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Landlord-Tenant - Eviction Proceedings - Appeal Bond

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preme Court and ultimately in the judiciary system itself, and greatly eroded the "moral suasion" of the Court.

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LANDLORD-TENANT—EVICTION PROCEEDINGS—APPEAL BOND—The Supreme Court of the United States has held that a state statute requiring a tenant to post a double-bond before appealing an adverse eviction decision violates the equal protection clause.

Lindsey v. Normet, 405 U.S. 56 (1972).

Portland Bureau of Buildings officials declared appellee-landlord's building to be unfit for human habitation[1] where-upon appellant-tenants refused to pay their rent until the substandard conditions were remedied. The landlord threatened eviction under the Oregon Forcible Entry and Wrongful Detainer Statute[2] and appellants filed a class action requesting injunctive relief and seeking a declaratory judgment that the statute was unconstitutional on its face. A three-judge district court upheld the statute which provided that in eviction proceedings because of nonpayment of rent: (1) trial must be held no later than six days after service of the complaint on the tenant unless the tenant posts security for payment of any rent that may accrue during the continuance; (2) the issues litigable during the trial are restricted to those involving tenant's default and consideration of defenses based on the landlord's breach of any duty to maintain the premises are precluded; (3) a tenant who wishes to appeal from an adverse decision is required to post, in addition to the usual civil appeal bond,[3] sureties for twice the amount of rent expected to accrue pending appellate review, and to forfeit this double bond to the landlord, if the lower court decision is affirmed.[4]

1. Lindsey v. Normet, 405 U.S. 56, 58 n.2 (1972):
It was stipulated that city inspectors found rusted gutters, broken windows, broken plaster, missing rear steps, and improper sanitation, all in violation of the Portland Housing Code, and that the inspectors posted a notice that the dwelling was required to be vacated within 30 days unless the owner could show cause why the building should not be declared unfit for occupancy.
2. ORE. REV. STAT. §§ 105.105-.160 (1971) [hereinafter referred to as FED].
3. ORE. REV. STAT. § 19.040 (1971) provides:
Form of Undertaking on Appeal . . . (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal . . . .
4. Civ. No. 70-8 (D. Ore., Sept. 10, 1970).

The Supreme Court held[5] that the double-bond requirement violated the tenant's guarantee of equal protection[6] but affirmed the district court's holding as to constitutionality of the early trial provision and the limitation on litigable issues.[7]

In holding that the tenants could be precluded in a FED action from raising certain triable issues—principally, the landlord's failure to maintain the premises—the Court relied heavily on its previous holdings in *Grant Timber & Manufacturing Co. v. Gray*[8] and *Bianchi v. Morales*.[9]

In *Grant*, a case involving timber allegedly misappropriated by defendant, the Court held that due process was not violated by a Louisiana statute which provided that one sued in a possessory action could not bring a petitory action until a judgment was rendered in the possessory action.[10] Additionally, if the defendant lost in the possessory action he must have satisfied that judgment before maintaining the petitory suit.[11] In his two-page opinion, Mr. Justice Holmes justified the Court's result in large measure by looking back to ancient common law authorities.[12]

In *Bianchi*, Mr. Justice Holmes' ten-sentence opinion relied in large measure on the *Grant* rationale to sustain, against a due process attack, a Puerto Rican mortgage law which permitted a foreclosure by summary suit in which no defense was permitted except payment.[13]

Heavy reliance by the Court in *Lindsey* on *Grant* and *Bianchi* may not have been justified since the cutting of timber and the foreclosure of a mortgage, both having taken place in rural settings during the first quarter of this century, did not address themselves to the considerations inherent in an urban leasehold.[14] Further, it is suggested that by con-

5. Justices Powell and Rehnquist took no part in this case.
6. 405 U.S. at 74-79.
7. *Id.* at 64-74. A discussion of the double-bond requirement and the early trial provision is beyond the intended scope of this note.
8. 236 U.S. 133 (1915).
9. 262 U.S. 170 (1923).
10. 236 U.S. at 134-35.
11. *Id.*
12. It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of medieval law. From the "*exception spolii*" of the Pseudo-Isidore, the Canon Law and Bracton to the assize of novel disseisin the principle was of very wide application that a wrongful disturbance of possession must be righted before a chain of title would be listened to—or at least that in a proceeding to right such disturbance a claim of title could not be set up . . . .

Id. at 134.
13. 262 U.S. at 171.
14. In accord, at least as to *Bianchi* is Justice Douglas' dissent, 405 U.S. at 90. *See also*

struing lessee's covenants as independent of lessor's, the *Lindsey* Court has breathed new life into the heretofore dying concept of treating a lease as a conveyance of land rather than as a contract, and in consequence the lessee can be required to pay rent without a concomitant duty by the lessor to repair.[15]

Prior to *Lindsey* there had been a discernible trend by some courts away from the early common law conveyance theory toward a contract theory for leases, and courts have been willing to treat material covenants—such as payment of rent and repair of defects—as mutually dependent. Thus, if one party breaches, the other may be relieved of his duty to perform.[16] By relying on this contract theory of leases courts have recently been willing to condition the payment of rent upon an implied warranty of habitability.[17] In *Lemle v. Breeden*[18] the

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NATIONAL COMMISSION ON URBAN PROBLEMS, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS, RESEARCH REPORT NO. 14, at 110-12 (1968).

