St. Mary's Law Journal

Volume 5 | Number 1 Article 5

3-1-1973

The Implied Warranty of Habitability in Landlord-Tenant Relationships: The Necessity of Application in Texas.

Stephen Bond Paxson

COMMENTS

THE IMPLIED WARRANTY OF HABITABILITY IN LANDLORD-TENANT RELATIONSHIPS: THE NECESSITY OF APPLICATION IN TEXAS

STEPHEN BOND PAXSON

Quite recently, several jurisdictions have reassessed the validity of the common law rule of caveat emptor as it is applied to landlord-tenant transactions. Convinced of its inapplicability to the modern leasing situation these courts have imposed the antithesis of caveat emptor: an implied warranty of habitability. It is contended that this implied warranty more adequately reflects the view that the modern tenant is seeking the use of a habitable dwelling for a period of time and is not concerned with creating any tenurial estate in the realty. This comment proposes to examine the traditional application of the agrarian based landlord-tenant law and its resulting conflict with the mass urbanization that has taken place since the Industrial Revolution. The inability of limited exceptions and modifications to the caveat emptor rule to provide needed changes, the courts' evidenced concern over the harshness of the rule, and the persuasiveness of recent decisions in other jurisdictions which have adopted an implied warranty, provide a favorable backdrop for the rejection of the doctrine of caveat emptor in Texas.

TRADITIONAL LANDLORD-TENANT LAW

The law has generally regarded the relationship of landlord and tenant as one governed by the precepts and doctrines of property law.[1] The lease was looked upon as a conveyance of an estate in land for a term which was based upon the mutual promises between the parties.[2] These promises, although mutual, were not mutually dependent[3] since the rules governing the

1. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 462 P.2d 470, 472 (Hawaii 1969); Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Marini v. Ireland, 265 A.2d 526, 532 (N.J. 1970); 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1029, at 87 (J. Grimes repl. ed. 1959) [hereinafter cited by volume as G. THOMPSON]; 6 S. WILLISTON, CONTRACTS § 890, at 587 (3d ed. 1962).

2. 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952); 3A A. CORBIN, CONTRACTS § 686 (1960); 3A G. THOMPSON § 1232, at 162; 6 S. WILLISTON, CONTRACTS § 890, at 583 (3d ed. 1962).

3. Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Marini v. Ireland, 265 A.2d

leases of real property had solidified under property law doctrines and were not subject to the later developing contract law concept of mutually dependent promises.[4] The view was that the tenant's promise to pay was exchanged only for the bare right of possession.[5] This possession of the land was so central to the original common law concept of a leasehold that the rent was actually looked upon as originating or flowing from the land.[6] Therefore, once the landlord delivered to the tenant the right of possession and thereafter did not interfere with the tenant's possession, use, or enjoyment of the premises, his part of the agreement was completed.[7]

One significant result arising from the common law courts' application of the special rules governing real property transactions to the landlord-tenant relationship was the attendant doctrine of caveat emptor.[8] This common law doctrine "was fundamentally based upon the premise that the buyer and seller [or lessee and lessor] dealt at arm's length, and that the purchaser [lessee] had means and opportunity to gain information concerning the subject matter of the sale [lease] which were equal to those of the seller."[9] The landlord did not impliedly warrant the fitness, suitability, or condition of the premises for any purpose.[10] The prospective tenant was deemed to have equal knowledge of such facts and was therefore aware of all defects

---

526, 534 (N.J. 1970); Ammons v. Beaudry, 337 S.W.2d 323, 324 (Tex. Civ. App.—Forth Worth 1960, writ ref'd); 3A A. CORBIN, CONTRACTS § 686, at 238 (1960); 3 G. THOMPSON § 1115, at 395; 6 S. WILLISTON, CONTRACTS § 890, at 586 (3d ed. 1962).

4. 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952); 6 S. WILLISTON, CONTRACTS § 890, at 587 (3d ed. 1962).

5. 3 G. THOMPSON § 1051; Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 228 (1969) [hereinafter cited as Quinn & Phillips].

6. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 131 (2d ed. 1923).

7. Mitchell's, Inc. v. Friedman, 294 S.W.2d 740, 744 (Tex. Civ. App.—Dallas 1956), *rev'd on other grounds*, 157 Tex. 424, 303 S.W.2d 775 (1957); Quinn & Phillips 228. "The landlord was *not* expected to assist in the operation of the land. Quite the reverse, he was expected to stay as far away as possible."

8. Lusco v. Jackson, 175 So. 566, 567 (Ala. Ct. App. 1937); Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Marini v. Ireland, 265 A.2d 526, 532 (N.J. 1970); J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved); Walling v. Houston & T.C.R.R. 195 S.W. 232, 237 (Tex. Civ. App.—Dallas 1917, writ ref'd); 3A G. THOMPSON § 1230, at 129.

9. Humber v. Morton, 426 S.W.2d 554, 557 (Tex. Sup. 1968). "This maxim [caveat emptor] summarizes the rule that a purchaser must examine, judge, and test for himself." BLACK'S LAW DICTIONARY 281 (rev. 4th ed. 1968). For the origin and development of the doctrine of caveat emptor *see* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

10. Lynch v. Alexander Ortlieb & Co., 70 Tex. 727, 731, 8 S.W. 515, 516 (1888); 49 AM. JUR. 2d *Landlord and Tenant* § 768, at 707 (1970); 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952); 51C C.J.S. *Landlord and Tenant* § 303, at 768 (1968); 3A G. THOMPSON § 1230, at 129.

or conditions that a reasonable inspection would reveal.[11] Unless the tenant could exact express warranties from the landlord, the only warranty extended was the covenant of quiet enjoyment.[12] Even if the tenant subsequently discovered that the premises would not adequately sustain his tenancy or were unsuitable for the intended use, he was not relieved of his duty to pay rent for the remainder of the term as he still retained everything he was entitled to under the lease—the right of possession.[13]

With the lack of warranties as to the condition of the premises at the inception of the lease, came the absence of responsibility on the part of the landlord to maintain the premises in a reasonable state of repair during the term.[14] The buildings on the demised premises were deemed secondary in importance to the land and were generally readily repairable by the tenant in the agrarian economy that prevailed when landlord-tenant law was formulated.[15] Even when a tenant had secured a specific covenant to repair from the landlord, the breach of this covenant did not absolve the tenant of his duty to pay rent because the covenant to repair was also considered independent of the exchange of rent for possession.[16]

With the advent of the Industrial Revolution and later mass urbanization, the agrarian based concepts of landlord-tenant law began losing credence and became less and less representative of the transactional relationship existing between the lessor and lessee.[17] The urban dweller, in seeking a

11. J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved); 3A G. THOMPSON § 1230, at 143.

12. L-M-S Inc. v. Blackwell, 149 Tex. 348, 354, 233 S.W.2d 286, 289 (1950); 1 AMERICAN LAW OF PROPERTY § 3.47 (A.J. Casner ed. 1952). *See generally* 3 G. THOMPSON § 1129.

