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LANDLORD AND TENANT: CAVEAT EMPTOR IN  
OKLAHOMA — NEED FOR REFORM

Originally the landlord-tenant relationship was considered as a contractual arrangement.<sup>1</sup> The tenant was a "termor" who "had no right in the land, but merely the benefit of a contract."<sup>2</sup> By the 16th century this conception had changed and the tenant's interest in the land was considered to be a possessory estate with rights against the landlord, as well as third parties, for interference with its enjoyment.<sup>3</sup> Under this conception the lease granted a present estate to the tenant with a reversionary interest in the landlord.<sup>4</sup> This metamorphosis brought the landlord-tenant relationship within the realm of real property law and the lease which put the tenant in possession of the land was considered to be a conveyance of an estate to the tenant, rather than a contractual arrangement.<sup>5</sup>

The landlord-tenant relationship developed when agrarian society was dominant.<sup>6</sup> The land and its produce, rather than the structures on the estate, were of prime importance.<sup>7</sup> The landlord's only obligation was to put the tenant in possession of the land.<sup>8</sup> Rent paid by the tenant was considered as *quid pro quo* for the right of possession.<sup>9</sup>

<sup>1</sup> 2 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 221[1], at 177 (1971) [hereinafter cited as POWELL].

<sup>2</sup> POWELL ¶ 221[1], at 177 (quoting 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 113 (1895)).

<sup>3</sup> POWELL ¶ 221[1], at 177.

<sup>4</sup> 1 *AMERICAN LAW OF PROPERTY* § 3.13 (A.J. Casner ed. 1952).

<sup>5</sup> *Id.* § 3.11; POWELL ¶ 221[1], at 178; Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 *FORDHAM L. REV.* 123 (1971).

<sup>6</sup> POWELL ¶ 233, at 300-01.

<sup>7</sup> *Kline v. Burns*, 111 N.H. 87, 89, 276 A.2d 248, 250 (1971).

<sup>8</sup> POWELL ¶ 233, at 300; Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 227 (1969).

<sup>9</sup> Quinn & Phillips, *supra* note 8, at 233.

Under the doctrine of *caveat emptor* the tenant was required to inspect the premises and assume the risk of suitability of the estate.<sup>10</sup> Since the main concern was centered on the land, the responsibility for putting and maintaining any dwelling in a habitable condition rested solely on the tenant.<sup>11</sup> In its historical setting this burden was not unduly harsh.<sup>12</sup> Structures upon the estate were of simple construction and a tenant could reasonably be expected to possess the skills and materials necessary to make repairs.<sup>13</sup> However, the imposition of this burden on the modern tenant is unworkable. The complexity of modern dwellings and the fact that modern man does not necessarily possess the required skills<sup>14</sup> makes it impracticable for today's tenant to perform his own repairs.

Deficiencies in the doctrine of *caveat emptor* which arise because of the increasing urbanization of modern society require a re-evaluation of the use of the doctrine in Oklahoma. This comment will analyze avenues of reform that have been successful in other jurisdictions and suggest possible approaches for Oklahoma.

#### I. OKLAHOMA DECISIONS

With respect to both commercial and residential leases, Oklahoma has consistently adhered to the common law doctrine of *caveat emptor*.

*Tucker v. Bennett*<sup>15</sup> is illustrative of the application of the

<sup>10</sup> POWELL ¶ 233, at 300; 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

<sup>11</sup> See authorities cited notes 7-10 *supra*.

<sup>12</sup> 1 AMERICAN LAW OF PROPERTY § 3.78 (A.J. Casner ed. 1952).

<sup>13</sup> *Id.*; *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

<sup>14</sup> 1 AMERICAN LAW OF PROPERTY § 3.78 (A.J. Casner ed. 1952); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

<sup>15</sup> 15 Okla. 187, 81 P. 423 (1905).

doctrine to commercial leases. In this case the lessor sued for rent due on premises leased to the tenant for printing and publishing a newspaper. The tenant alleged that the lessor had represented that the rental property was suitable for such a purpose, but afterwards found that the flooring was too weak to support the necessary equipment. Alleging the existence of an oral agreement to make the necessary repairs and the failure of the landlord to do so, the tenant claimed that the premises were untenable.

