.[7] The tenant, by inspecting the premises, impliedly asserted that he knew the condition of the leasehold. Third, the law of leases evolved in an agrarian society. In a rural environment the value of the lease to the tenant lay in the quantity and quality of the land itself.[8] The common law tenant bargained primarily for cultivation rights and the condition of any structure upon the land was of secondary importance. The process by which this background law has been adapted to modern conditions has involved many exceptions, some based on judicially constructed qualifications on the basic doctrine of caveat emptor, others on statutory enactments, and still others on a complete reappraisal of the assumptions upon which the common law is based.[9]

Historically, the tenant's obligation to pay rent was absolute, regardless of the condition of the premises. Only the actual expulsion of the tenant by the landlord terminated the rental duty. Most courts now, however, recognize the doctrine of constructive eviction as justification for suspension of the rental covenant.[10] The increased acceptance of this doctrine seems to indicate a judicial preference against a strict interpretation of the caveat emptor rule.[11] In addition, courts have recently begun to hold sellers and developers of real property responsible for the fitness of their product.[12] The failure to disclose a known defect in the sale of new or used housing has been held a sufficient basis for recovery.[13] Several courts have held that an implied warranty of habitability exists in the sale of new housing where the construction of the dwelling was not started or completed at the time of the contract of sale.[14] Other courts have extended the implied warranty

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7. 2 R. POWELL, THE LAW OF REAL PROPERTY § 233, at 300 (1967).

8. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 131 (2d ed. 1923).

9. 2 R. POWELL, THE LAW OF REAL PROPERTY § 233, at 301 (1967).

10. *See* Comment, *Rent Abatement Legislation: An Answer to Landlords*, 12 VILL. L. REV. 631 (1967).

11. Judges have not been hesitant in expressing their displeasure over the common law rule of caveat emptor. In Bowles v. Mahoney, 202 F.2d 320, 325 (D.C. Cir. 1952), dissenting Judge Baezlon said, "I think that rule is an anachronism which has lived on through stare decisis alone rather than through pragmatic adjustment to 'the felt necessities of (our) time.' "

12. *See* Bearman, *Caveat Emptor in Sale of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

13. Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960).

14. Weck v. A & M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Hoye v. Century Builders Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).

of fitness doctrine to include completed structures.[15] Courts have also held builders of new homes liable for breach of an implied warranty that all local building codes are satisfied.[16] Another judicial exception to the rule of caveat emptor is the implied warranty of habitability for use in the short term lease of a furnished dwelling.[17] Additionally, recent decisions[18] and commentary[19] suggest the possible extension of liability to parties other than the immediate seller for improper construction of residential real estate. Despite this trend, many courts have been unwilling to imply warranties of habitability into apartment leases.[20]

Recognition of the substandard condition of low income housing has prompted state legislatures to enact housing codes and regulations. The purpose of a housing code is to provide an effective method of enforcement of certain minimum standards deemed essential for human occupancy.[21] The effectiveness of these codes has been questionable.[22] In Pennsylvania, for example, the tenant's obligation to pay rent is suspended upon certification by authorized officials that a dwelling is "unfit for human habitation."[23] The tenant is required to pay the withheld amount into an escrow account until the building is re-certified as "fit for occupation."[24] The effectiveness of the statute is limited by the fact that withheld monies cannot be used to make repairs.[25] The statute thus provides only a partial

15. *See* Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). The court said, ". . . the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of the contracting." *Id.* at 83, 388 P.2d at 402. *See also* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1969); Waggoner v. Midwestern Development Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

16. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Schiro v. W. E. Gould & Co., 18 Ill. 2d 538, 165 N.E.2d 286 (1960).

17. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

18. Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

19. Comment, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. CHI. L. REV. 739 (1968).

20. Rubinger v. Del Monte, 217 N.Y.S.2d 792 (App. T. 1961); Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (N.Y. City Ct. 1964); Kearse v. Spaulding, 406 Pa. 140, 170 A.2d 450 (1962).

21. *See* D.C. CODE ANN. § 5-701 (1967).

22. One of the few things about which every observer of the slum housing situation agrees is that present enforcement techniques have been a failure. The combination of bureaucratic overlapping and understaffing, the use of procedural delays to the advantage of recalcitrant landlords, and the lack of militancy by both administrative and judicial officials, have all worked against the achieving of significant change.

Sax and Hiestand, *Slumlordism as a Tort*, 65 U. MICH. L. REV. 869, 915 (1967). *See generally* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

23. PA. STAT. ANN. tit. 35, § 1700-01 (1967).

24. *Id.* If at the end of six months the building has not been re-certified, the deposits in the escrow account are repaid to the tenant.

