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LINDSEY V. NORMET: A SUPREME COURT REFUSAL TO FEDERALIZE OREGON'S LANDLORD—TENANT PROCEDURE

In *Lindsey v. Normet*,[1] month-to-month tenants refused to pay their rent unless certain violations of a local housing code were remedied. After the landlord threatened to evict them for nonpayment of rent, the tenants filed a class action in federal court asking that the Oregon Forcible Entry and Wrongful Detainer Statute (FED)[2] be declared unconstitutional on its face.

The tenants' principal attack was against the limitation of triable issues in the FED statute;[3] the statute having precluded the raising of other affirmative defenses, such as the landlord's failure to maintain the premises, the property being in violation of the housing code or the landlord's eviction of the tenants in retaliation for reporting housing code violations.[4] Appellant-tenants claimed this limitation of

1. 405 U.S. 56 (1972).

2. ORE. REV. STAT. §§ 105.105-.160 (Supp. 1971).

3. The tenants also attacked: (1) the requirement of the FED statute that the trial be held no later than six days after service of the complaint unless security for accruing rent was provided; and (2) the requirement of posting bond on appeal in twice the amount of rent expected to accrue pending appellate decision, with a complete forfeiture of this bond if the lower court decision is affirmed. The Supreme Court found that the six day trial requirement was not unconstitutional, but the double bond requirement was found to be a violation of the equal protection clause as discriminating against tenants who want to appeal and imposing an unfair burden on indigent tenants. 405 U.S. at 64.

4. The landlord need only prove: (1) a description of the premises; (2) that the tenant is in possession; (3) that the tenant unlawfully holds the premises with force; and (4) that the landlord is entitled to possession. ORE. REV. STAT. § 105.125 (Supp. 1971). A tenant is considered unlawfully holding with force "[w]hen the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement. . . ." *Id.* § 105.115. The verdict by the court or jury is limited to the truth of the landlord's complaint. *Id.* §§ 105.145-.150. An issue apparently not raised by plaintiffs was whether the rent was "due" under the FED statute. If an implied warranty of habitability was accepted by Oregon courts, plaintiffs could argue that the rent was not due because of the landlord's breach. Plaintiffs may have decided not to argue this point because a federal court probably would not have interpreted the

defenses to be a denial of due process in that they were denied an opportunity to present every available defense.[5] They also argued that the FED statute denied tenants equal protection of the laws by "classifying tenants of real property differently from other tenants for purposes of possessory actions. . . ."[6] Appelants claimed that the equal protection standard should be stringently applied because of the statute's effect on the "need for decent shelter"[7] and the "right to retain peaceful possession of one's home"[8]—both of which should be protected as "fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest."[9]

The Supreme Court affirmed the district court's holding that the limitation of defenses did not violate the requirements of due process or equal protection. In an opinion written by Justice White, the majority held that the FED statute was a reflection of the common law rule of independent covenants—that the tenant's covenant to pay rent was not dependent upon any obligation of the landlord to maintain the premises. The Supreme Court refused to upset that long-standing rule and, therefore, found that the Oregon courts did not violate the tenant's right to due process by keeping the duties of the landlord and tenant as separate triable issues and by prohibiting the tenant from raising certain defenses to a landlord's action for possession.[10] The Court also held that the FED statute did not violate the tenants' equal protection rights because Oregon had an adequate state interest in the quick settlement of disputes over the possession of real property; thus, the limitation of triable issues was justified.[11] Furthermore, the Court refused to apply the more stringent equal protection standard since there is no constitutional right to adequate housing, and the assurance of adequate housing is a legislative, not judicial, function.[12]

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state statute. Furthermore, plaintiffs' primary target seems to be the constitutionality of the common law doctrine of independent covenants in leases, not an interpretation of the FED statute.

5. *See, e.g.*, American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932).
6. 405 U.S. at 70.
7. *Id.* at 73.
8. *Id.*
9. *Id.*
10. *Id.* at 64-69.
11. *Id.* at 69-73.
12. *Id.* at 73-74.