In refuting the tenant's claim, the Oklahoma Supreme Court relied on the common law and stated that "it is the well-settled rule that, in the absence of any agreement between the parties, the landlord is generally under no obligation to his tenant to keep the demised premises in repair."<sup>16</sup> The tenant's claim that the lessor was under a statutory duty<sup>17</sup>

<sup>16</sup> *Id.* at 188, 81 P. at 424. See also *Clifton v. Charles E. Bainbridge Co.*, 297 P.2d 398 (Okla. 1956); *Wick v. Wasson*, 193 Okla. 209, 142 P.2d 124 (1943); *Arbuckle Realty Trust v. Rosson*, 180 Okla. 20, 67 P.2d 444 (1937); *Nehring v. Ferguson*, 170 Okla. 383, 40 P.2d 1040 (1935); *Barker v. Findley*, 136 Okla. 55, 275 P. 1054 (1929); *Enterprise Seed Co. v. Moore*, 51 Okla. 477, 151 P. 867 (1915).

<sup>17</sup> OKLA. STAT. tit. 41, § 31 (1971), which provides:

The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, except that the lessee must repair all deteriorations or injuries thereto occasioned by his ordinary negligence.

OKLA. STAT. tit. 41, § 32 (1971), which provides.

If within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expense of such repairs from the rent, or otherwise recover it from the lessor; or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

to place the premises in a condition fit for occupation was also rejected by the Oklahoma court. The court held that the statute was applicable only to leases of premises that were "intended for the occupation of human beings"<sup>18</sup> and not to commercial leases.

In *Gordon v. Reinheimer*<sup>19</sup> the tenant, under an oral renewal of a lease, rented the premises for a mercantile business with the understanding that the lessor would keep the building in tenantable condition. The Oklahoma Supreme Court rejected the tenant's claim for damages resulting from the disrepair of the building on the basis that, in absence of a written agreement to the contrary, there is no implied duty on a lessor of business premises to keep the demised property in good repair.<sup>20</sup>

The holding in these cases indicates that the doctrine of *caveat emptor* is still very much alive in Oklahoma, at least with respect to commercial leases, since the statute prescribing the duties of a lessor to repair and maintain leased premises applies only to residential property. Thus, in order to protect himself the commercial lessee can only rely on written provisions embodied in the lease instrument.

In the area of residential leases, *Lavery v. Brigance*<sup>21</sup> expresses the prevailing view in Oklahoma. The tenant was injured when gas escaping from an uncapped pipe exploded. The tenant alleged that the house was unfit for habitation because of the open pipe beneath the floor of the dwelling. The Oklahoma Supreme Court rejected the tenant's claim and stated that "in the absence of a statute, or an agreement, there is no implied warranty that leased premises are suit-

<sup>18</sup> 15 Okla. at 190, 81 P. at 425. See also *Clifton v. Charles E. Bainbridge Co.*, 297 P.2d 398 (Okla. 1956); *Teeter v. Midwest Enterprise Co.*, 174 Okla. 644, 52 P.2d 810 (1935); *Barker v. Findley*, 136 Okla. 55, 275 P. 1054 (1929).

<sup>19</sup> 167 Okla. 343, 29 P.2d 596 (1934).

<sup>20</sup> *Id.* at 345, 29 P.2d at 598.

