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CAVEAT LESSEE

JOHN S. GRIMES*

INTRODUCTION

The noted historian Breasted said that the history of Egypt could never be written because no one man could acquire the knowledge of the many tongues necessary to transverse all of the fields of available research material.

The same problem has cursed the study of legal history. Legal historians, in the sublime egotism of the lawyer, have ignored the many factors which have operated to develop the system of customal behavior that we Olympic-like call "The Common Law." The oceans of panegyrics that have flowed over Magna Charta submerge the humanistic influences of selfishness, greed and religious fanaticism that led to the birth of that Great Charter of Human Liberties. Those who every Law Day eulogize the noble barons who confronted King John gloss over the fact that one of the weightiest charges levied against the king was that he had given sanctuary to the accursed race that had crucified the founder of the established church.

It is a sad commentary on the depth of modern legal reasoning that we attempt not merely to solve present-day problems but also to plan for future developments on the basis of principles that were either formulated to satisfy long past social, political and economic needs or arose out of situations the existence of which have now been forgotten.

Our system of common law even in its codification mold, developed under political, economic and cultural conditions of an English society, crystallized during centuries when the population expansion was held down to perhaps as little as five per cent. So firmly did the hand of time compress these legal molecules, that this stratification firmly resisted the population phenomenon that developed in the eighteenth century,¹ even

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1. This explosion and its influence has been only lately recognized by historians. Louis XIV was hard put to place fifty thousand men in the field at any time. A hundred years later revolutionary France had a million men under arms. After another hundred years France could only rally seven hundred and fifty thousand men at the Marne. Ireland with less than half a million population after Cromwell may have had nine million when the potato blight struck. Similar population growths seem to have occurred

though this led to earthshaking changes in political and economic areas. This was particularly true of the noble oak of the property law. Lord Mansfield's petty sniping² at Shelley's Case had no lasting effect except to invoke the stern rebuke of Fearne.³

Even the tender mercies of that development of the legal philosophy termed "equity," although it eventually penetrated to the recesses of the property law in England,⁴ still left the American property law largely unaffected.

The great expounders of the "Common Law," Coke, Pollock, Maitland, Holdsworth, Holmes, even Plucknett, have all blithely ignored the blight that *stare decisis* has cast on the development of modern society. Untold economic wealth has been lost through the application of the *ferae naturae* doctrine to hydrocarbons in place. Only recently has there been a voice crying in the wilderness on the terror of the perpetuities rules. The sloth of our law has permitted rules formulated too often by dynastic struggles in English history to filter our social growth. Typical of this legal inadequacy is the long lot of human misery created by the application of the concept of *caveat emptor* to the relationship of landlord and tenant.

DEVELOPMENT OF CAVEAT LESSEE

An established legal rule should not, of course, be today swept away merely because it has long existed. But its continued functioning in modern society should involve consideration as to why it was born and whether the factors of its conception are still of importance in present-day society.

Historical Foundations

The legal pundits⁵ have stated that the "Common Law" was firm in its position that there was no implied covenant on the part of the lessor as to fitness of the leased premises either at the beginning or during the continuation of the lease. The origin, as well as the causes, of this doctrine of *caveat emptor* in leases is lost in the blue haze of history.⁶

It is regrettable that the light of English legal historical research has not penetrated into the origin of that remarkable hermaphrodite, the leasehold. The classic English historians pronounced the belief, which we

all over the world during the eighteenth century, hardly attributable to the "Industrial Revolution."

2. *Perrin v. Blake*, 98 Eng. Rep. 355 (W.B. 1770).

3. FEARNE, *CONTINGENT REMAINDERS* (1770).

4. 15 George 5, c.20 (1926).

5. *Shira's Doyle v. Union Pacific R.R.*, 147 U.S. 413 (1892); *Bowe v. Hunking*, 135 Mass. 380 (1882).

6. COKE, *A COMMENTARY ON LITTLETON* *§ 102(a) [hereinafter cited as *Co. Litt.*].

accept *cum grano salis*, that the Conquest, the Northumbrian Rebellion and the abortive Danish invasion that led to the Salisbury Oath resulted in a concentration of title to all land in England, except the Channel Isles, in the sovereign. The original feoffments were, therefore, separations of the titular and the possessory rights in land only for life or during good behavior. There was no passing of present consideration to the reversioner, only the prospects of future revenue. By a latter development, through the use of the words "*et hereditibus suis*," such possessory estates became hereditary fees, with the family, not the individual, as the unit of ownership. Later the development of covenants of warranty permitted alienation by the terre-tenant to defeat the family.⁷

Although possession and title were thus united in the fee, they could be separated in interest for the duration of life or for years. Eventually, a major division developed between terms for life as freeholds and terms for years as non-freehold estates.⁸ This development is strange since there is evidence that terms for years at that time were held by powerful political organizations such as the church militant.⁹ But for some unexplained reason the term for years sank down to coalesce with the villenage as a non-freehold interest in land.¹⁰

Just when, where and why the distinction between the freehold life estate and the non-freehold term arose is not clear.¹¹ Originally, a term of lease may have been a tenement subject to seizin¹² but not a "free tenement."¹³ As late as Littleton¹⁴ "leases" could be for life, or for life

7. 2 Blackstone, Commentaries *ch. 1 [hereinafter cited as BLACKSTONE]; Co. Litt. § 1(a). PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW, ch. 3 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

8. BLACKSTONE 142 considered leaseholds as merely seasonal agricultural lettings. This result, however, is immediately contradicted by indicating that long term leases were mentioned in the Mortmain statute. *Id.* at 143.

9. It is possible that the reduced status of the term to a non-freehold estate was a preconceived plan to enable religious corporations to avoid "mortmain" and various other statutes by creating in the church corporations an interest in land that did not require livery of seizin. The "use" may have had a similar origin.

Scutton, LAND IN FETTERS 65 (1886), suggests that *De Viris Religiosis* was necessitated by the use of the long term by religious corporations to avoid the inhibitions of feoffments under Section 43 of the Magna Carta (1217) and Section 14 of the Provisions of Westminster in 1259. See LITTLETON, TENURES § 7 [hereinafter cited as LITTLETON] and Co. Litt. § 49(b) (but not a tenancy at will).

10. LITTLETON § 59.

11. The explanation suggested by Bacon, that the distinction arose by reason of the fact that originally leases were only for a crop season, cannot be accepted in view of evidence of early long term leases and that leases were at one period created by livery of seizin.

12. *But see* Challis, *Are Leaseholds Tenements*, 6 LAW Q. REV. 69 (1890).

13. A lease for a term was valid even though the lessor died before the lessee entered. This was not true in a feoffment. If the feoffor died before entry, the deed was void. LITTLETON § 66. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 115 (3rd ed. 1927) [hereinafter cited as POLLACK & MAITLAND].

14. LITTLETON § 217.

of another or for terms of years.

Plucknett¹⁵ suggests that the lowered status of the term for years was due to its use as a security device to avoid the church's stigma on usury. Maitland¹⁶ attributed it to the influence of the Roman law of usufruct in reducing a lease to a non-freehold interest.

The term for years did not wholly forget its noble beginnings, however, and thus evolved that strange legal being, the leasehold as a chattel real. Starting with the approach that certain of the legal consequences of a leasehold follow real property and certain personal property rules, the legal scholar finds delight in determining which of these situations are followed in the various jurisdictions. With certain notable exceptions such as the probate consequences¹⁷ and the doctrine of caveat emptor, the cases are not in harmony as to whether on a particular issue leaseholds are realty or personalty.

The courts are virtually unanimous that in all phases of the law of decedent's estates a lease is personalty. But by a similar concord, the real property concept of caveat emptor is attached to leases. This application of the real property doctrine of "caveat emptor" to leaseholds has resulted in a major legal storm.

It is accepted English doctrine that the lessor impliedly warrants quiet enjoyment in the lessee as against any acts of the lessor and those claiming under him or under a superior title.¹⁸ The lessor covenants that he has the legal right to transfer possession to the lessee for the full term. Thus arose the feudal trait whereby the lord incurred a duty to protect the vassal.¹⁹ As to whether there is also an implied covenant to place the tenant in possession as against trespassers the cases disagree.²⁰

But it is generally accepted that there is no implied covenant given by the lessor that the leased premises are fit for any purpose. The leasehold adheres to the common law concept of the fee in this regard. Apparently, this doctrine of caveat emptor was retained because a leasehold is a conveyance of an interest in land. In feoffments the rule was well

15. PLUCKNETT 572.

16. POLLOCK & MAITLAND 115.

17. That a leasehold is personalty for probate purposes seems to have been early accepted. *See* CO. LITT. 46 and BLACKSTONE 144.

Chattels real pass to the executors of the grantee or lessee, not to the heirs or to administrators. LITTLETON § 740; CO. LITT. § 387 (b).

18. *Budd-Scott v. Daniell*, [1902] 2 K.B. 351. But under English law this arose not from the landlord-tenant relationship but by the use of the word "demise." *Baynes v. Lloyd*, [1895] 2 Q.B. 610.

19. *See* BLACKSTONE ch. 5.

20. No duty to place in possession. *Snider v. Deban*, 249 Mass. 59, 144 N.E. 69 (1924); *HARRIS V. Greenberger*, 50 App. Div. 439, 64 N.Y.S. 136 (Sup. Ct. 1900); *Contra*, *Adrian v. Robinowitz*, 116 N.J. 586 A. 29 (1936); *Block v. Busch*, 160 Tenn. 21, 22 S.W.2d 242 (1929).

established early.²¹

The feudal obligation of the lord to defend his tenant's seizin was itself an implied warranty. This may have died with *Quia Emptores Terrarum*.²² Butler²³ felt that tenants thereafter insisted on a special covenant of warranty as a *quid pro quo* for their attornment on alienation.

If it is true that the feoffment did not at first contemplate a present passing of consideration to the feoffer but merely contemplated the rendition of future services by the feoffee, the lack of any implied covenant either of title or of fitness of use is understandable. Such feoffments were primarily of rural areas and did not embrace substantial improvements.

Even after the scheme of giving covenants of warranties by the feoffor developed, presumably to permit the defeat of the heir,²⁴ there was no implication of warranty of fitness in a feoffment. The land was visible and the lessee had ample opportunity to discover defects.

It is reasonable that the common law of leases suffered this same development. Leases, at least long term, were largely agricultural. The parties were on an equal bargaining level and conditions were visible. Actual tillers of the soil were either on a sharecropper basis of little political force or were agricultural laborers whose deplorable economic conditions were notorious but accepted. The dissatisfied lessee could always default. Thus the law saw no necessity of placing a protective cloak around the lessee either for economic or social reasons.

Nor did urban development in England see any impelling reason for a change in the lease concept. In medieval England with its growth of towns the political power was in the hands of the mercantile class. These established citizens almost universally had their living quarters above their places of business. They, at least the wealthier element, owned the fee of their business-dwelling house. Their servants and employees were most likely to be their tenants as well. This early forerunner of the notorious company house, the "company store" of American mining history, was not conducive to a consideration of the welfare of the tenant by his employer-landlord. And in the rural areas the plight of the tenant farmer,

21. BLACKSTONE, 299. *See also* Co. LITT. 174.

22. 18 Edward 1 (1290).

23. Co. LITT. 365 (a) n. 1 (19th ed.)

24. *Quia Emptores Terrarum*, 18 Edward 1 (1290). *See* 4 BLACKSTONE, COMMENTARIES *301; POLLACK & MAITLAND 311; Co. LITT. 373.

Statute of Gloucester, 6 Edward 1 (1278) contemplated warranties. However, the existence of such a warranty has been staunchly denied. *See* WRIGHT, INTRODUCTION TO THE LAW OF TENURES, 38-40 (1750) and SCRUTTON, LAND IN FETTERS (1886).

Even the lessor's implied covenant of title gave way in the seventeenth century to the express covenant of quiet enjoyment. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 250 (3rd ed. 1927).

while the subject of sympathy among the English liberal writers, was not of sufficient social significance to cause pressure to be brought on either the courts or Parliament to change a doctrine by this time firmly established in the common law.

Nothing else could be expected of an age in which freeholders alone could exercise the ballot. The chains which bound the law of leases were forged in the context of a lack of tenant political power. Tenant relief was dependent upon the coming of universal suffrage and the passing of the "freeholder" power factor.

The obligation to pay rent seems originally to have come out of the produce of the real estate, not being due until the end of the term; the obligation lay in property law.²⁵ The giving of a covenant to pay rent permitted the developing contract law to force its head into the picture.²⁶

After the lessee had become personally obligated to pay a fixed sum for the possession he had purchased, contract law with its equitable overtones might have ameliorated the caveat emptor rule as applicable to leases. The fact that the equitable thrust was but slight is tribute to the rigidity of the property law.

English Cases

The recorded cases do not, however, support a bland assumption of the firmness of the common law caveat lessee. When the issue was first presented, counsel for the lessors were hard put to find authority for their position. There was a tendency to repudiate the concept.²⁷ It may be that the stirrings of early Victorian conscience rebelled at applying the doctrine to human habitation.²⁸

In the case of *Collins v. Barrow*,²⁹ a tenant was discharged from liability on a covenant to pay rent. The court relied on the fact that the house was unfit for habitation because of dampness. The tenant's express covenant to repair was held not to require him to undertake the expense of constructing a sewer. In *Edwards v. Etherington*,³⁰ a tenant was allowed to quit where the premises had become unfit for habitation. And in *Salisbury v. Marshall*,³¹ the court refused to require a tenant to continue to pay rent where the house was not in a habitable state of repair. None of these opinions mentioned the caveat emptor doctrine.

25. POLLOCK & MAITLAND 129. See LITTLETON § 58.

26. 8 Anne, c.14, § 4 (1709), first gave an action of covenant for rent.

27. See *Erskene v. Adene*, L.R. 6 Ch. 756 (1871) and *Sutton v. Temple*, 152 Eng. Rep. 1108 (K.B. 1843). See also BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE (Woodbine ed. 1915-1942) and BACON, ABRIDGEMENT *633.

28. Presumably the Irish and the English agricultural laborers did not belong to the human race.

29. 174 Eng. Rep. 38 (Ex. 1831).

30. 117 Eng. Rep. 1016 (Q.B. 1840).

31. 172 Eng. Rep. 268 (Com. Pl. 1829).

Whether the rulings were based on a repudiation of the rule or whether an exception of habitability was intended is uncertain.

The issue was first squarely presented in the case of *Smith v. Marrable*.³² Lady Marrable sought to avoid a rental obligation of a furnished house because of bug infestation. Baron Parke sustained her position. It is not clear whether the decision was based on a noblesse oblige, courtesy to a lady, a denial of caveat lessee, a furnished habitation exception, or the theory of nuisance. In the opinion Baron Parke relied upon the hoary precedents of *Collins v. Barrow* and *Edwards v. Etherington*.

These four cases furnished much grist for the mills of English justice. The Law Barons were soon appalled at the vile heresy they displayed. Even Baron Parke made his pilgrimage to Canossa. This re-emergence of the sacred rights of property which marked the Chartest failure and was so graphically portrayed in the Irish potato famine found reflection in the case of *Erskene v. Adeane*,³³ where the court refused to apply *Smith v. Marrable* to leases of agricultural land.

In *Hart v. Windsor*,³⁴ where the lessee tried in vain to avoid his obligation because of vermin infestation, the judges purged themselves of much of the pernicious heresy of *Smith v. Marrable*. There was a strong feeling that the *Marrable* decision was erroneous.

