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THE IMPLIED WARRANTY OF HABITABILITY IN THE LEASE OF A FURNISHED HOME

The general rule in regard to the suitability of leased premises is so fundamental as to scarcely require remark. "One taking a lease of premises is in the position of a purchaser and the rule of *caveat emptor* applies to him. It results that there is no implied warranty by the lessor as to the condition of the premises, and the lessee cannot ordinarily complain that they were not, at the beginning of the tenancy, in a tenantable condition, or were not adapted to the purpose for which they were leased."¹ Dwelling houses as well as other real property naturally fall under this rule.² Of course, it is obvious that an express covenant of habitability in any such lease will protect the tenant, but unless there is such a covenant or unless there has been such misrepresentation or fraud on the part of the lessor as would vitiate the contract, the tenant has no remedy if he discovers after the lease is made that his home is unsuitable as a place in which to live.

However, when we come to the case of a furnished house, we find that some jurisdictions introduce an important qualification into this general rule, and hold that in the lease of a furnished house there is an implied warranty of habitability. In so doing, these courts follow the English case of *Smith v. Marrable*,³ decided in 1843, in which the lessee of a furnished summer cottage refused to remain in it because it was infested with bed bugs. The Court flatly held, on the authority of some *Nisi Prius* cases,⁴ that there was an implied obligation on the part of the lessor to have a furnished house in a habitable condition, but gave no reasons for its decision.

In the same year the case of *Sutton v. Temple*⁵ came up in which *Smith v. Marrable* was cited as authority for the broad statement that there was an implied warranty of fitness for the purpose intended in any demise of real property. Lord Abinger, who had taken part in the decision in the previous case, overruled it as authority for any such broad doctrine and distinguished the two cases, limiting the rule of implied warranty. He pointed out that the lease of a furnished house was a mixed lease of realty and personalty. In the sale of a chattel there is an implied fitness for the purpose intended, and he placed the burden on the lessor of seeing that proper furniture was

1. *Tiffany on Real Property*, p. 136.
2. 24 App. D. C. 532.
185 Mass. 341.
57 N. Y. S. 79.

3. 11 M. & W. 6.
4. Ry. & M. 268.
1 M. & Rob. 112.
5. 12 M. & W. 52.

provided. It is worth noting that the fault in *Smith v. Marrable* was in the furniture and not in the realty. There is no indication of what the ruling might have been had the roof leaked, or the drains been choked, or something else wrong with the realty itself. The New Jersey Court, in *Murray v. Albertson*,⁶ in 1887, overruling *Smith v. Marrable* as good law, in that State, pointed this out and distinguished it from the earlier case on the grounds that such an implied warranty based on those grounds could not exist in the case of a house with the basement full of water for the fault was in the realty itself. However, when that case of the non-habitability of the realty, as distinct from its furniture arose in the English Courts in *Wilson v. Finch-Hatton*,⁷ the Court held that there was an implied warranty, but changed the grounds of its decision to the point that the tenant had a right of possession for a short time only, and the chief value of his lease was in his ability to enter into possession at once, and the lessor was expected to know this.

This is the chief ground of American decisions supporting this doctrine. The ruling case in this country is *Ingall v. Hobbs*.⁸ Here, by dicta, the Court admitted the general rule that there is no implied warranty of habitability in a dwelling house, but decided that it should be qualified in the case of a furnished house leased for a short term. Stress was laid on the fact that an important item in persuading one to take such a lease was his ability to use the premises at once, and the lessor, knowing this, impliedly warrants that such premises are fit for immediate habitation. In *Young v. Povich*,⁹ the Maine Court held that there was such an implied warranty on the grounds of *Ingalls v. Hobbs*, quoting from it at length and then proceeding to define what was meant by a "short term." It held that the words used should properly be "for a temporary purpose" which meant the lease of a furnished house for transient use for a season as distinguished from a permanent year round place of abode. The Court held that a three months summer season was sufficient to raise the warranty. In New York, the Court of Appeals held in the case of *Morgantheu v. Erich*¹⁰, that the unsuitability of a house leased for the winter season of five months caused by such an infestation of bed bugs as to make life miserable for the tenant amounted to a constructive eviction by the landlord.

This doctrine seems fixed in these jurisdictions as well as in Pennsyl-

6. 50 N. J. L. 167.

7. 2 Ex. D. 336.

8. 156 Mass. 348.

9. 121 Me. 141.

