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LANDLORD AND TENANT: DEFECTS EXISTING AT THE TIME OF THE LEASE

In the bailment and sale of chattels the law of negligence has imposed on the bailor and seller a duty to exercise reasonable care in inspecting and preparing a chattel so that it will be safe for its intended use. Implied warranties have developed in the sale of chattels. But *caveat emptor* still prevails in the sale and leasing of real property; and the liability of the landlord for injuries caused the tenant by defects existing in the premises at the time of the demise continues to be the subject of much litigation although the courts treat the law as well settled. The general rule is stated to be that the landlord is not liable—*caveat lessee*—on the theory that the tenant assumes the risk of defective conditions existing at the time the lease is executed.¹ But the exception early developed that the landlord was liable if he knew of a defect and the tenant was unaware of it and could not have discovered it by a reasonable inspection.² Thus,

74. Before 1929, the inchoate lien doctrine was not used at all by the Supreme Court and before 1950 it was used only in cases arising under § 3466 of the *Revised Statutes*. See text accompanying notes 48-51. Thus the dilemma is of the Court's own making.

75. The federal tax lien is valid as against anybody except a mortgagee, pledgee, purchaser or judgment creditor without filing. *United States v. Toys of the World Club, Inc.*, 170 F. Supp. 450 (S.D.N.Y. 1959); *In re Litt*, 128 F. Supp. 34 (E.D. Pa. 1955). It is valid as against a mortgagee, pledgee, purchaser, or judgment creditor provided it has been filed before the competing lien became specific and perfected. *United States v. Security Trust & Sav. Bank*, *supra* note 20; *United States v. Kings County Iron Works*, 224 F.2d 232 (2d Cir. 1955); *United States v. Phillips*, 198 F.2d 634 (5th Cir. 1952).

1. *Valin v. Jewell*, 88 Conn. 151, 90 Atl. 36 (1914); *Whitman v. Oronor Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032 (1892); *Bowe v. Hunking*, 135 Mass. 380 (1883); *Marshman v. Stanley*, 122 N.E.2d 482 (Ohio Ct. App. 1952); *Stewart v. Raleigh County Bank*, 121 W. Va. 181, 2 S.E.2d 274 (1939).

2. *Wilson v. Lamberton*, 102 F.2d 506 (3d Cir. 1924); *Shotwell v. Bloom*, 60 Cal. App. 2d 303, 140 P.2d 728 (1943); *Wilensky v. Perell*, 72 So. 2d 278 (Fla. Sup. Ct. 1954); *Borggard v. Gale*, 107 Ill. App. 128, *aff'd*, 205 Ill. 511, 68 N.E. 1063 (1903);

the landlord's duty, at most, is merely to disclose the existence of a defect, not to correct it.³

The ordinary judicial statement of the rule fails, however, to note any distinction between knowledge of the physical condition and appreciation of the risk. Failure to note the distinction may seem of slight importance when a tenant is struck on the head by a trap door which she knew was standing almost perpendicular to the floor,⁴ but the omission can confuse the opinion of a court. In a Kansas case the tenant alleged that she received an injury which caused the removal of one eye and blindness in the other from a quantity of "Barnyard Spray," a DDT preparation, which the landlord had left in the food cabinet of the kitchen.⁵ The court held the pleadings insufficient to state a cause of action in that the tenant failed to allege how the spray entered her eyes—causation. The court also held the pleadings insufficient because the tenant should have discovered the spray, a patent defect. Perhaps the court had in mind that she should have realized the risk of injury from the spray entering her eyes while it was being used, but it could not have entered her eyes while she was using it since she did not discover it until *after* her injury according to the allegations. If the chemical entered her eyes through vaporization while in the cabinet or through a residue of vapor clinging in the air after someone else used it, charging the tenant with realizing such a risk as a matter of law seems questionable.⁶

The *Restatement of Torts* uses the word *condition* rather than *defect* where it states the basis of a landlord's liability to be that he knows of the condition and realizes the risk; and that the lessee does not know of the condition or the risk.⁷ The Fourth Circuit made clear the distinction

Guenther v. Jackson, 79 Ind. App. 127, 137 N.E. 582 (1922), 73 Ind. App. 162, 126 N.E. 873 (1920); Booth v. Merriam, 155 Mass. 521, 30 N.E. 85 (1892).