In *Sutton v. Temple*³⁵ the court adhered to caveat lessee in the case of a lease of agricultural land. One judge, anticipating a possible present-day American exception, assigned the *Marrable* decision to situations in which property is leased for a specific purpose. Parke, however, heaped ashes upon his own head by admitting that *Edwards v. Etherington* and *Collins v. Barrow*, on which he had rested his opinion, were erroneously decided. He excused *Smith v. Marrable* on the theory that the letting of personalty being involved, the law merchant as to chattels prevailed.³⁶

*Keats v. Earl Cadogan*³⁷ likened the rental of a house to the purchase of goods—a taking for better or for worse. *Chadwick v. Noland*³⁸ limited *Smith v. Marrable* to seasonable lettings of furnished premises or to furnished rooms in a hotel, ignoring the modern distinction between a lodger and a tenant. Presumably bedbugs in a chair were taboo but bedbugs in the room were acceptable.

32. 152 Eng. Rep. 693 (Ex. 1843).

33. L.R. 6 Ch. 756 (1871).

34. 152 Eng. Rep. 1114 (Ex. 1843).

35. 152 Eng. Rep. 1108 (Ex. 1843).

36. *Id.*

37. 138 Eng. Rep. 234 (Ex. 1851).

38. 136 Eng. Rep. 211 (Ex. 1848).

Some of the judges in attempting to avoid *Smith v. Marrable* relied upon the fact of the leasing of personalty in that case and an assertion that caveat emptor did not apply to personalty. This assertion was not universally approved. But none explained why in this instance leases were to be treated as realty.

In the latter part of the nineteenth century the English courts³⁹ adopted a more human element. Baron Parke's retraction was in turn repudiated and *Smith v. Marrable* reinstated as a furnished dwelling exception to the "common law" rule.⁴⁰ The courts, however, refused to make this a total exception. Its application was limited to bug infestation, clogged drains, disease or other unlawful situations⁴¹ which would today be considered nuisances.⁴² The lessor was not required to make repairs, and lessors' covenants to repair were independent.⁴³ By statute, however, an exception was recognized in the case of houses let for low rent.⁴⁴ A further exception was admitted as to that portion of the premises of which the lessor retained possession.⁴⁵

Counsel for lessees, while accepting the caveat lessee rule as part of their fate, did not despair, but attacked on the perimeter. From these legal battles three concepts evolved:

(a) The basic philosophy that there is no implied covenant of fitness of use at the outset, and the satellite theories that;

(b) there is no implied covenant of continued fitness of use during the duration of the lease; and

(c) the lessor is not liable to the lessee nor to others for torts resulting from the condition of the premises.

The sanctity of these doctrines has been almost universally admitted. Their opposition has centered the attack upon "exceptions" to the stated rules.

39. Under Scottish law the landlord was under an obligation to let a house in habitable condition, but not to so maintain it. *Cameron v. Young* I.T.C. 176 (Scot. 1908).

40. *Wilson v. Finch-Halton*, L.R. 2 Eq. 336 (1865). A leading English authority felt that *Wilson v. Finch-Halton* had reaffirmed the doctrine of *Smith v. Marrable* as to furnished houses. See WOODFALL, LANDLORD & TENANT 213 (23rd ed. Blundell ed. 1960).

41. *Parnell v. Chester*, 52 L.T.R. (n.s.) 722 (K.B. 1885).

42. Even in the furnished house situation with an express covenant of fitness of habitation, the bug infestation must constitute a nuisance of serious and substantial extent. *Parnell v. Chester*, 52 L.T.R. (n.s.) 722 (K.B. 1885).

Knowledge of lessor that the previous tenant was suffering from tuberculosis made furnished house unfit for habitation and justified terminating lease. *Collins v. Hopkins*, [1923] 2 K.B. 617.

43. Even where the lessor was bound by custom or by contract to repair, his failure so to do was not a defense to an action on rent. See *Hart v. Rayus*, [1916] K.B. 646; *Green v. Symns*, 13 L.T.R. (n.s.) 301 (K.B. 1897); *Longmore v. Blant*, 12 L.T.R. (n.s.) 520 (K.B. 1896); and *Kennard v. Achman*, 10 L.T.R. (n.s.) 213 (K.B. 1894).

44. Housing Act of 1925, 15 George 5, c.14.

45. *Demster v. Holles*, [1918] 2 K.B. 795.

The lessees early attacked the "duration" corollary of the caveat lessee doctrine. Was the lessee absolved from further liability when benefit of use was affected by (a) military action, (b) loss by water, and (c) destruction by fire? In each instance there are the further problems of whether the existence of a covenant to pay rent introduces the contract law so as to bind the lessee regardless of possibility of yield from the demised premises, whether equity should relieve from the harshness of the contract, and who equitably should bear the consequences of a loss for which neither was responsible.⁴⁶

The early cases indicate that military action did not exonerate the lessee.⁴⁷ But doubt was expressed as to the correctness of this position.⁴⁸

Likewise, there was doubt as to the effect of destruction by fire or water.⁴⁹ But the English law finally resolved this issue also in favor of the lessor.⁵⁰ The commercial frustration doctrine has not become rooted in the English law.⁵¹

46. Bacon distinguished between covenants implied by law, the performance of which the law excuses when the party without fault is unable to perform, and those created by contract, where the conventor creates a duty or charge upon himself which he is bound to make good, not withstanding an accident by unavoidable remedy. 5 BACON, ABRIDGEMENT* ch. 7. Bacon stated further that where no equitable circumstances arise, equity will not relieve from an express covenant on account of the destruction of the value of the subject by subsequent accident. Accordingly, where a tenant covenants to repair damage by fire he continues to remain liable for the payment of the rent though the premises be destroyed by fire, the equity of the parties being equal the covenant of the law prevails. *Id.*

47. In *Harrison v. North*, [1891] 1 Ch. 83, a house was seized by Parliament for use as a hospital. The Lord Chancellor stated his desire to relieve the tenant if he could. The final outcome of the case is not recorded.

48. During the Scottish troubles the tenant was relieved. Y.B. 9 Ed. 3 (1336).

49. Bacon distinguished between the case where land was covered by the sea and where burnt with wildfire. The former discharging the rent obligation, the latter resulting in apportionment. 6 BACON, ABRIDGEMENT *49-50.

A distinction has been asserted between loss of use (which falls on the lessee) and total destruction of the leased premises (which terminates the lease). Several cases support the assertion that equity will relieve the rent obligation upon destruction of the premises. See 73 Mich. 577, 41 N.W. 695 (1889), 172 Eng. Rep. 609 (Com. Pl. 1829), *Harrison v. North*, L.R. 1 Ch. (1865) and *Steel v. Wright*, 1 T.R. 708 (Ch. 1821).

Scottish Law, the Code Napoleon, the Civil Code of Louisiana and the Ancient Egyptian laws of Senestres all relieved the tenant in case of total destruction. PUFENDORFF, LAW OF NATURE AND NATIONS Ch. 5 (1931).

50. In *Belfour v. Weston*, 99 Eng. Rep. 1112 (K.B. 1786) the tenant covenanted to repair the premises. The house was destroyed by fire. The court, relying on a prior statement of Lord Mansfield, held that the tenant was still liable for rent. See also *Monk v. Cooper*, 93 Eng. Rep. 832 (K.B. 1725) (liable for rent even though the house is blown down); *Izon v. Gortin*, 132 Eng. Rep. 1193 (Com. Pl. 1839) (tenants of a second floor destroyed by fire are still liable for rent) and *Carter v. Cummins*, 1 L.R. 1 Ch. 84 (1865) (wharf swept away).

In *Richard Le Faverners Case*, 73 Eng. Rep. 811 (K.B. 1886), the court said, "if the sea again come upon part of the land demised or part be burned with wildfire, the entire rent shall issue out of the remainder." See *Maisfall v. Shofeld*, 47 L.T.R. 405 (K.B. 1855) and *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1792).

51. *Grimsdeck v. Sweetman*, [1909] 1 K.B. 704.

England has now returned to *Smith v. Marrable* by the Housing Act of 1925,⁵² which provides that any dwelling in the administrative county of London renting for less than forty pounds, or elsewhere for less than twenty-six is a working-class dwelling which the landlord must keep in all respects reasonably fit for human habitation.

The cold logic of the law extended to tort liability. The lessor had surrendered possession to the lessee; his entrance on the premises, even to make repairs, was a trespass. Therefore, the lessor was not liable to the lessee, his family, nor those on the premises with the lessee's consent, for torts incurred as a result of a defective condition of the premises.⁵³ The lessor who let an unfurnished house in a dangerous condition was not liable to the tenant for personal injuries.⁵⁴

CAVEAT LESSEE IN AMERICA

Scope of the Rule

The American authorities have accepted both the principal rule and its two corollaries as the "Common Law." The American cases are in accord in following the precept that the lessor covenants (a) that he has title and (b) that he has present right of possession. In approximately half of the American jurisdictions the lessor also covenants that he will place the lessee in possession.⁵⁵ In no jurisdiction, however, does the lessor impliedly covenant that the leased premises are fit for the use intended by the lessee.

While no instance has been found in which the tide of dissent has been sufficiently strong to impell the courts to sweep away this dike of legal irresponsibility, certain definite cracks have occurred. Changes in the basic "common law" rule of caveat lessee or any of its derivatives may be effected by the terms of the lease, allowing a further intrusion of contract concepts with equitable overtones into the property law.

The earliest American judges in the area had the same difficulty as their English contemporaries in recognizing the existence of the "common law" rule.⁵⁶ But later courts, even in those states which had accepted the

52. 15 George 5, c. 14, §1.

53. *Tredway v. Marbin*, 91 L.T.R. 415 (Ch. 1899).

54. *Bottomby v. Banister*, [1932] 1 K.B. 488 (noticing the possibility of a condition being dangerous per se). See *Brandt v. Yeager*, 199 A.2d 768 (Del. Super. Ct. 1964); *Cobb v. Lord*, 202 A.2d 560 (Me. Sup. Ct. 1964); *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958) and *Corcione v. Ruggieri*, 139 A.2d 388 (R.I. Sup. Ct. 1958).

55. *E.g.*, *Cleveland & St. L. R.R. v. Joyce*, 54 Ind. App. 658, 103 N.E. 354 (1913); *Vincent v. Defield*, 98 Mich. 84 (1893). *Contra*, *Budler v. Fish*, 14 Ind. App. 27 (1895); *O'Brien v. Smith*, 13 N.Y.S. 408 (Sup. Ct. 1891).

56. *Carson v. Godley*, 26 Pa. 117 (1856); *Godley v. Hargerty*, 20 Pa. 387 (1853). It is interesting that the courts attributed liability to the lessor even though the bailee, the United States government, was immune from suit.

Common Law as of 1607,⁵⁷ have followed the decisions of the English judges after 1850 to the effect that the rule had always existed.⁵⁸ This is equated to the tame American acquiescence to the English shaping of the Rule Against Remoteness of Vesting which was never even spoken of prior to 1618.⁵⁹

American Exceptions to the Rule

The caveat lessee rule has rarely been attacked directly. However, the American lawyers have been more ingenious than their English brethren in inducing the conscience of the courts to recognize "exceptions," not merely to the rule itself, but also to its two corollaries.⁶⁰ Exceptions⁶¹ have been proposed in the case of nuisance, furnished habitations, short term seasonal leases, constructive eviction, commercial frustration, lessors' covenants, lettings for public use, knowledge of lessor of improper conditions or concealment amounting to fraud, areas in common use, lease of part of a building, multiple dwelling, fiduciary relationships, houses built by the lessor for rent, or special statutes.⁶²

Landlord has no duty to repair. *Gallagher v. Button*, 46 A. 819 (Conn. Sup. Ct. 1900); *Divines v. Dickinson*, 189 Iowa 194, 174 N.W. 9 (1919).

57. 4 James 1 (1609).

58. *Hart v. Windsor* was adopted by *Foster v. Peysers*, 63 Mass. (9 Cush) 242 (1852).

Holding *Smith v. Marrable* overruled on a mere exception. *Naumberg v. Young*, 44 N.J.L. 331 (1882).

Asserting that *Smith v. Marrable* is shaken but is not overruled so far as it applies to reality: *Dutton v. Gerrish*, 63 Mass. (9 Cush) 89 (1851); *Mayer v. Moller* 1 Hilt 491 (N.Y. 1867); *Bennett v. Sullivan*, 100 Me. 118, 60 A. 886 (1905); *Thellusson v. Woodford*, 11 Ves. 112 (1867); *Cadell v. Palmer* (1833) 1 Cl. & F 373; *Childe v. Baylie*, 79 Eng. Rep. 393 (1618).

59. *The Duke of Norfolk's Case*, 3 Ch. Cas 1, 26 (1682), could not go back for precedent further than *Childe v. Baylie*, 79 Eng. Rep. 393 (1618).

60. Illinois, while adopting the common law rule, has made so many exceptions that like the puppy's tail, it is doubtful whether what is left is longer than what was excised. *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 123 N.E.2d 151 (1954).

61. *Theunissen v. Huyler's, Inc.*, 25 F.2d 530 (D.C. Cir. 1928); *Treharne v. Flint*, 324 Ill. App. 546, 58 N.E.2d 638 (1944); *Allen v. Forsyth*, 25 N.Y.S.2d 822 (Sup. Ct. 1941); *Weddle v. Parrish*, 135 Ore. 345, 295 P. 454 (1931).

There is a major exception in the case of the so-called "mineral lease." *Moore v. Lackey Min. Co.*, 215 Ky. 71, 284 S.W. 415 (1926).

The RESTATEMENT OF TORTS §§ 355-361 (1934) recognizes only the exceptions of negligent performance of covenants to repair, concealment of conditions, public use and retention of control exceptions.

Uninhabitability held grounds for termination by lease. *Leonard v. Armstrong*, 73 Mich. 577, 41 N.W. 695 (1889); *Campbell v. Frances*, 378 S.W.2d 790 (Tenn. 1964) (implying covenant of habitability); *Shawmakers v. Bayer*, 3 Pa. County Ct. 271 (1873).

Duty of lessor to inspect premises and make repairs on lessee's demand. *Canfield v. Howard*, 109 Ga. App. 566, 136 S.E.2d 431 (1964).

Duty of lessor to turn the premises over to tenant in safe condition for living and working. *Campbell v. Frances*, 378 S.W.2d 790 (Tenn. 1964).

Minnesota implied a condition of habitability in the case of multiple apartment dwellings. *Detawater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931).

62. A Louisiana statute requires the lessor to deliver the premises in good condition. *Barrow v. Culver Bros. Garage*, 78 So. 2d 69 (La. App. 1955).

I. *Marrable* Case

Baron Parke's philosophy of "nuisance" advanced in *Smith v. Marrable* has been relied upon by some of the American courts to avoid the impact of caveat emptor.⁶³ Thus, as in England,⁶⁴ the presence of infection or disease has made the lessor vulnerable not merely to a surrender by the lessee,⁶⁵ but also to tort liability.⁶⁶ The existence of illegal conditions or unsanitary factors⁶⁷ which would constitute a public nuisance are also grounds for relief to the lessee. No distinction has been made between public and private nuisance.

One who, by letting the premises, puts it out of his power to abate an existing nuisance is as much responsible for a tort resulting therefrom as one who fails to abate the nuisance while it is in his power so to do. However, the cases disagree as to whether the lessor must have had actual knowledge of the existence of the nuisance at the time he makes the demise or whether he may be charged with constructive knowledge.⁶⁸

The doctrine of *Smith v. Marrable* has been assumed to apply to an implied covenant of habitability of furnished dwellings.⁶⁹ In this context the doctrine has been extended to include unfurnished residences.⁷⁰ The exception to the caveat emptor rule in the case of short term leases, such

63. Nuisance caused by noise of overhead tenant's family justified plea of constructive eviction. *Home Life Ins. Co. v. Bresterman*, 168 Misc. 126, 5 N.Y.S.2d 272 (Sup. Ct. 1938).