13. 3A A. CORBIN, CONTRACTS § 686, at 236 (1960); 3A G. THOMPSON § 1230, at 138. The tenant still had the responsibility to pay rent even if the buildings on the leasehold were destroyed by fire unless a specific provision had been made for such a contingency. 3A A. CORBIN, CONTRACTS § 686, at 244 (1960); 3A G. THOMPSON § 1230, at 139. *See generally* 6 A. CORBIN, CONTRACTS § 1356 (1962). *But see* Beham v. Ghio, 75 Tex. 87, 92, 12 S.W. 996, 998 (1889).

14. Lopez v. Gukenback, 137 A.2d 771, 774 (Pa. 1958); Yarbrough v. Booher, 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943); 1 AMERICAN LAW OF PROPERTY § 3.78, at 346 (A.J. Casner ed. 1952); 3A G. THOMPSON § 1230, at 132. *Contra*, Presson v. Mountain States Properties, Inc., 501 P.2d 17, 20 (Ariz. Ct. App. 1972) (duty of landlord to repair so as to keep leashold free from unreasonably dangerous instrumentalities).

15. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Kline v. Burns, 276 A.2d 248, 250 (N.H. 1971); 1 AMERICAN LAW OF PROPERTY § 3.78, at 347 (A.J. Casner ed. 1952).

16. Edwards v. Ward Associates, Inc., 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); 3A A. CORBIN, CONTRACTS § 686, at 238 (1960); 3 G. THOMPSON § 1115, at 396; 6 S. WILLISTON, CONTRACTS § 890A, at 632 (3d ed. 1962).

17. Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE 6 (Tent. draft 1969).

combination of living space, suitable facilities and attendant services, has changed the basic function of the lease.[18]

A majority of the courts, reacting to the harsh results imposed by the strict application of caveat emptor in an urban environment, have developed several limited exceptions in an attempt to inject vitality into the doctrine.[19] These exceptions call for the responsibility for the condition of the premises to be borne by the landlord in situations where the premises are leased with any fraud, deceit, or wrongdoing on the part of the landlord,[20] or if the premises in question are common facilities or partially controlled by the landlord,[21] or if some type of an express warranty has been exacted from the landlord.[22] Two other exceptions recognized by only a few jurisdictions arise when the premises have not been sufficiently completed at the time the lease was made so as to allow the prospective lessee the opportunity to make a reasonable inspection[23] and when the lease is for a furnished dwelling house for a short time and for temporary purposes.[24]

Another means frequently used by the courts to avoid the effects of the caveat emptor rule is the remedy of constructive eviction.[25] Where the landlord's wrongful, affirmative acts have rendered the premises untenantable, or there is a failure to correct such a situation in an area under the landlord's control, the tenant may vacate the premises and terminate his obligation to pay rent.[26] In practice, however, this remedy has proved to be a

18. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See generally* Quinn & Phillips 231.

19. Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972).

20. Yarbrough v. Booher, 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943); 49 AM. JUR. 2d *Landlord and Tenant* § 768, at 706 (1970); 3A G. THOMPSON § 1230, at 131.

21. Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Macke Laundry Serv. Co. v. Weber, 298 A.2d 27, 30 (Md. Ct. App. 1972); O'Connor v. Andrews, 81 Tex. 28, 33, 16 S.W. 628, 629 (1891); McCutcheon v. United Homes Corp., 486 P.2d 1093, 1094 (Wash. 1971); 1 AMERICAN LAW OF PROPERTY § 3.78, at 346 (A.J. Casner ed. 1952); 3A G. THOMPSON § 1242, at 237.

22. F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co., 108 S.W.2d 947, 951 (Tex. Civ. App.—San Antonio 1937, writ dism'd). *See generally* 1 AMERICAN LAW OF PROPERTY § 3.79 (A.J. Casner ed. 1952).

23. Woolford v. Electric Appliances, Inc., 75 P.2d 112, 114 (Cal. Dist. Ct. App. 1938); J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved); Hardman v. McNair, 111 P. 1059, 1061 (Wash. 1910); 1 AMERICAN LAW OF PROPERTY § 3.45, at 268 (A.J. Casner ed. 1952).

24. Horton v. Marston, 225 N.E.2d 311, 312 (Mass. 1967); Delamater v. Foreman, 239 N.W. 148, 149 (Minn. 1931); Morgenthau v. Ehrich, 136 N.Y.S. 140, 142 (Sup. Ct. 1912); 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952); 3A G. THOMPSON § 1231, at 155; 6 S. WILLISTON, CONTRACTS § 892, at 658 (3d ed. 1962).

25. Lemle v. Breeden, 462 P.2d 470, 473 (Hawaii 1969). *See generally* 1 AMERICAN LAW OF PROPERTY § 3.51 (A.J. Casner ed. 1952); 6 S. WILLISTON, CONTRACTS § 892 (3d ed. 1962).

26. Stillman v. Youmans, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954,

rather dubious solution for the aggrieved tenant since he must assume the risk of being held liable for accrued rent if it is later determined upon litigation that the defects in the premises were not sufficient to constitute a constructive eviction.[27] An even more serious objection to the adequacy of constructive eviction as an aid to the tenant arises when the realities of urban living are brought into perspective. A tenant may actually be unable to abandon the premises because of innumerable related problems including housing shortages, expenses and inconveniences incurred during moving, and transportation difficulties.[28] The doctrine of constructive eviction, however, requires that the tenant vacate within a reasonable period of time to obtain relief,[29] even though this action is often contrary to the tenant's real desire—simply to have the defect repaired. If the tenant remains in possession, most courts will refuse to find that a constructive eviction has occurred, holding that the defect in the premises has been waived.[30]

These exceptions and remedies have eased some of the strain caused by the impact of the antiquated rule of caveat emptor in limited situations. However, the majority of today's urban dwellers, especially the poor, must still contend with the inequities and hardships caused by a doctrine which is patently out-of-step with the economic realities of 20th century society.

JURISDICTIONS WHICH HAVE IMPOSED AN IMPLIED WARRANTY OF HABITABILITY IN LANDLORD-TENANT RELATIONSHIPS

An increasing number of jurisdictions are attempting to combat the onerous burdens of caveat emptor in leases (as is being done by an increasing number of jurisdictions in the sale of new homes)[31] through the adoption of an implied warranty of habitability. As of this writing, the highest courts in

---

no writ); 1 AMERICAN LAW OF PROPERTY § 3.51, at 280 (A.J. Casner ed. 1952); 6 S. WILLISTON, CONTRACTS § 892, at 648 (3d ed. 1962); Comment, *Failure of Landlord to Comply with Housing Regulations as a Defense to Non-payment of Rent*, 21 BAYLOR L. REV. 372, 384 (1969).

27. Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969); Nabor v. Johnson, 51 S.W.2d 1081, 1082 (Tex. Civ. App.—Waco 1932, no writ); Comment, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 TEXAS L. REV. 1160, 1164 n.29 (1969).

28. Marini v. Ireland, 265 A.2d 526, 535 (N.J. 1970).

29. Candell v. Western Fed. Sav. & Loan Ass'n, 400 P.2d 909, 912 (Colo. 1965); Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969); Richker v. Georgandis, 323 S.W.2d 90, 96 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); 1 AMERICAN LAW OF PROPERTY § 3.51, at 282 (A.J. Casner ed. 1952); 52 C.J.S. *Landlord and Tenant* § 457 (1968).