<sup>21</sup> 122 Okla. 31, 242 P. 239 (1925).

able for the purposes for which they are demised."<sup>22</sup> The court held that, in the absence of fraud, deceit or warranty, the duty is on the tenant to inspect the premises for habitability and suitability and that the landlord was not liable for injuries caused by latent defects.<sup>23</sup> This decision indicates that the doctrine of *caveat emptor* will be strictly applied in Oklahoma whenever the tenant takes full control over the leased premises.<sup>24</sup>

Oklahoma does have a statutory provision which requires the landlord to place a dwelling in a habitable condition and to make subsequent repairs whenever necessary.<sup>25</sup> The statute provides that, if the landlord fails to meet the statutory obligation, the tenant may either repair the defect and deduct

<sup>22</sup> *Id.* at 32, 242 P. at 240.

<sup>23</sup> *Id.* at 33, 242 P. at 241.

<sup>24</sup> *Id.*; accord, *Wick v. Wasson*, 193 Okla. 209, 142 P.2d 124 (1943); *King v. Collins*, 190 Okla. 601, 126 P.2d 76 (1942); *Arbuckle Realty Trust v. Rosson*, 180 Okla. 20, 67 P.2d 444 (1937); *Price v. MacThwaite Oil & Gas Co.*, 177 Okla. 495, 61 P.2d 177 (1936); *Young v. Beattie*, 172 Okla. 250, 45 P.2d 470 (1935); *Nehring v. Ferguson*, 170 Okla. 383, 40 P.2d 1040 (1935). There are two exceptions to this general rule. The first exception pertains to common areas not under the exclusive control of the tenant; see *Geesing v. Pendergrass*, 417 P.2d 322 (Okla. 1966) (defective common stairway); *Price v. Smith*, 373 P.2d 242 (Okla. 1962) (faulty gas pipe in common bathroom); *Staples v. Baty*, 206 Okla. 288, 242 P.2d 705 (1952) (faulty common stairway); *Arnold v. Walters*, 203 Okla. 503, 224 P.2d 261 (1950) (defective walkway). The second exception pertains to negligent repairs gratuitously made by the landlord; see *Beard v. General Real Estate Corp.*, 229 F.2d 260 (10th Cir. 1956); *Crane Co. v. Sears*, 168 Okla. 603, 35 P.2d 916 (1934); *Horton v. Early*, 39 Okla. 99, 134 P. 436 (1913) (in which the court stated that "the law distinguishes between [what] the landlord . . . is not legally bound to do, and his doing it in a negligent manner." *Id.* at 101, 134 P. at 438).

<sup>25</sup> OKLA. STAT. tit. 41, § 31 (1971), for the text of the statute see note 17 *supra*.

the cost of the repairs from the rent or vacate the premises.<sup>26</sup> While these provisions appear to protect the tenant, in actuality they fail to provide him with an adequate remedy.<sup>27</sup>

The remedies of either repairing the defect and deducting the cost from the rent or vacating the premises are exclusive in Oklahoma.<sup>28</sup> The tenant does not have an alternative cause of action if the landlord refuses or fails to make necessary repairs.<sup>29</sup> In *Alfe v. New York Life Ins. Co.*<sup>30</sup> the plaintiff, a member of the tenant's household, was injured by a defective gas connection in the dwelling. The landlord had failed to send a repairman as promised before the accident. After establishing that the relevant Oklahoma statutes<sup>31</sup> provide the exclusive remedies for a landlord's failure to make necessary repairs, the court held that there is no right to a tort action for personal injuries because of non-repair.<sup>32</sup>

In *King v. Collins*<sup>33</sup> the tenant, an old woman with failing eyesight, sued the landlord for injuries sustained when she fell from a porch. The landlord had failed to carry out a promise made prior to the accident to erect a banister around the porch. In its opinion the Oklahoma court reasoned that, regardless of whether the promise to repair was made or whether an obligation to repair arose under the Oklahoma

<sup>26</sup> OKLA. STAT. tit. 41, § 32 (1971), for the text of the statute see note 17 *supra*.

<sup>27</sup> See cases cited notes 16, 18, 24 *supra*.