Rental of house is similar to purchase of goods, requiring inspection and a taking for better or for worse. *Keats v. Earl Cadagon*, 138 Eng. Rep. 234 (Ex. 1851).

Smith v. Marrable limited to seasonable lettings of furnished premises comparable to furnished rooms in a hotel. *Chadwick v. Woodward*, 136 Eng. Rep. 211 (Ex. 1848).

64. *Bud v. Lord Grenville*, 1 Cab & Ellis 316 (R.I. 1882); *Wolfe v. Arrott*, 109 Pa. 473, 1 A. 333 (1885).

65. The presence of mice justifies abandonment even though the lease provided that presence of vermin would not affect the obligations under the lease. *Mutual Life Ins. Co. of N.Y. v. Winslow*, 183 Misc. 754, 52 N.Y.S.2d 255 (Sup. Ct. 1944).

Vermin provided no excuse for terminating lease where landlord would be required to trespass on the leased premises to get rid of the vermin. *Gunther v. Oliver*, 117 A. 402 (N.J. 1922).

66. Nuisance justifies termination where it is caused by lessor, is tortious, and renders premises unfit for purpose of the lessee. *Bahcall v. Gloss*, 244 Wis. 473, 12 N.W.2d 674 (1944). A distinction has been made between public and private nuisance. *Rosewell v. Prior*, 91 Eng. Rep. 397 (1795); *Swords v. Edgar*, 59 N.Y. 28 (1874).

67. *Hartenbauery v. Brumbaugh*, 220 Ill. App. 326 (1920).

68. *J. W. Cushman & Co. v. Thompson*, 58 Misc. Rep. 539, 109 N.Y.S. 757 (Sup. Ct. 1908) (notice stressed).

No duty of landowner to warn tenant of dangerous natural conditions. *Hersch v. Anderson Acres*, 146 N.E.2d 648 (Ohio 1957); *Lathers v. Coates*, 18 Misc. Rep. 231, 41 N.Y.S. 373 (Sup. Ct. 1896).

Collins v. Hopkins, [1923] 2 K.B. 617 (furnished house, tuberculosis).

69. *But see Dutton v. Gerrish*, 63 Mass. (9 Cush.) 89 (1851). The court refused to imply a covenant of fitness in a lease where there was no express use described in the lease. It mentioned *Smith v. Marrable* and stated that *Smith* had probably been overruled. *See also Royce v. Guggerfurm*, 106 Mass. 201 (1870).

70. *Leonard v. Armstrong*, 73 Mich. 577, 51 N.W. 695 (1899).

as seasonal rentals of furnished dwellings,⁷¹ has found some acceptance. There has also been reliance on the theory of constructive eviction resulting from unfitness of habitation.⁷²

A few cases have placed property leased for business purposes in the same category as furnished houses.⁷³ The weight of United States authority, however, is to the contrary,⁷⁴ even where machinery is included in the lease.⁷⁵

II. Provisions in the Lease

In all of these situations a statement of purpose in the lease may or may not be of importance, depending apparently on the attitude of the particular court.⁷⁶

71. *Young v. Povich*, 121 Me. 141, 116 A. 26 (1922); *Hacher v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942).

Implied covenant in summer furnished house. *Davenport v. Squibb*, 320 Mass. 629, 70 N.E.2d 793 (1947); *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892); *Ackarey v. Carbonaro*, 320 Mass. 537, 70 N.E.2d 418 (1946) (extending *Ingalls v. Hobbs* to structural conditions of the house).

Presence of beetles in large furnished house at seashore did not absolve the lessee. *Davenport v. Smith*, 320 Mass. 629, 70 N.E.2d 793 (1947).

72. *Lloyd Const. Co. v. Dudgeon*, 76 Misc. Rep. 246, 134 N.Y.S. 888 (Sup. Ct. 1912); *Tallman v. Earle*, 3 Misc. Rep. 76, 23 N.Y.S. 17 (N.Y.C.P. 1893); *Berlinger v. MacDonald*, 146 App. Div. 5, 133 N.Y.S. 522 (1912) (actions for rent); *McCurdy v. Wyckoff*, 73 N.J.L. 368, 63 A. 992 (1906); *Streep v. Simpson*, 80 Misc. Rep. 666, 141 N.Y.S. 863 (Sup. Ct. 1913); *Tallman v. Murphy*, 135 App. Div. 376, 345, 24 N.E. 716 (1909) (action for rent).

Failure to provide heat is a constructive eviction. *Ira Handleman Bldg. Corp. v. Dolan*, 15 Ill. App. 2d 49, 145 N.E.2d 250 (1957).

Bedbugs constitute a constructive eviction. *Hancock Construction Co. v. Bassinger*, 198 N.Y.S. 614 (Sup. Ct. 1923).

Failure of landlord to furnish steam heat as covenanted is a constructive eviction in an agreement. *Lawrence v. Burrell* 17 Abb. N. Cas. 312 (1885).

In *McMillan v. Wickstrom*, 244 Mass. 159, 138 N.E. 253 (1923), a suite of rooms was rented with no electricity, no gas and doors without knobs or locks. The lessee secured a promise from the landlord to repair. The lessee remained in possession for several months, paid part of the rent, but refused to pay the rest based upon a failure of landlord to perform. The court held that failure to repair did not constitute a constructive eviction, nor relieve the lessee of the burden of paying rent. The right of tenant to damages would be worked out through independent or cross action and not by way of recoupment to obligations of defendant to pay rent for use and occupation of the premises while he occupied them.

73. *Kanes v. Koutras*, 203 Ga. 570, 47 S.E.2d 558 (1948).

No implied covenant of fitness on agricultural land. *Roger v. Rob Ray Plantation Co.*, 208 Ark. 429, 186 S.W.2d 661 (1945). *Davey v. Christoff*, 28 D.L.R. 447 (Ont. Sup. Ct. 1916).

74. *Kulchera v. Graft*, 191 Iowa 1200, 184 N.W. 297 (1921); *Taylor v. Finnigan*, 189 Mass. 568, 76 N.E. 203 (1905); *York v. Stewart*, 21 Mont. 515, 55 P. 29 (1898); *Carson v. Godley*, 26 Pa. 111 (1908); *Charlow v. Blankenship*, 80 W.Va. 200, 92 S.E. 318 (1917) (denying that the renting of a refrigeration room for commercial purposes was within the *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892) exception of implied habitability).

75. *Naumberg v. Young*, 44 N.J.L. 331 (1882); *Fitts v. Hanks*, 209 Ore. 1, 303 P.2d 220 (1956).

76. Lessee may terminate the lease if the lessor fails to maintain the property in a

Even when the lessor has himself altered the common law rule by expressly covenanting to repair or by voluntarily assuming the duty to make repairs, the courts have been reluctant to shake off the caveat emptor concept. When the issue is the release of the lessee's obligation to pay rent, the courts have usually treated the lessor's promise to repair as an independent covenant.⁷⁷ In the case of torts, a mere breach of the duty to repair does not create a liability against the lessor. Such liability arises only from a negligent attempt to perform his contractual obligation.⁷⁸

It has been held that a limitation of purpose of use in a lease implies a covenant of fitness for the intended use.⁷⁹

III. Public Use

When the use contemplated by the lessee involves the presence of the general public, there is some support for a theory of an implied covenant of fitness by the lessor. This exception is more prominent, however, in the tort liability situation.

IV. Lessor Knowledge

There is a creditable body of authority supporting a further exception where the lessor had or should have had knowledge of the lack of fitness of use, and the lessee does not have such knowledge.⁸⁰ But where the

condition fit for the purpose for which it is leased. *Guillot v. Morgan*, 165 So.2d 330 (La. App. 1964).

See Doyle v. Union Pacific R.R., 147 U.S. 413 (1893); *Sieber v. Blanc*, 76 Cal. 173, 18 P. 260 (1888); *Chatard, Bishop v. O'Donovan*, 80 Ind. 20 (1881); *Jaffee v. Harteau*, 56 N.Y. 398 (1874).

No implied covenant from a statement of intended use. *Conradi v. Arnold*, 34 Wash. 2d 730, 209 P.2d 491 (1949); *Soresi v. Repetti*, 76 A.2d 585 (D.C. Mun. Ct. App. 1950).

No common law covenant of suitability of use even though the intended purpose was known to the lessor. *Daniels v. Brunton*, 7 N.J. 102, 80 A.2d 547 (1951).

Unsuitability for express purposes releases the lessee. LA. CIV. CODE art. 2692 (*Slovenko* 1961); *Siracusa v. Leloup*, 28 So. 2d 406 (La. Ct. App. 1946).

Covenant that premises shall be put to no other use implies a covenant of fitness for the stated use. *Wolfe v. Arrott*, 109 Pa. 473, 1 A. 333 (1885).

77. *Leadfdale v. Mesa Wholesale Sales Terminal*, 79 Ariz. 112, 284 P.2d 649 (1955).

Covenant to repair is independent of the covenant to pay rent. *Obermeyer v. Nichols*, 6 Benney 159, 6 Am. Dec. 439 (1813); *Edwards v. Ward Associates, Inc.*, 367 S.W.2d 390 (Tex. Ct. Civ. App. 1963).

Covenant to heat held mutually dependent with covenant to pay rent. *Duncan Development Co. v. Duncan Hardware*, 34 N.J. Super. 293, 112 A.2d 274 (1955); *Stevenson Stanoyevich Fund v. Steinacher*, 125 N.J.L. 326, 15 A.2d 772 (1940).

No liability from agreement to repair. *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958).

78. Lessor's promise to repair must amount to a covenant to keep in good condition. *Taylor v. Geroff*, 347 Ill. App. 55, 106 N.E.2d 210 (1952).

79. *Isreal v. Beale*, 270 Mass. 61, 199 N.E. 777 (1930); *Waterbury v. Riss & Co.*, 169 Kan. 271, 219 P.2d 673 (1950); *Young v. Collett*, 63 Mich. 331 (1886).

80. *Franklin v. Tracy*, 117 Ky. 267, 77 S.W. 1113 (Ct. App. 1904).

Terminating lease on grounds of fraudulent concealment of conditions making

lessor's knowledge is a factor, the cases scatter to the four winds on the consequences. The exception based on the landlord's knowledge divides into the problem of actual versus constructive knowledge of the lessor, actual or constructive knowledge of the lessee, and moves from actual fraud through misrepresentation to a duty to disclose. Does the lessor have a duty to come forward with his knowledge of existing conditions; and, if so, is it limited to nuisance situations? The cases are not in harmony.⁸¹ The basis of the exception is a concept of fraud by the lessor. But must the lessor have had actual knowledge of the existence of the conditions and their effect on the lessee?⁸² Or may knowledge or notice be imputed to the lessor?⁸³ And to what extent must the lessor make known the situation to the lessee when the facts are such that the lessee could have acquainted himself therewith, or that knowledge could be imputed to the lessee?⁸⁴

The tenant may, of course, terminate the rental contract on the basis of fraudulent representations by the landlord which induced the tenant to enter the contract.⁸⁵ Here the equity concepts of contract law

premises uninhabitable. *Goldberg v. Reed*, 116 A. 429 (N.J. Ct. Err. & App. 1922). *Contra*, *Murry v. Albertson*, 50 N.J.E. 167, 13 A. 394 (Ct. Err. & App. 1888).

Latent or dangerous conditions known to the lessor and not discoverable by ordinary means. *Sunasack v. Morey*, 196 Ill. 569, 63 N.E. 1039 (1902); *Steeffel v. Rothschild*, 179 N.Y. 273, 72 N.E. 112 (1904); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 689 (1934).

Suppression of truth by lessor as a defense. *Minor v. Sharon*, 112 Mass. 477 (1873); *Ceasar v. Karutz*, 60 N.Y. 229 (1875) (contagious disease); *Rhenelander v. Seaman*, 13 Abb. N. Cas. 455 (N.Y. 1881) (previous use as house of prostitution).

Under the English law the lessor is not liable to repair even though he knew of the state of property at the time of letting. *Nelson v. Liverpool Brewing Co.*, L.R. 2 C.P.D. 311 (1877).

81. *See Franklin v. Brown*, 118 N.Y. 110, 23 N.E. 126 (1889) (dictum); *White v. De Vito Realty Co.*, 120 Conn. 331, 180 A. 461 (1935); *Gamble-Robinson Co. v. Buzzard*, 65 F.2d 950 (8th Cir. 1933); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 698 (1934).

82. Constructive notice. *Hill v. Norton*, 74 W.Va. 428, 82 S.E. 363 (1914).

Actual notice required. *Larson v. Calders Pack. Co.*, 54 Utah 325, 180 P. 599 (1919); *Ahern v. Steele*, 115 N.Y. 203, 22 N.E. 193 (1889).

Roberts v. Rogers, 129 Neb. 298, 261 N.W. 354 (1935) (before it can be said that the landlord is advised of defects, he must see them himself, not be informed by someone else).

83. *Hines v. Wilcox*, 96 Tenn. 328, 34 S.W. 420 (1896).

84. No obligation where the lessor discovers a latent defect after the beginning of the tenancy. *Corcione v. Ruggieri*, 87 R.I. 182, 139 A.2d 388 (1958).

Knowledge of defect by tenant, actual or constructive, excuses lessor. *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958). *Contra*, *Batterman v. Levenson*, 102 Misc. Rep. 92, 168 N.Y.S. 197 (Sup. Ct. 1917).

85. Exception of fraudulent misrepresentation or concealment of a hidden material defect. *Looney v. Smith*, 96 N.Y.S.2d 607 (Sup. Ct. 1950). *Meyers v. Rosenback*, 5 Misc. Rep. 337, 25 N.Y.S. 521 (N.Y.C. Ct. 1893); *Wallace v. Lent*, 29 How. Practice 289 (N.Y.C.P. 1865).

False representations by the lessor as to tenable conditions voided the lease. *Jackson v. Odell*, 14 Abb. N. Cas. 47 (N.Y. 1882) (odors from sewer gas caused typhoid fever).

appear. But the property law counters by contrasting a bad faith misrepresentation regarding a hidden condition (concerning which the tenant had made inquiry and the existence of which he could not have himself discovered prior to taking possession), to mere "puffing."⁸⁶

V. Additional Considerations

When the lease covers only a portion of a unit, such as a floor of a building,⁸⁷ or in the case of a multiple unit dwelling,⁸⁸ the courts both in the principal rule and the two corollaries have been quick to find an exception involving areas reserved by the lessor for the common use of himself or of the several tenants. Here there is an implied covenant that such common areas are suitable and safe.⁸⁹

It has been suggested that when the lessor stands in a fiduciary relationship to the lessee, there exists an implied covenant of fitness of purpose.

An attempt has been made to find an exception similar to the craftsman concept under the law merchant where the lessor has constructed a house for rental purposes. A similar idea has been advanced in houses built for sale.⁹⁰

Lessees have placed considerable reliance, with varying degrees of success, on the doctrine of a particular unfit condition resulting in a constructive eviction.⁹¹ And some states have made certain statutory

86. Representation that house was good, safe and fit to live in was a mere expression of opinion and not a warranty of safe condition. *Walsh v. Schmidt*, 206 Mass. 405, 92 N.E. 496 (1910); *Stovall v. Newell*, 158 Ore. 206, 75 P.2d 346 (1938); *Ask v. Meeks*, 118 N.Y.S. 821 (Sup. Ct. 1909).