30. Yaffe v. American Fixture, Inc., 345 S.W.2d 195 (Mo. 1961); Angelo v. Deutser, 30 S.W.2d 707, 710 (Tex. Civ. App.—Beaumont 1930, writ ref'd); 6 S. WILLISTON, CONTRACTS § 892, at 646 (3d ed. 1962). Massachusetts, however, seems to allow constructive eviction without abandonment. Charles E. Burt, Inc. v. Seven Grand Corp., 163 N.E.2d 4 (Mass. 1959).

31. Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971); Wawak v. Stewart, 449 S.W. 2d 922 (Ark. 1970); Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964); Gable v.

seven jurisdictions and the lower courts of two more states have chosen to align themselves against the great weight of authority with their imposition of an implied warranty of habitability in lease agreements.[32]

The Supreme Court of Wisconsin was one of the first courts to directly address the problems presented by the collision of the anachronism of caveat emptor with the modern leasing situation.[33] The court noted that the doctrine of caveat emptor was inconsistent with present-day demands for adequate housing for large numbers of people and the legislative efforts to provide for such housing.[34] The court added that the lessee's covenant to pay rent and the lessor's covenant to provide a habitable dwelling were in fact mutually dependent.[35] The bold departure by the Wisconsin court from the common law doctrine of caveat emptor was not followed by any other jurisdictions for more than eight years. Beginning in 1969, however, the highest courts of Hawaii,[36] New Jersey[37] and the District of Columbia[38] chose to align themselves with the Wisconsin decision.[39] Later cases have extended the application of an implied warranty to the leasehold for the entire lease term rather than imposing it just at the inception of the lease.[40] A trend

---

Silver, 258 So. 2d 11 (Fla. Ct. App.), *aff'd,* 264 So. 2d 418 (Fla. 1972) (condominiums); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969); Weeks v. Slavik Builders, Inc., 181 N.W.2d 271 (Mich. 1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972); Rutledge v. Dodenhoff, 175 S.E.2d 792, 795 (S.C. 1970); Humber v. Morton, 426 S.W.2d 554 (Tex. Sup. 1968). *See generally* 11 S. WILLISTON, CONTRACTS §§ 1399A, 1399B (3d ed. 1968).

32. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Hinson v. Delis, 102 Cal. Rptr. 661 (Dist. Ct. App. 1972); Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969); Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 276 A.2d 248 (N.H. 1971); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Amanuensis, Ltd. v. Brown, 318 N.Y.S.2d 11 (Civ. Ct. N.Y. City 1971); Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961).

33. Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961), *noted in* 45 MARQ. L. REV. 630 (1962).

34. "The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor.*" *Id.* at 413.

35. *Id.* at 413. This provides a direct reciprocity between these covenants and gives the tenant the economic lever which allows payment to the landlord only for that which he receives in the way of livable housing. Quinn & Phillips 255.

36. Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969), *noted in* 2 ST. MARY'S L.J. 106 (1970).

37. Marini v. Ireland, 265 A.2d 526 (N.J. 1970), *noted in* 16 VILL. L. REV. 395 (1970).

38. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970), *noted in* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 193 (1970).

39. *Id.* at 1075: Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969); Marini v. Ireland, 265 A.2d 526, 535 (N.J. 1970).

40. As the court in Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970) so aptly stated:

> Since the lessees continued to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition

now has begun to reveal itself with the supreme courts of New Hampshire,[41] Illinois[42] and Iowa[43] having followed the course adopted by the forward-looking jurisdictions mentioned above.[44]

The decision of whether or not to adopt an implied warranty in leases may soon be facing the Court of Appeals of New York and the California Supreme Court. Several recent decisions handed down by the Civil Court of the City of New York have called for a reassessment of the caveat emptor doctrine and the imposition of an implied warranty arising out of the state housing codes.[45] A court of appeals in California in 1967[46] approvingly cited the Wisconsin decision and its attack on the doctrine of caveat emptor.[47] However, the court relied on specific statutory relief to provide the remedy in that particular case.[48] Not until the recent court of appeals decision of *Hinson v. Delis*,[49] has a California court embraced the imposition of an implied warranty of habitability to lease agreements.[50]

One basic premise found in all the recent decisions adopting an implied warranty of habitability is the contention that the doctrine of caveat emptor cannot stand, even on its own terms, in today's housing market. The theoretical meaning of a lease has no relevancy in the modern leasing situation and should be replaced with realistic concepts.[51] In making such a change the Supreme Court of Iowa noted that "in so holding we serve the highest function and duty reserved to this court: to test and weigh our common law against the social and economic demands of the current times."[52]

---

during the lease term.
Id. at 1079; *accord* Marini v. Ireland, 265 A.2d 526, 534 (N.J. 1970).

41. Kline v. Burns, 276 A.2d 248 (N.H. 1971).

42. Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972).

43. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

44. The decision by the Supreme Court of Illinois, however, was specifically limited to lease agreements governing multiple unit dwellings. Jack Spring, Inc. v. Little, 280 N.E.2d 208, 218 (Ill. 1972).

45. Mannie Joseph, Inc. v. Stewart, 335 N.Y.S.2d 709, 711 (Civ. Ct. N.Y. City 1972); Morbeth Realty Corp. v. Rosenshine, 323 N.Y.S.2d 363, 366 (Civ. Ct. N.Y. City 1971); Amanuensis, Ltd. v. Brown, 318 N.Y.S.2d 11, 19 (Civ. Ct. N.Y. City 1971).

46. Buckner v. Azulai, 59 Cal. Rptr. 806 (Dist. Ct. App. 1969).

47. *Id.* at 808.

48. *Id.* at 808.

49. 102 Cal. Rptr. 661 (Dist. Ct. App. 1972).

50. *Id.* at 666.

51. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Hinson v. Delis, 102 Cal. Rptr. 661, 665 (Dist. Ct. App. 1972), *citing* Pines v. Perssion, 111 N.W.2d 409, 412 (Wis. 1961); Lemle v. Breeden, 462 P.2d 470, 473 (Hawaii 1969); Jack Spring, Inc. v. Little, 280 N.E.2d 208, 216 (Ill. 1972); Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Marini v. Ireland, 265 A.2d 526, 532 (N.J. 1970), *citing* Michaels v. Brookchester, Inc., 149 A.2d 199, 201 (N.J 1958); Kline v. Burns, 276 A.2d 248, 251 (N.H. 1971); Amanuensis, Ltd. v. Brown, 318 N.Y.S.2d 11, 17 (Civ. Ct. N.Y. City 1971).

52. Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972).

NARROWING OF THE CAVEAT EMPTOR DOCTRINE IN TEXAS

Exceptions to the Doctrine

Texas courts have yet to waiver in their general application of caveat emptor in lease agreements. Consequently, there is still no implied warranty of habitability on the part of the landlord that the premises are fit for the purpose for which they are leased.[53] As in many other jurisdictions, however, the Texas courts have narrowed their use of the doctrine through the application of various exceptions.