<sup>28</sup> *Wallace v. Williams*, 313 P.2d 784 (Okla. 1957); *King v. Collins*, 190 Okla. 601, 126 P.2d 76 (1942); *Alfe v. New York Life Ins. Co.*, 180 Okla. 87, 67 P.2d 947 (1937); *Young v. Beattie*, 172 Okla. 250, 45 P.2d 470 (1935); *Ewing v. Cadwell*, 121 Okla. 115, 247 P. 665 (1925); *Lavery v. Brigance*, 122 Okla. 31, 242 P. 239 (1925).

<sup>29</sup> *Alfe v. New York Life Ins. Co.*, 180 Okla. 87, 89, 67 P.2d 947, 949 (1937).

<sup>30</sup> 180 Okla. 87, 67 P.2d 947 (1937).

<sup>31</sup> OKLA. STAT. tit. 41, §§ 31-32 (1971).

<sup>32</sup> 180 Okla. at 89, 67 P.2d at 949.

<sup>33</sup> 190 Okla. 601, 126 P.2d 76 (1942).

statute,<sup>34</sup> to hold that a cause of action existed would "defeat the very purpose of the statute, to wit, to prevent actions in tort by persons injured by reason of a failure to repair premises by the landlord."<sup>35</sup> By relieving the landlord of tort liability for the refusal or failure to make repairs, these decisions effectively destroy the incentive to maintain the leased premises in a fit condition.

The rights and remedies provided by statute in Oklahoma appear illusory at best. The tenant may be discouraged from repairing by the high costs involved and the complications which might arise from the attempt to deduct the costs over an extended period of time. Structural complexities of modern dwellings may also inhibit the undertaking of repairs by the tenant. The inhabitant of a multiple dwelling unit may decide not to repair a defect that extends beyond his own unit, such as central heating, electrical or plumbing systems. The right to vacate the premises is also of limited value. Housing shortages,<sup>36</sup> the number of children, lack of equal bargaining power, receipt of public assistance<sup>37</sup> and race are some of the possible factors which might restrict the availability of alternative housing.

## II. TRENDS

The doctrine of *caveat emptor* has been severely criticized and landlord-tenant law has been described as "a scandal."<sup>38</sup> Increasing concern has prompted many courts and commenta-

<sup>34</sup> *Id.* at 602, 126 P.2d at 77.

<sup>35</sup> *Id.*

<sup>36</sup> Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909 (1971); William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. Ct. App. 1970); Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. 1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

<sup>37</sup> William J. Davis, Inc. v. Slade, 271 A.2d 412, 415 n.12 (D.C. Ct. App. 1970).

<sup>38</sup> Quinn & Phillips, *supra* note 8, at 225.

tors to re-evaluate and redefine the traditional common law concept of *caveat emptor* in light of presently existing social and economic conditions. In a number of recent decisions in other jurisdictions the residential lease has been considered as a contractual arrangement embodying an implied warranty of habitability.<sup>39</sup>

In *Lemle v. Breeden*<sup>40</sup> the tenant leased a furnished dwelling consisting of several structures after making a half-hour inspection of the premises during the daylight hours. The first evening after moving into the dwelling the tenant discovered that the premises were infested with rats. The Supreme Court of Hawaii held that rodent infestation of the leased premises was a breach of an implied warranty of habitability and allowed the tenant to recover his initial deposit and rent payment. In reaching this decision the court recognized that the common law conception of a residential lease as a conveyance of an estate is "no longer viable"<sup>41</sup> since the modern tenant is interested in the premises "for living purposes"<sup>42</sup> rather than for his livelihood. Drawing an analogy to the sale of chattels with the implied warranties of fitness and merchantability,<sup>43</sup> the court characterized the lease as both the transfer of an estate and a contractual relationship.<sup>44</sup> Relying on the contractual nature of the lease arrangement, the court concluded that there is an implied warranty of habitability and fitness for the intended use in the lease of a dwelling.<sup>45</sup> The court's acceptance of the "more flexible

<sup>39</sup> POWELL ¶ 234[2]; *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Lemle v. Breeden*, 462 P.2d 470 (Hawaii 1969).

<sup>40</sup> 462 P.2d 470 (Hawaii 1969).

<sup>41</sup> *Id.* at 473.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 473-74.

<sup>44</sup> *Id.* at 474.

<sup>45</sup> *Id.* While the dwelling in *Lemle* was a furnished house, the court expanded its holding to include unfurnished homes in *Lund v. MacArthur*, 462 P.2d 482 (Hawaii 1969).

concept" of an implied warranty of habitability lessens the importance of the judicial fiction of constructive eviction<sup>46</sup> by making the more "consistent and responsive" remedies of damages, reformation and rescission available to the tenant for a material breach of the lease contract.<sup>47</sup> On the basis of this reasoning, *Lemle* abrogated the common law concept of *caveat emptor*.

Taking a somewhat different approach is *Javins v. First National Realty Corp.*<sup>48</sup> In this case the landlord was seeking possession of the premises after the tenants defaulted in the rental payments. The tenants admitted non-payment of the rent but defended on the basis that the landlord had violated the District of Columbia Housing Regulations. In its opinion the court held that an implied warranty of habitability arose by operation of law because of the housing regulations<sup>49</sup> and that contract remedies would be applied for a breach of the warranty.<sup>50</sup>

In a lucid opinion the Court of Appeals for the District of Columbia traced the historical aspects of landlord-tenant law and analyzed its place in modern society. Drawing an analogy to the implied warranty of fitness that exists in the sale of goods under the Uniform Commercial Code, the renting of chattels and the sale of services,<sup>51</sup> the court concluded that the old rule of *caveat emptor* "must be abandoned."<sup>52</sup>

Arguing that the common law must recognize the demise of *caveat emptor*, the court cited three considerations supporting this conclusion: 1) the recognition that the historical factual assumptions which form the basis for the doctrine are no longer true; 2) consumer protection; and 3) the modern

<sup>46</sup> 462 P.2d at 475.

<sup>47</sup> *Id.*

<sup>48</sup> 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

<sup>49</sup> *Id.* at 1072-73.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1075.

<sup>52</sup> *Id.* at 1077.

urban housing shortage.<sup>53</sup> Drawing on legal principles established in the area of products liability and consumer protection, the court was of the opinion that the lessee's reliance on the representations and special knowledge of the lessor should be given legal protection<sup>54</sup> and, since the tenant is required to pay the same amount of rent throughout the term of the lease, the landlord should be required to maintain the premises in their original condition.<sup>55</sup> The court indicated its abandonment of the doctrine of *caveat emptor* by stating that contract principles "provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings."<sup>56</sup>

While the opinion in *Javins* offers support for the proposition that a warranty of habitability should be implied in fact in all leases of residential premises, the strict holding in the decision is that the warranty is implied by operation of law because of the district's housing regulations,<sup>57</sup> which the court stated must be read into every housing contract.<sup>58</sup> Accordingly, the court found that the tenant's obligation to pay rent was commensurate with "the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition."<sup>59</sup>

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1079.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1080 (footnote omitted).

<sup>57</sup> *Id.* at 1082.

<sup>58</sup> *Id.* at 1081.

<sup>59</sup> *Id.* at 1082. *Javins* relied on *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943 (D.C. Cir. 1960), which required the landlord to place the premises in a safe condition prior to rental and to install and maintain the utilities required under the housing regulations and *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968), which held that the rental of a dwelling in violation of the housing regulations was an illegal contract which conferred no rights on the wrongdoer. *Id.* at 837. The court in *Javins* was impressed by the