Historically, the lease has been considered a conveyance of land as well as a contract.[13] Consequently, rent was considered a species of realty and, absent an express covenant in the lease, the only duty of the landlord was to provide for quiet enjoyment of the land by the tenant.[14] Furthermore, any other covenants expressed or implied in the lease contract have usually been considered as independent covenants, so that a breach by either party would not excuse the other party from performance.[15] This traditional view of leases puts the urban tenant at a significant disadvantage:[16] the tenant, bound by the doctrine of *caveat emptor*;[17] the landlord, in the absence of an express covenant, under no obligation to maintain the premises.[18] A breach by the landlord of a covenant to repair was no defense to an action of rent or eviction.[19]

Recognizing this hardship on indigent urban tenants, courts and legislatures have shown a definite trend toward liberalizing the strict and antiquated laws of real property for the benefit of apartment dwellers.[20] An early departure from traditional landlord-tenant law was the doctrine of constructive eviction whereby a substantial interference with possession or enjoyment which makes the leased property

13. 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

14. *Id.* § 3.47. The duty to provide "quiet enjoyment" is a restraint on the landlord from interfering with the possessory rights of the tenant or allowing third parties to take possession under a paramount title. *Id.* § 3.47-.49.

15. *Id.* § 3.11. This is unlike a breach of a material covenant in a bilateral contract where, the covenants being mutually dependent, the other party is excused from further performance. RESTATEMENT OF CONTRACTS, §§ 267, 274 (1932). However, even if the covenants in a lease are construed as mutually dependent, a breach by the landlord will not allow the tenant to retain possession of the leased property without paying some rent; the tenant will still be responsible for any rent which accrues while he retains possession, minus the damages from the landlord's failure to meet his obligations under the lease contract. *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 535-36 (1966).

16. The hardship of traditional favoritism toward the landlord in lease agreements is especially severe for the indigent tenant who is faced with a shortage in tenantable low-income housing. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 96 (1968).

17. Pittsley v. Acushnet Saw Mills Co., 299 Mass. 252, 12 N.E.2d 823 (1938).

18. Suydam v. Jackson, 54 N.Y. 450 (1873).

19. Mitchell v. Weiss, 26 S.W.2d 699 (Tex. Civ. App. 1930).

20. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Mo. REV. STAT. §§ 441.500-.640 (1969).

untenantable excuses the tenant from the lease if he abandons the premises within a reasonable time.[21]

Another remedy available to the tenant is an implied warranty of habitability, whereby the traditional application of *caveat emptor* in leases is rejected in favor of a contractual warranty of fitness for purpose implied in the lease.[22] The leading case finding an implied warranty of fitness in lease contracts is *Javins v. First National Realty Corp.*,[23] heavily relied on by Justice Douglas in his dissenting opinion in *Lindsey*.[24] The *Javins* court ruled that violations of the housing code provided tenants with a defense to an eviction based on nonpayment of rent. The court based its decision on an implied warranty to maintain the premises in compliance with the housing code: "by signing the lease the landlord has undertaken a continuing obli-

21. Auto Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942); Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. 1964); 1 AMERICAN LAW OF PROPERTY, *supra* note 13, at § 3.51. The requirement that the tenant actually abandon the premises renders the remedy of constructive eviction ineffectual for the indigent who cannot afford to find suitable housing. Schoshinski, *supra* note 15, at 530. However, a few cases have found a constructive eviction without abandonment. Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959); Johnson v. Pemberton, 196 Misc. 739, 97 N.Y.S.2d 153 (New York Mun. Ct. 1950); Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (New York Mun. Ct. 1946).

22. To utilize this doctrine, a court must first recognize that a lease is more like a bilateral contract than a conveyance of land. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Lemle v. Breeden, 51 Hawaii 426, 463 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *See also* UNIFORM COMMERCIAL CODE §§ 2-314, -315; Jaeger, *Warranty of Merchantability & Fitness for Use*, 16 RUTGERS L. REV. 493 (1962). The standards of fitness used by courts in implying a warranty have been found in housing codes. *See* Whetzel v. Jess Fisher Management Corp., 282 F.2d 943 (D.C. Cir. 1960) (duty to repair enforceable in tort by private parties); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968) (voiding a lease known to be in violation of the housing code at the commencement of the lease); Schiro v. W. E. Gould & Co., 18 Ill. 2d 538, 165 N.E.2d 286 (1960) (existing law should be implied in contract terms). Using this doctrine, courts have found that housing code violations at the commencement of a lease will render the lease void. Brown v. Southall, *supra*; Reste Realty Corp. v. Cooper, *supra*; Morbeth Realty v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971); Pines v. Perssion, *supra*. Also, a few courts have found that failure to maintain the premises to the standards set by the housing codes may render a lease voidable. Javins v. First Nat'l Realty Corp., *supra*; Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

23. 428 F.2d 1071 (D.C. Cir. 1970).

24. 405 U.S. at 79 (Douglas, J., dissenting).

gation to the tenant to maintain the premises in accordance with all applicable law."[25]

Although both cases were concerned with the issue whether a landlord's violation of the housing code afforded tenants an affirmative defense to an action for eviction for non-payment of rent, there are important differences between *Javins* and *Lindsey*. First, *Javins* was basically concerned with the interpretation of a lease, and the remedy sought was contractual; *Lindsey*, on the other hand, was concerned with the constitutional question "whether Oregon's judicial procedure for eviction of tenants after nonpayment of rent violat[ed] either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment."[26] This difference is particularly important in the Court's discussion in *Lindsey* of the relevance of medieval property law to the modern lease, and whether there was a federal question sufficient to allow the Court to evaluate Oregon's landlord-tenant law. The *Javins* court, in speaking of the common law rule of property, stated: "Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed."[27] Justice Wright, writing for the *Javins* court, stated that the historical view of a lease as a conveyance is not relevant to leases of urban dwellings, but that urban leases are closer to a purchase of a package of goods[28] which should be treated like any other contract.[29] Since the only issue in *Lindsey* was the constitutionality of the FED procedure, the Supreme Court, unlike the court in *Javins*, refused to evaluate the merits of the eviction statute and throw out ancient precepts which seem to hold no relevance today. Thus, the Court in *Lindsey* refused to federalize landlord-tenant law. Citing *Grant Timber & Manufacturing Co. v. Gray*,[30] a case which upheld the com-

25. 428 F.2d at 1081.
26. 405 U.S. at 58.
27. 428 F.2d at 1074.
28. "[A] package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." *Id.*
29. *Id.* at 1074-75. Under this treatment, a lease, like any other contract, includes an implied warranty and dependent covenants.
30. 236 U.S. 133 (1915). This case upheld a Louisiana procedure that provided that a defendant sued in a possessory action could not bring an action to establish title or present equitable claims until after the possessory suit was decided. Thus, the tenant of real property, like the tenant in *Lindsey*, could not defend an action for possession by using the breach of the landlord as an affirmative defense.

mon law doctrine of independent covenants in the sale of real property, the Court stated:

> 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 the medieval law. . . . But it is unnecessary to follow the speculations or to consider whether the principle is eternal or a no longer useful survival. The constitutionality of the law is independent of our views upon such points.[31]

The *Lindsey* Court's refusal to federalize landlord-tenant law was also based on the doctrine of *Erie Railroad Co. v. Tompkins*[32] which held that no federal general common law exists.[33] Therefore, unless the Court found a federal question or a constitutional violation, it could not interfere with Oregon's substantive rental laws, regardless of how antiquated they may be. As stated in *Lindsey*:

> The Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants.[34]

Attempting to find a constitutional "handle" which would allow the Court to evaluate the common law doctrine of independent covenants, Justice Douglas pointed out in his dissenting opinion that the right to complain to public officials is constitutionally protected.[35] One of the affirmative defenses the tenants in *Lindsey* wished to raise against the landlord's action for possession was that the landlord was evicting the tenants in retaliation for reporting housing code violations.[36] Justice Douglas claimed that the right to complain to public officials concerning violations of the housing code is constitutionally protected and, therefore, the Oregon courts' refusal to allow retaliatory eviction as a defense to a FED action was unconstitutional.[37]

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31. 405 U.S. at 68 n.14, *citing* Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133, 134 (1915). *See also* Bianchi v. Morales, 262 U.S. 170 (1923).

32. 304 U.S. 64 (1938).

33. *Id.* at 78.

34. 405 U.S. at 68.

35. *Id.* at 89 (Douglas, J., dissenting). *See also In re* Quarles, 158 U.S. 532 (1894).

36. 405 U.S. at 66 n.12.

37. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

However, the majority in *Lindsey* rejected this argument because the tenants were estopped from claiming a retaliatory eviction since they had not paid their rent. The Court said that to allow such a defense without paying rent would constitute a taking from the landlord without due process.[38]

In his dissenting opinion, Justice Brennan suggested that the Court could evaluate the constitutionality of the FED procedure, but only after the Oregon courts redefined their position on landlord-tenant law.[39] There are equitable defenses that are recognized by Oregon courts in FED actions,[40] but the majority stated that the defenses sought to be raised by the appellants apparently were not among those. However, Justice Brennan claimed that the Supreme Court had no clear indication of whether Oregon courts would recognize the substantive right of a tenant, based on the landlord's breach of duty, to remain in possession while withholding rent.[41] Justice Brennan felt that if Oregon courts did recognize such an implied warranty of habitability, the issue of the case would become:

> [W]hether Oregon would violate the Fourteenth Amendment if its substantive law in some circumstances recognized tenants' rights to withhold rent and retain possession based on the landlord's breach of duty to maintain the premises, but its procedural law would not permit assertion of those rights in defense of an FED action.[42]

Justice Brennan, therefore, would advocate abstention by the district court in order to avoid having a federal court dictate substantive law to a state.[43]

To avoid having federal courts determine Oregon's substantive landlord-tenant law, Justice Douglas suggested another version of the issue in *Lindsey*:[44] while it is not known whether Oregon accepts an

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38. 405 U.S. at 67 n.13. The Court did not deal with the possibility of protecting the landlord by putting accrued rent into an escrow account administered by the court. *See* note 49 *infra* and accompanying text.

39. 405 U.S. at 90 (Brennan, J., dissenting).

40. *E.g.*, mental incompetence, forfeiture of the lease, reformation of the lease and lessor's breach of a dependent covenant not to rent another part of the premises to businesses in competition with the lessee's. *Id.* at 66 n.11.

41. *Id.* at 91 (Brennan, J., dissenting).

42. *Id.*

43. *Id.* For abstention see Reetz v. Bozanich, 397 U.S. 82 (1970).

44. 405 U.S. at 89 (Douglas, J., dissenting).

implied warranty of habitability in leases,[45] it is certain the Oregon courts have construed a lease as being a contract;[46] perhaps, therefore, the issue should be whether Oregon, since it has accepted that a lease is a contract, can exclude common defenses in a contract action without violating the tenants' rights of due process.[47]

While reviewing the constitutionality of the FED statute, the majority in *Lindsey* concluded that the ends sought by the statute justified the limitation of defenses against eviction. The purpose of the FED statute is the peaceable and swift settlement of disputes between landlord and tenant without resorting to the common law practice of removing a delinquent tenant by force.[48] Thus, the FED statute limits defenses against eviction so that a landlord may obtain swift possession of premises for which he is receiving no rent. However, the Court did not deal with alternative procedural solutions which could provide protection for the landlord and allow the tenant to raise defenses against an eviction. One such solution, offered in *Javins*, would require the tenant to make rental payments into the registry of the court as they became due during the period of time between the filing of the eviction action and either the termination of the litigation or the abandonment of the rental property by the tenant.[49]

Lindsey should not affect any prior decisions holding either that a warranty of habitability can be implied in a lease[50] or that a tenant

45. *Id.*

46. Wright v. Baumann, 239 Ore. 140, 398 P.2d 410 (1965) (applying the contractual principle of mitigation of damages to a commercial lease); Eggen v. Wettorborg, 193 Ore. 145, 237 P.2d 970 (1951) (based on contractual principles, destruction of a leased building by fire terminated the lease). However, these cases are mere exceptions to the principle of independent covenants and do not seem to adequately support Justice Douglas' statement that Oregon courts have construed a lease as a contract.

47. Justice Douglas would find a violation of due process since he deems the right of a tenant to claim his home to be fundamental. *See* 405 U.S. at 89 (dissenting opinion). However, under common law a lease is both a conveyance of property and a contractual agreement. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 13. It is therefore doubtful that the Supreme Court would find a violation of due process merely because Oregon courts treat a lease as a contract in some actions, but not in others.

48. 405 U.S. at 71. For common law eviction under prior Oregon law see Smith v. Reeder, 21 Ore. 541, 28 P. 890 (1892).

49. 428 F.2d at 1083 n.67.

50. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 463 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 490, 111 N.W.2d 409 (1961).

should be allowed to raise violations of the housing code as a defense to eviction actions based on non-payment of rent.[51] However, *Lindsey* represents a strong statement that federal courts will not federalize a state's landlord-tenant law—even when there are compelling arguments that the state is perpetuating antiquated rules of real property which have no modern basis.[52] Also, the Supreme Court's dicta will probably persuade courts to reject many equal protection arguments that would favor indigent urban dwellers. The tenants in *Lindsey* argued that the equal protection standard should be applied more strictly in landlord-tenant cases because the right to peaceful possession and the need for shelter of indigents is fundamental.[53] The Supreme Court rejected this argument by saying that the right to adequate housing does not fall into the category of fundamental interests which have been vigorously protected by the courts: "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality. . . ."[54]

Lindsey does not prohibit any state from finding that the landlord's failure to maintain the leased premises in accordance with the housing code is a defense against an action of eviction brought by the landlord for non-payment of rent. *Lindsey* only held that the right to such a defense is not constitutionally guaranteed. Thus, it is unclear what will happen to the tenants in *Lindsey* and other tenants in similar circumstances. The tenants could still argue in state court that the rent has not come due because of the landlord's breach of an implied warranty to maintain in accordance with the housing code.[55] Also, the tenants might tender rent which has accrued and ask the court to offset this amount by the damages attributable to the landlord's failure to maintain. Another argument which might be used by the tenants is that they are being evicted in retaliation for reporting violations of the housing code.[56]

However, it is most likely that Oregon and other state courts will not accept these arguments. The dicta in *Lindsey* will probably be

51. 428 F.2d 1071 (D.C. Cir. 1970).
52. *See* notes 30 & 31 *supra* and accompanying text.
53. 405 U.S. at 73.
54. *Id.* at 74.
55. *See* note 4 *supra.*
56. *See* notes 35-38 *supra* and accompanying text.

persuasive in encouraging courts to defer these questions to the legislatures. "Absent constitutional mandate, the assurance of adequate housing and the definition of the landlord-tenant relationships are legislative, not judicial, function."[57]

This leaves the indigent tenant in a difficult situation: he cannot afford to move from substandard housing, withhold rent and remain in possession, or report violations of the housing code for fear of being evicted in retaliation by the landlord. Since *Lindsey* has found that such a scheme is not unconstitutional, the indigent tenants' only real relief can come from the state legislatures. Surely, the state legislatures, in the interest of providing adequate housing and the enforcement of housing codes, must answer the challenge presented by *Lindsey*.

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57. 405 U.S. at 74.