One of the most basic exceptions to the application of the caveat emptor doctrine to leases occurs when, at the inception of the lease, the landlord was guilty of fraud or concealment.[54] Such misrepresentations will render a lease agreement void if the representation was in fact false, was made to induce the lessee to execute the lease and was a material inducement causing the lease to be executed.[55] Even an *innocent* misrepresentation of a material fact, made by a lessor with the intent of inducing the prospective lessee to do or to refrain from doing some act, will justify the voidance of the lease agreement.[56] An unusual expansion of this exception, in light of the caveat emptor doctrine, has occurred. With the general scheme under the doctrine being that the lessee and lessor are on an equal plane with reference to information about the prospective leasehold,[57] several decisions have allowed the prospective tenant to rely on the landlord's representations as to the suitability of the premises.[58] This has effectively relieved the prospective

53. Perez v. Rabaud, 76 Tex. 191, 194, 13 S.W. 177, 178 (1890); Lynch v. Alexander Ortlieb & Co., 70 Tex. 727, 731, 8 S.W. 515, 516 (1888); Cameron v. Calhoun-Smith Distrib. Co., 442 S.W.2d 815, 816 (Tex. Civ. App.—Austin 1969, no writ); Jackson v. Amador, 75 S.W.2d 892, 893 (Tex. Civ. App.—Eastland 1934, writ dism'd); J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved); Archibald v. Fidelity Title & Trust Co., 296 S.W. 680, 682 (Tex. Civ. App.—Eastland 1927, no writ).

54. Mitchell v. Zimmerman, 4 Tex. 75, 80 (1849); Merchandise Mart, Inc. v. Marcus, 483 S.W.2d 893, 896 (Tex. Civ. App.—Tyler 1972, no writ); Miller v. Latham, 276 S.W.2d 858, 866 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.); Hilton Hotel Co. v. Peyton, 47 S.W.2d 395, 397 (Tex. Civ. App.—El Paso 1932, writ dism'd).

55. Merchandise Mart, Inc. v. Marcus, 483 S.W.2d 893, 896 (Tex. Civ. App.—Tyler 1972, no writ); Miller v. Latham, 276 S.W.2d 858, 866 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.).

56. Mitchell v. Zimmerman, 4 Tex. 75, 83 (1849); Miller v. Latham, 276 S.W.2d 858, 866 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.).

57. Johnson v. Murray, 90 S.W.2d 920, 925 (Tex. Civ. App.—Austin 1936, writ dism'd); J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved).

58. Mitchell v. Zimmerman, 4 Tex. 75, 80 (1849); Hilton Hotel Co. v. Peyton, 47 S.W.2d 395, 397 (Tex. Civ. App.—El Paso 1932, writ dism'd); Poutra v. Sapp, 181 S.W. 792 (Tex. Civ. App.—Galveston 1916, writ ref'd); Robey v. Craig, 172 S.W. 203, 204 (Tex. Civ. App.—Austin 1914, no writ).

lessee from the burden of inspection imposed by the caveat emptor rule.[59] The reasoning behind these holdings was lucidly stated in *Robey v. Craig*:[60]

> As appellant was the owner of the land, he was peculiarly cognizant of the quality and quantity of it. The appellee, applying to him to lease the same, naturally and properly looked to him for information, and had the right to rely on his representations.[61]

An early Texas Supreme Court decision, *Mitchell v. Zimmerman*,[62] also addressed the effect that fraudulent misrepresentations by the lessor have on the landlord-tenant relationship.[63] In discussing the relative positions of the parties to a lease as to information concerning the leasehold, the court stated:

> It cannot with justice be said that the parties had equal means of information respecting the facts . . . . A false representation relating to the value of an estate, the knowledge of which is usually confined to the owner . . . *does not come within the rule that the party making it is not responsible to one deceived by it, by reason of its being a matter which is or should be equally well known to both parties.* And a lessee, it has been held, cannot be considered as having waived such defense to an action on the lease from the mere fact that he had been upon the premises before the lease was executed.[64]

How distant is an implied warranty of habitability from allowing a prospective lessee to rely on a lessor's representations as to the suitability of the premises? Is an advertisement in the newspaper of an apartment for rent, a representation that the landlord is renting premises that are in fact habitable or is he simply notifying the public that he has available space and nothing more?[65]

Another exception to the caveat emptor rule concerns that portion of the leased premises which are considered common facilities of the tenants and/or the landlord.[66] The distinctions as to what parts of the leasehold may or

59. Mitchell v. Zimmerman, 4 Tex. 75, 80 (1849); Miller v. Latham, 276 S.W.2d 858, 866 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.); Robey v. Craig, 172 S.W. 203, 204 (Tex. Civ. App.—Austin 1914, no writ).

60. 172 S.W. 203 (Tex. Civ. App.—Austin 1914, no writ).

61. *Id.* at 204.

62. 4 Tex. 75 (1849).

63. *Id.*

64. *Id.* at 80 (emphasis added). Presumably, however, a representation that the leasehold will remain habitable for sometime in the future would not fall under this rule which protects the prospective lessee for it is well established that failure to discharge a promise which will be done in the future is not fraud. Merchandise Mart, Inc. v. Marcus, 483 S.W.2d 893, 897 (Tex. Civ. App.—Tyler 1972, no writ).

65. "The landlord is not in the business of leasing *space, period*, but in the business of leasing *habitable* space, and that rather obvious point should be clearly seen and consciously enforced by the courts." Quinn & Phillips 254; *e.g.*, Marini v. Ireland, 265 A.2d 526, 533 (N.J. 1970).

66. Brown v. Frontier Theatres, Inc., 369 S.W.2d 299, 303 (Tex. Sup. 1963); Lang v. Henderson, 147 Tex. 353, 358, 215 S.W.2d 585, 588 (1948); Denson v. Willcox, 298 S.W. 534 (Tex. Comm'n App. jdgmt adopted), *rev'g* 292 S.W. 621, 623 (Tex. Civ. App.—Austin 1927); Taylor v. Gilbert Gertner Enterprises, 466 S.W.2d 337, 341

may not be included within this exception are not clear from the decisions rendered. The Texas Supreme Court in *O'Connor v. Andrews*,[67] applying the exception to multiple apartment buildings, stated that the exception "must . . . be applied so as to make each tenant responsible only for so much as his lease includes, leaving the landlord liable for every part of the building not included in the actual holding of any one tenant."[68] The court also specifically included those defects which arose from the original construction of the building and roof.[69] In applying these guidelines, the Texas Commission of Appeals in *Denson v. Willcox*[70] found an implied warranty and a duty to repair rested with the landlord as to a partition wall between two of his tenants.[71] Since neither of the contracts of the two tenants contained any provisions concerning the maintenance of the wall, the duty devolved to the landlord.[72] Two civil appeals cases also held that repairs concerning "a vital and substantial portion of the premises"[73] and a "structural and/or foundation defect"[74] fall within the responsibility of the lessor. In response to these decisions concerning the landlord's maintenance responsibility for structural components of the leased building and those areas of the premises that are used in common with other tenants, one might ask where the lines are drawn as to these categories. Are heating, plumbing facilities and electrical systems shared in common? Does a defect in original construction relate to built-in appliances, windows and doors?[75]

If the premises were not sufficiently completed at the time the lease was made for the prospective lessee to make a reasonable inspection of the premises, the Texas courts will impose an implied warranty if, upon possession, it is not suitable for the known purposes of his tenancy.[76] Would this rule logically extend to the tenant who was unable to inspect the premises prior to his occupancy because they were occupied by another tenant at the time the lease was executed? No reported decisions have dealt with this

(Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); Goldstein v. Corrigan, 405 S.W.2d 425, 427 (Tex. Civ. App.—Waco 1966, no writ).