3. Daulton v. Williams, 81 Cal. App. 2d 70, 183 P.2d 325 (1947). This duty to disclose latent defects has been said to be a continuing one which imposes upon the lessor the obligation of disclosing latent defects of which he knows even if he was not the lessor when the lease was made. Grimmeissen v. Walgreen Drug Stores, 229 S.W.2d 593 (St. Louis Ct. App. 1950). *But cf.* Roehrs v. Timmons, 28 Ind. App. 578, 63 N.E. 481 (1902).

4. Roberts v. Rogers, 129 Neb. 298, 261 N.W. 354 (1935).

5. Branstetter v. Robbins, 178 Kan. 8, 283 P.2d 455 (1955).

6. In State v. Feldstein, 207 Md. 20, 113 A.2d 100 (1955) the tenant had been asphyxiated by carbon monoxide from an unvented gas water heater. The court in discussing whether the defect was latent or patent as to the tenant seemed reluctant to refer explicitly to the risk of asphyxiation from carbon monoxide as it stated that "the mere fact that there was an opening three inches wide in the top of the heater surrounded by a raised flange would not, as a matter of law, be notice to the tenant that a vent was necessary." *Id.* at 30, 113 A.2d at 104.

7. "A lessor of land, who conceals or fails to disclose to his lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land, is subject to liability for such harm caused thereby to the lessee . . . if

"(a) the lessee does not know of the condition or the risk involved therein, and

when it found that a tenant knew of the defect of rat infestation, but did not realize the risk of typhus infection.⁸ The analytical function of the risk concept is clearly illustrated in a Minnesota case in which the court held that where a landlord knew of the risk of accidental discharge of tear gas on the premises, he was not liable for powder burn injuries since he did not know that the device on the premises could be used to explode a shot gun shell.⁹ The result was not within the risk of which the landlord was aware.

The test of the landlord's knowledge of the source of danger is subjective; the courts are concerned with his actual knowledge.¹⁰ The tenant is held to both subjective and objective tests, *i.e.*, actual knowledge of defects and that knowledge which would result from a reasonably careful inspection.¹¹ The question—what test is applied to the landlord and tenant regarding their appreciation of the risk—remains. Justice Holmes said: "The law takes no account of the infinite varieties of temperament, intellect and education which makes the internal character of a given act so different in different men. It does not attempt to see men as *God* sees them, for more than one sufficient reason."¹² The courts in the law of landlord and tenant seldom discuss the problem. In an early Massachusetts case when discussing appreciation of the risk the court stated that a landlord "is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would not warn him"¹³ A Maryland court has held that knowledge that a gas heater is unvented does not charge the tenant, as a

"(b) the lessor knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk." RESTATEMENT, TORTS § 358 (1934).

8. Maryland, for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949) (landlord in control of part of multiple dwelling). See also Cutter v. Hamlen, 147 Mass. 471, 18 N.E. 397 (1888); Branham v. Fordyce, 103 Ohio App. 379, 145 N.E.2d 471 (1957).

9. Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949).

10. Daulton v. Williams, 81 Cal. App. 2d 70, 183 P.2d 325 (1947). In addition the landlord may be required to disclose to the tenant information which he has which would lead a reasonable man to suspect the danger. Meade v. Montrose, 173 Mo. App. 722, 160 S.W. 11 (1913); Charlton v. Brunelle, 82 N.H. 100, 130 Atl. 216 (1925); Cesar v. Karutz, 60 N.Y. 229 (1875).

11. Shotwell v. Bloom, 60 Cal. App. 303, 140 P.2d 728 (1943); Purcell v. English, 86 Ind. 34 (1882); Roberts v. Rogers, 129 Neb. 298, 261 N.W. 354 (1935). A latent defect has been defined as one which is not discoverable by ordinary observation or reasonably careful inspection. Kearns v. Smith, 55 Cal. App. 2d 532, 131 P.2d 36 (1942); Garshon v. Aaron, 330 Ill. App. 540, 71 N.E.2d 799 (1947); Smith v. Morrow, 230 Ill. App. 382 (1923).