87. Exception where lessor lets only part of the building since tenant does not have control of the building. *Washington Chocolate Co. v. Kent*, 28 Wash. 2d 448, 183 P.2d 514 (1947).

Exception of fiduciary relationship between lessor and lessee. *Anderson Drive-In Theatres, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E.2d 506 (1953) (dictum).

88. *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931).

89. *Post v. Vetter*, 2 E.D. Smith (N.Y.) 248 (1853); *Smith v. Earl Douglas Hanson*, 9 Misc. Rep. 2d 244, 170 N.Y.S.2d 866 (Sup. Ct. 1957).

Exception in the case of construction or alteration for particular purpose. *Woolford v. Electric Appliances*, 24 Cal. App. 2d 385, 75 P.2d 112 (1938); *J.D. Young Corp. v. McClintic*, 26 S.W.2d 460 (Tex. Civ. App. 1930).

Illinois, as to common passageways or other portions used in common, also distinguishes between a lease for years where the lessor was not liable for repairs and did not covenant fitness, and a short term lease, *Viterbor v. Friedlander*, 120 U.S. 707 (1887); *Fowler v. Bott*, 6 Mass. 63 (1809).

90. England did not recognize the house built for sale exception. *Bottemly v. Banister*, [1932] 1 K.B. 458 (1930).

91. *Maywood v. Logan*, 78 Mich. 135, 43 N.W. 1052 (1889); *Berlinger v. MacDonald*, 149 App. Div. 5, 133 N.Y.S. 522 (1912); *Hancock Const. Co. v. Bassinger*, 198 N.Y.S. 614 (Sup. Ct. 1923); *Moddes v. Bullock*, 115 N.Y.S. 723 (Sup. Ct. 1909); *McWhitton v. Wickstrom*, 244 Mass. 159, 138 N.E. 253 (1923).

Failure of landlord to furnish steam as covenanted held a constructive eviction from an apartment. *Lawrence v. Burrell*, 17 Abb. N. Cas. 312 (N.Y. 1885).

exceptions to the rule, as they have more frequently done in the tort situation.⁹²

One further deviation from the norm has been discovered by the courts in the difference between a landlord-tenant and an employer-employee relationship. In the latter case, housing may be furnished as part of compensation.⁹³ Although there is dissent,⁹⁴ courts have taken the position in this situation that the employee is a licensee, not a possessor.⁹⁵ It follows that since possession remains in the lessor, liability, at least in tort, should rest in him also.

California has made an exception when the property is not in existence at the time of the lease, but is created later.⁹⁶

The law conceivably could have recognized the historical problem as to whether the obligation to pay rent issues out of the land, or stems from the covenant to pay. A distinction might also be made between mere use and occupancy, and formal leases. While the English courts noticed each of these facets, the distinctions have not been pressed in the American decisions. Nor has the intervention of the *interesse termini* been of major importance.⁹⁷

In virtually all of the exceptions the condition has been treated as a condition subsequent, voiding the lease at the option of the lessee, rather than as a covenant compelling the lessor to place the premises in a condition satisfactory to meet the desired use. There is little inclination

92. Statute requiring a multiple dwelling to be kept vermin free. *Connors v. Benjamin I. Magid, Inc.*, 353 Mich. 628, 91 N.W.2d 875 (1958).

Tenant may not avoid the obligations of the lease, even under a statute, if he has had an opportunity to inspect before entry. *Green v. Redding*, 92 Cal. 548, 28 P. 599 (1891).

N.Y. MULT. DWELL. LAW § 78 (1946) requires the landlord to keep the premises in repair. *See People v. Robertson*, 281 App. Div. 990, 120 N.Y.S.2d 883 (App. Div. Sup. Ct. 1953). New Jersey has a similar requirement under the N.J. REV. STAT. § 55:7-1 (1964). *See Daniels v. Brunton*, 9 N.J. Super 294, 76 A.2d 73 (1950).

The District of Columbia requires a landlord to maintain common areas, D.C. CODE § 45-1610 (1961). *See Goldberg v. Charles C. Koonos & Co.*, 66 A.2d 495 (D.C. Mun. App. 1949).

Georgia by statute, GA. CODE ANN. § 61-111 (1935), has imposed a duty to repair on a landlord, distinguishing between a landlord-tenant relationship and an estate for a term of years when the duty to repair is on the the tenant, *Evans Theatre Corp. v. De Gire Investment Co.*, 79 Ga. App. 62, 52 S.E.2d 655 (1949).

93. *Davis v. Williams*, 130 Ala. 530, 30 So. 488, (1901); *Reeder v. Bell*, 70 Ky. (7 Bush) 255 (1870); *see cases collected in 3 THOMPSON ON REAL PROPERTY* § 1034 (1959).

94. *Snedaker v. Powell*, 32 Kan. 396, 4 P. 869 (1884); *State v. Smith*, 100 N. C. 466, 6 S.E. 84 (1888).

95. Relationship of employer held landlord and tenant so no liability to employer for tort. *Tucker v. Pack Yarn Mill Co.*, 194 N.C. 726, 140 S.E. 744 (1927).

96. *Friedman v. Isenbruck*, 111 Cal. App. 2d 326, 244 P.2d 718 (1952).

97. In *Edwards v. McLean*, 122 N.Y. 302 (1890), the tenant could not avoid a lease where during the *interesse termini* there was an infectious illness of the former tenant.

to give the lessee an action of specific performance on an implied covenant to repair. The courts are also reluctant to award damages to the lessee for the lessor's breach.⁹⁸ The tort area is the only major situation in which any penalty other than a loss of rents is imposed on the lessor.⁹⁹ When the lease is vitiated under one of the exceptions, the result is usually treated as an apportionment of rent rather than an avoidance of the obligation *ab initio*.

The whole story is a fascinating study of the workings of the judicial mind, Baron Parke beating his breast at the thought that he had sinned against the common law, later judges, English and American, adhering to the *stare decisis* line of *Smith v. Marrable* and ignoring Baron Parke's *me peccavi*, and none daring to think independently and to render a decision based on current human needs.

Thus we must accept as gospel in the United States the basic principle of *caveat lessee*: there is not an implied covenant of fitness of use in a lease,¹⁰⁰ not even of habitability in the case of dwellings.¹⁰¹ This is in sharp contrast to the warranty of fitness of use found in the transfer of goods under the commercial law and reaffirmed in the Uniform Commercial Code.¹⁰²

Covenant of Continued Benefit

The companion rule that the lease does not carry an implied covenant or conditions of continued benefit to the lessee has also remained largely unshaken in the United States.¹⁰³ However, three circumstances

98. *Bliss v. Clark*, 104 Misc. Rep. 543, 172 N.Y.S. 112 (Sup. Ct. 1918); *Martin v. Richards*, 155 Mass. 381, 29 N.E. 591 (1892) (damages awarded).

99. *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 132 S.E.2d 385 (1963).

100. No implied warranty of fitness. *Jaffee v. Harteau*, 56 N.Y. 398 (1874); *Vallon v. Nat. Life Ass'n. Co.*, 20 N.Y. 32 (1859); *Keates v. Cadogan*, 138 Eng. Rep. 324 (C.P. 1851).

No implied covenant of condition. *Croskey v. Shawnee Realty Co.*, 225 S.W.2d 509 (Mo. Ct. App. 1949); *Siegert v. Taubman*, 85 N.Y.S.2d 724 (N.Y.C. Mun. Ct. 1948).

Caveat Emptor. *Rette v. Meierjohan*, 78 Ohio App. 387, 70 N.E.2d 684 (1946); *Hill v. Woodman*, 14 Me. 38 (1836).

Lessor has no implied covenant to repair. *Hoover v. Wukasch*, 274 S.W.2d 458 (Tex. Civ. App. 1955).

No implied covenant of fitness in the absence of fraud. *Sill v. O'Rourke*, 352 Mich. 318, 89 N.W.2d 463 (1958).

But the civil law treated a lease for use as a transfer of the use and enjoyment, and hence the lessor was under an implied duty to keep in repair and fit for use. *Durham v. Lewitz*, 3 Ill. App. 2d 481, 123 N.E.2d 151 (1954).

101. *Dwyer v. Wollard*, 205 App. Div. 546, 199 N.Y.S. 840 (1923); *Hill v. Woodman*, 14 Me. 38 (1836); *Graves v. Cameron*, 58 How. Pr. 75 (1879).

No implied covenant to keep premises in a habitable condition. *Post v. Vetter*, 2 E.D. Smith (N.Y.) 248 (1853).

102. UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

103. *Hallett v. Wylie*, 3 Johns (N.Y.) 44, 3 Am. Dec. 457 (Sup. Ct. 1808); *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N.W. 785 (1897); *Ripley v. Wightman*, 7 S. C. 169, 4 McCord 447 (Ct. App. 1828).

have been recognized which may justify the lessee in abandoning the leased premises for reasons not due to fault of the lessor: (a) total destruction of the property for causes not within the lessee's control, (b) a taking by eminent domain, and (c) "business frustration."

The American cases reflect the early uncertainty of the English courts¹⁰⁴ as to the effect of the destruction of the leased premises in the absence of fault of either party and in the absence of anticipatory covenants. The cases are in disagreement as to the effect of total destruction of the demised res by casualty beyond the control of the lessor or lessee.¹⁰⁵

104. PUFFENDORF, *LAW OF NATURE AND NATIONS* 505 (1931), held that the lessee should be excused if the thing demised perished during the term without his fault, and that he should be entitled to apportionment. He cited Herodatus Book II as to a ruling by Pharaoh Sesosties on land eroded by the Nile.

At common law, tenants were not liable for waste by accidental burning. Under the Statute of Gloucester, tenants for life and years became absolutely liable. But by 6 Anne Ch. 31 (1706), tenants were excused from liability for waste by accidental fire.

LITTLETON § 71 distinguished between a tenant for years who was bound to sustain or repair a house, and a tenant at will who was not.

105. Total destruction by fire releases obligations under lease: *Heart of America Lumber Co. v. Belove*, 111 F.2d 535 (8th Cir. 1940); *Wood v. Bactolina*, 48 N.M. 175, 146 P.2d 883 (1944).

Statutes discharging liability in case of total destruction: *Lebanon Production Credit Ass'n v. Feldhaus*, 34 N.E.2d 463 (Ohio App. 1938); *Smith v. Gillen*, 245 S.W.2d 596 (Ky. 1952); LA. CIV. CODE art. 2697 (Slovenko 1961), *Thomas v. Snodhalter*, 19 So. 2d 885 (La. App. 1944); *Millen Hotel Co. v. Gray*, 67 Ga. App. 38, 19 S.E.2d 428 (1942); *Jacoby v. Peck*, 23 Cal. App. 183, 137 P. 264 (1913); *Colonial Land Co. v. Asmus*, 82 N.J.L. 521 (1911).

Cases holding that total destruction of the premises releases obligations under the lease: *Anderson v. Ferguson*, 17 Wash. 2d 262, 135 P.2d 302 (1943); *Joiner v. Brightwell*, 252 Ala. 112, 39 So. 2d 414 (1949); *O'Bryne v. Henley*, 161 Ala. 620, 50 So. 83 (1909).

Cases holding that total destruction by fire did not release: *Iespersen v. Desert News Pub. Co.*, 225 P.2d 1050 (Utah 1951); *General Ins. Co. of America v. Christian-son Furniture Co.*, 229 P.2d 298 (Utah 1951).

Total destruction does not excuse lease obligations. *Hallett v. Wylie*, 3 Johns. 44, 3 Am. Dec. 457 (N.Y. Ct. of App. 1808).

Tenant held liable, even though premises destroyed. *Fowler v. Bott*, 6 Mass. 63 (1809); *Winton v. Cornish*, 5 Ohio 477 (1932); *Ainsworth v. Ritt*, 38 Cal. 89 (1869).

In the absence of a covenant to rebuild, total destruction by fire does not relieve liability to pay rent. *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306 (Dec. C.P. Ct. 1967). See *Solomon v. Neisner Bros.*, 93 F. Supp. 310 (N.D. Penn. 1950); *Joiner v. Brightwell*, 252 Ala. 112, 39 So. 2d 414 (1949); *Wilson v. Treadwell*, 81 Cal. 58, 22 P. 304 (1889) (California exception is limited to dwelling habitations); *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430 (1870); *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944); *Hallett v. Wylie*, 3 Johns. 44, 3 Am. Dec. 457 (N.Y. Ct. of App. 1808); *Ferrucci v. McDermott*, 138 Misc. 438, 246 N.Y.S. 22 (Oneida County Ct. 1930) [Interpreting N.Y. Real Prop. § 227 (1945)]; *Gates v. Green*, 4 Paige ch. 355, 27 Am. Dec. 68 (N.Y. Ct. of Ch. 1834); *Smithfield Improvement Co. v. Coley-Bardin*, 156 N.C. 255, 72 S.E. 312 (1911); *Linn v. Ross*, 10 Ohio 412, 36 Am. Dec. 95 (1941); *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 P. 572 (1914); *Japhet Polemanokos*, 160 S.W. 416 (Tex. Civ. App. 1913); *Jespersen v. Desert News Pub. Co.*, 119 Utah 234, 225 P.2d 1050 (1951). See also Note, *Power of Life Tenant or Remainderman to Extinguish Other Interest by Judicial Process*, 42 HARV. L. REV. 30 (1928); 3 Kent's Comm. *373.

Liability released. *Smith v. Gillen*, 219 Ark. 853, 245 S.W.2d 396 (1952) (building

Of course, the lessee is not excused if the fault is his,¹⁰⁶ but he is released if the fault is that of the lessor.¹⁰⁷ The courts seldom grant proportionate relief where the use has only been diminished, or interrupted by such casualty.¹⁰⁸

There is likewise sharp disagreement as to the effect of a taking by eminent domain. If only a part of the term is taken, under the principal rule the lessee remains liable on the lease and must look to the condemnor for damages.¹⁰⁹ Some authorities follow a similar rule where there has been a total taking, while others exonerate the lessee and permit a rental apportionment.¹¹⁰

Where premises have been leased for a stated commercial purpose

need not be wholly destroyed, but rather merely unusable); *Schwecke v. Leone, Inc.*, 21 N.J. Misc. 6, 29 A.2d 624 (Hudson County Ct. 1942); *Mellis v. Berman*, 9 N.Y.S.2d 553 (App. Term. 1938) (eminent domain taking); *Bornard Realty Co. v. Bonwit*, 155 App. Div. 182, 139 N.Y.S. 1050 (1913) (in an action for breach of covenant, defendant was held justified in abandoning premises when landlord failed to exterminate rats and vermin-odors).

For an attempt to distinguish between total destruction during the *interesse termini* and the actual taking of possession, see *Willard v. Tillman*, 19 Wend. 360 (N.Y. Sup. Ct. 1838) (dissenting opinion); *Wood v. Hubbell*, 10 N.Y. 479 (Ct. of App. 1853).

Under the common law rule not even total destruction terminated the lease, except when only part of the building was leased. *Davis v. Shepperd*, 196 Ark. 302, 117 S.W. 2d 337 (1938); *Sigal v. Wise*, 114 Conn. 297, 158 A. 891 (1932); *White v. Steele*, 33 S.W.2d 224 (Tex. Civ. App. 1930); *Anderson v. Ferguson*, 17 Wash. 2d 260, 135 P.2d 302 (1943); *Finnegan v. McGavock*, 320 Wis. 112, 283 N.W. 321 (1939) (partial destruction did not release).

106. *Gunther v. Oliver*, 97 N.J.L. 376, 117 A. 402 (1922); *Wainwright v. Helmer*, 193 N.Y.S. 653 (1922).