67. 81 Tex. 28, 16 S.W. 628 (1891).

68. *Id.* at 33, 16 S.W. at 629.

69. *Id.* at 34, 16 S.W. at 629.

70. 298 S.W. 534 (Tex. Comm'n App. 1927, jdgmt adopted).

71. *Id.*

72. *Id.*

73. Patteson v. McGee, 350 S.W.2d 241, 244 (Tex. Civ. App.—Eastland 1961, no writ).

74. Goldstein v. Corrigan, 405 S.W.2d 425, 427 (Tex. Civ. App.—Waco 1966, no writ).

75. Lang v. Henderson, 147 Tex. 353, 358, 215 S.W.2d 585, 588 (1948) (hot water heater used by entire building held to be duty of landlord to repair); McCrory Corp. v. Nacol, 428 S.W.2d 414, 416 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.) (window held to be a structural member of the building).

76. J.D. Young Corp. v. McClintic, 26 S.W.2d 469, 472 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved).

problem and one could not safely predict what decision might be rendered. Texas courts have yet to give credence to the argument that the lessee at times is not physically able to make a reasonable inspection due to his lack of technical knowledge as to how plumbing and heating systems work or whether his electric appliances are safely and properly wired.[77] Compounding this inadequacy is the normal prospective lessee's lack of funds to employ experts to make these determinations.[78] Even where the defect was seasonal in nature (*e.g.*, during the rainy season) as in *Cameron v. Calhoun-Smith Distributing Co.*,[79] the court upheld the conclusion under caveat emptor that the tenant could have discovered this defect upon reasonable investigation.[80] Considerable leeway could be ascribed as to what is in fact a "reasonable" inspection of the premises by the modern lessee. However, Texas courts have yet to take advantage of this to inject equity into the creation of landlord-tenant relationships.[81]

Texas courts have not, of course, applied the caveat emptor doctrine with its accompanying repair burdens to the lease situation where the tenant has received an express warranty or covenant from the landlord as to the habitability of the premises.[82] However, if this covenant has not been specifically noted in the lease agreement, it will not arise by estoppel.[83] Even if the landlord and tenant subsequently enter into an agreement whereby the landlord promises to make repairs, the court will consider the agreement as unenforceable due to lack of consideration.[84]

---

77. *E.g.*, Cameron v. Calhoun-Smith Distrib. Co., 442 S.W.2d 815, 816 (Tex. Civ. App.—Austin 1969, no writ) (plumbing).

78. Lemle v. Breeden, 462 P.2d 470, 474 (Hawaii 1969); Reste Realty Corp. v. Cooper, 251 A.2d 268, 272 (N.J. 1969).

79. 442 S.W.2d 815 (Tex. Civ. App.—Austin 1969, no writ).

80. *Id.* at 816.

81. In the sale of new houses, however, the Texas Supreme Court has noted that the prospective buyer cannot make a meaningful inspection that would protect him under the caveat emptor doctrine. Humber v. Morton, 426 S.W.2d 554, 561 (Tex. Sup. 1968).

82. Yarbrough v. Booher, 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943); Morton v. Burton-Lingo Co., 136 Tex. 263, 266, 150 S.W.2d 239, 240 (1941); Weinsteine v. Harrison, 66 Tex. 546, 548, 1 S.W. 626, 627 (1886); Ross v. Haner, 258 S.W. 1036, 1041 (Tex. Comm'n App. 1924, jdgmt adopted); McCrory Corp. v. Nacol, 428 S.W. 2d 414, 416 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co., 108 S.W.2d 947, 951 (Tex. Civ. App.—San Antonio 1937, writ dism'd).

83. Flynn v. Pan Am. Hotel Co., 143 Tex. 219, 228, 183 S.W.2d 446, 450 (1944); Yarbrough v. Booher, 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943); Morton v. Burton-Lingo Co., 136 Tex. 263, 267, 150 S.W.2d 239, 241 (1941); Kallison v. Ellison, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, no writ); F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co., 108 S.W.2d 947, 952 (Tex. Civ. App.—San Antonio 1937, writ dism'd). A particularly strong statement of this rule is found in Yarbrough v. Booher, 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943):

> The making of repairs does not constitute an admission of any duty to keep the leased premises in repair nor is it evidence of an agreement to keep the leased premises in repair, nor does it operate to make a new or collateral agreement to keep the premises in repair.

84. Perez v. Rabaud, 76 Tex. 191, 194, 13 S.W. 177, 178 (1890); Gray v. Block,

In *Ingram v. Fred,*[85] however, the court eased the requirement of the necessity for an express covenant by finding that the context of the lease agreement implied a covenant to repair.[86]

> While the lease contract in the present suit did not expressly and specifically bind the landlord to repair the roof, in case it should become so leaky as to render the building untenantable, yet we think that such obligation was clearly implied from the terms of the lease itself.[87]

The court went on to say that the lease called for the tenant to notify the lessor if the building did leak and that the lessor would be given a "reasonable time to repair the same."[88] This implied covenant to repair, arising from an "understanding between the parties to the instrument"[89] could more appropriately protect the tenant who entered into a lease agreement seeking a habitable dwelling rather than a commitment to expend extensive time and money in the maintenance of the leased premises. Texas courts in the main, however, have continued to require that an express covenant to repair be present in the lease agreement before the landlord will be responsible for the habitability of the leased premises.[90]

The Role of Constructive Eviction

One warranty that the courts have uniformly found to be implied in the lease agreement is the covenant of quiet enjoyment.[91] Relief from a breach of this covenant generally calls for the tenant to prove an actual, physical eviction by the landlord or by one claiming a superior adverse interest.[92] Reacting to the onerous burdens of caveat emptor, the courts have developed in connection with the covenant of quiet enjoyment, the fiction of constructive eviction.[93] This remedy provides relief where the actions of the

---

416 S.W.2d 848, 850 (Tex. Civ. App.—Eastland 1967, no writ); F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co., 108 S.W.2d 947, 951 (Tex. Civ. App.—San Antonio 1937, writ dism'd); Miller & Bro. v. Nigro, 230 S.W. 511, 513 (Tex. Civ. App.—Amarillo 1921, no writ).

85. 210 S.W. 298 (Tex. Civ. App.—Fort Worth 1919, writ ref'd).

86. *Id.* at 300.

87. *Id.* at 300.

88. *Id.* at 301.

89. *Id.* at 301.