12. HOLMES, THE COMMON LAW 108 (1881).

13. Cutter v. Hamlen, 147 Mass. 471, 474, 18 N.E. 397, 398 (1888). The concept of the reasonable man appears to find its greatest difficulty in the question of experience. See PROSSER, TORTS 130 (2d ed. 1955).

matter of law, with notice of the risk of asphyxiation from carbon monoxide.¹⁴ An Ohio court has reached the opposite result.¹⁵ Of more significance than the holding on common knowledge is the latter court's rejection of plaintiff's "ingenious argument" that the risk was a latent one as to the tenant because of his limited education. The objective "reasonable man" appears, therefore, to be the standard to which the cases hold the tenant in discovery of the defect and appreciation of the risk.

There are a few cases, however, which create some doubt regarding this conclusion. In a California case where the tenant had been asphyxiated by carbon monoxide from a gas room heater the court emphasized that the tenant "was employed regularly as an oil well driller, and must be presumed to have been familiar with the danger of noxious fumes incident to the improper combustion of gas."¹⁶ His particular education or experience was considered significant, rather than that common to all the community. This may be reconciled, however, with the principle which, as part of the objective standard, charges the actor with such *superior* knowledge and skill as he actually has.¹⁷ It is doubtful whether a Tennessee case may be so reconciled. The court stated that the facts that the landlord was a builder and that the tenant was a woman with no "building structural knowledge" were factors to be considered in determining their appreciation of the risk of falling through a plasterboard portion of an attic floor.¹⁸ It is arguable that no special training or experience is required to know the difference in supporting capacity between wood and plasterboard.¹⁹ Furthermore, it is difficult to comprehend how the fact that the tenant was a woman could put her in a superior position to the ordinary man. The court, thus, appears to introduce factors, at least as to the tenant, which derogate from the general concept of the reasonable man and tend toward a subjective test.

Such slight authority indicates no trend toward a subjective test, but is worthy of note in conjunction with the position of the *Restatement of Torts* which makes no reference to what the tenant *should* know. The *Restatement* rule is written in terms of what the landlord and tenant actually know of the defect and risk, and then there is added as a final con-

14. *State v. Feldstein*, 207 Md. App. 20, 113 A.2d 100 (1955). Although involving a different rule of law the holding of *Davis v. Hochfelder*, 153 La. 183, 95 So. 598 (1923) on the tenant's contributory negligence in using an unvented heater appears to place it in accord with the *Feldstein* case.

15. *Branham v. Fordyce*, 103 Ohio App. 379, 145 N.E.2d 471 (1957).

16. *Nelson v. Myers*, 94 Cal. App. 66, 74, 270 Pac. 719, 722 (1928).

17. See PROSSER, *TORTS* 132 (2d ed. 1955).

18. *Boyce v. Shankman*, 40 Tenn. App. 475, 485-86, 292 S.W.2d 229, 234 (1953) (in context of a unique rule on landlord's liability).

19. *Cf. Branham v. Fordyce*, 103 Ohio App. 379, 382, 145 N.E.2d 471, 474 (1957).

dition to the landlord's liability that he must have "reason to believe that the lessee will not discover the condition or realize the risk."²⁰ The comments make clear that the landlord can expect an inspection by the tenant.²¹ But by placing emphasis upon what the landlord has reason to believe, the *Restatement* rule would hold the landlord liable if the tenant's age, intelligence or experience precluded an inspection or awareness equal to that of the ordinary man, and the landlord knew of these facts. Under this position the qualities of the particular tenant, as known by the landlord, become significant.²² Perhaps this has never been argued to a court, but, regardless of the reason, no court appears to have noted the distinction between the *Restatement* rule and the common judicially announced rule except, possibly, the Tennessee court.²³

As stated in a leading article on the law of landlord and tenant the courts are fairly uniform in their statement of the rule holding a landlord liable for injuries resulting from latent defects, but they are not in complete agreement as to the theory of his liability.²⁴ Deceit²⁵ and negligence²⁶ have been advanced as supporting theories, but there seems to be no reason for distorting the law of deceit where negligence will adequately protect the tenant's rights. The landlord has a duty to inform his tenant of any latent defects and dangers of which the landlord is aware. A breach of this duty may cause the tenant to be unaware of the hazard and ultimately may lead to his injury. The tenant has a corresponding duty to exercise reasonable care for his own protection which includes making a careful inspection to ascertain defective conditions and hazards in the premises. Thus, in the typical action under the rule the elements of negligence—a duty owed by the defendant, a breach of the

20. RESTATEMENT, TORTS § 358 (1934).

21. *Id.* §§ 358, comment b, 353, comment c.