In *Marini v. Ireland*<sup>60</sup> the tenant, after signing a one year lease, discovered that the toilet in the apartment was cracked and leaking water onto the floor of the bathroom. After several unsuccessful attempts to notify the landlord, the tenant hired a plumber to repair the toilet and deducted the cost of the repairs from the rent. The landlord sued the tenant for possession of the apartment for non-payment of the full rent. Construing the lease as a contract, the New Jersey court looked to the "object" to be accomplished by the parties<sup>61</sup> and considered the "subject matter and circumstances of the letting" to determine the "natural intentions of the parties."<sup>62</sup> Since the "subject matter" of the transaction was a dwelling, the court found a clear implication that the parties intended the premises to be "habitable and fit for living."<sup>63</sup> On the basis of this finding the court held that the natural intent of the parties gave rise to an implied covenant of habitability<sup>64</sup> with the ancillary duty of maintaining and repairing the premises during the term of the lease.<sup>65</sup>

The remedies espoused in *Marini* for the landlord's breach of the implied warranty are similar to the Oklahoma statutory

"comprehensive regulatory scheme" of the District's housing regulations which 1) set housing standards, 2) specified whether the lessor or lessee is responsible for satisfying each of the standards and 3) provided for enforcement of the Regulations. 428 F.2d at 1080.

<sup>60</sup> 56 N.J. 130, 265 A.2d 526 (1970). See also *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

<sup>61</sup> 56 N.J. at 137, 265 A.2d at 533.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 138, 265 A.2d at 534. The court refused to indulge in a semantical game and decided that a warranty against latent defects is the same as a warranty of habitability, the court stated that it did not matter whether the covenant was termed "one 'to repair' or 'of habitability and livability fitness.'" *Id.*

<sup>65</sup> 56 N.J. at 138, 265 A.2d at 534.

remedies.<sup>66</sup> The *Marini* decision gave the tenant the option of vacating the premises under the doctrine of constructive eviction or, in recognition of the urban housing shortage, of making reasonable repairs and deducting the cost from the rent.<sup>67</sup> This harsh limitation of remedies was modified by the subsequent decision of a lower New Jersey court in *Academy Spires, Inc. v. Brown*.<sup>68</sup> In this case the landlord sought possession of the apartment for non-payment of rent. The tenant claimed that the landlord had failed to provide heat, hot water and garbage disposal, that the apartment was unpainted, that the wall plaster was cracked and that water leaked into the bathroom. The New Jersey District Court held that a restriction of the tenant's remedies for a breach of an implied covenant of habitability to those outlined in *Marini* would be a retreat from the principles underlying that decision.<sup>69</sup> Realizing that a tenant in a multi-storied dwelling is in no position to make repairs,<sup>70</sup> the court followed a "percentage-diminution approach",<sup>71</sup> which it characterized as a sufficiently accurate remedy,<sup>72</sup> to allow a partial abatement of the rent. Under this formula the court allowed the tenant to reduce the rent by an amount proportionate to the corresponding reduction in the living quality or fair market value of the leased premises.<sup>73</sup>

<sup>66</sup> See OKLA. STAT. tit. 41, § 32 (1971) and the text accompanying notes 19-25 *supra*.

<sup>67</sup> 56 N.J. at 139, 265 A.2d at 535.

<sup>68</sup> 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970).

<sup>69</sup> *Id.* at 480-81, 268 A.2d at 559-60.

<sup>70</sup> *Id.* at 481, 268 A.2d at 560.

<sup>71</sup> *Id.* at 483, 268 A.2d at 562.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 482, 268 A.2d at 561. Although an express covenant was involved in *Berzito v. Gambino*, 114 N.J. Super. 124, 274 A.2d 865 (Dist. Ct. 1971), the court in this case held that the payment of rent over an extended period of time did not waive the landlord's breach of warranty. Since a housing shortage for low income families with children

The obvious trend in these and other jurisdictions<sup>74</sup> is to abrogate the outdated common law doctrine of *caveat emptor*. These courts have resorted to contract principles and implied warranties of habitability and fitness in order to achieve more just results in light of existing social and urban conditions.

### III. SUGGESTIONS

Oklahoma can no longer claim to be a rural state. The state is fast approaching the same balance of rural-urban in-

forced the family to remain at their present location, the court determined that the payment of rent did not constitute a voluntary relinquishment of the claim. *Id.* at 127, 274 A.2d at 868.

<sup>74</sup> See *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971) (which held that the landlord's breach of his statutory duty to repair enables the tenant to repair and deduct in emergency situations); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. 1971) (which held that the landlord's violation of a state statute and the housing code was a valid defense to eviction proceedings for non-payment of rent); *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. 1970) (which held that, where a state statute is enforceable only by a municipality, the tenant has a cause of action for reimbursement of expenses that save the landlord from an actionable tort that *might* have resulted from the landlord's inaction). Recently, the United States Supreme Court, in *Lindsey v. Normet*, 405 U.S. 56 (1972), held that Oregon's forcible entry and wrongful detainer statute did not, on its face, violate the due process or equal protection provisions of the Constitution; however, a double bond requirement for the right to appeal was considered a denial of equal protection. In its opinion the Court held that there was no constitutional right to housing "of a particular quality" and stated that the "Constitution does not provide judicial remedies for every social and economic ill." *Id.* at 74. However, the Court did note that defenses such as a breach of an implied warranty and violations of a housing code were recognized in some jurisdictions. *Id.* at 69.

habitants as the United States as a whole.<sup>75</sup> Of twenty-nine incorporated cities with a population of 10,000 or more, twenty-five have increased in population between 1960 and 1970.<sup>76</sup> Of these twenty-five, fifteen have increased in population by at least 10%.<sup>77</sup> Oklahoma as a whole has increased in urban population by 18.8% between 1960 and 1970, while the rural population has declined during the same period by 5.2%.<sup>78</sup> This shift in the state's population provides the basis for abrogating the rule of *caveat emptor*; an urbanized state requires new concepts to deal with a legal relationship that grew out of an agrarian society.

<sup>75</sup> Oklahoma had more urban inhabitants than rural, for the first time, in 1950. The urban-rural breakdown since 1950 is as follows.

Year	Urban	Rural
1950	51.0%	49.0%
1960	62.9%	37.1%
1970	68.0%	32.0%

U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1970, NUMBER OF INHABITANTS, FINAL REPORT PC (1)-A 38 OKLAHOMA.

The breakdown for the United States for the same period is:

Year	Urban	Rural
1950	64.0%	36.0%
1960	69.9%	30.1%
1970	73.5%	26.5%

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971.

<sup>76</sup> U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1970, NUMBER OF INHABITANTS, FINAL REPORT PC (1)-A 38 OKLAHOMA.

<sup>77</sup> Tulsa has increased in population by 26.7%; Oklahoma City by 13%; Broken Arrow by 98.8%; Stillwater by 29.9%; Midwest City by 33.4%; Norman by 56%; Edmond by 93.9%; Sand Springs by 48.6%; El Reno by 31.7%; Moore by 952.2%; Lawton by 20.7%; Del City by 76.5%; Bethany by 76.5%; Enid by 13.3%; and The Village by 13%. *Id.*

<sup>78</sup> U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1970, NUMBER OF INHABITANTS, FINAL REPORT PC (1)-A 38 OKLAHOMA.

When the Oklahoma court decides to re-evaluate the doctrine of *caveat emptor*, three rationales are at its disposal — *Lemle*, *Marini* or *Javins*.

*Lemle* rejected the doctrine on the basis of judicial decision. This method is open to the Oklahoma court. While the court may be influenced by *stare decisis*, a fresh look at the Oklahoma statute and an understanding of current social problems should produce the desired reform. Since the statute<sup>79</sup> is written in terms of the landlord's obligations, the court could interpret it to allow the enforcement of the more flexible contractual remedies available for a breach of an implied warranty of habitability.

As an alternative the Oklahoma court could follow the *Marini* decision by considering the natural intent of the parties at the time of the leasing. Taking price into consideration, both parties would be concerned with the best housing available for the tenant. Since the tenant would not actively seek out inadequate housing, the court could impose on the landlord the obligation of an implied warranty of habitability. If it appears to be impossible or impractical for the tenant to repair or vacate the premises, the court, by following the lead of *Academy Spires*, could alleviate the harshness of the statutory remedies for a breach of the implied warranty by allowing a partial abatement of the rent.

Since municipal housing codes are commonplace, the methodology of *Javins* is also available. Municipalities have the inherent police power to set reasonable standards for the health, safety and welfare of their inhabitants<sup>80</sup> and it would seem only reasonable that an implied warranty could be found

<sup>79</sup> OKLA. STAT. tit. 41, § 31 (1971).

<sup>80</sup> See *Nebbia v. New York*, 291 U.S. 502 (1934). For cases upholding the constitutionality of housing standards, see *Tenement House Dept. v. Moeschel*, 179 N.Y. 325, 72 N.E. 231 (1904); *Health Dept. v. Rector of Trinity Church*, 145 N.Y. 32, 39 N.E. 833 (1895).

on the basis of the local housing codes. Generally, housing codes make a legislative finding that substandard housing exists within the municipality, that such housing adversely affects the public health, safety and general welfare and that the imposition of minimum housing standards is necessary.<sup>81</sup> These findings should provide a sufficient basis for abrogating the doctrine of *caveat emptor* and for enforcing an implied warranty of habitability in a residential lease.<sup>82</sup> Support for such a decision might also be found in the language prohibiting the occupancy of a dwelling which does not meet the

<sup>81</sup> *E.g.*, TULSA, OKLA. ORDINANCES tit. 55, ch. 1, § 1 (1968):

Legislative Finding. It is hereby found that there exists, within the city of Tulsa, premises, dwellings . . . which by reason of their structure, equipment, sanitation, maintenance . . . affect or are likely to affect adversely the public health, . . . safety, and general welfare . . . . [T]he establishment and enforcement of minimum housing standards are required.

Purpose. It is hereby declared that the purpose of this ordinance is to protect and preserve, and promote the physical and mental health and social well-being of the people, to prevent and control . . . communicable diseases, to regulate privately and publicly owned dwellings for the purpose of maintaining adequate sanitation and public health, and to protect the safety of the people and to promote the general welfare by legislation which shall be applicable to all dwellings now in existence or hereinafter constructed. It is hereby further declared that the purpose of this ordinance is to insure that the quality of housing is adequate for the protection of public health, safety, and general welfare, including: establishment of minimum housing standards . . . .

*See also* *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968).

<sup>82</sup> *See* *Javins v. First Nat'l Realty Corp.* 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968).

minimum standards set forth in the housing regulations.<sup>83</sup> The enactment of these codes<sup>84</sup> also allows the municipality to "localize" its standards by taking into consideration its particular needs and setting.

#### IV. CONCLUSION

The need for change in Oklahoma's landlord-tenant law is apparent. Whether by judicial decision or statutory enactment<sup>85</sup> the doctrine of *caveat emptor* should be abandoned. Its replacement should be equally fair for both the tenant and the landlord.

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.<sup>86</sup>

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<sup>83</sup> Cases cited note 82 *supra*. See TULSA, OKLA. ORDINANCES tit. 55, ch. 2, §§ 21-26 (1968).

<sup>84</sup> In the absence of local housing regulations the court may have to rely on the *Lemle* or *Marini* rationales.

<sup>85</sup> There have been various model landlord-tenant acts suggested. While they may not be a panacea for all jurisdictions, the model acts deserve serious consideration when drafting housing legislation. See Daniels, *supra* note 24, at 958-61; Dooley & Goldberg, *A Model Tenant's Remedies Act*, 7 HARV. J. LEGIS. 357 (1970); AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969).

<sup>86</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (footnote omitted).