90. Flynn v. Pan Am. Hotel Co., 143 Tex. 219, 228, 183 S.W.2d 446, 447 (1944); Yarbrough v. Booher, 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943); Morton v. Burton-Lingo Co., 136 Tex. 263, 267, 150 S.W.2d 239, 240 (1941); Kallison v. Ellison, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, no writ); F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co., 108 S.W.2d 947, 952 (Tex. Civ. App.—San Antonio 1937, writ dism'd).

91. L-M-S Inc. v. Blackwell, 149 Tex. 348, 354, 233 S.W.2d 286, 289 (1950); Richker v. Georgandis, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Angelo v. Deutser, 30 S.W.2d 707, 710 (Tex. Civ. App.—Beaumont 1930, writ ref'd).

92. 1 AMERICAN LAW OF PROPERTY §§ 3.47-.50 (A.J. Casner ed. 1952).

93. Lemle v. Breeden, 462 P.2d 470, 473 (Hawaii 1969); Mease v. Fox, 200 N.W. 2d 791, 793 (Iowa 1972); Quinn & Phillips 237.

landlord have deprived the tenant of the use and beneficial enjoyment of the demised premises or a substantial part thereof.[94] The elements necessary to constitute a constructive eviction were outlined in *Richker v. Georgandis*:[95]

> 1. An intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstances proven; 2. A material act by the landlord or those acting for him or with his permission that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let; 3. The act must permanently deprive the tenant of the use and enjoyment of the premises; and 4. The tenant must abandon the premises within a reasonable time after the commission of the act.[96]

One limiting factor which confronts the tenant seeking to use this remedy to maintain a habitable dwelling is that before the courts will assign a constructive eviction due to the inhabitability of the leased premises, there must be a covenant to repair on the part of the landlord.[97] The phrase "substantial interference with the use and enjoyment" has generally been strictly construed in Texas.[98] However, in *Maple Terrace Apartment Co. v. Simpson*,[99] the refusal of the lessor's agent to enforce apartment regulations and abate the nuisance of the keeping of a dog in an apartment next to the lessee's resulted in a constructive eviction.[100] Additionally, in *Tuchin v. Chambers*[101] the court found that a constructive eviction had occurred when a dentist was not able to jointly use, as provided in the lease, a room adjoining his clinic as an X-ray room although he had not required the use of this extra space in the previous 6 years of the lease.[102] Have the tenant's rights been substantially interfered with in these cases? Unfortunately, instances of a rather liberal application of constructive eviction are few and far between in Texas case law and do not indicate a substantial remedy to overcome the problem of making repairs to leased premises that have become uninhabitable during the lease term.[103] Consequently, for any meaningful

---

94. Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 472 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); Richker v. Georgandis, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Stillman v. Youmans, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954, no writ).

95. 323 S.W.2d 90 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

96. *Id.* at 95.

97. Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 471 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); Hoover v. Wukasch, 274 S.W.2d 458, 460 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

98. *All* elements of a constructive eviction must be present with no room for speculation. Richker v. Georgandis, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Stillman v. Youmans, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954, no writ).

99. 22 S.W.2d 698 (Tex. Civ. App.—Texarkana 1929, no writ).

100. *Id.* at 700.

101. 439 S.W.2d 849 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

102. *Id.*

103. The only remedy provided by constructive eviction is the means by which the tenant can abandon the leasehold prior to the end of the lease term without being held

changes in the inequities inherent presently in the landlord-tenant relationship, the tenant must look elsewhere.

Application of Contract Principles to Leases[104]

The modern lease more closely resembles a contract for the purchase of space and attendant services for a term than it does the purchase of an interest in realty.[105] However, the lease agreement is governed by the principles of property law,[106] including the independency of covenants.[107] The lack of mutuality in lease covenants has resulted in frustration to the tenant who, in return for his payment of rent, expects to be provided with habitable premises.[108] Reflecting support for the application of property law principles to leases, the court in *Edwards v. Ward Associates, Inc.*[109] applied the general rule that "[t]he covenant of the landlord to repair and the tenant's covenant to pay rent are regarded as independent covenants . . . ."[110] Accordingly, even if the tenant had exacted an express covenant to repair from the landlord, the breach of this covenant does not allow the tenant to withhold rent payments.[111] The court in *Edwards*, however, went on to say that the covenants were independent "unless the contract between the parties

liable for unaccrued rent. Abandonment of the premises is an essential element, although not a reasonable one, for the tenant who merely wants his landlord to make the repairs which the landlord covenanted that he would make. Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969); Marini v. Ireland, 265 A.2d 526, 535 (N.J. 1970); Quinn & Phillips 236-37.

104. *Caveat*: The lease agreement is in the nature of a hybrid. It is a conveyance of an estate in land and a contract (due to accompanying contractual provisions relating to repairs, taxes, insurance, etc.) for services between the landlord and tenant. The lessee's possessory rights which are governed by property law doctrines, however, are intimately connected with the contractual provisions. Because of this interrelationship, courts tend to designate leases, at least nominally, as contracts. Care must be taken to determine whether a court is addressing a lease "contract" as one governed by the contract principles of mutually dependent promises or as one governed by the property law concept of independent covenants. *See generally* 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952); 3A A. CORBIN, CONTRACTS § 686 (1960).

105. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Quinn & Phillips 231.

106. 3 G. THOMPSON § 1029, at 87; 6 S. WILLISTON, CONTRACTS § 890, at 587 (3d ed. 1962).

107. Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 471 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); Edwards v. Ward Associates, Inc., 367 S.W. 2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Ammons v. Beaudry, 337 S.W.2d 323, 324 (Tex. Civ. App.—Fort Worth 1960, writ ref'd); Mitchell v. Weiss, 26 S.W.2d 699, 700 (Tex. Civ. App.—El Paso 1930, no writ).

108. Quinn & Phillips 234.

109. 367 S.W.2d 390 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

110. *Id.* at 393, *quoting* Mitchell v. Weiss, 26 S.W.2d 699, 700 (Tex. Civ. App.—El Paso 1930, no writ) (emphasis added).

111. Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 471 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); Edwards v. Ward Associates, Inc., 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Ammons v. Beaudry, 337 S.W.2d 323, 324 (Tex. Civ. App.—Fort Worth 1960, writ ref'd); Mitchell v. Weiss, 26 S.W.2d 699, 700 (Tex. Civ. App.—El Paso 1930, no writ).

evidences the contrary. . . ."[112] This last phrase raises the question of how would a tenant be assured that his intention to pay rent was to be *quid pro quo* for occupation of a habitable dwelling? In *Langham's Estate v. Levy*,[113] the court stated that the parties' intentions as to the independency of covenants was to be "determined from the language of the contract."[114] The court added that "[t]he presumption is that all stipulations in a contract are *dependent* and a promise would be so regarded in case of a doubt."[115] The court, however, sought to limit this only to leases where the lessee seeks to avoid the lease before he takes possession of the property because of its unsuitability for the purpose for which it was leased.[116] Why the distinction? The application of contract principles of construction to leases is also found in *Neiman-Marcus Co. v. Hexter*,[117] in which the court stresses that lease agreements are to be construed in accordance with the intentions of the parties.[118]

The courts' reliance on the intention of the parties as governing the scope of the lease agreement,[119] along with the established rule that the lease will be most strongly construed against the lessor,[120] open wide possibilities for obtaining an implied warranty of habitability. However, the prospective lessee is often faced with a standard form contract that only requires the lessor to turn over control of the property.[121]

---

112. Edwards v. Ward Associates, Inc., 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.), *quoting* Mitchell v. Weiss, 26 S.W.2d 699, 700 (Tex. Civ. App.—El Paso 1930, no writ).