22. This conclusion is consistent with RESTATEMENT, TORTS § 480 (1934) which states:

"A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant

"(a) knew of the plaintiff's situation, and

"(b) realized or had reason to realize that the plaintiff was inattentive and therefor unlikely to discover his peril in time to avoid the harm, and

"(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

23. See text accompanying note 18 *supra*.

24. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260, 270 (1927).

25. *Holzhauser v. Sheeny*, 127 Ky. 28, 104 S.W. 1034 (1907).

26. *Wilensky v. Perell*, 72 So. 2d 278 (Fla. Sup. Ct. 1954); *Cowan v. Sunderland*, 145 Mass. 363, 14 N.E. 117 (1887).

duty, causation, injury, and due care by the plaintiff—are present.²⁷

Imprecision has led some courts into a confusing use of the concept of contributory negligence. In a California case after finding that the tenant knew or should have known of the defect and the risk of asphyxiation from carbon monoxide produced by an unvented gas heater, the court seemed to approve the proposition that by using the room while the heater was in operation the tenant was contributorily negligent with respect to the charge that the landlord had failed to inform him of a latent defect.²⁸ But the only negligence of the tenant which was relevant was that of failing to discover the defect. If a tenant knows or should know of a defect and risk, the quantum of care exercised by the tenant with respect to the hazard is irrelevant because the landlord's responsibility extends only to the tenant's awareness; the landlord is not responsible for the creation or the maintenance of the hazard. The proper perspective can best be obtained by noting that it is from the injury to the tenant's awareness—his ignorance of the danger—that all recoverable damages flow.

The rigidity of the rule limiting the landlord's liability has been assaulted by the device of an implied warranty that the premises are suitable for occupation at the time of the lease. The warranty is found where a fully furnished house is rented for a short term. Massachusetts is the only state which clearly maintains this position with regard to personal injuries.²⁹ Although this implied warranty was adopted by the District Court of Appeal of California as to furnishings,³⁰ later cases by the supreme court leave the status of the warranty in California in doubt.³¹ The warranty is implied only with regard to the condition of the premises at the beginning of the tenancy.³² Theories advanced to support the implied warranty by the landlord are: a short term is consistent only with immediate occupation without the necessity of alteration; a furnished house is difficult for a tenant to inspect before renting;³³ the warranty

27. It should be noted that the burden of pleading and proving the tenant's want of awareness of the defect and risk rests upon the tenant. See *Goodmaker v. Kelley*, 154 Cal. App. 2d 457, 316 P.2d 746 (1957).

28. *Nelson v. Myers*, 94 Cal. App. 66, 270 Pac. 719 (1928). See also *Goodmaker v. Kelley*, 154 Cal. App. 2d 457, 316 P.2d 746 (1957); *Hamilton v. Feary*, 8 Ind. App. 615, 35 N.E. 48 (1893).

29. *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942) (injury to tenant from collapse of bunk ladder); *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892) (defense in action for rent). *Young v. Povich*, 121 Me. 141, 116 Atl. 26 (1922) applied the warranty in an action to recover for rent paid in advance.

30. *Fisher v. Pennington*, 116 Cal. App. 248, 2 P.2d 518 (1931).

31. *Stowe v. Fritzie Hotels*, 44 Cal. 2d 416, 282 P.2d 890 (1955); *Forrester v. Hoover Hotel & Investment Co.*, 87 Cal. 2d 226, 196 P.2d 825 (1948).

32. *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942).

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

is equitable and just.³⁴

Tennessee, alone, has avoided the rigors of the rule which charges a landlord only with actual notice and the tenant with notice imputed through inspection by not adopting it at all. The Tennessee court places a duty of inspection on the landlord as well as the tenant.³⁵ In *Wilcox v. Hines* the court stated the rule as follows:

[T]he landlord is liable for such defects and dangers as are in existence when the lease is made, provided he knew of them, or ought to know of them, and provided, also, that the tenant does not know of them, and could not know of them; *both* parties in the matter exercising reasonable care and diligence.³⁶
(Emphasis added.)