107. Acts of the lessor depriving the lessee of beneficial use or enjoyment of the whole or a part of the premises constitutes constructive eviction. *Telegraph Ave. Corp. v. Raentsch*, 205 Cal. 93, 269 P. 1109 (1928); Annot., 61 A.L.R. 366 (1929); *Hopkins v. Murphy*, 233 Mass. 476, 124 N.E. 252 (1919); Annot., 13 A.L.R. 816 (1921); *Blomberg v. Evans*, 194 N. C. 113, 138 S.E. 593 (1927); Annot., 53 A.L.R. 686 (1928).

108. Only total destruction relieves. *Eggen v. Wetterborg*, 193 Ore. 145, 237 P.2d 970 (1951).

Common law rule abated only in case of total destruction. *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944) (refusing to apply "commercial frustration" rule to illegality of use by legal prohibition); *Anderson v. Ferguson*, 17 Wash. 2d 262, 135 P.2d 302 (1943).

109. *Clark v. Erich*, 31 Cal. Rep. 628 (Dist. Ct. App. 1963) (partial condemnation does not avoid, but lessee entitled to part of proceeds); *Leonard v. Autocar Sales & Service Co.*, 325 Ill. App. 375, 60 N.E.2d 457 (1945), *aff'd.*, 392 Ill. 182, 64 N.W.2d 497 (1945), *cert. denied*, 375 U.S. 804 (1963) (condemnation for part of term does not absolve). *Contra McCardell v. Miller*, 22 R.I. 96, 46 A. 184 (1900) (permitting pro tanto release).

110. Total taking by eminent domain held a good defense. *Corrigan v. Chicago*, 144 Ill. 537, 33 N.E. 746 (1893); Annot., 21 A.L.R. 212 (1922); *Levine v. Horwitz*, 373 Pa. 77, 95 A.2d 540 (1953). *Contra*, *Foote v. Cincinnati*, 11 Ohio 408, 38 Am. Dec. 737 (1842); *P.J.W. Moodie Lumber Corp. v. A.W. Banister Co.*, 286 Mass. 424, 190 N.E. 727 (1934).

Lessee released (leading rule). *Pasadena v. Porter*, 201 Cal. 381, 257 P. 526 (1927); Annot., 53 A.L.R. 679 (1928); *Lowell Housing Authority v. Save-Mor Furniture Stores, Inc.*, 346 Mass. 426, 193 N.E.2d 585 (1963) (condemnation terminated lessee's rent). *Contra*, *Foote v. Cincinnati*, 11 Ohio 408, 38 Am. Dec. 737 (1842).

and the accomplishment of this purpose is prevented by act of the sovereign, without fault of the lessee, some authorities terminate the lease at the lessee's request on the "business frustration" theory.¹¹¹ However, the attempt to extend this theory to destruction of the leased res has been rebuffed.

Tort Liability of the Lessor

The chief assaults on the common law caveat lessee rule have been achieved in tort actions against the lessor. While Pennsylvania in the earliest tort cases found liability in the lessor,¹¹² later American decisions found a wall of immunity protecting the lessor from property damage or personal injury claims arising out of dangerous conditions on the leased premises.¹¹³ The announced justification is the exclusive possession of the lessee.¹¹⁴ Today, Louisiana alone imposes a liability on the lessor to keep the leased premises safe for the use for which they are rented.¹¹⁵

One of the joys of the "Common Law" is that, under our federal system, any departure under moral or economic pressure leads to a variety of results. In the case of torts on leased premises, this reaction is stimulated by the presence of the interests of others than the contracting parties.

While the caveat emptor tort rule has been criticized,¹¹⁶ no court has yet dared to openly repudiate it. But the rule has survived in a harsh

111. Business frustration denied even where the lessor induced the authorities to take away the lessee's liquor license. *Baughman v. Portman*, 12 Ky. L. 342, 14 S.W. 342 (Ct. App. 1890); *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N.E. 509 (1893).

Interruption by war used as a defense to rent liability. *Bayly v. Lawrence*, 1 Bay 499 (S.C. 1795).

112. *Carson v. Godley*, 26 Pa. 111 (1856); *Godley v. Hagerty*, 8 Hanis 387 (Pa. 1853).

113. Lessor not liable for tort in the absence of fraud, concealment, or a covenant in lease. *Hogan v. Miller*, 153 Cal. App. 2d 5, 314 P.2d 230 (Dist. Ct. App. 1957); *Taylor v. Stimson*, 52 Wash. 2d 278, 324 P.2d 1070 (1958).

No tort liability in the absence of actual knowledge. *Daulton v. Williams*, 81 Cal. App. 2d 70, 183 P.2d 325 (Dist. Ct. App. 1947). *But see Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960) (mere reason to suspect existence of dangerous condition creates liability); Annot., 88 A.L.R.2d 577 (1963); *accord*, *Rick v. Baslerfield*, [1847] 4 C.B. 783, 16 L.J. Cp. 273; *Nelson v. Liverpool Brewing Co.*, [1877] 2 C.P.D. 311, 462 J.C.P. 675.

No tort liability unless latent defects were known to the landlord. *Galbreath v. N.Y. State Realty Liquidating Corp.*, 170 N.Y.S.2d 950 (App. Div. 1958).

114. *Ellis v. McNeese*, 109 Cal. App. 667, 293 P. 854 (Dist. Ct. 1930); *Bouy v. Fidelity-Philadelphia Trust Co.*, 338 Pa. 5, 12 A.2d 7 (1940); *Miller v. Vance Lumber Co.*, 167 Wash. 348, 9 P.2d 531 (1932).

115. *Bost v. Provenza*, 47 So. 2d 437 (La. App. 1950); LA. CIVIL CODE art. 2695 (Slovenko 1961).

116. *See generally Waite, Caveat Emptor and the Judicial Process*, 25 COLUM. L. REV. 129 (1925).

climate. This distaste for the rule is consonant with the modern lego-religious desertion of the Baal of real property in favor of the Yhvh of Man. Perish the thought that anything but the purest concepts of jurisprudence would ever creep into the judicial mind—but courts may be aware of the modern device of liability insurance. At all events, there are abundant exceptions to this tort rule.

The possession justification of the tort rule would be capable of rationalization if confined to conditions created by the lessee alone. But the justification is difficult to equate to the accepted theories findings liability in the context of chattels.¹¹⁷

It is possible to rationalize that, in the case of injuries to third persons, the lessee as the possessor in control should alone be liable for defects. But except for the historical philosophy of the leasehold as the sale of a real interest, there is no explanation of the lack of liability of the lessor to the lessee for the lease of real property carrying an inherently dangerous latent defect. One who releases possession of a chattel to another remains liable in a measure for injuries resulting from defects in the chattel. *A* sells or leases to *B* a mobile home which contains a defect. *B* is injured thereby. *A* is liable though he did not know of the defect. *A* leases to *B* a fixed home containing a defect. *B* is injured thereby. *A* is not liable to *B* even, under the older rule at least, if *A* knew of the defect.

Tradition has limited this chattel liability to the buyer-seller relationship. The common law of chattels has long maintained a barrier of immunity between the maker and the first buyer of a defective chattel, barring claims of subsequent vendees against the maker on lack of privity.¹¹⁸ But in recent years this defense is breaking down, and the injured party is frequently able to penetrate through to the maker.¹¹⁹

The duty of the lessor under the common law is no higher in the case of such third parties than in the case of the tenant.¹²⁰ Since he has surrendered all right of possession to the tenant, the lessor cannot be

117. One English case, *Mint v. Good* [1951] 1 K.B. 517, has tried to liken the lessor's liability in tort to that of the manufacturer of a defective chattel. This claim has not had much support. *Devine v. London Housing Society* [1950] 2 All E.R. 117; see Note, 67 LAW QUARTERLY REV. 145, 148 (1951).

For a discussion of the theory that solidification of the property law was due to lack of social pressures for reform and the consequent influence of the lawyers who relied upon precedent, see *Humphrey, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY WITH OUTLINE OF CODE* (London, 1820) 3, 1179.

118. *Winterbottom v. Wright* [1842] 10 M. & W. 109, 152 Eng. Rep. 402; *Savings Bank v. Ward*, 100 U.S. 195 (1879).

119. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). See generally *W. PROSSER, LAW OF TORTS* § 84 (2d ed. 1955).

120. *Midland Oil Co. v. Thigpen*, 4 F.2d 85 (8th Cir. 1925); Annot., 53 A.L.R. 31 (1928); *Anderson v. Souza*, 38 Cal. 825, 243 P.2d 497 (1952). See generally THOMPSON ON REAL PROPERTY § 1241 (rev. ed. 1965).

held accountable for injury or loss to persons who are on the leased property at the instance of the tenant.¹²¹

These principles follow the English precept. But even the gauge of the common law has balked at carrying them to their ultimate conclusion. When third parties are involved there is a strong thrust to require the lessor to share the lessee's exposure for unsafe conditions arising from negligence. But the approach again has involved making exceptions to the rule rather than challenging the foundations.

The tort liability of the lessor is subject to classification according to the relationship of the aggrieved party: (a) the tenant, (b) members of his family, (c) persons on the premises with the tenant's permission, and (d) the general public. Attempts have been made to subdivide (c) into guests, invitees and business invitees.

The tort exceptions embrace all those advanced against the basic caveat lessee rule, along with a few new overtones. Both the furnished house concept of *Smith v. Marrable*¹²² and the seasonal rental¹²³ exception to the rule are recognized.

I. Common Area

Perhaps the strongest thrust of the courts away from caveat lessee is in the common area concept. Here the American law has not merely followed but has gone much beyond the English doctrine.¹²⁴

If the basis for the tort rule is the fact that the lessor has surrendered possession and control to the lessee, then it should not be applicable to areas where the lessor has retained control. Virtually without exception, the American courts recognize liability in the lessor for claims arising in areas as to which exclusive possession has not been given to the lessee.

In the hotel situation the owner is clearly subject to tort exposure. And in the case of areas in common use, the courts unanimously subject the lessor to some degree of care.

The "common area" exception extends liability into other areas.

121. *White v. Spreckels*, 10 Cal. 287, 101 P. 920 (1909). *But see* *Bostian v. Jewell*, 254 Ia. 1289, 121 N.W.2d 141 (1963) (lessor held to a higher degree of liability to third parties than to tenants in the case of common passageways); *Long v. Flanigan Warehouse Co.*, 79 Nev. 241, 382 P.2d 399 (1963) (still insisting upon the priority rule).

122. *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942) (holding lessor liable for damages due to sickness and injury arising out of breach of implied covenant of fitness in a furnished apartment); Annot., 139 A.L.R. 257 (1942). *Contra*, *Starve v. Fitzie Hotels*, 44 Cal. 2d 416, 282 P.2d 890 (1955).

123. *Primus v. Bellevue Apts.*, 241 Ia. 1055, 44 N.W.2d 347 (1950); Annot., 25 A.L.R.2d 565 (1952); *Bowser v. Artman*, 363 Pa. 388, 69 A.2d 836 (1950); Annot., 12 A.L.R.2d 213 (1950); *Lennox v. White*, 133 W.Va. 1, 54 S.E.2d 8 (1949).

124. *Donnelly v. Larkin*, 327 Mass. 287, 98 N.E.2d 280 (1950); Annot., 25 A.L.R. 2d 487 (1952); *Taylor v. New Jersey Highway Authority*, 22 N.J. 454, 126 A.2d 313 (1956); Annot., 62 A.L.R.2d 1211 (1958); *Pritchard v. Terrill*, 189 Ore. 662, 222 P.2d 652 (1950); Annot., 25 A.L.R.2d 358 (1952).

Included within its scope are areas not necessary to the use of the demised premises but to which access is offered by the lessor for the convenience of the lessee, areas considered as environs, and sections where the lessor has retained exclusive possession. There is, likewise, potential liability in the case of areas to which the lessee is invited. In other areas where the lessor has retained possession the lessee is a trespasser.

a. Scope of the Lessor's Duty. The accord as to the liability of the lessor for common areas dissolves when the theoretical rule is applied to the facts. Certain courts merely require the lessor to maintain common areas in the same condition as at the time of letting.¹²⁵ The most popular test requires the lessor to repair only if the defect is known or should have been known¹²⁶ in the exercise of due or reasonable care.¹²⁷ Other rules vary from a duty to periodically inspect¹²⁸ to a final position of making the lessor almost an insurer of safe conditions.¹²⁹

In the case of areas to which an invitation is extended to the tenants, such as laundry rooms, play rooms and roofs, a degree of care of varying intensity has been imposed upon the lessor.¹³⁰ In areas to which

125. In Massachusetts, the common areas tort duty is to keep the common areas in as good condition as they were at the time of letting. *Regan v. Nelson*, 345 Mass. 678, 189 N.E.2d 516 (1963).

126. *Marion v. Bryson*, 326 Mass. 618, 96 N.E.2d 165 (1950). *Accord*, *Yazzolino v. Jones*, 153 Cal. App. 2d 626, 312 P.2d 107 (Dist. Ct. 1957) (lessor liable for defect in common area only if known or should have been known to him); *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960); Annot., 88 A.L.R.2d 577 (1963) (actual knowledge not necessary to make lessor liable for defects resulting in injury).

127. *Skupienski v. Maly*, 47 N.J. Super. 409, 136 A.2d 41 (1957) (landlord has duty of reasonable care regarding maintenance of common area). *Accord*, *Gill v. Jakstas*, 325 Mass. 309, 90 N.E.2d 527 (1949); *Fitzpatrick v. Ford*, 372 S.W.2d 844 (Mo. 1963); *Corroso v. West Jersey Corp.*, 13 N.J. Super. 342 (App. Ct. 1951).

A landlord's tort liability is based on negligence for defective premises rather than on his being an insurer. *Girardot v. Williams*, 102 Colo. 456, 80 P.2d 433 (1938); *Wade v. Yale University*, 129 Conn. 615, 30 A.2d 545 (1943); *Gibson v. Littlejohn*, 67 Ga. App. 597, 21 S.E.2d 248 (1942); *Flynn v. Katz*, 164 So. 2d 55 (La. App. 1964).

128. Duty to inspect after receiving notice of a defect. *Gibson v. Littlejohn*, 67 Ga. App. 597, 21 S.E.2d 248 (1942). *See also* *Newman v. Sears Roebuck & Co.*, 77 N.D. 466, 43 N.W.2d 411 (1950) (no duty on lessor to inspect before leasing); Annot., 17 A.L.R.2d 694 (1951).

Lessor has a duty of periodic inspection of common areas. *Guslinger v. Village of Wilkins*, 269 Minn. 116, 130 N.W.2d 62 (1964). *Accord*, *Trimble v. Spears*, 182 Kan. 406, 320 P.2d 1029 (1958); *Robinson v. Alston*, 413 Pa. 296, 197 A.2d 40 (1964) (safe stairways).

129. *Revell v. Dugan*, 192 Va. 428, 65 S.E.2d 543 (1951); Annot., 26 A.L.R.2d 462 (1952).

Ordinary care in common use areas. *Pritchard v. Terrill*, 189 Ore. 662, 222 P.2d 652 (1951); Annot., 25 A.L.R.2d 358 (1952); *Revel v. Dugan*, 192 Va. 428, 65 S.E.2d 543 (1951); Annot., 26 A.L.R.2d 462 (1952).

Reasonable care. *Schedler v. Wagner*, 37 Wash. 2d 612, 225 P.2d 213 (1950); Annot., 26 A.L.R.2d 604 (1952). *But see* *Festa v. Piemonte*, 349 Mass. 761, 207 N.E.2d 535 (1965) (refusing relief to a tenant injured on a stairway which was not available to tenants under ordinary circumstances).

130. *Primus v. Bellevue Apts.*, 241 Ia. 1055, 44 N.W.2d 347 (1950) (liability in laundry room); Annot., 25 A.L.R.2d 565 (1952). This is particularly true if the access

the lessee is denied admittance the lessor's liability is only the same as to trespassers.¹³¹

b. *Environs*. The environs problem has been disturbing. Walls, roofs, driveways and sidewalks create questions of liability to tenants and to third persons. A variety of answers have been reached by the courts. When the entire premises are leased, the caveat lessee rule is applicable to the lessee personally.¹³² But in the case of multiple lessees, there is a tendency to apply the common area rule to environs.¹³³

As respects third persons on the premises with the lessee's consent the common area concept as it varies from state to state operates on environs.¹³⁴

In the case of the general public there is sharp disagreement as to whether the lessor or lessee or both are both responsible for injuries resulting from the existence of dangerous conditions in the environs.¹³⁵ An example of this is the contrasting Massachusetts and Connecticut rule as to the duty to remove snow and ice.¹³⁶

Some cases draw a distinction between passageways, stairways, and the like for the common use of all tenants, and the walls of the building. The former are considered as appurtenances to the property which the tenants are invited to use. The walls, however, are not considered as appurtenances or utilities separate from the demised

can be considered a right. *Harper v. Vallejo Housing Authority*, 104 Cal. App. 2d 621, 232 P.2d 262 (Dist. Ct. 1951); *Keane v. McIndoe*, 93 Cal. App. 2d 82, 207 P.2d 1059 (Dist. Ct. 1949).

131. *Kossine v. Styliano*, 40 Cal. App. 2d 721, 105 P.2d 952 (Dist. Ct. 1940); *Smelser v. Deutsche Evangelische Lutherische Germinde Der St. Markus Kirche*, 88 Cal. App. 469, 263 P. 838 (Dist. Ct. 1928).

132. *Home Owner's Loan Corp.*, 124 F.2d 684 (8th Cir. 1942); *Lucas v. Brown*, 82 F.2d 361 (8th Cir. 1936); *Harris v. Joffe*, 28 Cal. 2d 418, 170 P.2d 454 (1946).

133. Liability as to environs. *Rodenbur v. Kaufman*, 320 F.2d 679 (D.C. Cir. 1963). *See also Weingreen v. Gromeberg*, 416 Pa. 567, 207 A.2d 781 (1965) (lessor liable only if there are multiple tenants).

134. No duty to remove snow and ice on the sidewalks of multiple dwellings. *Root v. Henry*, 395 S.W.2d 280 (Mo. App. 1965). *Accord*, *Zak v. Craig*, 5 N.J. Misc. 275, 136 A. 410 (1927). *Contra*, *Mitchell v. Thomas*, 91 Mont. 370, 8 P.2d 639 (1932).

135. *Fisher v. City of Philadelphia*, 112 Pa. Super., 226, 170 A. 875 (1934) (lessor held liable). *Contra*, *Handlon v. Copestone Temple Ass'n* 106 N.Y.L. 362, 150 A. 386 (Ct. App. 1930).

Multiple dwelling owner must remove ice and snow. *Robinson v. Park Central Apts.*, 248 F. Supp. 632 (D.C. Dist. Ct. 1965); *Archer v. Blalock*, 97 Ga. 719, 25 S.E. 391 (1896); *Guthman v. Castleberry*, 48 Ga. 172 (1873); *Kuperschmid v. Tauszig*, 208 N.Y.S. 464 (App. Term 1925).

136. Under the Massachusetts rule, the landlord is under no duty to remove snow and ice from common passageways. *Root v. Henry*, 395 S.W.2d 280 (Mo. App. 1965).

The Connecticut rule, however, imposes such a duty. *Reardon v. Shemelman*, 102 Conn. 383, 128 A. 705 (1925). *Accord*, *Brunswick Groc. Co. v. Spencer*, 97 Ga. 764, 25 S.E. 764 (1896); *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 123 N.E.2d 151 (1954); *Vaillancourt v. Rex Realty Corp.*, 326 Mass. 534, 95 N.E.2d 650 (1950); *Massor v. Yates*, 137 Ore. 569, 3 P.2d 784 (1931). *See generally* W. PROSSER, *LAW OF TORTS*, 657 (2nd ed. 1955).

premises.

When the lease covers only a portion of the premises, as a room or floor of a building, the lessor must maintain the portion of which he reserves possession so that no injury comes to the lessee's goods. Thus the lessor is liable for damage resulting from a leaky roof¹³⁷ or for personal injuries arising through his negligence.¹³⁸ However, this does not put the lessor in the position of an insurer.¹³⁹ The lessor must have knowledge, actual or constructive, of the existence of the defect.¹⁴⁰

II. Knowledge of the Condition

The courts, in handling the tort problem, have recognized an exception when the lessor has knowledge of the defect. Here the rights of third parties play an important role. Hence, we have an intriguing variety of results regarding the duty of the lessor to disclose or to take positive steps to remedy a defect known to him. What is actual notice or what facts should impute notice? How much disclosure should be made and to whom? To what extent may the lessor seek refuge behind the shred of the exclusive possession of the lessee and the somewhat shopworn defense of contributory negligence?

The duty of the lessor to investigate the existence of dangerous conditions existing at the time of the letting and to make such fact known to the lessee is more profound in the case of tort liability. The "puffing" concept as distinguished from fraudulent misrepresentation is not recognized in these torts.

Furthermore, some of the courts have not permitted the lessor to remain silent as to knowledge of improper conditions from which damage or injury develops. To avoid liability even to the tenant, these cases require that the lessor reveal conditions known to him. Many courts have

137. *White v. Montgomery*, 58 Ga. 204 (1877).

138. *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1 (1948).

139. Liability if negligent. *Brain v. J. P. Logan Realty Co.*, 265 App. Div. 965, 39 N.Y.S.2d 26 (1942).

140. *Shotwell v. Bloom*, 60 Cal. App. 2d 303, 140 P.2d 728 (1943); *Corrigan v. Antupit*, 131 Conn. 71, 37 A.2d 697 (1944); *Burton v. Rothchild*, 351 Mo. 562, 173 S.W.2d 681 (1943). *See also* *Civale v. Meriden Housing Authority*, 192 A.2d 548 (Conn. 1963) (lessor held liable in tort for injury resulting from faulty design or repair which was known to lessor at beginning of tenancy but not discoverable by tenant through reasonable inspection); *Cole v. Lord*, 160 Me. 223, 202 A.2d 560 (1964) (tort liability for known latch defect); *Flournoy v. Kuhn*, 378 S.W.2d 264 (Mo. App. 1964) (tort liability for latent defects known to lessor but not discoverable by lessee); *Rodebearer v. Sears Roebuck & Co.*, 34 F.R.D. 488 (N.D. Ohio, E.D. 1964) (in the absence of contractual or statutory duty, the lessor held liable in tort for a condition he knowingly concealed at the time of the lease).

Extent of the lessor's liability: *Cowen v. Sunderland*, 145 Mass. 363, 14 N.E. 117 (1887) (to lessee); *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959) (to lessee's family); *Annot.*, 78 A.L.R.2d 1230 (1961); *Ames v. Brandvold*, 119 Minn. 521, 138 N.W. 786 (1912). *See generally* RESTATEMENT OF TORTS § 358 (1934).

also adopted a constructive knowledge rule. This, in effect, imposes a duty of inspection upon the lessor.¹⁴¹

The imputed knowledge exception in the United States antedates even the recognition of the rule itself. In 1809 Pennsylvania held a lessor responsible both for property damage and personal injury resulting to bailors and their servants where the lessor had leased a building to the bailee for warehouse purposes. The courts felt that the lessor should have known that the building was not of adequate construction for the intended purpose.¹⁴² The scope of this exception, however, runs from actual knowledge of existing conditions that are not obvious defects, through awareness of facts which should give warning or even mere suspicion of dangerous or potentially dangerous conditions, to a duty to inspect before turning over possession.¹⁴³ As might be expected, the reasonable care doctrine is the most popular.

Some cases adhere to the contributory negligence defense regarding the tenant, preventing him from recovering against the landlord if as an occupant he could have discovered the defect on reasonable inspection.¹⁴⁴ However, the degree of diligence imposed upon third parties is not so extensive.¹⁴⁵ In this context, the lessee's approval of the conditions has been held immaterial.¹⁴⁶

The lessor may be liable if he has practiced fraud upon the lessee as to the actual condition of the premises from which the injury arises, or if he is guilty of deliberate or wanton misconduct.¹⁴⁷ Here also a mere expression of opinion is to be distinguished from fraud.¹⁴⁸

141. The lessor has a duty of ordinary care to inspect the premises before delivering possession if he has reason to suspect a defect. *Cummings v. Prater*, 95 Ariz. 20, 386 P.2d 27 (1963); *Nelson v. D'Agastino*, 135 Conn. 384, 64 A.2d 539 (1949). See *Charlton v. Brunelle*, 82 N.H. 100, 130 A. 216 (1925).

142. *Robertson v. Nat Kaiser Inv. Co.*, 82 Ga. App. 416, 61 S.E.2d 298 (1950); *Ross v. Heberling*, 92 Ohio App. 148, 109 N.E.2d 586 (1952).

143. Lessor has the duty of a reasonable man to warn a tenant of defects at the time of leasing, even though they are obvious. *Cummings v. Prater*, 95 Ariz. 20, 386 P.2d 27 (1963). See *Mark v. Belrose Corp.*, 367 S.W.2d 368 (Tex. Civ. App. 1963) (lessor liable for injury to tenant even where defect was obvious).

144. No liability where the tenant knows of the dangerous conditions. *670 New St. Inc. v. Smith*, 170 Ga. App. 539, 130 S.E.2d 773 (1963).

But a tenant's knowledge of a defect is not necessarily knowledge of the dangers involved. *Canfield v. Howard*, 109 Ga. App. 566, 136 S.E.2d 431 (1964).

A landlord has been held not liable for latent defects if the tenant should have discovered them. *Brandt v. Yeager*, 199 A.2d 768 (Del. Super. Ct. 1964).

145. *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960); *Cohen Bros. v. Krumbein*, 28 Ga. App. 788, 113 S.E. 58 (1922).

146. *Cutter v. Hamlen*, 147 Mass. 471, 18 N.E. 397 (1888).

147. *Cote v. Blodgett*, 70 N.H. 316, 48 A. 281 (1900); *Cole v. McKey*, 66 Wis. 500, 29 N.W. 279 (1886).

148. *Wilkenson v. Clauson*, 29 Minn. 91, 12 N.W. 147 (1882).

III. Duty to Repair

The prevailing viewpoint today is that the independent covenant concept of agreements by the lessor carries over into the tort field. Accordingly, a contractual obligation of the lessor as to fitness of use, safety, or a continuing promise to repair, does not of itself expose the lessor to a tort liability to the lessee or others for damage or injury resulting from dangerous conditions caused by breach of the lessor's duty.¹⁴⁹

There are modern cases, however, which do impose upon the lessor a contractual duty to repair. In such situations, the duty extends to the tort concept and imposes a liability on the lessor in favor of the lessee or his family.¹⁵⁰ This liability sometimes extends to persons on the premises with the lessee's permission.¹⁵¹

Where, however, the lessor, whether pursuant to the performance of a contractual¹⁵² or a statutory duty¹⁵³ or as a purely voluntary act,¹⁵⁴

149. No tort liability arises from a covenant to repair in the absence of latent defects. *Goff v. United States*, 159 F. Supp. 415 (D. Me. 1958).

Lacking consideration, there is no liability for injury due to a failure to make repairs. *Lee v. Giosso*, 46 Cal. Rptr. 803 (Dist. Ct. App. 1965).

Metcalf v. Chiprin, 31 Cal. Rptr. 571 (Dist. Ct. App. 1963); *Tarrant v. Hull*, 259 N.C. 238, 130 S.E.2d 321 (1963) (same holding as to employee of the lessee).

150. See *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959), *overruling* *Clyne v. Holmes*, 61 N.J.L. 358, 39 A. 767 (1898); *Prapper v. Kisner*, 104 So. 2d 1 (Fla. 1958); *Marialli v. Berns*, 114 Cal. App. 2d 666, 251 P.2d 72 (1953); RESTATEMENT OF TORTS, § 357 (1934).

The old non-liability rules for tort under a covenant to repair were based on lack of privity. This has now been changed in England by statute. J. SALMON, LAW OF TORTS, § 528 (12th Ed. 1957).

In England, third parties cannot base a cause of action on a lessor's contract with the lessee for the lessor to make repairs. *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74 (1922); *Dean v. Hershowitz*, 119 Conn. 398, 177 A. 262 (1935); *Fried v. Buhrmann*, 128 Neb. 590, 259 N.W. 512 (1935). *Contra* *Sordillo v. Fradkin*, 282 Mass. 255, 184 N.E. 666 (1933).

151. *Lischner v. Hahn*, 273 Mass. 259, 173 N.E. 424 (1930); *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686 (1935).

The lessor has been held liable to a third person for breach of a covenant to maintain the entrance. *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1951); *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959).

Today, the weight of authority does not make a landlord liable in tort for injury arising out of a defective condition on the leased premises, even though he has covenanted to repair. *Home Owners Loan Corp. v. Huffman*, 124 F.2d 684 (8th Cir. 1942); *Busick v. Home Owners Loan Corp.*, 18 A.2d 190 (N.H. 1941); *Cullings v. Goetz*, 231 App. Div. 266, 247 N.Y.S. 109 (1931); *Dorswitt v. Wilson*, 51 Cal. App. 2d 623, 125 P.2d 626 (1942). *Contra*, *Maday v. New Jersey Title Guarantee & Trust Co.*, 127 N.J.L. 426, 23 A.2d 178 (1941); *Des Marchais v. Daly*, 135 Conn. 623, 67 A.2d 549 (1949).

It has been held that no liability to the tenant's invitee arises from the lessor's promise to repair. *Rodenheaver v. Sears, Roebuck & Co.*, 220 F. Supp. 120 (N.D. Ohio 1962).

152. Liability has been imposed on a lessor for negligent breach of a covenant to repair if this creates an unreasonable risk to those on the land. *Lammori v. Milner Hotels, Inc.*, 63 N.M. 342, 319 P.2d 949 (1958) (called the modern rule).

This is also true where the agreement amounts to a covenant to keep in safe

negligently makes repairs creating a dangerous condition, there is much authority imposing tort liability for injuries caused by the objectionable condition.¹⁵⁵ Again, there arises the question of the nature of such liability¹⁵⁶ and to whom the liability extends.¹⁵⁷

Also to be considered is the extent to which a lessor incurs additional personal liability if, to protect himself against such liability, he reserves the right of entrance on the leased premises for the purpose of inspection and repair in the event the lessee permits a nuisance¹⁵⁸ to arise or continue.

IV. Statutory Provisions

Judicial assaults on the landlord's pocketbook have been abetted by statute in a number of states. Such legislation initially concerned multiple dwellings, the so-called tenement acts. The statutes involve the maintenance of structural conditions, habitability in general, or specifics such as lighting of stairs and hallways. The existence of such statutes leads to the inquiry as to the extent to which public policy in the form of criminal penal provisions overflows into the realm of tort liability.¹⁵⁹ If they do

condition. *Taylor v. Geroff*, 347 Ill. App. 55, 106 N.E.2d 210 (1952); *McCourtie v. Bayton*, 159 Wash. 418, 294 P. 238 (1930).

153. A statute requiring a landlord to keep his building in good repair or safe condition creates no contract rights or duties between landlord and tenant. CAL. HEALTH & SAFETY CODE §§ 15035, 17800, 17821 (West 1955); *Metcalf v. Chiprin*, 31 Cal. Rptr. 571 (Dist. Ct. App. 1963).

154. *Nelson v. Myers*, 94 Cal. App. 66, 270 P. 719 (1928); *Kimmons v. Crawford*, 92 Fla. 652, 109 So. 585 (1926).

155. Even where the lessor is not liable in tort for breach of a covenant to repair, he is liable if a further covenant exists to maintain in a safe condition for occupancy. *Sanderson v. Berkshire-Hathaway, Inc.*, 245 F.2d 931 (2d Cir. 1957).

A landlord making repairs voluntarily is liable only for gross negligence. *Carney v. Bereault*, 348 Mass. 502, 204 N.E.2d 448 (1965).

A lessor has been held liable if he voluntarily undertakes to make repairs, and is negligent. *Freddi-Gad Inc. v. Royal Holding Co.*, 45 N.J.Super. 471, 133 A.2d 362 (1957).

The landlord has been held liable if he merely agrees to make repairs. *Coates v. Dewaskin*, 379 S.W.2d 146 (Mo. Ct. App. 1964).

A lessor making voluntary repairs has been held not liable in negligence to the tenant's business invitee, but only to the tenant. *Carney v. Bereault*, 348 Mass. 502, 204 N.E.2d 448 (1965).

A lessor has been held liable for the negligent making of repairs to all who in the contemplation of the parties are on the premises. *Continental Oil Co. v. Ryan*, 392 P.2d 492 (Okla. 1964); *Green v. Independent Oil Co.* 414 Pa. 477, 201 A.2d 207 (1964).

156. A statutory duty of the lessor to keep the premises in repair imposes a tort liability of reasonable care, but not that of an insurer. CONN. GEN. STAT. REV. § 4050 (1949); *Zisken v. Confietto*, 137 Conn. 629, 79 A.2d 816 (1951).

157. The Restatement does not distinguish between liability to the lessee and to third parties. RESTATEMENT OF TORTS §§ 355-363 (1934).

Tenants and guests have been held entitled to the protection of a public housing Code. *Gilpin v. Abraham*, 218 F. Supp. 414 (E.D. Pa. 1963); *Black v. Partridge*, 115 Cal. App. 2d 639, 252 P.2d 760 (1953).

158. *Leonard v. Fulton Nat. Bank*, 86 Ga. App. 635, 72 S.E.2d 93 (1952) (no liability).

159. Creating tort liability: *Collier v. Hyatt*, 110 Ga. 317, 35 S.E. 271 (1900);

invade the tort field, the question remains whether the liability of the lessor is absolute or whether the statute merely allocates the burden of proof.¹⁶⁰ Even a statutory duty upon the lessor to repair does not always, of itself, create a tort liability on breach.

Under a statutory duty to repair, a landlord has been held responsible for damage caused to the tenant's goods by a leaky roof.¹⁶¹ The lessor also could be held liable for personal injuries to the tenant caused by a defect in the premises.¹⁶² Certain statutes provided that if, within a reasonable time after notice to the lessor, he neglects to make repairs, the lessee may make the repairs and deduct the cost thereof from the rent, or otherwise recover it from the lessor. Such statutory provision becomes a part of a contract of lease as though incorporated therein.¹⁶³ Even under these statutes a landlord is not liable for damages caused by a defective condition of the premises where the injury is caused by contributory negligence of the tenant. The issue of contributory negligence must be determined by the jury.¹⁶⁴ Such statutes do not make the lessor an insurer of safety of the premises but merely hold him to reasonable care.¹⁶⁵

Sometimes the lease imposes a specific contractual duty to repair upon the lessee. This does not affect the lessor's tort liability as to persons not in privity with the lessee. It does, however, pose the problem of the extent to which waiver of a legal right by the lessee may be attributed to those on the demised premises with the lessee's permission.

A few of the states are in accord with the English "small rent" principle. This doctrine recognizes that multiple housing dwellers are not usually in a comparable bargaining position with the lessor. The states adhering to this idea have adopted "tenement acts" which grant a measure of protection to the tenant with respect to the tort liability of the land-

Hanlon v. St. Frances Seminary, 264 Wis. 603, 60 N.W.2d 381 (1953); Lasyone v. Zenoria Lumber Co., 163 La. 185, 111 So. 670 (1927).

Cases imposing no additional liability are Johnson v. Carter, 218 Iowa 587, 255 N.W. 864 (1934); Staples v. Baty, 206 Okla. 288, 242 P.2d 705 (1952); Cook v. Seidenverg, 36 Wash. 2d 526, 217 P.2d 779 (1950). Creating a reasonable care duty is Ziskin v. Confietto, 137 Conn. 629, 79 A.2d 816 (1951).

160. Dein v. Holderfield, 275 Ala. 360, 155 So. 2d 314 (1963) (statute requiring lessor to repair gas heater created liability); Ziskin v. Confietto, 137 Conn. 629, 79 A.2d 816 (1951) (statute as to common areas imposed duty on landlord); Gibson v. Hoppman, 108 Conn. 401, 143 A. 635 (1928) (failure to perform statutory duty of lighting gave rise to negligence); Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1950) (tenement house statutes).

161. Florence v. Northoutt, 145 Ga. 265, 88 S.E. 933 (1916).

162. Archer v. Blalock, 97 Ga. 719, 25 S.E. 391 (1896).

163. Johnson v. Carter, 218 Iowa 587, 255 N.W. 864 (1934).

164. Johnson v. Collins, 98 Ga. 271, 26 S.E. 744 (1896).

165. Kitchen V. Landy, 215 App. Div. 586, 214 N.Y.S. 241 (1926).

lord.¹⁶⁶

The cases are not in accord when the public authority directs repairs and the lessor's noncompliance results in injury.¹⁶⁷

Another possible exception has been noticed when the lessor has constructed the house which is the subject of the letting. Here he may have an implied covenant of safety and habitability similar to the manufacturer of a chattel.¹⁶⁸

V. Public Use

There is a line of authority extending the lessor's tort liability when the demised premises were intended to be open to the public generally.¹⁶⁹ If the demised premises are of a public character, the lessor cannot avoid tort liability to invitees of the lessee if the property was in a dangerous condition when leased.¹⁷⁰ But the role of the lessor is not that of an insurer of the public safety. He is responsible only for the existence of dangers of which he was aware¹⁷¹ or should have noticed.¹⁷²

The rationale of the public use exception is unclear. Of the various explanations given, a general public policy is probably the most reasonable.¹⁷³

The courts have here drawn a line beyond which the historical "common law" may not further transgress modern concepts of justice. The exception itself has two exceptions. One limits the exception to places of amusement.¹⁷⁴ Another applies the rule only to leases intended for extensive public use, as opposed to occasional public admission.¹⁷⁵ Both of these exceptions to the exception have only limited following.

166. *Johnson v. Carter*, 218 Iowa 587, 255 N.W. 864 (1934); *Wechsler v. United Produce Dealer's Ass'n, Inc.*, 126 Misc. Rep. 563, 214 N.Y.S. 136 (1926); *Hanlon v. St. Francis Seminary*, 264 Wis. 603, 60 N.W.2d 381 (1953).

167. *Goodman v. Harris*, 40 Cal. 2d 254, 253 P.2d 447 (1953); *Lachowicz v. Beaver Realty, Inc.*, 1 A.D.2d 738, 146 N.Y.S.2d 920 (1955).

168. *Robertson v. Nat Kaiser Inv. Co.*, 82 Ga. App. 416, 61 S.E.2d 298 (1951).

169. *E.g.*, *Gentry v. Taylor*, 182 Tenn. 223, 185 S.W.2d 521 (1945).

170. *Zinn v. A.H. Hill Lumber & Investment Co.*, 176 Kan. 669, 272 P.2d 1106 (1954); *RESTATEMENT OF TORTS*, § 359; *Schlender v. Andy Johnson Co.*, 380 P.2d 523 (Okla. 1962) (public or semi-public exception); *Atlantic Rural Exposition, Inc. v. Faga*, 195 Va. 13, 77 S.E.2d 368 (1953) (where there is public use, a third party becomes a licensee of both the lessor and lessee, when such parties share the profits).

171. *Torwick v. Lisle*, 286 Minn. 176, 128 N.W.2d 330 (1964) (public purpose exception: lessor liable for known defect).

172. *Hayes v. Richfield Oil Corp.*, 38 Cal. 2d 375, 240 P.2d 580 (1952) ("reasonable care").

173. *Row v. Redwood Men's Club*, 111 Cal. App. 2d 546, 245 P.2d 12 (1952).

174. *Bender v. Weber*, 250 Mo. 51, 157 S.W. 570 (1913); *Gentry v. Taylor*, 182 Tenn. 223, 185 S.W.2d 521 (1945).

175. *City of Daytona Beach v. Baker*, 98 So. 2d 804 (1957) (no liability for subsequent defects); *RESTATEMENT OF TORTS*, § 359 (limitation to large numbers); *Hayden v. Second Nat. Bank of Allentown*, 331 Pa. 29, 199 A. 218 (1938).

VI. Third Parties

Where third parties were involved, the common law did not merely require the lessor to share the lessee's burden of liability, but wholly insulated the lessor.¹⁷⁶ This position prevailed even when the lessee could not have known of the defect, but the lessor could and even did.¹⁷⁷ This is logical—as the law understands logic—since “possession” was and is a mystical concept under the common law.

At common law, members of the tenant's family, his employees, guests, and invitees stand in the shoes of the tenant. Their right to recover from the lessor for injuries arising from his failure to keep the premises in repair is the same as that of the tenant if he suffers injury.¹⁷⁸ This same restriction upon the liability of the landlord applies to subtenants, their servants, employees, and to members of the subtenant's family. The reason given is that by entering under the tenant's title, without invitation from the owner, they assume the risk as the tenant does.¹⁷⁹

Some cases have departed from this tradition. When a tenant has an action against the lessor for breach of covenant, the injured third party can bring a tort action against the lessor to avoid circuity of action.¹⁸⁰ A lessor cannot avoid liability to a stranger by covenanting in the lease that he shall not be liable for repairs.¹⁸¹ When the lessor has a duty to third parties as a result of a nuisance, he cannot avoid this by contract with the lessee.¹⁸²

Statutes¹⁸³ and, in some cases,¹⁸⁴ the courts, have shown a modern tendency to abandon the old rule with respect to areas in multiple dwellings when the lessor retains possession and control.¹⁸⁵ The lessor may thus be liable to guests and invitees of the lessee who suffer injury

176. *Velthuzen v. Hoboken Land & Improvement Co.*, 17 N.J. Misc. 376, 9 A.2d 634 (1939) (no privity); *Schlender v. Andy Johnson Co.*, 380 P.2d 523 (Okla. 1962) (liable for unsafe public or semi-public premises if the owner by reasonable diligence should have discovered).

177. Under Louisiana civil law, the landlord is held to strict liability for injuries of third parties and for defects in the leased premises. LA. CIV. CODE ANN., art. 2322; *Green v. Southern Furniture Co.*, 94 So. 2d 508 (La. Ct. App. 1957).

178. *Corcione v. Ruggieri*, 87 R.I. 182, 139 A.2d 388 (1958) (guests or family of lessee have no greater right than lessee).

179. *Leslie v. Glazer*, 273 Mass. 221, 173 N.E. 413 (1930); *Schley v. Steele*, 59 Cal. App. 2d 402, 138 P.2d 733 (1943) (imposing a higher liability to third parties).

180. *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N.W. 489 (1914).

181. *Springer v. Ford*, 189 Ill. 430, 59 N.E. 953 (1901); *Cussen v. Weeks*, 232 Mass. 563, 122 N.E. 757 (1919).

182. *Dickey v. Suggs*, 90 Ga. App. 124, 82 S.E.2d 24 (1954).

183. *Morningstar v. Strich*, 236 Mich. 541, 50 N.W.2d 719 (1950).

184. *Powell v. Jaffee*, 39 Ohio App. 236, 177 N.E. 523 (1929). *Contra*, *Helwig v. Jordan*, 53 Ind. 21, (21 Am. R. 1876); *Cadwell v. Slade*, 156 Mass. 84, 30 N.E. 87 (1892).

185. *Hull v. Bishop-Stoddard Cafeteria*, 238 Iowa 650, 26 N.W.2d 429 (1946).

as the result of defective conditions¹⁸⁶ in the areas in which the lessor retains control.

The increasing authorities¹⁸⁷ favoring the Connecticut¹⁸⁸ viewpoint of the landlord's duty to remove ice and snow on common approaches as distinguished from the non-liability of the Massachusetts¹⁸⁹ rule are evidence of this tendency away from the old caveat lessee doctrine.

Most courts hold that the landlord owes the same duty to business visitors of the tenant as he owes to the guests of the tenant.¹⁹⁰ Some courts, however, have attempted the fine distinction between invitees and licensees of the lessee.¹⁹¹ Distinction has also been made between lessees and tenants at sufferance.¹⁹²

In some jurisdictions somewhat more attention has been given to injuries suffered by third parties than to those of the lessee.¹⁹³

VII. Nuisance

Under one rule, where the tenancy is periodic and not for a term, the landlord has not made a sufficient release of control to absolve him from liability to third persons resulting from a nuisance maintained by the

186. *Moore v. Bryant*, 27 Misc. 2d 22, 83 N.Y.S.2d 365 (1928).

187. *Langhorne Road Apts., Inc. v. Bisson*, 207 Va. 474, 150 S.E.2d 540 (1966) (landlord liable for accumulations of ice and snow on common walkways).

188. *Reardon v. Shimelman*, 102 Conn. 383, 128 A. 705 (1925); Annot., 39 A.L.R. 287 (1925).

189. *Woods v. Naumkiag Storm Cotton Co.*, 34 Mass. 357, 45 Am. R. 344 (1882).

190. *Bowles v. Mahoney*, 202 F.2d 320 (D.C. Cir. 1952) (lessor has no tort liability to third persons); *Cooper v. Anderson*, 96 Ga. App. 800, 101 S.E.2d 770 (1957) (lessor liable to business invitee); *Goodman v. Provincetown*, 283 Mass. 457, 186 N.E. 625 (1933) (invitees have no greater rights than tenant); *Peirce v. Hunnewell*, 285 Mass. 287, 189 N.E. 77 (1934) (exoneration provisions).

191. An attempt has been made in some cases to distinguish between persons who are on the premises by express or implied invitation of the tenant and mere trespassers or licensees who are there for their own convenience or profit. 32 AM. JUR. *Landlord and Tenant* § 811 (1941).

The RESTATEMENT OF TORTS § 360 (1934), however, makes the lessor liable to licensees as well as invitees. *Swanson v. Godwin*, 327 S.W.2d 903 (Mo. 1959); *Hume v. Ten Eycks*, 245 App. Div. 794, 280 N.Y.S. 808 (1935).

Duty to an invitee of the tenant. *Gulley v. Trader's Oil Corp.*, 102 Cal. App. 557, 283 P. 97 (1929); *Chalmers v. Kolb*, 9 F.2d 924 (E.D. Pa. 1925).

Less duty to mere licensees. *Lally v. A.W. Perry Inc.*, 277 Mass. 463, 179 N.E. 155 (1931); *Wierzbicki v. Thacker*, 273 Mass. 346, 173 N.E. 512 (1930).

192. *Ferno v. Roberts*, 327 Mass. 305, 98 N.E.2d 611 (1951) (no duty to tenant at sufferance).

Lessor's liability toward an employee or an invitee of the lessee is the same as his liability to the lessee. *Fraser v. Kruger*, 298 F. 693 (8th Cir. 1924); *Glidden v. Goodfellow*, 124 Minn. 101, 144 N.W. 428 (1913).

193. Lessor liable for a dangerous condition existing at the time of leasing and known to the lessor and the lessee but not to a third party. *Senner v. Dartwolf*, 139 Ore. 93, 6 P.2d 240 (1932).

A covenant of non-liability is not binding on an employee of the tenant. *Springer v. Ford*, 189 Ill. 430, 59 N.E. 953 (1901).

Ordinance permitting tenant's employees to recover against the lessor. *Patterson v. Jos. Schlitz Brewing Co.*, 16 S.D. 33, 91 N.W. 336 (1902).

tenant.¹⁹⁴ This result is based upon the theory that each period is a renewal of the lease, the lessor being therefore as liable as though the nuisance existed at the beginning of the lease.¹⁹⁵ There is substantial authority to the contrary, however.¹⁹⁶

When the facts disclose that the injury resulted from a nuisance, the courts rely upon varying factors in imposing liability on the lessor. A distinction has been made between a public and a private nuisance.¹⁹⁷ If the nuisance existed on the premises at the time of leasing, there is a tendency to hold the lessor liable along with the lessee for an injury caused by the nuisance.¹⁹⁸ Likewise, the lessor may be liable where he has retained a measure of control over the demised premises.¹⁹⁹

Dangers affecting public health may also fall into the nuisance class.²⁰⁰ But even here the old rule dies hard²⁰¹ and virtually all of the

194. *Lucas v. Brown*, 82 F.2d 361 (8th Cir. 1936) (liability as of the time of renewal).

195. *Perkins v. Weibel*, 132 Conn. 50, 42 A.2d 360 (1945).

196. *Perkins v. Weibel*, 132 Conn. 50, 42 A.2d 360 (1945); *Britton v. Donwin Realty Corp.*, 23 N.J.L. 540, 10 A.2d 360 (1940).

197. *Berl v. Rochester State Corp.*, 14 N.Y.S.2d 516 (Rochester City Ct. 1939).

A licensee of one of several tenants to a building bears the relationship of licensee also to the lessor as to common areas if the licensee's presence could be reasonably anticipated by the lessor, and there was a dangerous condition caused by landlord's negligence. *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 153 A.2d 1 (1959); *Annot.*, 78 A.L.R.2d 95 (1961).

198. *Whalen v. Shwick*, 326 Mass. 142, 93 N.E.2d 393 (1950); *Annot.*, 33 A.L.R. 2d 74 (1954) (liable for nuisance existing at time of letting); *Baldassare v. Crown Furniture Co.*, 349 Mass. 183, 207 N.E.2d 268 (1965) (lessor's liability for nuisance).

A lessor was held liable to a neighboring landowner for a nuisance resulting from defective premises when the defect existed at the time of letting. *Woffard v. Rudick*, 63 N.M. 307, 318 P.2d 605 (1957).

A lessor has been held liable for damages if the nuisance existed at time of leasing or if the particular use was contemplated or if the property was adapted to causing the nuisance. *Hindman v. Texas Lime Co.*, 157 Tex. 592, 305 S.W.2d 947 (1957).

A lessor is liable for his tenant's nuisance if authorized or if there is an unreasonably great likelihood that the tenant will create the nuisance. *Green v. Asher Coal Mining Co.*, 377 S.W.2d 68 (Ky. Ct. App. 1964).

The English law makes the lessor liable if he has leased the property with a nuisance on it. *Todd v. Flight*, 142 Eng. Rep. 148 (1860).

This rule applies only if continuance of the nuisance was due to the failure of the lessor to make the repairs required by the rental contract. *G. Winnel v. Eamer*, L.R. 10 C.P. 658 (1875); *Pretty v. Bickmore*, L.R. 8 C.P. 401 (1873).

199. A lessor has been relieved from liability for a nuisance if the lessee continues the nuisance after the letting. *Howell Gas of Athens v. Coile*, 112 Ga. App. 732, 146 S.E.2d 145 (1965).

W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (3rd. ed. 1964) disagrees with the *RESTATEMENT OF TORTS* § 366 (1934) position that the lessee as well as the vendee assumes liability for a nuisance existing on the premises at the time of taking possession, even if the occupier has had no opportunity to discover the existence of the nuisance. He has substantial support for the liability of the lessor in *McDonough v. Gilman*, 85 Mass. 264 (1861).

200. *Hamilton v. Feary*, 8 Ind. App. 615, 35 N.E. 48 (1893); *Long v. Chicago*, K. & W. R.R., 48 Kan. 28, 28 P. 977 (1892); *Cutter v. Hamlen*, 147 Mass. 471, 18 N.E. 397 (1888). *See Smith v. Wolsiefer*, 119 Va. 247, 89 S.E. 115 (1916).

cases involve the lessor's knowledge, so as to raise the implication of fraud.²⁰²

Regarding third parties, the American doctrine has extended the nuisance rule beyond conditions which are actually dangerous at the time of transfer, to situations of potential peril²⁰³ and even to intended uses which may bring about a nuisance.²⁰⁴ Therefore, the lessor is also liable if he lets the land for purposes from which a nuisance will naturally arise.²⁰⁵ And if the nuisance arose out of non-repair, and the factors producing the defect were of such extensive and material character that the lessee could not have been required to repair, the lessor is liable for the nuisance.²⁰⁶

Attempts by lessors to restore their common law tort immunity by exculpatory clauses in leases have met with varying results.²⁰⁷ Such clauses have been held generally not to transgress any basic public policy as far as they purport to be a waiver of the lessee's personal rights.²⁰⁸

201. *Finney v. Steele*, 148 Ala. 197, 41 So. 976 (1906); *Cutter v. Hamlen*, 147 Mass. 471, 18 N.E. 397 (1888).

202. *Maryland for Use of Pumphrey v. Manor Real Estate & Trust Co.*, 176 F.2d 414 (4th Cir. 1949) (dictum); *Owens v. Ramsey*, 213 Ky. 279, 280 S.W. 1112 (Ct. App. 1926); *Martin v. Richards*, 155 Mass. 381, 29 N.E. 591 (1892); *Kern v. Myll*, 80 Mich. 525, 45 N.W. 587 (1890); *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (App. Div. 1953) (a lessor knowing that the premises were infected with disease was liable to lessee who contracted the disease); *Ceaser v. Karutz*, 60 N.Y. 229, 19 Am. Rep. 164 (1875).

203. Statute requiring a gas appliance to be maintained in good repair imposes a duty on the lessor, but only after tenant gives notice of lack of repairs. *Morris v. Oney*, 217 Cal. App. 2d 623, 32 Cal. Rptr. 88 (Dist. Ct. 1963).

Lessor held liable for the death of a fireman when the lessor had violated a safety ordinance. *Dini v. Norditch*, 20 Ill. App. 2d 406, 170 N.E.2d 881 (1960).

204. *Benton v. Kernan*, 127 N.J. Eq. 434, 13 A.2d 825 (1940), *modified*, 130 N.J. Eq. 193, 21 A.2d 755 (1941); *San Angelo v. Sitas*, 143 Tex. 154, 183 S.W.2d 417 (1944).

205. *Midland Oil Co. v. Thigpen*, 4 F.2d 85 (8th Cir. 1924); *Annot.*, 53 A.L.R. 311 (1928).

206. *Moretti v. C. S. Realty Co.*, 78 R.I. 341, 82 A.2d 608 (1951); *Annot.*, 39 A.L.R.2d 963 (1955).

207. *Weirick v. Hamm Realty*, 179 Minn. 25, 228 N.W. 175 (1929); *Midland Carpet Corp. v. Franklin Associated Properties, Inc.*, 90 N.J. Super. 42, 216 A.2d 231 (1966) (exculpatory clause valid as respects industrial property); *Olson v. Hoffman*, 65 Ill. App. 2d 87, 213 N.E.2d 68 (1965) (exculpatory clause in private real estate leases); *Thomas-Mack v. Ursula Holding Corp.*, 5 A.D.2d 837, 170 N.Y.S.2d 926 (1958) (exculpatory clause void); *Dien v. Holderfield*, 155 So. 2d 314 (Ala. 1963) (exculpatory clause protected against injury to tenant's wife).

208. Exculpatory clause of lessor was not valid on grounds of public policy as against the tenant or occupant, there being no distinction between business and residential property. *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. App. 2d 349, 146 N.E. 2d 198 (1957).

Clause in lease purporting to bar tort claims for injury to persons or property arising out of the use of lake and recreational facilities leased, and providing for both parties to carry liability insurance, did not protect the lessor against liability to third parties caused by defective conditions arising from lessor's negligence. *Larson v. Santa Clara Valley Water Conservation Dist.*, 32 Cal. Rptr. 875, (Dist. Ct. App. 1963) (liable as to retained possession where persons on land were there with the lessor's consent and the lessor's approval, if the lessor could by reasonable diligence have discovered the defect).

But the courts' distaste is shown in that the clauses are most strongly construed against the lessor.²⁰⁹

CONCLUSION

One must adopt the pessimism of Schopenhauer in attempting to reach conclusions as to the future of caveat lessee in American law.

Most of the courts today view with revulsion a landlord playing the role of Pontius Pilate.²¹⁰ But almost without exception the judges decline to advance beyond the judicial barrier, requiring that changes in the common law come from the legislature. This doctrine itself defies common sense. If the judiciary, supposedly comprising the most learned of the legal profession, cannot determine the origin of existing legal concepts and the extent to which the atrophy of their roots has destroyed their meaning, how can a legislature, made up largely of laymen, be expected to be endowed with such wisdom?

Most interesting in this situation is the varying ideas of the states as to what the "common law" is or was. English iconoclasts have remarked that the common law was what the seventeenth century lawyers did not know about the thirteenth century. Today a cynic may similarly perceive that the "common law" is what the court of each state uses to justify its position with relation to a particular state of facts.

This is an age in which medicine, science, philosophy and related schools of thought no longer accept as correct those propositions which have no apparent merit other than antiquity. Not so the law. That which was accepted as truth in the time of the Plantagenets remains immutable.

Legal egotism spurs the belief that laws may influence economic development as well as the converse. If this be true, we may hypothesize that the spreading of slum conditions in the course of increasing urbanization was materially promoted by the non-existence of legal liability of the landlord for the conditions of his rental properties. It may be asserted with some force that the ghetto development in the United States is a

209. *Midland Carpet Corp. v. Franklin Associated Properties, Inc.*, 90 N.J. Super. 42, 216 A.2d 231 (1966) (exculpatory clause strictly construed against lessor); *Larson v. Dauphin Realty Co.*, 224 F. Supp. 989 (E.D. Pa. 1964) (exculpatory clause construed against lessor).

An exculpatory clause was not effective where the proximate cause of the damage was the lessor's violation of a city ordinance. *Hanna v. Lederman*, 36 Cal. Rptr. 150 (Dist. Ct. App. 1963). Nor does an exculpatory clause cover the lessor's active negligence. *Plastone Plastic Co. v. Whitman-Webb Realty Co.*, 278 Ala. 95, 176 So. 2d 27 (1965).

The courts have shown a similar reluctance to set aside the common law approval of exculpatory clauses in leases. See *Simmons v. Columbus Venetian Stevens Bldg.*, 20 Ill. App. 2d 1, 155 N.E.2d 372 (1958).

210. *Bowles v. Mahoney*, 202 F.2d 320 (D.C. Cir. 1952), contains a dissenting opinion to the effect that courts should require the lessor to repair.

direct consequence of adherence to Coke's maxim. Had the law in its early stages in America been cloaked with the social enlightenment of today, the consequent liability of the landlord would have mitigated against the growth of city slums. It is questionable whether even today social consciousness has progressed so far that instincts of self interest have been wholly supplanted in this area.

The attention of those interested in a solution of tenement conditions has been channeled into the broad river bed of governmental assistance. But public housing and rental subsidies are insufficient. As long as the fee is in private hands there is no impelling force to keep rental properties in proper condition when the tenant lacks equality in bargaining power. There is evidence that conditions in public housing projects tend to deteriorate when the government has merely supplied the financing rather than assumed the entire responsibility.

Laws are, too often, made by lawyers for the benefit of lawyers or for the benefit of influential clients of lawyers. Only when the malfunctioning of existing legal roots becomes so intolerable as to create social unrest is there hope of legal reform. When this occurs, the solution too often is found in the interference of the sovereign in private affairs rather than voluntary improvement of the basic causes.

The caveat emptor concept in landlord and tenant relationships is only one of the numerous instances in which property law concepts molded under medieval conditions do not fulfill the demands of an expanding society.

It is regrettable that the organized legal profession, like the medical, has not been sufficiently alert to recognize the need for remolding its thinking to confront the challenge. The possibility exists that this procrastination may have eventualities as unsatisfactory to the lawyers as recent developments have been to the physicians.

It must be conceded that the state courts have not had the opportunity, as has the Supreme Court of the United States, to sail over the seas of tradition on the cloak of the federal constitution. An airworthy if less maneuverable vehicle is provided by the Uniform Commercial Code. But the opportunity for legal rectification of the situation was missed when the Uniform Commercial Code limited implied warranties in Section 2-314 and 2-315 to "Goods" as defined in Section 2-105.

The coin is not wholly one-sided. Scriveners' language in leases has been molded to fit the deep groove worn by centuries of legal footsteps. Court decisions have a retrospective aspect as contrasted with the prospective view of a statute. Any frontal attack on the caveat lessee doctrine would perhaps inequitably affect long term leaseholds.

But "the poor must live." Any change in the landlord's position

must increase his cost, not merely as to maintenance, but also as to taxes and liability insurance. This burden must be passed on to the tenant, resulting either in an increased share of the family budget for rent or in a decreased standard of housing. At a decreasing economic level this looks toward governmental rent subsidies. Sir Thomas Moore's dream is not yet a reality.

The forward thinking of some of the later cases give warning to prospective lessors not to place their trust too strongly in the common law rule of non-liability in the case of torts. The waiver of liability in the case of the lessee can, at least in the absence of fraudulent conduct by the lessor, be avoided. The expanding social conscience may enforce a liability on the lessor in the case of members of the lessee's family and third parties. This tort liability cannot be wholly avoided by contract between the lessor and the lessee. The answer therefore lies either in the retention of a right of maintenance by the lessor, which may in turn result in an increased degree of legal liability,²¹¹ or in protection through liability insurance. A lessor's lot is not a happy one!

The courts have shown, to date, little inclination to set aside earlier decisions which worshipped at the caveat emptor shrine. But as matters of first impression arise involving any of the numerous exceptions, particularly in the tort area, there is a decided inclination to find against the lessor.

This trend places a red flag encouraging all leases, particularly those involving terms of some length, to contemplate in the rental charge the necessity of ever-increasing liability insurance coverage in areas not heretofore contemplated.

So children may fall,
But not in the hall
And boards may rot,
but not
On the stairs,
And rats may play,
but must also stay
Out of common areas.

211. *De Clara v. Barber Steamship Lines*, 309 N.Y. 620, 132 N.E.2d 871 (1956); *Bukowitz v. Winston*, 128 Ohio St. 611, 193 N.E. 343 (1934) (no liability to third parties from lessor's promise to repair); *Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785 (1933); *Annot.*, 89 A.L.R. 477 (1934) (reservation of right to enter to make repairs creates liability).

Courts may revise an outmoded common law. *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959); *Annot.*, 78 A.L.R.2d 1230 (1961); *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958).