113. 198 S.W.2d 747 (Tex. Civ. App.—Beaumont 1947, writ ref'd n.r.e.).

114. *Id.* at 754.

115. *Id.* at 754 (emphasis added).

116. *Id.* at 754.

117. 412 S.W.2d 915 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

118. *Id.* at 919. The court quoted from the broad language of the early Texas Supreme Court case of Howeth v. Anderson, 25 Tex. 557, 573 (1860):

> Leases are construed, like other written agreements, so as to give effect to the intentions of the parties. To arrive at the intention, regard is to be had to the situation of the parties, the subject matter of the agreement, the object which the parties had in view at the time, and intended to accomplish. A construction should be avoided if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal; and that construction which is most obviously just is to be favored, as most in accordance with the presumed intention of the parties.

Id. at 919.

119. Fox v. Thoreson, 398 S.W.2d 88, 92 (Tex. Sup. 1966); Neiman-Marcus Co. v. Hexter, 412 S.W.2d 915, 919 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.); Richker v. Georgandis, 323 S.W.2d 90, 98 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

120. Sirtex Oil Indus., Inc. v. Erigan, 403 S.W.2d 784, 788 (Tex. Sup. 1966); Richker v. Georgandis, 323 S.W.2d 90, 99 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Pickrell v. Buckler, 293 S.W. 667, 668 (Tex. Civ. App.—El Paso), *writ ref'd*, 116 Tex. 567, 296 S.W. 1062 (1927) (per curiam).

121. This raises the possibility of attacking the validity of the lease agreement on the grounds that it is in effect an adhesion contract. However, decisions of Texas courts in a related area, the inclusion of exculpatory clauses by landlords into lease agreements, support the rule that such provisions are not contrary to public policy. Mitchell's, Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775 (1957) (lease between

From a practical standpoint, if the lessee is able to obtain an express covenant requiring the landlord to undertake the repair burdens, he may not need to show that the covenants to pay rent and to repair are mutually dependent to insure that the rent he is paying provides him with a habitable dwelling. According to several Texas decisions and recent statutory authority, while these covenants may not be considered dependent, they are ot least *offsetting*.[122] This offsetting factor provides the tenant witth economic pressure not found in the general rule as stated earlier in *Edwards v. Ward Associates, Inc.*[123] It must be noted, however, that while the covenant to pay rent and the covenant to repair are offsetting, a tenant is not allowed to *defend* against an action for nonpayment of rent by pleading a failure to repair on the part of the landlord.[124] The tenant must seek affirmative relief for such a breach by instituting his own suit or by filing a cross-action in a suit by the landlord for the rent.[125] Reflecting this offsetting relationship between rent payments and repairs, the court in *McCrory v. Nacol*[126] announced the rule that allows the tenant, upon refusal of a landlord to make repairs as agreed, to make the repairs himself and deduct the cost from his rent.[127] Article 5236 of the Texas Revised Civil Statutes provides that:

> Should the landlord, without default on the part of the tenant or lessee, fail to comply in any respect with his part of the contract, he shall be responsible to said tenant or lessee for whatever damages may be sustained thereby; and to secure such damages to such tenant or lessee, he shall have a lien on all the property of the landlord in his possession not exempt from forced sale, *as well as upon all rents due to said landlord under said contract.*[128]

The measure of damages for the landlord's breach of a covenant to repair is "the difference between the contract rental of the premises and the rental value of the premises in their unrepaired condition."[129]

Although the general rule is to the contrary, this relationship between repairs and rent has actually been treated as mutually dependent by several

---

private parties); Crowell v. Housing Authority, 483 S.W.2d 864 (Tex. Civ. App.—Tyler 1972, writ granted) (public housing lease agreement), *noted in* 4 ST. MARY'S L.J. 432 (1972).

122. Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 472 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); Ammons v. Beaudry, 337 S.W.2d 323, 324 (Tex. Civ. App.—Fort Worth 1960, writ ref'd); Oscar v. Sackville, 253 S.W. 651, 653 (Tex. Civ. App.—Austin 1923, no writ); TEX. REV. CIV. STAT. ANN. art. 5236 (1962).

123. 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

124. Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470, 471 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

125. *Id.* at 472.

126. 428 S.W.2d 414 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.).

127. *Id.* at 416; *accord*, Hamblen v. Mohr, 171 S.W.2d 168, 174 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.).

128. TEX. REV. CIV. STAT. ANN. art. 5236 (1962) (emphasis added).

129. Edwards v. Ward Associates, Inc., 367 S.W.2d 390, 395 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

courts. In *Coleman v. Bunce*,[130] the Texas Supreme Court stated that "the defendant in this case would have a right to plead, in answer to an action for rent, a breach of covenant to repair, especially as it would seem that the covenant and rent charge were part and parcel of the same contract."[131] Additionally, several courts of civil appeals decisions have explicitly dealt with the landlord-tenant relationship in a contractual setting with the covenants arising therefrom as mutually dependent.[132] One of these cases, *Ingram v. Fred*,[133] is particularly confusing in light of the general rule that covenants between a landlord and tenant are independent. The court flatly states as Texas law that covenants between landlord and tenant are mutually dependent as distinguished from English decisions.[134] The court continues: "On the contrary, such an exception in favor of a landlord and against the tenant, which, so far as we can perceive, is purely arbitrary and without any reasonable or equitable basis . . . should not be allowed."[135] From these conflicting court decisions and the rationale behind them it becomes readily apparent that the modern apartment tenant is not advancing such a novel idea when he contends that he is entitled to a habitable dwelling in return for his rent payment.

There has been a decided tendency by the courts to narrow the application of the common law doctrine of caveat emptor in landlord-tenant relationships. This effort, however, has not been entirely successful in effecting meaningful and needed changes in this area. The bulk of the modern day tenants must still deal with the many inherent inequities presented, in that the remedies developed by the courts only apply to limited situations and often provide incomplete or inappropriate relief. Although the previous discussion has dwelled on the confusion present in and the possible expansion of the exceptions, extensions and modifications of the doctrine of caveat emptor, the appropriate solution to the problems raised can only be found in the imposition of an implied warranty of habitability in lease agreements. As the court in *Lemle v. Breeden*[136] stated:

> [I]t appears to us that to search for gaps and exceptions in a legal doctrine . . . which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferrable [sic] alternatives exist.[137]

130. 37 Tex. 171 (1872).
131. *Id.* at 173.
132. Graham Hotel Co. v. Garrett, 33 S.W.2d 522, 527 (Tex. Civ. App.—El Paso 1930, writ dism'd); Dabney v. Beckwith, 1 S.W.2d 946 (Tex. Civ. App.—Beaumont 1928, no writ); Mazzie v. Woolly, 273 S.W. 642, 643 (Tex. Civ. App.—Texarkana 1925, no writ); Ingram v. Fred, 210 S.W. 298, 300 (Tex. Civ. App.—Fort Worth 1918, writ ref'd).
133. 210 S.W. 298 (Tex. Civ. App.—Fort Worth 1918, writ ref'd).
134. *Id.* at 300.
135. *Id.* at 300.
136. 462 P.2d 470 (Hawaii 1969).
137. *Id.* at 475.

Sale of New Houses

The application of the doctrine of caveat emptor to the sale of a new home was not rejected in Texas until rather recently.[138] The imposition of an implied warranty on a builder-vendor was mentioned by way of dicta as early as 1943 in *Loma Vista Development Co. v. Johnson.*[139] The application, however, of such a warranty was not the subject of any decisions until 1967. In *Moore v. Werner*[140] the Houston Court of Civil Appeals, in holding that such a warranty did obtain, equated the sale of a new house with the sale of personalty.[141] Soon after this decision, the Texas Supreme Court in *Humber v. Morton*[142] dispelled any doubts remaining as to the applicability of caveat emptor to the sale of a new house with its statement that the rule "is an anachronism patently out of harmony with modern home buying practices."[143] The court attacked the validity of the theory of personal inspection as the basis for the rule stating that "[o]bviously, the ordinary purchaser is not in a position to ascertain when there is a defect in a chimney flue, or vent of a heating apparatus, or whether the plumbing work covered by a concrete slab foundation is faulty."[144] In light of the *Humber* decision, the obvious question is whether this reasoning can be applied to the landlord-tenant relationship. In support of a direct analogy between the lease and a sale of land as to the doctrine of caveat emptor, the Texas Supreme Court in *Perez v. Rabaud,*[145] citing a Pennsylvania case noted:

> [T]here is no more reason for holding the lessor, in absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor.[146]

With the *Humber* decision the law has changed with reference to the application of caveat emptor to the sale of new houses. Are there any overriding policy considerations that would prevent a similar change in landlord-tenant relationships?

---

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

139. 177 S.W.2d 225, 227 (Tex. Civ. App.—San Antonio 1943), *rev'd on other grounds,* 142 Tex. 686, 180 S.W.2d 922 (1944).

140. 418 S.W.2d 918 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ).

141. *Id.* at 920. The rationale behind the imposition of warranties under the Uniform Commercial Code in sales of personalty [TEX. BUS. & COMM. CODE ANN. §§ 2.314, 2.315 (1968)] has often been equated with the imposition of an implied warranty of habitability in leases. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Lemle v. Breeden, 462 P.2d 470, 474 (Hawaii 1969); Mease v. Fox, 200 N.W.2d 791, 795 (Iowa 1972).

142. 426 S.W.2d 554 (Tex. Sup. 1968).

143. *Id.* at 562.

144. *Id.* at 561.

145. 76 Tex. 191, 13 S.W. 177 (1890).

146. *Id.* at 193, 13 S.W. at 178.

Leases of Personalty

The general rule concerning bailments for hire, in the absence of any agreement to the contrary, is that the lessor impliedly warrants the reasonable suitability of the chattel for the uses or purposes known to be intended by the lessee.[147] Texas courts, while originally embracing this rule, have subsequently limited its application somewhat in both economic loss and personal injury cases which arise from defects in the leased chattel. The rule in Texas now is that it must be shown that the defective condition of the chattel was either known or should have been known by the lessor before he will be subject to liability.[148] The similarity of this warranty in bailments for hire and the sales law warranties has been noted by several authorities[149] and, as contended in an early Texas case, the implication of a warranty arising from the bailment contract is even clearer than it would be in the case of a sale.[150]

The analogy that can be drawn between bailments for hire and the landlord-tenant relationship are obvious. The policy reasons for imposing an implied warranty of fitness to a bailment for hire transaction are equally applicable to the lease of real property:

> [E]xpansion of enterprises engaged solely in bailment for hire seems to justify increasing imposition of absolute warranties, at least to the extent that they would be imposed upon a seller of similarly used goods. In addition, reliance is greater than in the typical sale, for it is generally true that the bailee for hire spends less time shopping for the article than he would in selecting like goods to be purchased, and since the item is not one which he expects to own, he will usually be less competent in judging its quality.[151]

Implied warranties of fitness are considered by law as arising out of transactions where one of the parties is in a superior position as to knowledge of the chattel transferred[152] and yet when the same facts obtain in the lease agreement between landlord and tenant, the inequities present are ignored.

147. Sims & Smith v. Chance, 7 Tex. 281, 285 (1852); Baker & Lockwood Mfg. Co. v. Clayton, 90 S.W. 519, 520 (Tex. Civ. App. 1905, no writ); 8 C.J.S. *Bailments* § 25, at 380 (1962).

148. Ellis v. Moore, 401 S.W.2d 789, 794 (Tex. Sup. 1966); Lackey v. Perry, 366 S.W.2d 91, 94 (Tex. Civ. App.—San Antonio 1963, no writ); Continental Bus Sys., Inc. v. Toombs, 325 S.W.2d 153, 161 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.); Alexander v. Cheek, 241 S.W.2d 950, 951 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.).

149. Holmes Packaging Mach. Corp. v. Bingham, 60 Cal. Rptr. 769, 775 (Dist. Ct. App. 1967); Cintrone v. Hertz Truck Leasing & Rental Service, 212 A.2d 769, 775 (N.J. 1965); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 673 (1957). *See* TEX. BUS. & COMM. CODE ANN. § 2.313, comment 2 (Tex. UCC 1968).

150. El Paso & S.W.R.R. v. Eichel & Weikel, 130 S.W. 922, 937 (Tex. Civ. App. 1910, writ ref'd), *appeal dism'd*, 226 U.S. 590 (1913).

151. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 673 (1957).

152. Cintrone v. Hertz Truck Leasing & Rental Service, 212 A.2d 769, 775 (N.J. 1965).

CONCLUSION

The inadequacy of the traditional landlord-tenant law in dealing with modern leasing necessities is evident even to the casual observer. Although the caveat emptor doctrine and its underlying premises have been rejected in other areas of the law including sales and leases of personalty and sales of new houses, many courts have been unwilling to extend this trend into the landlord-tenant relationship.[153] The doctrine of caveat emptor, more so than in cases concerning sales, is based on factual assumptions which can no longer be supported in light of modern urban realities. Upon realization of this fact by the courts, rejection of the doctrine with the substitution of an implied warranty of habitability should be close at hand. As the Texas Supreme Court stated:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . .[154]

---

153. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1076 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

154. Humber v. Morton, 426 S.W.2d 554, 560 (Tex. Sup. 1968), *quoting* Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965). Concern over the inequities endured by the modern tenant has also evoked legislative action. At present there is a bill in the Texas Legislature calling for the imposition of an implied warranty of habitability in lease agreements which includes a self-help, repair and deduct provision. H.B. No. 518, 63d Leg. (Feb. 15, 1973).