It was strenuously argued to the court that a landlord is chargeable only with actual knowledge and that no active duty rests upon him to ascertain defects and dangers. To this the court replied:

The logic of this position is that a landlord is under no obligation to know anything about the condition of his premises,—whether they are dangerous or safe,—whether habitable or a nuisance,—and so long as he keeps himself ignorant, either intentionally or negligently, he cannot be held liable for any damages resulting from the dangerous condition of his property when leased; but if, by accident or examination, he becomes aware that a secret defect does exist, then he is liable, if he fails to disclose it. Under this ruling the landlord is placed in the better condition, the more negligent and inattentive he is, and a premium is put upon his ignorance

The ground of liability upon the part of a landlord when he demises dangerous property has nothing special to do with the relation of landlord and tenant. It is the ordinary case of liability for personal misfeasance, which runs through all the relations of individuals to each other.³⁷

The court concluded that *caveat emptor* applies only where the rights of the parties rest on contract, not, as in the case before it, where the cause of action is in tort.

34. *Young v. Povich*, 121 Me. 141, 116 Atl. 26 (1922).

35. *Wilcox v. Hines*, 100 Tenn. 538, 46 S.W. 297 (1898); *Boyce v. Shankman*, 40 Tenn. App. 475, 292 S.W.2d 229 (1953).

36. 100 Tenn. 538, 557, 46 S.W. 297, 302 (1898) (tenant falling through porch floor).

37. *Id.* at 547-49, 46 S.W. at 299.

In reaching its result the court relied heavily on cases which had found exceptions to the rule of *caveat emptor* where the injury was caused by a part of the property over which the landlord retained control or by property which had been let for a purpose involving admission of the public. In those instances the lessor is under an affirmative duty to exercise reasonable care to inspect and repair the property.³⁸ The court found no significant distinction between such cases and the situation before it with respect to the landlord's duty to know the condition of his property. The distinction between a lease of premises with complete surrender of control over them and a lease with retention of some control by the lessor was found to rest only upon the duration of liability; liability in the former existing only at the time of the lease, liability in the latter continuing so long as control is retained. As to the public purpose exception the court found no difference between a duty not to endanger the public and a duty not to endanger the individual lessee.³⁹

The rule has been attacked as a reversal of *caveat lessee* to the position of *caveat lessor*.⁴⁰ However, since the duty to exercise diligence to discover defects rests upon both lessee and lessor, *caveat lessee and lessor* would appear more appropriate. No special appellation seems really necessary since the rule does not change the principle that a person must exercise reasonable care in his conduct for the protection of himself and others. In actual application the rule has not resulted in the landlord's becoming a guarantor of the condition of the premises.⁴¹ To the contrary, the tenant's duty may tend to cancel that of the landlord with the result of no liability. The Tennessee court observes that that is the ordinary and proper function of contributory negligence.⁴² It should also be noted that because of his oftentimes long familiarity with the property the landlord may be able to discover more about its condition than the tenant although both exercise the same degree of care.

Caveat emptor which still rules with such great strength in real property transactions is no longer dominant in chattel transactions. In the sale and bailment of chattels, although the buyer or bailee is required to exercise ordinary observation, the obligation of inspection to discover

38. See PROSSER, TORTS 468, 471 (2d ed. 1955).

39. Wilcox v. Hines, 100 Tenn. 538, 558, 46 S.W. 297, 302 (1898).

40. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260, 266 (1927).

41. Landlord not liable: Glassman v. Martin, 196 Tenn. 595, 269 S.W.2d 908 (1954); Jolly Motor Livery Corp. v. Allenberg, 188 Tenn. 452, 221 S.W.2d 513 (1949); Haire v. American Trust & Banking Co., 19 Tenn. App. 656, 94 S.W.2d 59 (1935); Diamond v. Drew, 17 Tenn. App. 488, 68 S.W.2d 955 (1933); Bishop v. Botto, 16 Tenn. App. 178, 65 S.W.2d 834 (1932). Landlord liable: Pulaski Housing Authority v. Smith, 39 Tenn. App. 213, 282 S.W.2d 213 (1955); Boyce v. Shankman, 40 Tenn. App. 475, 292 S.W.2d 229 (1953).