10. 77 Misc. (N. Y.) 139.

vania where, although it has never come before the Supreme Court, an inferior court has upheld it.¹¹ Illinois, by a recent decision, has opened the way in that State for an extension there of the doctrine. In that case, a store building which was to be leased for a shoe store was found not to be suitable for that purpose and it was held that it was the legal duty of the lessor to put the premises in a tenantable condition for the purpose intended, and the tenant was under no obligation to accept them unless they were in such condition.¹² This overruled a contrary opinion by the Appellate Court of that State.¹³ The Court cites no authorities nor does it give any reasoning on which its decision is based. It will be noted that this is a broader application of the doctrine than any of the previous cases.

Even in those jurisdictions where it is firmly established, however, the courts have consistently refused to extend the doctrine beyond a lease for a furnished house for a short term. This began with the early English cases, for in *Hart v. Windsor*¹⁴, decided the same year with *Smith v. Marrable* and *Sutton v. Temple*, the Court refused to imply such a warranty in the case of an unfurnished house and has consistently held to that limit.¹⁵ The New York case of *Franklin v. Brown*¹⁶, in which the dwelling was made uninhabitable by offensive odors from causes off the premises and outside the landlord's control, in which it was held not to come under the implied warranty of habitability, is illustrative of this tendency to set limits to the doctrine. This case was also distinguished by the fact that the lease was for a full year instead of a "short term."

There seems to be no direct ruling on such an implied warranty in regard to a furnished house in Missouri, although the courts have upheld the general ruling of no implied warranty of suitability for the purpose intended in the case of other realty than furnished houses. In the memorandum decision in *Kerr v. Merrill*¹⁷, the Court held that there was no implied warranty of fitness for the purpose intended in the lease of real property, and moreover that words in the lease descriptive of the property are not a warranty that the description is a true one. This would seem to settle the matter in Missouri for this case appears to be the leading one on implied warranties of the condition of leased premises, being followed by a number of later ones.¹⁸

11. 3 Pac. Co. 271.

12. 132 N. E. 425.

13. 216 Ill. App. 282.

14. 12 M. & W. 67.

15. 5 C. P. D. 507.

(1881) 7 Q. B. D. 598.

16. 118 N. Y. 110.

17. 4 Mo. App. 592.

18. 21 Mo. App. 58.

28 Mo. App. 279.

173 Mo. App. 722.

The question has been definitely decided in England by the enactment of the statute of 9 Edward VII, chapter 44, sections 14 and 15, in 1909, which raises the implication by statute of a warranty of fitness for human habitation in the renting of any dwelling house.

It is interesting to note what some of the conditions are which have been held to have violated this implied warranty in those jurisdictions which enforce it. The earliest and most common cases are those where insects, particularly bed bugs, infested the premises.¹⁹ In *Wilson v. Finch-Hatton*²⁰, where the Court extended the doctrine from the furniture to the realty, choked sewers and a collection of filth under the basement floor, so that noisome odors were prevalent, were held to raise the warranty. English cases hold that sewer gas and bugs were a violation of the warranty²¹, as was the fact a person suffering from a communicable disease had occupied the premises just previously.²² There is a tendency in American cases on prior disease, however, to put the decision on the ground of misrepresentation on the part of the lessor rather than a breach of this implied warranty.²³ New York held that the frequent overflow of a cesspool was sufficient to cause a breach of the warranty²⁴, as was also the loathsome stench of the decaying bodies of rats which the landlord failed to remove.²⁵

Those jurisdictions which do not recognize this doctrine base their decisions on the grounds that a lease is a contract whose terms the parties may vary to suit themselves, and having failed to put such a warranty into the contract, the Courts will not amend it.²⁶

Summing up, one may say that this doctrine of implied warranty of habitability is an artificial one in the law of real property, which has grown up within the last century in a very few jurisdictions and even there is strictly limited to the case of furnished houses.

WARREN TURNER, '27.

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19. *Smith v. Marrable*, *supra*.
Morganthau v. Erich, *supra*.
Young v. Povich, *supra*.
 20. 2 Ex. D. 336.
 21. 3 Times L. R. 58.
 22. (1923) 2 K. B. 617.
 23. 112 Mass. 477.
60 N. Y. 229.
26 R. I. 129.
 24. 134 App. Div. (N. Y.) 154.
 25. 115 N. Y. Supp. 723.
 26. 4 Mackey 82.
67 N. H. 393.