25. *See* Note, *Rent Withholding in Pennsylvania*, 30 U. PITT. L. REV. 148 (1968).

remedy, because the tenant is still not provided with a suitable dwelling. In other states, the duty of repair and maintenance has been placed on the lessor by the passage of "repair and deduct laws."[26] "Generally, these statutes provide that the lessor of a building intended for human occupation must put it into a condition fit for such use, and repair all subsequent dilapidations not occasioned by the tenant's own negligence."[27] The effectiveness of this type of legislation has also been restricted. In certain states the cost of repairs is limited to one month's rent.[28] Additionally, all of the "repair and deduct" states expressly permit the landlord to contract away the statutorily imposed obligation. In New York, the court may stay eviction proceedings brought for nonpayment of rent upon proof that the conditions of the premises were such as to constructively evict the tenant.[29] The tenant must deposit the rent due, which may, at the court's discretion, be used for necessary repairs.[30] The conditions necessary to justify a constructive eviction have limited the use of this statute. A judicial attempt to liberalize the constructive eviction doctrine in New York has been rejected.[31]

It has been stated that one of the tasks of modern courts is "to divorce the law of leases from its medieval setting of real property law and adapt it to present day conditions and necessities. . . ."[32] A number of courts have felt that the enactment of housing code legislation justifies a judicial review of certain common law doctrines. The Supreme Court of Wisconsin in *Pines v. Perssion*[33] rejected the common law doctrine of caveat emptor with respect to the lease of a furnished dwelling. In upholding the imposition of an implied warranty of habitability the court said:

> Legislative and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete.[34]

26. CAL. CIV. CODE §§ 1941, 1942 (West 1954); MONT. REV. CODES ANN. §§ 42-201 & 42-202 (1947); N.D. CENT. CODE § 47-16-12-13 (1960); OKLA. STAT. ANN. tit. 41, §§ 31, 32 (1952); S.D. CODE §§ 38.0409 & 38.0410 (1939); statutes *cited in* Comment, *infra* note 27, at 312 n.35.

27. Comment, *Rent Withholding and Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 312 (1965).

28. CAL. CIV. CODE §§ 1941, 1942 (West 1954); MONT. REV. CODES ANN. § 42-202 (1947).

29. N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1970-71). Related proceedings are found in N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1970-71) and N.Y. SOC. WELFARE LAW § 143-b(2) (McKinney 1966).

30. N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1970-71).

31. *See* Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. T. 1964).

32. Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEXAS L. REV. 47, 48 (1937).

33. 14 Wisc. 2d 590, 111 N.W.2d 409 (1961).

34. *Id.* at 595, 111 N.W.2d at 412.

The Supreme Court of New Jersey has held that housing regulations effectively alter the common law rule of no implied warranty of habitability.[35] The Supreme Court of Hawaii recently adopted the position that the function of a lease is to create a contractual as opposed to a tenurial relationship.[36] The court stated:

> [A]pplication of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship.[37]

These cases indicate the increasing judicial concern over the inequalities perpetuated by antiquated common law rules. The common law doctrine of no implied warranties of habitability must be judged in the light of contemporary society, not on the basis of often accepted, but long outdated, concepts.

The *Javins* case reflects this policy decision. The rationale for establishing an implied warranty of habitability in *Javins* involves four points. First, the factual assumptions upon which the common law rules are based have lost their validity. The court points out that in today's urban society most tenants bargain primarily for the right to enjoy the premises for living purposes. The contemporary urban tenant is not interested in land but is concerned primarily with the structure on the land. The modern apartment lease involves the use of space and facilities in a building; the condition of the building, not the quality of the land, has become the most important feature of the lease-hold. As the court in *Javins* said, "Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in 'a house suitable for occupation.' "[38] Second, the court concludes that the reasons for the establishment of an implied warranty in the law of sales and torts are equally persuasive with respect to apartment leases. The contemporary lessor is required by statute to provide certain services. The types of services required of the landlord—heating, electricity and plumbing—are like those usually purchased by contract. Accordingly, it has been said that "the modern lease more closely resembles a contract for the purchase of space and services than it does the purchase of an interest in land."[39] Modern contract law has recognized that the purchaser of goods and services in an industrialized

35. *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

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

37. *Id.* at —, 462 P.2d at 474.

38. 428 F.2d at 1078.

39. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 535 (1965).

society is forced to rely upon the skill and honesty of the supplier. Because of this forced dependency, an increasing number of decisions have held manufacturers and sellers liable for breach of an implied warranty of fitness and merchantability. Based upon the premise that the public interest demands consumer protection, these cases place the burden of fitness on the manufacturer who, by marketing goods, impliedly attests to their suitability. The court's third reason for ruling in favor of an implied warranty of habitability lies in the nature of the present housing market. Today's urban tenant "usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee."[40] Moreover, building code violations uncovered by administrative agencies are not made known to the lessee. In addition, the lessor "is in a better position to know of latent defects, structural or otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them."[41] The resultant lack of knowledge is hardly conducive to effective remedial action on the part of the lessee. Furthermore, the increasing shortage of housing, racial and class discrimination, and standardized form leases enable landlords to place tenants in a take it or leave it situation. Finally, the court interprets the Housing Regulations of the District of Columbia as a legislative mandate to maintain leased premises in a habitable condition. Section 2501 of the Housing Regulations states:

> Every premises accommodating one or more inhabitants shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the code contemplates more than mere basic repairs . . . to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.[42]

The *Javins* court looked to other jurisdictions where housing code regulations have been held an integral part of any housing contract.[43] In addition, District of Columbia courts have held that the Housing Regula-

40. 428 F.2d at 1078.

41. Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

42. HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA § 2501 (1967). In addition, § 2304 of the Housing Regulations states: "No person shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin."

43. 428 F.2d at 1081. The court cited Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 544, 165 N.E.2d 286, 290 (1960): "[T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it." *See also* Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Gutowski v. Crystal Homes Inc., 20 Ill. App. 2d 269, 167 N.E.2d 422 (1960).

tions create legal rights and duties enforceable in tort by private parties.[44] The District of Columbia Court of Appeals has said that because of section 2501, a housing contract is void if, at the time of the signing of the lease, the landlord knew that substantial code violations existed on the premises.[45] If section 2501 effects the establishment of a housing contract, the court states, it should not cease to have effect once the contract is signed. "To the contrary, by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law."[46] Any private agreement to shift the statutorily imposed duties would be unenforceable because it would nullify the effect of the Code which specifically places the duty of maintenance upon the lessor.[47]

The significance of *Javins* lies in the fact that it is a judicial attempt to eliminate the discrepancy between legislative policies and urban realities. The Housing Regulations of the District of Columbia were passed in response to the increased need, and recognition of the social desireability, of adequate housing. The purpose of the Housing Regulations is to insure that every apartment possesses at least a minimum standard of habitability and fitness. If a tenant has a statutory right to a "habitable" apartment, he must have an effective means of enforcing this right. The ineffectual remedies provided the tenant by the common law have the practical effect of nullifying the "right to habitability." At common law the lessor's breach of a covenant to repair did not suspend the rental obligation of the tenant. The tenant could not even abandon the premises, his only remedy was an independent suit or counterclaim for damages. In essence, the tenant at common law had no effective means of compelling the landlord to make repairs. The constructive eviction doctrine provided the tenant with an additional, but by no means adequate, remedy. If it could be shown that the covenant breached by the lessor was of such a substantial nature as to materially interfere with the intended use of the premises, the tenant could abandon

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44. *See* Kanelos v. Kettler, 406 F.2d 951 (D.C. Cir. 1968); Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960). In Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922), Judge Cardozo, commenting upon the New York Tenement House Law (N.Y. Sess. Laws [1901] ch. 334), said:

> The legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.

233 N.Y. at 19, 134 N.E. at 704.

45. Brown v. Southall Realty, 237 A.2d 834 (D.C. Mun. Ct. App. 1968).

46. Javins v. First Nat'l Realty Corp., 428 F.2d at 1081.

47. *See* W. PROSSER, TORTS § 67, at 468-69 (3d ed. 1964). The precedents dealing with industrial statutes are in point. *See* Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 F. 298 (6th Cir. 1899).

and be released from the rental covenant. In addition to procedural problems,[48] the doctrine provided only an escape, not a method of enforcement. Because of the severe housing shortage, particularly in low income housing, many tenants do not want to abandon their dwellings, even if they are in need of serious repair. The tenant wants a means of compelling improvement, not a means of departure. Accordingly, it becomes evident that effective housing codes are dependent upon a reappraisal of the tenant's means of enforcement. The decision in *Javins* is such a reappraisal. "By adopting the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness, a more consistent and responsive set of remedies are available for a tenant."[49] The basic contract remedies of damages, reformation and rescission give the tenant a wide range of alternatives. For example, the tenant can now abandon the premises, be released from the covenant to pay rent, and recover damages. Alternatively, the tenant can now remain in possession and pay a rent reduced according to the extent of his damages,[50] or can bring an action for specific performance and compel the landlord to make necessary repairs.

The *Javins* case is important because it rejected the common law doctrine of caveat emptor and held that an implied warranty of habitability must be read into any apartment lease in the District of Columbia. It is more important because it held that the implied warranty is a "continuing obligation" existing for the duration of the lease. It is most important because it held that a lease is essentially a contractual relationship with statutorily imposed covenants, thereby providing the tenant with an effective means to enforce the legislative mandate of "habitability."

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48. To prove constructive eviction the tenant must abandon the premises within a "reasonable time."

49. Lemle v. Breeden, 51 Hawaii 426, —, 462 P.2d 470, 475 (1969).

50. 428 F.2d at 1082-83. "At the trial the finder of fact must have two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach." *Id.*