42. Wilcox v. Hines, 100 Tenn. 538, 562, 46 S.W. 297, 303 (1898).

defects in the chattels in order to prevent harm to the one receiving them is part of the duty of exercising ordinary care resting with the seller or bailor.⁴³ Yet in real property transactions the seller or lessor generally need not inspect the premises; this duty is upon the buyer. Even the courts of Tennessee have refused to extend the landlord's duty to inspect to the vendor in a sale of realty.⁴⁴

Dean Prosser states that "'duty' is . . . an expression of the sum total of . . . considerations of policy."⁴⁵ One authority has suggested that one of the factors involved in the origin of the rule of *caveat emptor* was the influence of the wealthy and powerful landowning class upon the English judges.⁴⁶ The break in the rule as to chattels can be accounted for by the revolution in means of production and distribution. From the system of the individual producer selling directly to a single or a few consumers the system of concentrated mass production developed with distribution through large outlets, each selling to many consumers. Each seller then had a greater impact on society in terms of both immediate buyer and ultimate consumer. The choice was between a single inspection operation and thousands; and the seller's generally greater familiarity with his goods was an important consideration. The duty to inspect the goods fell upon the seller.

There would seem to be a temporary aspect to the leasing of most homes today, whether furnished or unfurnished. Land ownership has become an almost traditional goal. One seldom finds the permanence with ties much like allegiance which characterized the landlord-tenant relationship in its feudal origin.⁴⁷ Instead factors appear similar to those discussed with respect to chattels. The landlord has a broader impact upon society. The landlord through continuity and familiarity is in a position to more efficiently ascertain the condition of the premises. At the least the rule of Tennessee seems called for.

Because of the vast precedent of the rule of *caveat emptor* change is more likely to come through the legislature. There can substantive considerations more readily overcome the formal strictures of the ancient common law. No statute appears to have been addressed to the precise problem of the initial letting of premises. Statutes have been enacted, however, which go beyond the duty to warn the tenant of hazards at the time of the demise and impose upon the landlord the duty to repair the

43. See PROSSER, TORTS 491-514 (2d ed. 1955). A seller's liability for negligence has been largely superseded by liability for breach of warranty.

44. *Smith v. Tucker*, 151 Tenn. 347, 270 S.W. 66 (1925).

45. PROSSER, TORTS 167 (2d ed. 1955).

46. Harkrider, *supra* note 40, at 261.

47. See *Smith v. Tucker*, 151 Tenn. 347, 360-61, 270 S.W. 66, 69 (1925).

premises throughout the term of the lease.⁴⁸

The statutes are of three principal types. Those of California, Montana, North Dakota, Oklahoma, and South Dakota require that buildings intended for human occupation be put in fit condition by the landlord, who must also repair subsequent dilapidations.⁴⁹ In the event the landlord fails to repair the premises the statutes provide that the tenant may make the repairs at the landlord's expense or vacate the premises. A second type of legislation imposes on the landlord the duty to repair tenements⁵⁰ or multiple dwellings⁵¹ or even all dwellings.⁵² Violations of these provisions are punishable by fine or imprisonment; civil penalties recoverable by the municipality are also provided; but no remedy is expressly given to the tenant.

Decisions under the first type of legislation have held that the remedies given the tenant by statute are exclusive and that the common law rules prevail as to the landlord's liability to the tenant for personal injuries.⁵³ Under the second type the courts are divided as to whether breach of the statutory duty to repair gives rise to tort liability.⁵⁴ The statutes of Georgia and Louisiana, the third principal grouping, expressly give the tenant the right to sue in tort.⁵⁵

48. An incisive analysis of these statutes is found in Feuerstein and Shestack, *Landlord and Tenant—The Statutory Duty to Repair*, 45 ILL. L. REV. 205 (1950).

49. CAL. CIV. CODE §§ 1941-42; MONT. REV. CODES ANN. §§ 42-201 to -202 (1947); N.D. REV. CODE §§ 47-1612 to -1613 (1943); OKLA. STAT. tit. 41, §§ 31-32 (1951); S.D. CODE §§ 38.0409-.0410 (1939).

50. CONN. REV. GEN. STAT. §§ 19-343, -347 (1958); MASS. ANN. LAWS ch. 144, §§ 66, 89 (1957); WIS. STAT. ANN. § 101.06 (Supp. 1959), § 101.28 (1957) (public building).

51. N.Y. MULT. DWELL. LAW §§ 78, 304.

52. IOWA CODE ANN. §§ 413.66, .108 (1946); MICH. STAT. ANN. §§ 5.2843, .2873 (1958).

53. *Van Every v. Ogg*, 59 Cal. 563 (1881); *Bush v. Baker*, 51 Mont. 326, 152 Pac. 750 (1915); *Newman v. Sears, Roebuck & Co.*, 77 N.D. 466, 43 N.W.2d 411 (1950); *Alfe v. New York Life Ins. Co.*, 180 Okla. 87, 67 P.2d 947 (1937). Cases are collected in Annot., 17 A.L.R.2d 704 (1951).

54. Violation of such a statute was held to impose tort liability on the landlord in *Morningstar v. Strich*, 326 Mich. 541, 40 N.W.2d 719 (1950); *Daniels v. Brunton*, 9 N.J. Super. 294, 76 A.2d 73 (1950), *aff'd*, 7 N.J. 102, 80 A.2d 547 (1951); *Altz v. Lieberman*, 233 N.Y. 16, 134 N.E. 703 (1922) (remedy extending to those whom there was purpose to protect). *Contra*: *Fogarty v. M. J. Beuchler & Son*, 124 Conn. 325, 199 Atl. 550 (1938) (landlord liable only as to portion of premises over which he retained control—common law rule); *Johnson v. Carter*, 218 Iowa 587, 255 N.W. 864 (1934). *Cf.* *Garland v. Stetson*, 292 Mass. 95, 197 N.E. 679 (1935). Cases are collected in Annot., 17 A.L.R.2d 704 (1951).

In addition to the general repair statutes there are numerous statutes and ordinances which require the landlord to take specific measures as to fire protection, lighting and maintenance of halls and stairways, and maintenance of elevators. Failure to comply with these requirements has generally been held to impose tort liability on the lessor. See Note, 62 HARV. L. REV. 669, 675 (1949). Cases are collected in Annot., 132 A.L.R. 863 (1941).

55. GA. CODE ANN. §§ 61-111 to -112 (1937); LA. CIV. CODE ANN. arts. 670, 2322, 2693-95, 2716 (West 1952).

These statutes recognize the impact of the landlord upon society in urban communities⁵⁶ and his superior position in protecting against hazards in the premises, especially with respect to low income housing.⁵⁷ No sound basis exists, however, to support the statutory derogation from the ordinary situation in which the duty owed the individual is commensurate with that owed the state.⁵⁸

The fundamental objection to these statutes, however, even in those states imposing tort liability for statutory breach, is that they have given no indication of the manner in which a landlord is required to carry out his duty of repair.⁵⁹ The courts have agreed that a landlord must have actual or constructive notice of a defect and risk if he is to be charged with liability to a tenant.⁶⁰ They have not agreed, however, whether a landlord is chargeable with notice of defects which would have been discovered by an inspection, *i.e.*, whether the landlord has a duty to inspect the premises.⁶¹ Yet, as noted above, the duty to inspect lies at the heart

56. The Iowa statute applies to cities with a population of 15,000 or more. Other cities are permitted to adopt it. IOWA CODE ANN. § 413.1 (Supp. 1959), § 413.2 (1946). The New York statute applies to all cities with a population of 8,000 or more. Other cities may adopt it. N.Y. MULT. DWELL. LAW § 3. Cities of 100,000 or more people are fully subject to the statute of Michigan. It has limited application to cities with populations of 10,000 but less than 100,000 people. MICH. STAT. ANN. § 5.2771 (1958). The Massachusetts statute applies to all cities which adopt it except Boston. MASS. ANN. LAWS ch. 144, § 1 (1957).

57. See Mitchell, *Historical Development of the Multiple Dwelling Law*, N.Y. CONSOL. LAWS, bk. 35-A, p. ix (McKinney 1946).

58. Feuerstein and Shestack state that the principal arguments against the repair statutes have been that such a duty discourages investment in housing and that the additional burden upon the owner leads to higher rentals which shift the burden to the tenant. The authors answer that the annual return from rented real estate is unusually high and that a rise in rent is extremely conjectural. Feuerstein and Shestack, *supra* note 48, at 231-32. Recognizing that the arguments have greater weight with regard to slum housing, the authors state:

"The solution, however, does not lie in allowing defective housing. The health and safety of the tenant require that dwellings be kept in good repair. Protection of health and safety are more important than maintenance of real estate profits in low income housing. If private enterprise is able to offer housing that affords the protection needed by the tenant, well and good. If it cannot, then perhaps this is the place that public enterprise should step in." *Id.* at 233.

59. See Feuerstein and Shestack, *supra* note 48, at 211-15.

60. *Elijah A. Brown Co. v. Wilson*, 191 Ga. 750, 13 S.E.2d 779 (1941); *Morningstar v. Strich*, 326 Mich. 541, 40 N.W.2d 719 (1950); *Daniels v. Brunton*, 9 N.J. Super. 294, 76 A.2d 73 (1950), *aff'd*, 7 N.J. 102, 80 A.2d 547 (1951); *Tkach v. Montefiore Hospital*, 289 N.Y. 387, 46 N.E.2d 333 (1943).

The exception is Louisiana where the lessor "*guarantees* the lessee against all the vices and defects of the thing, which may prevent its being used *even in case it should appear he knew nothing of the existence of such vices and defects*, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee . . ." LA. CIV. CODE ANN. art. 2695 (West 1952). (Emphasis added.)

61. The Georgia court has held that as to defects not in existence at the time of the lease and where the tenant has exclusive possession and control, the landlord has no duty to inspect the premises because he has no right to enter them. *Ocean S.S. Co. v. Hamilton*, 112 Ga. 901, 38 S.E. 204 (1901). The duty to inspect exists in Michigan. *Morn-*

of the entire problem.⁶² Whether one approaches the problem of defective leased premises from the standpoint of warning the tenant of hazards at the outset of the lease or from the standpoint of repairing hazards throughout the term of the lease, the statute should explicitly place upon the landlord a duty of inspection. Ignorance seems hardly the goal to set for the landlord.

PROPOSALS FOR TAXING INTERSTATE SALES IN INDIANA

With the ever soaring cost of state government¹ the tax structure of the state must be constantly re-examined with a view to meeting the increasing demands upon it. The basic tax in Indiana today is the gross income tax.² This tax has two rates: 3/8 of one percent on sales at

ingstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1950); Malosh v. Thompson, 265 Mich. 320, 251 N.W. 346 (1933) (*semble*); Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925) ("supervision"). New Jersey and New York have raised but not decided the general question. Daniels v. Brunton, 9 N.J. Super. 294, 76 A.2d 73 (1950), *aff'd*, 7 N.J. 102, 80 A.2d 547 (1951); Tkach v. Montefiore Hospital, 289 N.Y. 387, 46 N.E.2d 333 (1943).

62. Two additional suggestions have been directed to the repair statutes. One is that the statutes should make clear that contributory negligence is available to the landlord as a defense in a civil action arising under the statute and that the existence of contributory negligence should be determined from all the circumstances surrounding the plaintiff's conduct. The defense of assumption of risk should not be available. Feuerstein and Shestack, *supra* note 48, at 215-20, 227. The other proposal is that the statute should render void any agreement in connection with the lease which purports either to shift any duty imposed by the statute from the landlord to the tenant, or to exempt the landlord from civil liability for violation of the statutory duty. *Id.* at 220-25, 227-28. It has been noted that in the absence of the latter provision if the lessor uses a "superior bargaining position to impose a contract to repair on a lessee of insubstantial means, he would not necessarily be relieved of liability, at least as to third persons, because he might be held to be negligent in entrusting the performance of his duty to the impecunious tenant." Note, 62 HARV. L. REV. 669, 677(1949).

1. In 1955 the total expenditure of all state governments in the United States was \$20,357,065,000. U.S. DEP'T OF COMMERCE, COMPENDIUM OF STATE GOV'T FINANCE IN 1955 8 (1956). By 1958 the total state expenditures had risen to \$28,080,313,000, a percentage rise of 29.9% during the four year period. U.S. DEP'T OF COMMERCE, COMPENDIUM OF STATE GOV'T FINANCE IN 1958 21 (1959). Indiana also has had a general increase in state expenditures during the years 1955-1958. In 1955 Indiana expenditures were \$440,168,000, U.S. DEP'T OF COMMERCE, COMPENDIUM OF GOV'T FINANCE IN 1955 8 (1956). By 1958 expenditures had risen to \$584,407,000 an increase of 23.9% during the four year period. U.S. DEP'T OF COMMERCE, COMPENDIUM OF STATE GOV'T FINANCE IN 1958 21 (1959). And with the emphasis now being placed on education as well as other governmental expenses expenditures will continue to rise in the future.

2. When the gross income tax statute was passed in 1933, the purpose was not only to gain additional revenue for the state, but also to give relief to hard pressed parties with land interests. In addition, a gross income tax was utilized because of the possibility that a net income tax might be unconstitutional in Indiana. Three times prior to 1933 attempts were made to amend the state constitution to permit the enactment of a net income tax, however, all attempts failed. Ironically, shortly after the gross in-