15. *See* RESTATEMENT OF CONTRACTS § 290 (1932); 1 AMERICAN LAW OF PROPERTY § 3.78 (A.J. Casner ed. 1952); 2 R. POWELL, REAL PROPERTY § 233 (1967). For an early case vividly illustrating the possible results to be had by a treatment of lessor's and lessee's covenants as independent see Peterson v. Kreuger, 67 Minn. 449, 70 N.W. 567 (1897). There, plaintiff-landlord had leased property to the defendant-tenant for use by the latter as a hotel. When the tenant refused to pay his rent, plaintiff brought an action under a Minnesota Forcible Entry and Detainer Statute for restitution of the property. Over plaintiff's objections, the trial court allowed defendant to enter evidence indicating that because of the landlord's refusal to repair the roof of the hotel, some of the rooms had become unfit for rental, thereby causing a loss of income to the tenant in an amount in excess of the rent due under this action. The jury found that the damages sustained by the tenant equaled the amount of rent due to the landlord and that the defendant was not guilty of an unlawful detainer. The Supreme Court of Minnesota reversed saying:

> Even if it should be conceded that there was a breach on the part of the landlord . . . of a covenant to repair the roof, express or implied, the court erred in permitting [the tenant] to introduce evidence to support his so-called defense or counterclaim, for in this form of action it was all irrelevant and inadmissible . . . A tenant against whom an action was brought under this statute is not permitted to counterclaim for damages arising from a breach of any covenant in the lease which is independent of the covenant to pay rent. . . . The object of the [FED] statute is to provide an adequate and summary remedy for obtaining possession of leased premises withheld by tenants in violation of the covenants of their leases, and, so said in one of the cases we have cited, "this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law."

Id. at 450, 70 N.W. at 568. *See also* Annot., 4 A.L.R. 1453 (1919):

> Although there are a few decisions to the contrary, the great weight of authority is to the effect that in the absence of statute there is no warranty implied in the letting of an unfurnished house or tenement, that it is reasonably fit for habitation.

16. 1 AMERICAN LAW OF PROPERTY § 3.11 (A. J. Casner ed. 1952):

> There is evidence that the law, by one means or another and without disturbing the rules protecting the lessee's possessory rights, is moving toward an application of contract principles to leases. The courts tend to speak of leases as contracts, and an increasing number of cases treat material covenants as mutually dependent.

17. *See* Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412-13 (1961):

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

Supreme Court of Hawaii held that a tenant could recover his deposit and rental payments upon discovering that the rental property was infested with rats. The Court then noted:

> The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is, in essence, a sale, as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship, an implied warranty of habitability and fitness for the purpose intended is a just and necessary implication.[19]

This rejection of the conveyance-*caveat emptor* theory in favor of the contract-implied warranty of habitability position reached a high point in *Javins v. First National Realty Corporation*[20] with the court noting that while the feudal property law concept of a lease conveying primarily an interest in land may have been reasonable in a rural, agrarian setting, such is not the case with an urban apartment dweller

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legal cliché, *caveat emptor*. Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.

See also Earl Millikin, Inc. v. Allen, 21 Wis. 2d 497, 124 N.W.2d 651 (1963); CAL. CIV. CODE § 1941 (West 1954).

18. 51 Hawaii 426, 462 P.2d 470 (1969). For a review of *Lemle* and rules relating to implied warranty of habitability or fitness for use of leased premises see Annot., 40 A.L.R. 3d 637, 646 (1971).

19. 51 Hawaii at 433, 462 P.2d at 474. *See also* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). There the Supreme Court of New Jersey re-examined the doctrine of *caveat emptor* in a situation where a tenant's premises were flooded after each rain, and noted:

> It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee . . . cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily, all this information should be considered readily available to the lessor, who in turn can inform the prospective lessee. These factors have produced persuasive arguments for reevaluation of the *caveat emptor* doctrine and for imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning ordinances.

Id. at 452, 251 A.2d at 272; *accord*, Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967). There has been considerable legal scholarship supporting the implied warranty of habitability and fitness in lease situations. *See* Lemle v. Breeden, 51 Hawaii 426, 433 n.2, 462 P.2d 470, 474 n.2 (1969). A discussion of rent withholding statutes based on an implied warranty of habitability is beyond the scope of this note. For a general discussion see Annot., 40 A.L.R.3d 637 (1971). For a discussion of the Pennsylvania Rent Withholding Act in particular see 10 DUQ. L. REV. 113.

20. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). For expressions of approval of Judge J. Skelly Wright's opinion in *Javins* see 29 GEO. WASH. L. REV. 152 (1970) and 24 VAND. L. REV. 425 (1971).

in 1970.[21] The court stoutly rejected the doctrine of *caveat emptor* and held ". . . the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in a habitable condition."[22] The court of appeals also decided that the warranty of habitability was to be ". . . measured by the standard set out in the Housing Regulations for the District of Columbia and is implied by operation of law in all leases of urban dwellings covered by those Regulations and that a breach of such warranty gives rise to the usual remedies for breach of contract."[23]

It was subsequent to these decisions which had given the tenant a modicum of bargaining power against the landlord, where traditionally he had had none,[24] that *Lindsey* was decided.[25] It is believed that with the *Lindsey* case, the Court was presented with a clear opportunity to stamp its *imprimatur* of approval on the rationale of such progressive decisions as those in *Reste, Lemle* and *Javins*. Instead, after first noting that the Constitution had not federalized the substantive landlord-tenant law,[26] the Court remarked that it ". . . could see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants."[27] Thus with only this cursory language the Court opted to sustain the medieval common law concept of a lease being only a conveyance of land. In so holding the majority implicitly also approved appendant doctrines of independent covenants and *caveat emptor* which *Javins* had jettisoned so persuasively.

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21. 428 F.2d at 1078 n.39:
In 1968 more than two-thirds of America's people lived in the 228 largest metropolitan areas. Only 5.2% lived on farms. *The World Almanac* 1970 at 251 (L. Long ed.). More than 98% of all housing starts in 1968 were non-farm.

22. 428 F.2d at 1082.

23. *Id.* at 1072-73.

24. *See* Edwards v. Habib, 397 F.2d 687, 701 (D.D.C. 1968), *cert. denied*, 393 U.S. 1016 (1969), *citing* Kay v. Cain, 154 F.2d 305, 306 (D.D.C. 1946). The court of appeals in *Edwards* held, *inter alia*, that a tenant could not be evicted by a landlord in retaliation for reporting housing code violations to public officials. (This opinion was written by Judge J. Skelly Wright who two years later wrote the *Javins* opinion.) *See also* 2 R. POWELL, REAL PROPERTY § 221[1] (1967).

25. The factual situation giving rise to the *Javins* case parallels in large measure that of *Lindsey*, to-wit, in both, the tenants refused to pay their rent, whereupon the landlord initiated court action in an attempt to regain possession of the premises and the tenant resisted on the basis of numerous housing code violations.

26. 405 U.S. at 68.

27. *Id.* However, Justice Douglas' dissent wherein he maintains that the Oregon state courts have, in fact, adopted a contractual analysis of leaseholds and, thus, ". . . all defenses relevant to its legality and its actual operation would seem to be within the ambit of the opportunity to be heard that is embraced within the concepts of due process . . . ." *Id.* at 87-89.

It is believed that the Court in *Lindsey*, by failing to even acknowledge the critical and complex issues inherent in an urban leasehold, as exemplified by the discussion in *Javins*[28] and other cases, has stalled, at least in the absence of express legislative approval,[29] any continued trend toward equalization of power between tenant and landlord.[30]

C. Timothy Shaffer

CONSTITUTIONAL LAW—FREE EXERCISE OF RELIGION—The United States Supreme Court has held that the first and fourteenth amendments to the Constitution of the United States prevent a state from compelling Amish children to attend formal high school to age sixteen.

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Jonas Yoder, Wallace Miller and Adin Yutzy, the respondents, are members of the Old Order Amish religion and the Conservative Amish Mennonite Church. They were charged, tried, and convicted of violating Wisconsin's compulsory attendance law[1] and fined the sum of

28. The majority did not cite *Javins*.

29. The Court recognized the diverse treatment landlord-tenant law enjoys in various jurisdictions and that a state can legislatively provide for the withholding of rental payments by the tenant. *Id.* at 68-69.

30. By ignoring *Javins*, new impetus has been given to case results that are inapposite to twentieth century urban America. *See, e.g.*, McKey v. Fairbairn, 345 F.2d 739, (D.D.C. 1965). The court noted that in the absence of a promise to make repairs, the landlord was not bound to repair a roof, the leakage of which caused a visitor in tenant's home to fall and be injured. *Id.* at 742. The court quoted with approval from Security Savings & Commercial Bank v. Sullivan, 261 F. 461 (D.D.C. 1919):

> It is settled law that where the owner of premises, by lease, parts with the entire possession and control of the premises, and the tenant, either by express provision of the lease or by the silence of the lease on that subject, assumes liability for the keeping of the premises in proper repair, the tenant, and not the owner, will be liable in causes of an accident due to negligence in allowing the premises, or any portion thereof, to get out of repair.

Id. at 120, 261 F. at 462. *See also* Foster v. United States, 214 F. Supp. 181 (S.D. Miss. 1963); 3 H. TIFFANY, REAL PROPERTY § 905 (1939); Annot., 150 A.L.R. 1373-84 (1944).

1. WIS. STAT. § 118.15 (1969) provides in pertinent part:

118.15 *Compulsory school attendance*

(1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed