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Leo Bearman, Jr.

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CAVEAT EMPTOR IN SALES OF REALTY— RECENT ASSAULTS UPON THE RULE

LEO BEARMAN, JR.*

In one field or another of activity, practices in opposition to the sentiments and standards of the age may grow up and threaten to entrench themselves if not dislodged. Despite their temporary hold, they do not stand comparison with accepted norms of morals. Indolence or passivity has tolerated what the considerate judgment of the community condemns. In such cases, one of the highest functions of the judge is to establish the true relation between conduct and profession. There are even times, to speak somewhat paradoxically, when nothing less than a subjective measure will satisfy objective standards. Some relations in life impose a duty to act in accordance with the customary morality and nothing more. In those the customary morality must be the standard for the judge. Caveat emptor is a maxim that will often have to be followed when the morality which it expresses is not that of sensitive souls.

But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the year.

—Benjamin Nathan Cardozo**

I. BACKGROUND AND PURPOSE

There are few areas in the law today in which the expectations of the general public differ so widely from the rule of law which prevails as that of the purchase of a new home. Accustomed to buying items which, though relatively inexpensive and insignificant, cross the merchant's counter with an implied warranty of merchantability and fitness for a particular purpose attached,¹ the consumer, not without some justification, logically expects that the law will protect him with equal vigor in a purchase as significant (to his status, his every-day life, and his wallet) as a new home. But the

* Attorney, Memphis, Tennessee.

** CARDOZO, NATURE OF THE JUDICIAL PROCESS 108, 150 (1921).

1. See UNIFORM SALES ACT §§ 13-16; UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

life of the law has not been logic, as Holmes has warned,² and the consumer finds that he is mistaken. Though the ominous sounding doctrine of caveat emptor has all but disappeared from the purchase of chattels (due largely to the advent of the Uniform Sales Act and the Uniform Commercial Code), it still clings tenaciously to the black letter law of sales of realty³ to trap the unsuspecting vendee who has failed, or was unable, to secure an express warranty. The vendee's expectations are dashed because he has failed to realize that the modern implied warranty for chattels is the exception to the general rule of caveat emptor which strongly established itself in the common law during the seventeenth and eighteenth centuries,⁴ and which in 1633 was given added force by the personal approval of Coke himself.⁵

A changing law for sales of personalty, stimulated perhaps by early mass production and accompanying mass buying and consequent mass expectation of quality, had little effect upon the rules governing sales of realty, since before 1945 no similar mass production methods had so totally invaded the building industry. At the end of World War II, however, houses were in great demand and were produced in amazing quantities,⁶ largely by an increasing number of builder-vendors: builders who also sell their product. Almost inevitably, with so many housing developments in existence and the demand for them still rising, instances of poor quality resulted due to hurried construction and skimping on materials. Vendees, who had purchased from these builder-vendors often in haste and with little attempt at inspection or indeed knowledge of how to do it, turned to the courts for relief. They found, however, that their route to recovery was barred by the doctrine, practically unchanged from Coke's pronouncement, of caveat emptor: no warranties of quality or fitness for purpose are implied in the sale of real estate.

Even with this rash of vendees seeking relief, the courts were understandably reluctant to overrule flatly a doctrine which had become so deeply embedded in the common law. Nevertheless with

2. HOLMES, *THE COMMON LAW* 1 (1946).

3. See, e.g., 4 WILLISTON, *CONTRACTS* § 926 (rev. ed. 1936).

4. For an excellent history of the doctrine of caveat emptor, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133 (1931).

5. "Note, that by the civil law, every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty, either in deed or in law; but the common law bindeth him not, for *caveat emptor* . . ." 2 COKE, *LITTLETON* 102 (a), c.7, § 145 (1633).

6. Statistics reveal that the value of annual new construction of private residential buildings rose from less than \$2,000,000,000 annually in 1945 to about \$15,000,000,000 annually in 1950 and about \$18,000,000,000 annually by September 1959. At the same time, the number of one-family non-farm dwelling units begun in each year rose from about 100,000 units begun in 1945 to about 1,150,000 units begun in 1950. See *FEDERAL RESERVE SYSTEM, CHART BOOK ON FINANCIAL AND BUSINESS STATISTICS* (Historical supp. 1959).

some aid from the legislatures they met the challenge, but by more devious means: they extended, reshaped and in some instances distorted other areas of the law to fit their needs. The outcome is that, while caveat emptor is still ostensibly the law applicable to sales of realty in every common law jurisdiction, it no longer effectively protects the builder-vendor. In many instances he is now being held liable for damages or rescission for failure to meet what is in result, if not in fact, an implied warranty of good quality and fitness for purpose when he sells a newly constructed home.

The expansions of previously settled doctrine by the courts to reach this result have occurred in the areas of implied warranty itself, and in the areas of express warranty, marketable title, fraud, and negligence. It is the purpose of this article first, to delineate the form and outer boundaries of this new development, by an analysis of the cases and statutes which have forwarded it, and second, to determine whether this development is a desirable one. Further, this study records what seems to the author an interesting and rather dramatic illustration of an important characteristic of the common law itself: an instance of the courts' filling what they felt was a gap in the law's protection by the utilization of dynamic and flexible legal concepts when the more archaic and immutable ones failed them.⁷

II. IMPLIED WARRANTY

Despite an occasional small voice of criticism,⁸ the common law jurisdictions of this country and England have steadfastly reiterated that there are no implied warranties in the sale of new or used homes, with very little attempt at reevaluating the underlying bases of this rule.⁹ A single exception to the general rule of caveat emptor was developed in 1931 in the case of *Miller v. Cannon Hill Estates*,

7. Because of the increasing number of cases which involve builder-vendors, as compared with the ordinary home owner who sells his house, and because, as will be pointed out, inroads into the caveat emptor rule will most likely be made in cases involving vendors who are also in the business of building, the emphasis of this paper will be placed upon the builder-vendor. Note that since the disappointed vendee of a new home usually has only a buying contract and not a building contract with his builder-vendor he cannot sue the builder-vendor in his capacity as builder on an implied covenant to perform in a competent manner. Such a covenant exists only when there is a contract to *build*, and not when there is merely one to *buy* a house already built or to be built. Cf. *Evens v. Young*, 196 Tenn. 118, 264 S.W.2d 577 (1954); *Levy v. Young Constr. Co.*, 46 N.J. Super. 293, 134 A.2d 717 (1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958).

8. See Note, 18 Md. L. Rev. 332 (1958), criticizing *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957); Comment, 5 DE PAUL L. REV. 263 (1956).

9. *E.g.*, *Berger v. Burkoff*, 200 Md. 561, 92 A.2d 376 (1952); *Kerr v. Parsons*, 83 Ohio App. 204, 82 N.E.2d 303 (1948).

*Ltd.*¹⁰ In this English case the purchaser contracted with the builder-vendor of a housing development to buy a home which was in the course of construction when the contract for sale was signed. In a suit by the purchaser on the contract for damages for structural defects, the court held for the purchaser, finding a breach of an express warranty given by the builder-vendor, who had told the purchaser that "materials and workmanship are of the best."¹¹ The court then went further to hold the vendor liable as well on an implied warranty that the house was to be built in an efficient and workmanlike manner and of proper materials and was to be fit for habitation.

While expressing agreement with the application of the rule of caveat emptor in the absence of expressed warranties when a completed home is sold, the court decided that the opposite should be true when the vendee contracts to buy a house which is still in the process of construction. The court reasoned that one who contracts to buy a completed home could always inspect it as it stands and so discover its flaws, while, when a house not yet finished is contracted for, the vendee has no such opportunity. The court also argued that one buying a completed house might not even want it as a dwelling place but might be purchasing in order to tear it down and rebuild. If he desired, reasoned the court, that purchaser could always protect himself by obtaining an express warranty from his vendor, if he were able to pay for such a warranty. On the other hand, the court continued, when the vendee purchases a house still in the process of construction, it is clear that he intends to live in it. In such a situation, it was said, the vendee must of necessity rely on the builder-vendor's skill in constructing a house fit for habitation, since the vendee is unable at the time of signing the contract to inspect a completed structure. Consequently, the court concluded, when the house is bought before it is completed there should be a warranty not only of fitness for habitation, but also of good structural quality implied in the contract for its sale. The *Miller* exception has lately been reviewed and cited with approval in England,¹² and it is apparently the law in some jurisdictions in the United States as well.¹³

Despite its general acceptance, the reasoning of the *Miller* decision leaves much to be desired. It seems to go either too far, or not far enough.

10. [1931] 2 K.B. 113.

11. *Ibid.*

12. *Jennings v. Tavener*, [1955] 2 All E.R. 769 (Q.B.).

13. See, e.g., *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

In the first place, the result, at least as far as the finding of an implied warranty is concerned, is dictum, because the court found an express warranty in the transaction and could have based its decision on that point. Even if this be true, the distinction has been quickly lost, and the court's dictum has from the beginning been considered law.¹⁴

Secondly, it would seem that the very basis of the *Miller* court's reasoning is, at best, questionable, and, at worst, blithely oblivious to the realities of the situation. It is true that a completed home can to a limited extent be inspected for defects by the vendee before he signs the contract, but it is equally true that most potential home owners lack the competency to do their own inspecting. The high cost of hiring a skilled examiner would place that particular safeguard beyond the reach of most vendees, particularly the average home buyer who has very likely mortgaged heavily in order to purchase even a modest unit in a typical housing development.¹⁵ Further there is very little which even a skilled examiner could uncover if he must inspect after the house has been completed, since many defects over which litigation has occurred are found in the home's foundation, which can be effectively checked only before any more of the building has been constructed. Therefore, from a realistic viewpoint, it would seem that the individual who contracts to buy a completed house is relying much more heavily than the vendee of an uncompleted home upon the builder-vendor's superior knowledge and skill, since any competent inspection after completion would usually be pecuniarily or practically impossible. Similarly, the second reason given by the court, that the vendee of a completed house might not be buying with the purpose of living in it, seems without much weight when one considers that it is usually fairly obvious that the purchaser of a unit in a housing development, particularly if he has taken out a mortgage, is buying to inhabit.

It is also important to note that, when a builder-vendor begins

14. *A Conveyancer's Letter*, 85 L.J. 219 (1938).

15. An informal survey taken by the author among several Boston architects was most revealing at this point. In the first place, it seems that many architects are reluctant to do this type of inspecting anyway unless they were called in at the beginning of the construction by the builder, seller, or buyer. They fear litigation and are loath to pass on the quality of another's work unless they were hired from the beginning to do so. In addition, most architects emphasized that, if called upon to inspect a completed building, they would be greatly hampered in their ability to do a reliable job because many of the most important points, such as foundations, have already been hidden by construction. Finally, the fees charged for the expert inspection required to discover defects of the type which cause the most frequent damage are beyond the reach of many. Estimates from the architects ranged from \$75 to \$100 a trip, and, for a complete supervision job, a total of between \$300 and \$1,000. Those architects contacted advised the author that few people make these inspection requests.

construction on two houses in his development, he does not build one with more care than the other, because he cannot tell which one will be contracted for before, and which after, completion of construction. From the point of view of the builder-vendor there is no reliance interest which arises in the one situation and not the other, if he in fact makes a policy of selling his homes at all stages of completion.

The outcome is anomalous: the vendee who purchased his home one day before completion receives an implied warranty that his house is free from structural defects, while his neighbor, who by chance signed his contract the next day, buys without the implied warranty. Further, the very nature of the distinction creates problems. For example, when is a house "still in the process of construction" for purposes of implying the warranty?¹⁶ It would seem that the *Miller* court should have either rejected the implied warranty altogether or applied it in both situations.

The *Miller* case has not escaped criticism, even from courts which follow its ruling.¹⁷ Nevertheless, only one American judge has since attempted to extend its holding to include contracts for the sale of newly constructed homes which are completed at the time of contracting, and he failed to carry a majority of his court. In the 1957 case of *Levy v. Young Constr. Co.*,¹⁸ the vendee sued his builder-vendor for the cost of replacing a sewer line in his newly built home which was completed when he contracted to buy it. The majority of the New Jersey court held for the defendant on caveat emptor grounds, arguing that any other rule would bring great uncertainty into the real estate field because builder-vendors would never know when they would no longer be liable for property which they had sold. Judge Waesche, in dissent, pointed out that the defendant was in the business of buying and selling new homes and that, as such, he represented to the buyer that he had a reasonable amount of skill. Further, the defendant was aware that the buyer was relying upon his skill. Consequently Judge Waesche urged an implied warranty that the house had been erected in a workmanlike manner, even though construction was completed before the contract was signed.

No judge has since attempted to extend the *Miller* exception to the caveat emptor doctrine in such a direct manner. An interesting at-

16. See *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 390 (C.A.), where the house in question lacked only decoration, water-taps, bath, grates, and some plaster. The court agreed with the vendee that the house was unfinished for purposes of the *Miller* test and consequently found an implied warranty of quality and fitness in the purchasing contract.

17. *Ibid.*

18. 46 N.J. Super. 293, 134 A.2d 717 (1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958).

tempt by a caveat emptor-plagued home buyer to avoid the problem by taking his case entirely out of the field of realty and into the warranty-protected area of personalty was made in a 1959 Arizona case.¹⁹ In that case, the vendee of a new home sued his builder-vendor on an implied warranty theory to recover damages for a defective heating and refrigeration system installed in his home. He argued that the defective system was not realty at all but personalty and therefore governed by the appropriate section of the Arizona Uniform Sales Act.²⁰ The court rejected this view, finding that the system was a fixture and thus governed by the laws applicable to sales of realty; nevertheless the case suggests a possible argument upon which vendees may rely in the future if the facts of their case are more favorable and the defective item somewhat "less fixed."²¹

Though the rule of caveat emptor in realty sales pervades the black letter law of common law jurisdictions in the United States, the situation is a different one under the civil law of Louisiana, where the doctrine of redhibition reverses the common law rule. Redhibition, as defined by the Louisiana Civil Code, is "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased, had he known of the vice."²² Redhibition creates an implied warranty, existing at all sales unless expressly excluded²³ or unless the defect is such that the buyer might have discovered it by simple inspection.²⁴ It applies to the sale of realty as well as personalty,²⁵ even when the home was already completed before the contract for sale was signed.²⁶

It would seem therefore that the Louisiana vendee of a completed new home has little trouble holding his vendor liable for structural defects, while his common law counterpart must turn to other theories upon which to base his argument for recovery. This has been done.

19. *Voight v. Ott*, 86 Ariz. 128, 341 P.2d 923 (1959).

20. ARIZ. REV. STAT., § 44-215 (1956).

21. The *Voight* court left this possibility open by setting out as one of its tests for deciding whether the item is a fixture or not the difficult-to-prove element of intention of the party to make the chattel a permanent accession to the freehold, citing 36A C.J.S. *Fixtures* § 1 (1961).

22. LA. CIV. CODE ANN. art. 2520 (West 1952).

23. *Perkins v. Chatry*, 58 So. 2d 349 (La. App. 1952).

24. LA. CIV. CODE ANN. art. 2521 (West 1952).

25. *Rodriguez v. Hudson*, 79 So. 2d 578 (La. App. 1955).

26. *Sterbcow v. Peres*, 222 La. 850, 64 So. 2d 195 (1953).

III. EXPRESS WARRANTY

A. *Voluntary Warranties*

The courts have never had any difficulty in enforcing a written warranty of good quality given by the vendor in the contract for sale, if the warranty survived the passing of the deed. Builder-vendors customarily never place such a warranty in the deed, but this seldom prevents the warranty from being effective. The general rule applicable to these written express warranties is that all covenants and agreements in the contract for sale except those which are "collateral" merge with the deed, which is the final agreement between the parties, and so are extinguished.²⁷ This rule necessitates the repetition in the deed of all non-collateral clauses from the contract on pain of losing them. However, many courts have consistently held that, while most of the contract does merge with the deed, any written warranties given in the contract for sale are collateral to the agreement and therefore do not merge.²⁸ The reasoning applied is that most of the provisions in the contract to sell merge because they deal with the conveyance itself, which the deed covers with finality, but warranties, which are never mentioned in the deed and which are not aimed at conveying the property, are by their nature collateral to the main purpose of the deed and so survive.²⁹

The rule therefore protects express warranties written into the contract but, without more, affords little aid to the vendee who has secured from his vendor an express warranty in oral form. Vendors who gave such oral express warranties have sought to retain the caveat emptor result by claiming they could not be held to these warranties because the parol evidence rule³⁰ or the Statute of Frauds³¹ prevents their enforcement. In some instances they have been successful.³² Nevertheless, the most recent cases have been consistent in holding the vendor to his word in the face of both these objections and to that extent have thereby additionally reduced the caveat emptor concept.³³ These courts admit evidence of the parol warranty as long as the deed does not appear on its face to be complete or integrated (which it apparently never does without the warranty)

27. *Duncan v. McAdams*, 222 Ark. 143, 257 S.W.2d 568 (1953); Annot., 38 A.L.R.2d 1310 (1953).

28. *E.g.*, *Re v. Magness Constr. Co.*, 49 Del. 377, 117 A.2d 78 (Super. Ct. 1955); *Russ v. Lakeview Dev., Inc.*, 133 N.Y.S.2d 641 (City Ct. 1954).

29. *Greenfield v. Liberty Constr. Corp.*, 81 N.Y.S.2d 550 (Sup. Ct. 1948).

30. See 3 WILLISTON, CONTRACTS § 631 (rev. ed. 1936).

31. See generally, An Act for Prevention of Frauds and Perjuries, 29 Car. 2, c. 3, § 4(4) (1677), as quoted in FULLER, BASIC CONTRACT LAW 941 (1947).

32. *Kerr v. Parsons*, 83 Ohio App. 204, 83 N.E.2d 303 (1948).

33. See, *e.g.*, *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948); 2 WILLISTON, CONTRACTS § 575 (rev. ed. 1936).

and as long as the parol warranty is consistent with or not contradictory to the written instrument.³⁴ Such parol evidence has been regularly found to be consistent with a deed that fails to mention warranties. This line of reasoning suggests that the outcome of each case will depend in great part upon the judge's attitude toward the merits of the caveat emptor doctrine itself, since he must decide whether the silence of the deed as to warranties is a pregnant silence, reflecting intent that the conveyance contain none, or whether it merely evidences the fact that the agreement set forth in the deed is not completely integrated and can be supplemented by the oral warranty. If this analysis of the significance of the holdings is sound, these latest cases may be viewed as reflecting a judicial attitude hostile to the caveat emptor concept.

Because the courts are now almost unanimously prepared to reject defenses based upon the Statute of Frauds and the parol evidence rule, the vendee who has managed to secure an express warranty, even if it is oral, will be able to enforce it. The problem which many vendees face, however, is more basic. They are unable to extract from their builder-vendors any warranty at all, oral or otherwise. At this point, some additional post-1945 developments have interceded with some success.

Some builder-vendors will give the warranty of quality of construction if asked, though they may understandably raise the price of the home as a result. Others make a practice of not giving any, and the fact that they do not does not in any way condemn them as disreputable or untrustworthy. They simply feel a great reluctance to put themselves in a position of legally standing behind a structure which is so susceptible to the elements and over which they have no control after the passing of the deed. Nevertheless, the National Association of Home Builders in 1952 announced that they would recommend that all their members supply home buyers with a written warranty guaranteeing that the builder-vendor would make good on any defects that appeared in the home within one year of sale and for which he could normally be deemed responsible.³⁵ As it later turned out, the warranty which the NAHB was to offer was reduced to a legally more ambiguous "policy."³⁶ At about the same time, the Detroit, Michigan, Home Builders Association announced that it had advised all its members to give warranties of good quality

34. *Greenfield v. Liberty Constr. Corp.*, 81 N.Y.S.2d 550 (Sup. Ct. 1948); *Laurel Realty Co. v. Himelfarb*, 191 Md. 462, 62 A.2d 263 (1948).

35. The announcement appeared in the N.Y. Times, March 2, 1952, § 8, p. 1, col. 5. The warranty is quoted in Dunham, *Vendor's Obligation as to Fitness of Land For a Particular Purpose*, 37 MINN. L. REV. 108 n.2 (1952).

36. See 6 N.A.H.B. CORRELATOR 2 (1952). The policy is quoted in Dunham, *supra* note 35, at 109 n.4.

on the houses they built, but none of the warranties was to be in writing.³⁷

B. *The Influence of Legislation*

These voluntarily given express warranties were, from the vendee's standpoint, all too rare, and the courts, though willing to enforce an express warranty if the builder-vendor gave one, were by their nature unable to create such express warranties out of whole legal cloth. The task of creating a required express warranty naturally fell to the legislatures, and, spurred on by the pressure of increasing housing construction and the resulting increase in the number of complaints, they responded in limited fashion. The result is another reduction of the caveat emptor defense, but this was accomplished in the states, as will be seen, in a somewhat indirect manner.

The solution proposed by the national legislature was by no means indirect, however, and consequently deserves special attention here. Before 1954 Congress, through its legislation in regard to Federal Housing Administration and Veterans Administration housing, had authorized inspection by federal officials and minimum construction requirements on houses whose mortgages the two administrations were to guarantee.³⁸ Contrary to what many thought, the government was not by this action guaranteeing construction quality as part of the mortgage loan.³⁹ It was simply setting minimum standards for the types of houses for which they would guarantee mortgages. Should the house be built defectively, the buyer could not recover on any warranty theory based upon the FHA or VA mortgage guarantee.

In 1952 the Subcommittee on Housing of the House Committee on Banking and Currency, chaired by Representative Albert Rains, was organized to investigate complaints of shoddily constructed FHA and VA homes and the extent to which laxity in inspection by the FHA and VA had contributed to this situation. The report of the committee's hearing⁴⁰ and its final report and recommendations⁴¹ contain an almost unending collection of complaints by home buyers who, ignorant of the law or unable to obtain a bargaining position sufficient to demand an express warranty from their builder-vendor, were left without relief of any kind from the burdens of a poorly constructed

37. *Final Report From the Subcommittee on Housing of the House Committee on Banking and Currency*, 82d Cong., 2d Sess. 32 (1952), [hereinafter cited as *1952 Final Committee Report*].

38. 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1706 (C) (b) (2) (1958).

39. *1952 Final Committee Report* 9.

40. *Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on H.R. 436*, 82d Cong., 2d Sess. (1952) [hereinafter cited as *1952 Hearings*].

41. See note 37 *supra*.

house upon which they were paying heavy mortgages. The committee turned up situations of builders refusing to pass deeds to buyers who had lawyers present at the closings and of armed guards who prevented buyers from inspecting during the construction of the house they had contracted to purchase.⁴² The committee found that FHA and VA officials often provided little or no assistance in pressing claims against the builders, and that even when such claims were pressed, the FHA or VA accepted the builder's statements that repairs had been made when as a matter of fact they had not.⁴³ Buyers complained of builders who would incorporate, build without care, and then dissolve the corporation in order to avoid liability.⁴⁴ Some buyers were not afforded access to plans filed with the FHA and VA upon which they might try to base a complaint.⁴⁵ In one instance, a newly built home was actually condemned by the city shortly after the buyer moved in, and, when the buyer arrived at the local FHA office with his lawyer to complain, he found that his records had disappeared from the files.⁴⁶

The conclusions reached by the committee were significant:

The subcommittee found a frequent belief among home owners that their homes were insured or guaranteed against defects by the Government. Studied attention to their legal rights and obligations was not given—this despite the fact that the purchase of a home represents the largest single investment they would probably make in their lifetime. . . . The purchasers of homes generally bought through purchase contracts which did not contain or incorporate by reference plans and specifications which would in any way protect the buyers. On the basis of these contracts, they rarely had any legal basis for suit against the builders.⁴⁷

The committee recommended that a standard contract for FHA and VA construction be required, guaranteeing that the house has been built free of major structural defects and in conformity with the plans upon which the FHA and VA based their loan guarantee.⁴⁸ These recommendations were not heeded until 1954, when Congress adopted them in part.

In that year Congress authorized the Federal Housing Commissioner and Administrator of Veterans' Affairs to require that the seller or builder of a dwelling designed originally as not more than a four-family residence "shall deliver to the purchaser or owner of such property a warranty that the dwelling is constructed in sub-

42. 1952 *Final Committee Report* 8.

43. *Id.* at 11.

44. *Id.* at 11.

45. *Id.* at 13.

46. *Id.* at 28.

47. *Id.* at 37.

48. *Id.* at 40.

stantial conformity with the plans and specifications . . . on which the [Commissioner or Administrator] based his valuation of the dwelling."⁴⁹ This warranty applies only if the owner of the non-conforming structure gives written notice of the defect to the warrantor within one year from the date of conveyance of title to, or occupancy of the dwelling, whichever occurs first.⁵⁰ The warranty is in addition to any other remedy the buyer may have from any other law or instrument⁵¹ and, though the statute does not so require, the warranty has been expressly drawn to survive the final settlement of title and delivery of possession of the property as well as any attempt at waiver.⁵² As an additional safeguard, copies of the plans and specifications for the dwellings in connection with which warranties are required to be given are to be made available at the local FHA or VA offices for inspection and copying by anyone interested.⁵³

Will this warranty have the effect which the Rains committee sought in its recommendations? It would seem not. The words of the statute require only a warranty that the house be built in substantial conformity with plans and specifications. On its face this would offer much narrower protection to the vendee than would a general warranty against major structural defects. The legislative history of this warranty, however, does suggest that it may be somewhat broader than the unglossed words of the statute would admit, perhaps even requiring that the house which must be built according to plans be constructed with enough care so as to avoid structural defects. The House version of the bill, which used the word "warranty," was disapproved in the Senate's report on its own bill, and the Senate substituted the word "certification" with this explanation:

Your committee felt that the word "warranty" carried with it the connotation of the blanket guaranty against all structural defects, poor materials, and poor workmanship. The word "certification" more clearly indicates that the purchaser is only safeguarded against nonconformity with the plans and specifications.⁵⁴

The fact that the Conference report replaced in the statute the

49. The FHA requirement is found at 72 Stat. 1266 (1958), 12 U.S.C. § 1701 (J) (1) (a) (1958). The VA requirement, similarly worded, was formerly found in the same part of the statute, but by amendment (Pub. Law 85-857, § 13 (s) (2), 72 Stat. 1266 (1958) effective Jan. 1, 1959), now appears in 38 U.S.C. § 1805 (a) (1958).

50. *Ibid.*

51. *Ibid.*

52. See copy of standard FHA and VA warranty form, inserted in Appendix B; see also CONF. REP. No. 2271, 83d Cong., 2d Sess. 85 (1954).

53. 72 Stat. 1266 (1958), 12 U.S.C. § 1701 (J) (1) (b) (1958); 38 U.S.C. § 1805 (b) (1958).

54. S. REP. No. 1472, 83d Cong., 2d Sess. 47 (1954).

word "warranty"⁵⁵ at least arguably can be interpreted as a manifestation of a Congressional desire to include within the meaning of the statute protection of a more "blanket" nature which the Senate tried unsuccessfully to avoid by its use of the word "certification." Such a construction, in the face of the wording of the statute, will undoubtedly be difficult for a court to accept. The result is that this federal warranty is probably limited to mechanical conformity to plans and specifications filed, and does not include a warranty that the home was built of proper materials, if such materials were not specified. It would also very likely not encompass a general warranty against structural defects and poor workmanship.

Nor is the vendee particularly aided by the manner in which this warranty is to be enforced. The Conference report on the statute was careful to emphasize that the warranty provisions were not self-executing. Rather, the rights which the provisions establish are governed by the laws of the particular states.⁵⁶ This was later confirmed in the case of *Ames v. Chestnut Knolls, Inc.*,⁵⁷ in which the court held that the provisions of the statute did not authorize the VA to enforce the warranty but only authorized the Administrator to require the builder to supply it. The fact that the warranty was required by federal law did not, said the court, make the breach of it a federal question. So, though the new warranty can be used as the basis for a criminal prosecution of the builder who seeks to avoid it,⁵⁸ it seems to present a rather unsatisfactory civil remedy from the vendee's viewpoint and thus may represent only a rather narrow breach in the caveat emptor barrier to vendee recovery.

The state legislatures have as yet passed no law requiring the vendor of real property to warrant expressly the quality and workmanship of the home he sells, though Louisiana, as has been pointed out, has a statutory implied warranty on all sales which seems to have the same result as requiring an express warranty.⁵⁹ The failure of an attempt in the New York legislature to pass such a law has been reported.⁶⁰ Some states, despite this lack of direct action, have passed laws which the courts have utilized in recent cases as an indirect basis for finding an express warranty similar to the one required by the FHA and the VA.

This "indirect" statutory warranty has arisen in those states which now allow or require their cities to set up local commissions at

55. CONF. REP. NO. 2271, 83d Cong., 2d Sess. 85 (1954).

56. *Ibid.*

57. 159 F. Supp. 791 (D. Del. 1958).

58. *United States v. Wender*, 158 F. Supp. 496 (E.D.N.Y. 1958).

59. LA. CIV. CODE ANN. art. 2520 (West 1952).

60. *Dunham, Vendor's Obligation As to Fitness of Land For a Particular Purpose*, 37 MINN. L. REV. 108, 109 (1952).

which all prospective builders must file completed plans of housing they propose to construct.⁶¹ Once the builder-vendor promises that he will build according to the plans he has filed, even if the promise to do so is oral, the courts have been willing to enforce such a promise as an express warranty of conformity to plans which, being collateral to the contract or deed, does not merge and so is not extinguished by the final transaction.⁶² This same result would of course follow even though plans are not required by law to be filed, if the builder-vendor asserts that he will in fact build according to plans, but the requirement of filing gives the vendee the additional assurance that proof will be more easily available to him. Moreover, it would seem that the courts might easily extend their reasoning in this area and find, once the plans are filed, that the builder-vendor has impliedly agreed by his act of filing to build in conformity to those plans, even though he never expressly promised to do so. The fact that the builder-vendor files his plans could well be construed as an outward manifestation of a subjective intent on his part to follow them, upon which the buyer would be justified in relying even in the absence of actual verbal expression of the intent.⁶³

It should be pointed out here that some of the state cases have enforced this warranty of conformity to plans with reservation, warning that the vendor who promises to build according to plans does not guarantee that the work performed will be free of structural defects or accomplish the purpose desired.⁶⁴ The builder-vendor only promises, in other words, to perform as the plans instruct. Of course, when the building is constructed according to plans set out by the vendee, despite vendor's protests that such plans would result in inadequate construction, the builder-vendor will not be held liable for subsequent defects.⁶⁵ In addition, most courts hold that, even if the vendee has obtained an express warranty of conformity to plans, taking possession of the house after opportunity to inspect will bar claims based upon defects which could have been easily ascertained, though such action would not be considered a waiver of latent defects.⁶⁶ An occasional post-1945 court, however, has in such circumstances found no waiver even as to defects which could have been discovered.⁶⁷

61. See, e.g., CONN. GEN. STAT., tit. 19-378 (1958); HAWAII REV. LAWS, § 146-10 (1955); MD. ANN. CODE, art. 23A, § 2(5) (1957); N.H. REV. STAT. ANN., § 156:1 to 156:3 (1955); N.Y. CONSOL. LAWS art. 18, § 383 (McKinney 1951).

62. *Laurel Realty Co. v. Himelfarb*, 194 Md. 672, 72 A.2d 23 (1950); *Greenfield v. Liberty Constr. Corp.*, 81 N.Y.S.2d 550 (Sup. Ct. 1948).

63. Cf. 1 CORBIN, CONTRACTS § 106 (1950).

64. *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958). *But see* *Russ v. Lakeview Dev., Inc.*, 133 N.Y.S.2d 641 (City Ct. 1954) (*semble*).

65. *Glass v. Wiesner*, 172 Kan. 133, 238 P.2d 712 (1951).

66. *Laurel Realty Co. v. Himelfarb*, 194 Md. 672, 72 A.2d 23 (1950); *Weinberg v. Wilensky*, 26 N.J. Super. 301, 97 A.2d 707 (App. Div. 1953).

67. *Sparling v. Housman*, 96 Cal. App. 2d 159, 214 P.2d 837 (1950).

The outcome is that the courts with the aid of the legislatures have recently succeeded in contracting the caveat emptor result by expanding the availability to the purchaser of the express warranty, even when the warranty is oral. If this express warranty is one of conformity to plans and specifications, however, it may not afford the purchaser all the relief it at first glance seems to give.

IV. WARRANTY OF MARKETABLE TITLE

A third area in which the courts have whittled down the concept of caveat emptor is that of marketable title, though the post-1945 contributions have not been as numerous in this field as in others. Here the settled rule is that, absent an agreement to the contrary, the vendor of real property must give his vendee a marketable title.⁶⁸ To the extent that the courts are stiffening the requirements of marketable title, they are supplying the vendee with an implied warranty, not so much of quality, as of fitness of the land for a particular purpose.

A. Private Covenants and Restrictions

The law has been quite consistent, and the most recent cases do not vary, in holding that the existence of a private restriction upon the use of the land is enough to prevent the land from being marketable.⁶⁹ This holds true even though the private restriction is so old that an equity court would be warranted in restraining any action brought to enforce it.⁷⁰ Some courts have added to the general rule the requirement that in order to make the title unmarketable the private covenant or restriction must impose greater restrictions upon the use of the land than those already imposed by statute or ordinance.⁷¹

One post-1945 California case seems to have extended the settled

68. 3 AMERICAN LAW OF PROPERTY § 11.47 (Casner ed. 1952). Marketable title is defined as "a title free from reasonable doubt both as to matters of law and fact, a title which a reasonable purchaser, well informed as to the facts and their legal bearings and willing and ready to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." 3 AMERICAN LAW OF PROPERTY § 11:48 (Casner ed. 1952).

69. *Javna v. Fredricks*, 41 N.J. Super. 353, 125 A.2d 227 (App. Div. 1956); *Lasker v. Patrovsky*, 264 Wis. 589, 60 N.W.2d 336 (1953). *But see Swinks v. O'Hara*, 98 Ga. App. 542, 106 S.E.2d 186 (1958), where the court held that, when a religious organization bought realty containing covenants running with the land which prevented its use as a church or school, these covenants did not prevent the title from being marketable because it could not be said that a reasonable man would neither purchase nor lend money on the land because of the restrictions.

70. *Jeffrey Structures, Inc. v. Grimaldi*, 186 Pa. Super. 437, 142 A.2d 378 (1958).

71. *Weiss v. Sachs*, 112 N.Y.S.2d 97 (Sup. Ct. 1952).

law somewhat by holding that the fact that the vendee knew when he signed the contract to purchase that there were private building and use restrictions on the land did not prevent him from thereafter rescinding the contract.⁷² This startling extension seems most unfortunate since it in effect gives the vendee an option to "think it over" after the contract is signed, while the vendor remains bound. The vendee who is aware of the restriction can sign the contract knowing that he can rescind, if he wishes, at any time before the deed is signed, if he happens to find a better buy elsewhere. This seems unfair to a vendor who did not know of the restriction, for he is neither compensated for this "grant" of an "option," nor able himself to rescind. The result is the same of course when the vendee does not know of the private restriction, but, when the vendee is aware of it, the added element of gambling on the chance of a better deal makes the California court's holding unsound.

B. Easements

The presence of easements has generally had the same effect upon marketable title as have private restrictions. An existing easement will prevent title from being marketable, unless the easement is visible, open, and notorious.⁷³ The same rule applies when the contract to convey states that the property will be free from encumbrances.⁷⁴ The reasoning is sensible; there is an assumption that the vendee who must be aware of the obvious easement and who has nevertheless signed has impliedly consented to except the easement from the guarantee of no encumbrances. The longstanding rule places a burden upon the vendee to visit the property site before he buys, a burden which is slight and quite reasonable in view of the fact that the vendee is probably going to live on the property.

The 1958 case of *Siegel v. Shaw*⁷⁵ has apparently considerably changed this rule. In that case the builder-vendor agreed by contract to convey a clear marketable title. An easement for a city sewer was plainly visible on the property and was in fact observed by the vendee. It was also marked on the development plans, though uncertainly. The court nevertheless allowed the vendee to recover his deposit and rescind, holding that the easement was an encumbrance and that knowledge on the part of the vendee was irrelevant.

72. *George v. Colvin*, 98 Cal. App. 2d 57, 219 P.2d 64 (1950).

73. 3 AMERICAN LAW OF PROPERTY § 11.49 (Casner ed. 1952); *accord*, 3120 Realty Corp. v. Tong, 6 Misc. 2d 909, 162 N.Y.S.2d 476 (Sup. Ct. 1957), *aff'd*, 5 App. Div. 2d 796, 170 N.Y.S.2d 997 (1958).

74. *Ford v. White*, 179 Ore. 490, 172 P.2d 822 (1946); *Somers v. Leiser*, 43 Wash. 2d 66, 259 P.2d 843 (1953); Note, 52 Mich. L. Rev. 1248 (1954).

75. 337 Mass. 170, 148 N.E.2d 393 (1958); cf. *Bibber v. Weber*, 199 Misc. 906, 102 N.Y.S.2d 945 (Sup. Ct.), *aff'd*, 278 App. Div. 973, 105 N.Y.S.2d 758 (1951) (*dictum*).

Ironically the same parol evidence rule, which in cases previously discussed failed the builder-vendor by not barring evidence of an oral express warranty, again plagued him, but this time by operating in full force to prevent him from arguing that obvious easements were impliedly excepted from the agreement to convey a marketable title. If followed, the *Siegel* case may well lead to injustice if the vendee orally promises to accept the burden of obvious easements which he has seen on the property and then later, desiring to rescind the sale, avails himself of the parol evidence rule. Even if evidence of vendee's parol agreement were admitted under the theory of preventing fraud against the vendor, proof of what was said in general conversation between vendor and vendee would be difficult to establish, particularly in light of what seems to be a growing desire to protect the vendee whenever possible. It is not too much of a burden to require the vendee to visit the location of his new home, observe the obvious easements, and allow for them in some way in the contract on pain of taking subject to their existence. Otherwise, the same type of contract in which only the vendor is bound would result.

C. Zoning Restrictions

Zoning regulations are also connected with the concept of marketable title, and as zoning itself has become more prevalent in this country, the cases have begun to settle the law as to the effect of zoning restrictions upon the covenant to convey from encumbrances or with a marketable title. Here the general rule, again followed by the latest cases, is that the mere existence at the time of the contract of a zoning ordinance applicable to the property sold is not enough to render the title unmarketable or encumbered, since these zoning restrictions are matters of public record and the vendee is presumed to have contracted subject to them.⁷⁶ If, however, the buyer is purchasing property which is at the time being used in violation of a zoning ordinance, this will render the title unmarketable because the buyer is also purchasing a lawsuit.⁷⁷ Furthermore,

76. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920); *Hall v. Risley*, 188 Ore. 69, 213 P.2d 818 (1950); *Lasker v. Patrovsky*, 264 Wis. 589, 60 N.W.2d 336 (1953). See generally 3 *AMERICAN LAW OF PROPERTY* § 11.49 (Casner ed. 1952). Cf. *Josefowicz v. Porter*, 32 N.J. Super. 585, 108 A.2d 865 (App. Div. 1954), where the vendee tried to avoid the operation of the general rule by demanding that the vendor guarantee in the contract that there were no restrictions in any plans of record which would prevent the use of the land as a poultry farm. There was in fact a zoning ordinance outstanding which would have prevented just such a use, but the court would not allow rescission, pointing out that the zoning ordinance was not required to be filed in the conveyancing office records where title searches were made. Consequently the zoning ordinance was not one of the type against which the vendor had guaranteed.

77. 3 *AMERICAN LAW OF PROPERTY* § 11.49 (Casner ed. 1952).

an existing violation may be grounds for rescission notwithstanding the fact that the contract provides that the conveyance is made subject to all restrictions and easements of record.⁷⁸ This general rule was recently followed by analogy when, in the sale of a newly constructed house, there was a violation not of a zoning ordinance but of the local building code. In that case the Wisconsin court⁷⁹ allowed the vendee damages, the deed already having passed, despite the fact that the builder-vendor argued, significantly enough, that this decision would have the effect of fixing by law upon a realty sale by a builder-vendor an implied requirement of fitness of the land for use, a requirement which, the builder-vendor insisted, did not exist in realty sales absent an express warranty given to that effect because of the rule of caveat emptor.

One post-1945 case, *Clay v. Landreth*,⁸⁰ seems to have drastically extended the settled rules in the zoning area, much to the potential frustration and consternation of builder-vendors in states which choose to follow its holding. Here the court held in what it acknowledged to be a first impression case that, where both the vendor and the vendee knew the use to which the vendee intended to put the property, the adoption of a zoning ordinance by the city *after* the contract to purchase had been signed, which would frustrate this intended use, was sufficient reason not to allow the vendor specific performance on that contract. The vendee consequently could refuse to take title.⁸¹ Should this view be generally accepted, the builder-vendor's business would be completely subject to chance and to the whims of the local zoning board. The contract to sell realty, which is designed to secure a firm business commitment upon which both sides are entitled to rely, would settle nothing. Risks of this type should be set finally at the time of the signing of the contract, particularly since often the deed will not pass for a long period after the signing if the vendee is buying in installments. Despite the *Clay* case, the general rule is so well settled that even in Louisiana with its liberal rule of redhibition the mere existence of zoning regula-

78. *Lohmeyer v. Bower*, 170 Kan. 442, 227 P.2d 102 (1951).

79. *Brunke v. Pharo*, 3 Wis. 2d 628, 89 N.W.2d 221 (1958).

80. 187 Va. 169, 45 S.E.2d 875 (1948).

81. The suit was brought by the seller for specific performance of the contract under the theory of equitable conversion. There was no fraud or misrepresentation. The court refused to give specific performance because the result would be to put "hardship or injustice" on the parties. In thus holding, the court overruled in effect their previous test [set out in *Hale v. Wilkinson*, 62 Va. (21 Grat.) 75 (1871): whether the inequity of the situation was so great as to shock the moral sense of the chancellor. In the *Hale* case, the consideration given for a home by the vendee was paid in Confederate currency, which became worthless before the deed passed. Nevertheless the vendor was required to transfer title to his property.] Though the old test as applied in *Hale* may be too strict, the new one needs more careful delineation.

tions affecting the property does not amount to an encumbrance upon the property which would allow rescission.⁸² Only an existing violation of the zoning restriction at the time of the signing of the contract is a sufficient "vice or defect in the thing sold, which renders . . . its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."⁸³

D. The English Doctrine of "Permitted Use"

With the exception of a few cases then, courts in this country have not since 1945 greatly increased vendor vulnerability in the marketable title area. One reason of course is that the rules applicable to private restrictions and latent easements had by that time already stiffened the requirements of marketable title. To a marked degree it is only in the area of zoning laws which are on the books but not yet violated at contract time that the builder-vendor has usually been able to argue caveat emptor with success. The builder-vendor may well be unable to find protection even in this narrow area, however, if the American judges decide to adopt from their English brethren the concept of "permitted use" and its possible effect upon marketable title.

In England, under the Town and Country Planning Act of 1947,⁸⁴ local planning authorities have the power, subject to approval by the Minister of Town and Country Planning, to enter into agreements with anyone interested in a parcel of land, with a view to restricting or regulating the development of use of the land, either permanently or for a stated period; and these agreements may be enforced against subsequent title holders.⁸⁵ In that country it is a general rule that the vendor of land must disclose to his vendee all matters affecting title to land, though he need not make such disclosures when they relate merely to the land's quality.⁸⁶ Defects which are characterized as "non-material" or "patent" have been held not to be matters affecting title and so do not require disclosure.⁸⁷ The argument is made that, since under the Town and Country Planning Act of 1947 the "permitted or authorized use" of the land is now the most important factor which the potential vendee will consider before buy-

82. *Di Carlo v. Pacanins*, 164 F. Supp. 841 (E.D. La. 1958); *Oatis v. Delcuze*, 261 La. 751, 77 So. 2d 28 (1954).

83. LA. CIV. CODE ANN. art. 2520 (West 1952).

84. Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c.51.

85. 10 & 11 Geo. 6, c.51, § 25.

86. *Edwards v. Wickwar*, [1865] L.R. 1 Eq. 68; and see generally Potter, *Caveat Vendor, or Conveyancing Under the Planning Act*, 13 CONVEY. (n.s.) 36 (1948).

87. See, e.g., *In re Belcham and Gawley's Contract*, [1930] 1 Ch. 56; *Ashburner v. Sewell*, [1891] 3 Ch. 405.

ing, and since the "permitted use" is not always obvious because it can be temporarily varied for a stated period, the "permitted use" of the land given by the local planning authorities is both material and latent. Therefore it is a matter affecting title which must be disclosed to the vendee under penalty of rescission, even though there is no actual violation of the "permitted use" because another use is temporarily being allowed.⁸⁸ At the basis of this argument lies the interesting theory that, after the "permitted use" concept was imposed by the Town and Country Planning Act of 1947, there are no longer in England fee simples in land, but only fee simples in the use of the land; consequently the very existence of a "permitted use" on the land and not just a violation of this "permitted use" becomes a question of title which must be disclosed to the vendee.⁸⁹ The validity of this theory has apparently not yet been tested in the English courts, but its possible impact upon the general American rule concerning the effect of zoning regulations on marketable title is most significant.

American courts may not—even in the face of increasing zoning—reject the ancient concept of a fee simple in land for the fee simple in the use of the land. Nevertheless the argument could be made by analogy to the English theory that the use permitted by zoning to which land can be put is close enough to the English concept of "permitted use" so that it becomes a matter affecting title, just as, it is argued, the "permitted use" is. Therefore, even if the new home is not in actual violation of the zoning regulation, the builder-vendor would have a duty under risk of rescission to disclose to the vendee all currently existing zoning ordinances which affect the home and land involved in the transaction. This duty to disclose on the part of the builder-vendor would also lay the foundation for a cause of action in fraud on behalf of the vendee when any incomplete disclosure is made, based on the theory that the vendor said nothing when he had a clear duty to speak. This would reverse the present rule discussed earlier which places no such duty of disclosure on the vendor in the absence of an actual zoning violation because the mere existence of the zoning regulation is not a matter affecting title.⁹⁰ Absent the duty to disclose, of course, there can be no cause of action against the vendor in fraud for silence.

Thus far, the discussion of the latest cases which have had the effect of reducing the caveat emptor concept has centered around the extension of a contract or implied contract theory of warranty

88. This argument is more fully expanded in Cobby, *Is the Permitted Use a Matter of Title*, 13 CONVEY. (n.s.) 329 (1949).

89. *Ibid.*; Note, 23 AUSTR. L.J. 10 (1949).

90. *E.g.*, Hall v. Risley, 188 Ore. 69, 213 P.2d 818 (1950).

and marketable title. This is not the whole story, for the courts have been arriving at substantially the same results through expansion of longstanding rules in another field, that of torts, and particularly in the areas of fraud and of negligence.

V. FRAUD

The doctrine of caveat emptor has never been strong enough to hold sway in the face of an intentionally false misrepresentation by the vendor relevant to a sale of realty.⁹¹ If the purchaser is induced to buy through some false statement of fact about the quality or fitness for use of the realty or building, spoken by the vendor with knowledge that it was false and with intent to deceive the purchaser thereby, a cause of action lies in deceit against the vendor for damages or rescission or both.⁹² Even if the vendor's falsehood is easily discoverable, as when the truth can be ascertained by a perusal of public records, most of the modern courts will allow the vendee a cause of action in deceit, providing the misrepresentation was intentional.⁹³

As a corollary to these rules, many courts hold that mere non-disclosure is not fraud because the vendor-vendee relationship is not of a fiduciary nature; consequently there is no duty to speak.⁹⁴ A few jurisdictions, however, have since 1945 found such a duty on the part of the vendor when the fact concealed is material and undiscoverable upon inspection by the vendee and when the vendor knows that the vendee is relying.⁹⁵ In some states then the vendor who is aware of hidden defects in the house or lot is liable in deceit whether he speaks or whether he does not—the obvious moral being: knowledge requires disclosure.

The most recent cases are split over the question of whether a statement in the contract to sell to the effect that both parties have

91. See *e.g.*, *Finefrock v. Carney*, 263 P.2d 744 (Okla. 1953); *Scroggin v. Worthy*, 51 Wash. 2d 119, 316 P.2d 480 (1957). See generally 3 AMERICAN LAW OF PROPERTY § 11.20 (Casner ed. 1952).

92. 55 AM. JUR. *Vend. & Pur.* § 63 (1946); 3 AMERICAN LAW OF PROPERTY § 11.20 (Casner ed. 1952).

93. See *Suraci v. Ball*, 160 Pa. Super. 349, 51 A.2d 404 (1947); see generally 55 AM. JUR. *Vend. & Pur.* § 67 (1946). *But see* *Shappirio v. Goldberg*, 192 U.S. 232 (1904).

94. *Egan v. Hudson Nut Prods., Inc.*, 142 Conn. 344, 114 A.2d 213 (1955); *Fegeas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958); *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942).

95. *Curran v. Heslop*, 115 Cal. App. 2d 476, 252 P.2d 378 (1953); *Kaze v. Compton*, 283 S.W.2d 204 (Ky. 1955); *Simmons v. Evans*, 185 Tenn. 282, 206 S.W.2d 295 (1947). Cf. *Knight v. Hemming*, 1959 (1) S.A. 238 (F.C.), noted in 76 S.A.L.J. 137 (1959), where the court found a duty to disclose simply because the vendor knew of the defects, even though, contrary to the above cases, the defect would have been discovered upon competent expert inspection.

disclaimed reliance upon any representations made which are not in the contract is effective in the face of evidence of fraud. The majority view holds the disclaimer ineffective under the theory that the fraud vitiates all it touches, including the disclaimer, which itself might have been secured by fraud.⁹⁶ The influential New York court, in a decision which seems to represent a reaction back to caveat emptor, held to the contrary in 1959, Fuld, J. dissenting.⁹⁷

Common law courts have for some time been willing to allow rescission, though not an action in deceit for damages, when a seller makes a false statement without knowing that it was false, upon which the buyer relied.⁹⁸ Nevertheless some American courts, perhaps influenced by the pull of caveat emptor, have continued to require in a realty case a showing of deliberate intent to deceive before allowing any cause of action sounding in fraud in a case of either express statements or non-disclosure.⁹⁹ Many courts on the other hand allow an action in rescission of the executory contract to sell when the vendor's misrepresentations, though innocently made, concern facts the truth of which could only be known by the vendor and which are unavailable to the vendee.¹⁰⁰ It seems that the courts have balked, however, in allowing the vendee a cause of action even in rescission when the innocent misrepresentation made by the vendor was about information available to both vendor and vendee by reason, for example, of its appearing in public records.¹⁰¹ In such circumstances the courts have said that caveat emptor was the governing standard.¹⁰²

Aside from the instances already mentioned, the cases decided since the end of the Second World War have made some additional and more basic changes in the general rules of law for cases sounding in fraud in the realty area. These changes have been in the form of extensions both in the substantive law and in the remedies available, and the changes in both areas directly aid the vendee, making recovery against his vendor easier.

In the field of remedies, a small cluster of courts have now completely blurred the once well defined line between causes of action in

96. *Bryant v. Troutman*, 287 S.W.2d 918 (Ky. 1956); *Nyquist v. Foster*, 44 Wash. 2d 525, 268 P.2d 442 (1954).

97. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597 (1959); and see a critical Note, 59 COLUM. L. REV. 525 (1959).

98. *Derry v. Peek*, [1889] 14 App. Cas. 337 (House of Lords) (*dictum*).

99. *Egan v. Hudson Nut Prods., Inc.*, 142 Conn. 344, 114 A.2d 213 (1955); *Fegeas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958); *Finefrock v. Carney*, 263 P.2d 744 (Okla. 1953).

100. *Spiess v. Brandt*, 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950); *Power v. Esarey*, 37 Wash. 2d 407, 224 P.2d 323 (1950). See also TEX. REV. CIV. STAT., art. 4004 (1948).

101. Cf. *Shappirio v. Goldberg*, 192 U.S. 232 (1904); *Kalmans v. Powles*, 121 Wash. 203, 209 Pac. 5 (1922). See also 55 AM. JUR. *Vend. & Pur.* § 67 (1946).

102. *Traverse v. Long*, 165 Ohio St. 249, 135 N.E.2d 256 (1956).

intentional deceit for damages and causes of action in innocent misrepresentation for rescission, holding that even in an action based upon an innocent misrepresentation the duped vendee may now sue for damages.¹⁰³ Two other cases, both decided in 1954, have expanded the law of remedies available for a cause of action in "innocent fraud" even more and thus represent the present extremes. In *Ham v. Hart*,¹⁰⁴ the Supreme Court of New Mexico, faced with a situation in which the vendor falsely but innocently represented that a well on the land he was selling would yield two gallons of water per minute, decided, even though there was no finding of intent to defraud, to allow the vendee either rescission or damages, saying that it found no distinction between the two. This was not, however, mere rescission of the contract to convey, but rescission of the deed itself. In Delaware, in *Dugan v. Bosco*,¹⁰⁵ the court found a mutual mistake as to the location of the septic tank on the property and, like the New Mexico court, allowed rescission of the deed, despite the fact that the vendee had made some very material changes on the property which prevented him from returning it to the vendor in its *status quo*.

A trend of this sort, which allows damages even when there has only been an innocent misrepresentation, might under usual selling circumstances be considered an impure blending of two separate legal concepts and remedies. Ordinarily, courts have allowed only rescission in the case of non-intentional misrepresentation, probably because they have felt that an award of damages is a harsher measure and should be reserved for misrepresentation of the intentional variety as a kind of punishment for *scienter*. Though such reasoning might apply quite properly to sales of low cost, easily duplicated items which can be easily discarded or resold by the vendor at no great loss, it is not at all clear that such reasoning is appropriate in the realty sales field. There the builder-vendor has invested a much greater amount of time and labor in constructing and selling a home than would be spent in the manufacture and sale of the ordinary over-the-counter item. In addition, in the case of a department store merchant, his actual personal effort at selling the consumer is not a major business factor because the department store consumer ordinarily comes in, looks for what he wants, and buys (at least the lower cost items) without much convincing required. The builder-vendor on the other hand must often go through a great

103. *Spargnapani v. Wright*, 110 A.2d 82 (D.C. Mun. App. 1954); *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957); *Passero v. Loew*, 259 S.E.2d 909 (Tex. Civ. App. 1953) (by statute, TEX. REV. CIV. STAT. art. 4004 (1948)); *Dixon v. MacGillivray*, 29 Wash. 2d 30, 185 P.2d 109 (1947).

104. 58 N.M. 550, 273 P.2d 748 (1954).

105. 108 A.2d 586 (Del. Ch. 1954).

deal more to secure his sale. The reasons are inherent in the items he sells. A home, even in the low-priced range, is often the largest single purchase the consumer will make. Also, the consumer will not be buying a home lightly with the idea (which he usually has when he buys a department store item) that he will be easily able to return it if it is found to be defective, for he must have some place to live. These observations suggest that the consumer will buy a home with much greater care than, for example, a typewriter, and will try to insist that the home conform more closely to his individual whims than he would if the item were of the department store variety. He is after all often buying for lifetime use. This attitude on the part of the vendee necessarily increases the amount of selling time and effort the vendor of a home must spend on each of his units. Selling effort thus becomes a factor of primary importance in the builder-vendor's business. This, coupled with the fact that the manufacture of a home is a much longer and costlier process when compared with that of the average counter items, suggests that, contrary to the ordinary sales situation, it is rescission and not damages which often has the greater punitive effect upon the builder-vendor. If rescission is allowed, he cannot, like the merchant, simply discard his item as a "reject" or plan on repairs and an easy resale. A "reject" in the business of selling homes is a costly setback; the builder-vendor must make efforts to resell immediately or suffer heavy losses. All this implies that the trend being set by the few courts which allow damages for innocent misrepresentation is a satisfactory one, though those cases which so hold have not considered the problem in the terms just discussed, for they would also allow rescission. Given the choice, it would seem that the builder-vendor who has innocently misrepresented his product would rather be put to the expense of repairing a defect of quality rather than being saddled with rescission and the expensive task of finding a new vendee.¹⁰⁶ A proper solution to the problem of innocent fraud in the sale of real property which would be fairest to all concerned should certainly take this into consideration.¹⁰⁷

The largest change in the substantive law area is not as satisfactory. Massachusetts, which protects the vendor most staunchly when no representations are made by him,¹⁰⁸ paradoxically has also adopted the most liberal contrary rule when the vendor makes the mistake of

106. Of course, if the innocent misrepresentation concerns, not the quality of the realty, but its permitted use, rescission will often be the only appropriate remedy and should be given.

107. See the solution offered by the author's proposed Model Act, Appendix A.

108. See *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942).

saying anything at all. In *Yorke v. Taylor*,¹⁰⁹ a case directly within the philosophy of the *Siegel* case discussed earlier,¹¹⁰ the Massachusetts court held the purchaser entitled to rescind the sale of realty because of an innocent misrepresentation by the vendor as to the realty's assessed value, even though the vendee could have ascertained the falsity of the representation by simply looking in the public records. This case holds contrary to what seems to be the general rule¹¹¹ and, it is submitted, accomplishes an unfortunate result.

There may be good reason, to be sure, for holding the misrepresenting vendor liable for rescission, even when he has no intent to deceive, when the truth of the misrepresented facts cannot be readily verified by the vendee. But when the information is in the public record and the vendor has not intentionally lied, rescission is improper because it is unfair. Protecting the vendee is one thing; indulging him is yet another. Surely it is not too much to ask the vendee to take some burdens in the sale. It would seem that anyone making a purchase as significant as that of a home should feel called upon to make reasonable investigations into readily available information before acting. Those who agree with the Massachusetts court would argue that the vendor could have protected himself by giving no information at all. This view is theoretically sound but practically unrealistic. In a field as competitive as real estate sales, the vendor cannot be expected to remain silent and still stay in business. When questions arise, he must inform himself as best he can and give his vendee an answer which he thinks is correct, or the vendee may well go elsewhere. If the vendor's answers are intentionally false or, though unintentionally so, concern facts which are accessible only to the vendor, the vendee has a strong case morally for recovery because he must rely upon the vendor's word. But moral justification fades rapidly when the vendor's misrepresentation was unintentional and non-negligent and when the vendee, acting in a reasonable prudent manner, could have discovered the information himself. Then rescission places a burden upon the vendor which, as was pointed out above in the discussion of remedies, is too drastic relative to the amount of fault involved. (The *Yorke* court, attempting to mitigate the harshness of its holding, argued that it was after all only allowing the vendee the remedy of rescission, which it seemed to feel was the least punitive of the possible remedies.)¹¹² The issue seems to reduce itself to the question of whether it is desirable to

109. 332 Mass. 368, 124 N.E.2d 912 (1955); see also *Gamble v. Beahm*, 198 Ore. 537, 257 P.2d 882 (1953) (*semble*).

110. See note 75 *supra*.

111. See notes 101, 102 *supra*.

112. *Yorke v. Taylor*, 332 Mass. 368, 374, 124 N.E.2d 912, 916 (1955).

protect the fool in every situation at the expense of the vendor. The answer should be "No," when what follows is unjustifiably severe on a vendor who is, as in the *Yorke* situation, no more at fault than the vendee.

VI. NEGLIGENCE AND PERSONAL INJURY—THE *MacPherson* DOCTRINE

The fifth area in which the assault upon the doctrine of caveat emptor has gained ground through post-1945 cases is that of negligent construction of homes which later causes personal injury. Here the builder-vendor is exposed to liability in two capacities, as a vendor who sells a defectively constructed home and as a builder whose negligently manufactured product caused the injury. In both capacities, the protection formerly afforded by caveat emptor has recently dwindled considerably.

As for liability in the capacity of vendor one rule, which has been recently reaffirmed both in Tennessee¹¹³ and England,¹¹⁴ was first laid down in the leading case of *Smith v. Tucker*.¹¹⁵ In that case, the Tennessee court held that caveat emptor applied to sales of land and that consequently the vendor owed no duty to disclose to the vendee any defects or dangerous conditions in the property which eventually led to injury, even though the vendor knew of the dangerous condition when he sold. The rationale of the court was that the vendor, after passing the deed, no longer had control over the property and so could not be liable to the vendee for structural defects which thereafter caused injury.

This rule has been modified in some states which have re-examined it. Those jurisdictions hold that the vendor will be held liable for injuries caused by an existing structural defect which he actually knows about but fails to disclose when he passes the deed to the vendee.¹¹⁶ The basis for liability on the part of the vendor is not warranty, but an affirmative duty on the part of the vendor to disclose a dangerous condition when he knows of it.¹¹⁷ This view has

113. See *Smith v. Tucker*, 151 Tenn. 347, 270 S.W. 66 (1925). See also *McIntosh v. Goodwin*, 40 Tenn. App. 505, 292 S.W.2d 242 (1954) and *Evens v. Young*, 196 Tenn. 118, 264 S.W.2d 577 (1954), both approving *Smith v. Tucker*. See a critical Note, 24 TENN. L. REV. 1170 (1957), commenting on this line of cases. See also Trautman & Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921, 929-34 (1954).

114. *Otto v. Bolton and Norris*, [1936] 2 K.B. 46.

115. 151 Tenn. 347, 270 S.W. 66 (1925).

116. E.g., *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1953); *Bray v. Cross*, 98 Ga. App. 612, 106 S.E.2d 315 (1958); *Combrow v. Kansas City Ground Inv. Co.*, 358 Mo. 934, 218 S.W.2d 539 (1949) (*dictum*). See generally PROSSER, *TORTS* 462 (2d ed. 1955); Annot., 8 A.L.R.2d 218 (1949); Note, 44 MINN. L. REV. 144 (1959). The history of this modification can be traced to a dictum in *Palmore v. Morris, Tasker & Co.*, 182 Pa. 82, 37 Atl. 995 (1897).

117. *Bray v. Cross*, 98 Ga. App. 612, 106 S.E.2d 315 (1958).

also been adopted by the *Restatement*, which finds liability if the vendor knows of the risk involved and has reason to believe that the vendee will not discover it.¹¹⁸

The protection thus afforded the vendee is not complete, however, because of the possibility that the vendee might not be able to prove actual knowledge of the dangerous condition on the part of his vendor. To cure this situation a few courts have lately allowed the vendee or other injured party even without a "building" contract to sue the builder of his home under the auspices of the rule of *MacPherson v. Buick Motor Co.*¹¹⁹ Some jurisdictions, notably England¹²⁰ and Tennessee,¹²¹ dissent. Nevertheless in those jurisdictions which favor this extension the builder-vendor is placed in a very unenviable position. First, even if he escapes liability as vendor because he knows nothing of the structural defects, he can still be held liable as a negligent builder for what he should reasonably have known, if the house fits the "dangerous item" test of the *MacPherson* case. Secondly, if *MacPherson* applies, the builder-vendor will be liable, not only to his immediate vendee, but apparently to anyone (even though not a user)¹²² injured as a result of a structural defect in a home he has built, since privity of contract is no longer necessary.

This extension of the *MacPherson* doctrine to realty has been almost exclusively a post-1945 phenomenon. Thus, in 1954 the Florida court applied *MacPherson* to hold the contractor of a new home liable in the death of a young boy injured by a window falling from the home, though the boy did not live in the house.¹²³ In 1956 the District of Columbia court used *MacPherson* to hold the landlord's contractor liable to the tenant for the tenant's injuries resulting from negligent repairs.¹²⁴ In 1958 the Illinois Supreme Court would have held the builder-vendor liable for injuries to the vendee's son on a finding that the builder-vendor either knew or should have known of the structural defect, but declined to do so because the defect was

118. RESTATEMENT, TORTS § 353 (1934).

119. 217 N.Y. 382, 111 N.E. 1050 (1916).

120. See *Otto v. Bolton and Norris*, [1936] 2 K.B. 46, which refused to allow the injured party to sue the builder-vendor in his capacity either as builder or as vendor, holding that caveat emptor applied. The court limited the *MacPherson* rule to chattels for the dubious reason that the vendee of a house can always inspect it before buying and can therefore amply protect himself.

121. See *Evens v. Young*, 196 Tenn. 118, 264 S.W.2d 577 (1954) (*semble*), rejecting the injured vendee's suit against his builder-vendor in his capacity both as vendor and as builder and even as the architect who approved the dangerous construction.

122. *Carter v. Livesay Window Co.*, 73 So. 2d 411 (Fla. 1954); RESTATEMENT, TORTS § 385 (1934).

123. *Carter v. Livesay Window Co.*, 73 So. 2d 411 (Fla. 1954).

124. *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956).

an obvious one.¹²⁵ In California, also in 1958, the original builder-vendor was held liable for injuries to an owner who was the third vendee in the chain of title.¹²⁶ The injury was caused by negligence on the part of the builder-vendor's subcontractor. Finally in Rhode Island in a case only slightly more than a year old the federal district court decided that the Rhode Island state courts would apply *MacPherson* and so held the builder-vendor liable for injuries to an employee of the owner of the building caused by structural defects in the heating system.¹²⁷ In none of these cases was there encountered the least difficulty in finding or assuming that the house was one of the inherently dangerous items against which the *MacPherson* doctrine was designed to protect.

The most decisive reduction of the protection of caveat emptor in this context, however, is to be found in the case of *Coporaletti v. A-F Corp.*,¹²⁸ decided in 1956 in the District of Columbia by Judge Holtzoff. There the vendee was injured when the bottom of a stairway attached to her house came unbolted, throwing her to the ground. The court held that, when the vendor of a house is also the builder, he is liable not only for actual, but also for constructive knowledge of his own negligence if the defect could not have been discovered upon inspection by the ordinary man in the street. Thus the court reached the *MacPherson* result without requiring a preliminary finding on the limiting qualification that the item which caused the injury must be inherently dangerous when negligently made. At the same time, it expanded the liability of the vendor past "actual knowledge" to "reason to know" when the vendor is also the builder.

Addressing himself to what he admitted was a novel problem in his jurisdiction, Judge Holtzoff rejected a plea of caveat emptor in words which reflect clearly what, it has been previously submitted, is a changing attitude toward that doctrine in the courts today:

Conditions have radically changed since the origin of the general common law rule. Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because he usually lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise he would be at the vendor's mercy.

125. *Kordig v. Northern Constr. Co.*, 18 Ill. App. 2d 48, 151 N.E.2d 470 (1958).

126. *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958).

127. *Pastorelli v. Associated Eng'rs, Inc.*, 176 F. Supp. 159 (D.R.I. 1959).

128. 137 F. Supp. 14 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957).

The realities of modern life necessarily lead to the conclusion that the builder should be liable for injuries caused by his negligence under such circumstances, either to the purchaser or to an invitee. Any other result would be unjust and intolerable. It would encourage unscrupulous builders who may be tempted to reduce their costs and increase their profits by palming off defective and inferior construction on their customers.¹²⁹

The reasoning which these words convey could be employed, not only to hold the builder-vendor liable to the vendee for injuries due to negligent construction, but with equal logic to a case in which the vendee is arguing simply for an implied warranty of good workmanship and quality in the sale of a newly completed home. Perhaps, when such a case comes before Judge Holtzoff, it will be so employed.

The doctrine of the *MacPherson* case should not be extended to the law of realty sales without more careful consideration than most of the cases reflect. The builder-vendor may complain that it is unfair to hold him responsible for defects in the construction of an item over which he no longer can exercise control, but this same argument of course holds true for a manufacturer of chattels, to whom the *MacPherson* case was originally applied. The home builder can, however, make stronger arguments based on the inherent nature of the item he manufactures. A home is a much more complex structure than the ordinary chattel;¹³⁰ as a result there is a much greater probability of something going wrong, and the vendee should perhaps be held to a more rigid requirement of inspection before recovering for personal injuries than is ordinarily the case in personalty. Also the weather is a much more significant factor in bringing out or aggravating structural defects in a home than it is in the case of the ordinary chattel,¹³¹ but the distinction between defects caused by negligence and those caused by the elements will be quite difficult for the builder-vendor to prove in his own defense.

There are other difficulties. The extension of *MacPherson* to realty will lay the builder-vendor open to the caprice of juries who will not hesitate over the supposedly limiting qualification that the home be inherently dangerous when negligently made.¹³² Further, there may be no effective statute of limitations. The builder-vendor will be liable on all his products as long as a continuing causal connection can be shown to exist, and, since this is a jury question, the likeli-

129. *Caporaletti v. A-F Corp.*, 137 F. Supp. 14, 16 (D.D.C. 1956).

130. The average house is composed of some 30,000 parts, the average automobile of about 5,000. AMERICAN HOUSING—PROBLEMS AND PROSPECTS 41 (20th Century Fund 1944).

131. *Id.* at 85.

132. For an excellent criticism of this application of the *MacPherson* rule, see Prettyman, J., dissenting in *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956).

hood of findings of causal connections of very dubious length, which the court would still be reluctant to overrule as a matter of law, presents a serious problem to the insuring builder-vendor.¹³³ Nevertheless, the extension of *MacPherson* to realty would seem on the whole proper, if a suit could by statute be prohibited after a relatively brief fixed period beginning with the completion of the house: for example one or two years.

The extension of the *MacPherson* theory to realty in effect places upon the builder-vendor an implied warranty against structural defects upon which the vendee can sue should injury occur because of the defects. It would not seem too great a step for future courts to take, to reason that, if such a "warranty" exists when an injury has occurred, there is no reason to say that it does not exist when the vendee sues his vendor who is also the builder, not to redress an injury, but simply to establish the structural quality and good workmanship in his house, the lack of which may lead to injury at some later time. For this reason, the black-letter law to the effect that there are no implied warranties of quality in the sale of a new house is most likely to fall in the situation in which the vendor of the house is also its builder.

VII. PREDICTED TRENDS

As has been demonstrated, the vendee who is dissatisfied with the quality or fitness for purpose of his home now has at his disposal some five distinct theories on which he can base an action for damages or rescission despite the general rule that there are no implied warranties in the sale of real estate. There are other possible arguments, not fully developed as yet, which might be attempted by the vendee with increasing success as the courts become more and more receptive to views which narrow the gap between the warranty-filled transactions in sales of personalty and the domination of caveat emptor in sales of realty.

One of the symbols of the new mass production of housing has been the model home, which the builder-vendor constructs for the purpose of affording the potential purchaser a tangible idea of what his own unit will be like. Sale of personalty by sample today results in an implied¹³⁴ or expressed¹³⁵ warranty to the buyer that the items sold will conform to the sample. No case has yet unequivocally

133. See *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1 (1948), where the builder-vendor was held liable for a defect in a house built in 1925, when the injury occurred in 1943. See also *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956), where the injury occurred seven years after the repairs.

134. UNIFORM SALES ACT § 16.

135. UNIFORM COMMERCIAL CODE § 2-313 (1) (c).

applied this doctrine to the sale of homes, though some courts have suggested that they might be receptive to its use as a theory of recovery. In *Miller v. Cannon Hill Estates, Ltd.*,¹³⁶ the court noted that the vendee had purchased the unfinished home after inspecting a "show house," but it did not, as has been discussed, base its holding on this point. Similarly in *Kordig v. Northern Construction Co.*,¹³⁷ previously cited for its acceptance of the *MacPherson* doctrine, the concurring judge observed that the vendees, who were parents of the injured party, were induced to buy after inspecting the builder-vendor's model home, which did contain a handrail, the lack of which allegedly caused the injury in the vendee's own home. However he found for the builder-vendor because the actual contract to sell incorporated plans which did not call for the installation of such a rail.

When the builder-vendor actually promises to sell a home constructed like the model, this would seem to create an express warranty just as surely as promising to build according to plans and specifications would. Even in the absence of an express promise the courts may well find an implied warranty to conform to the quality of the model from the fact that the model home was constructed with the intention of inducing purchasers to buy with the expectation that their home would resemble the model.

The second possible theory on which vendees might rely has a somewhat shakier basis. It is a general rule of law that, when one contracts to build a home for another, there is an implied agreement between the parties to the building contract that the construction will be done in a workmanlike manner and that the finished home will be fit for the use intended.¹³⁸ As a result the vendee who has a building contract with the builder-vendor has no worries. Ordinarily however he has only a contract to buy a completed house, and caveat emptor then intervenes. Nevertheless, the vendee might argue, particularly if he is the first "consumer" buyer of a newly built house, that he is in the position of a third party beneficiary to the agreement to build in a workmanlike manner which is implied between the builder and the party for whom he has contracted to build, that is, the commercial vendor. The vendee's argument is considerably enhanced when the vendor from whom he bought is in the business of selling, for in that situation it is clearer that the builder was constructing the house for the sole purpose of immediate sale to the public. Therefore, it would be easier to conceive of the vendee as the bene-

136. [1931] 2 K.B. 113.

137. 18 Ill. App. 2d 48, 151 N.E.2d 470 (1958).

138. *Minemount Realty Co. v. Ballentine*, 111 N.J. Eq. 398, 162 Atl. 594 (1932); see generally 17 C.J.S. *Contracts* § 329 (1939).

ficiary of the building contract and any implied agreement that accompanies it. When the builder and vendor are the same person, the vendee would have his strongest chance of success because in that situation the vendee does have a contractual relationship with the builder, even though it be technically only a buying and not a building contract.

When the vendee buys his newly completed home from a builder-vendor, he is clearly relying directly upon the special skills of that individual as the builder for a workmanlike performance, even though he has no contract with the builder-vendor in his capacity as builder. The vendee will contend that when a person like the builder-vendor holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work he undertakes will be of proper workmanship and reasonably fit for the intended use,¹³⁹ and that the vendee is in a real sense the person who should derive the benefit of such a warranty, particularly when the builder who constructed the home and the seller from whom the vendee buys are the same individual.¹⁴⁰

Finally, there is the possibility of action from one of the state legislatures. Public opinion is apparently high, since there was enough pressure or interest to stimulate Congress in 1954 to attempt to deal with the problem by passing the FHA and VA warranties which have already been discussed. On the other hand, since there is a National Association of Home Builders but no organized association of home buyers, (other than perhaps the veterans) it is likely that, should the NAHB be opposed to a statutory warranty, its lobby would be decisive. It is also quite likely that the various means previously pointed out by which courts have lately been able to circumvent the caveat emptor rule now afford vendees sufficient theories of recovery so that pressure for a statutory change in the law will subside.

VIII. CONCLUSIONS

Perhaps the most obvious conclusion to be drawn from a study of the cases and literature in this area is that there is a great deal of uncertainty, lack of understanding, and ignorance as to just what the obligations of vendor and vendee are. This state of confusion exists, not only among the general public,¹⁴¹ but also among those

139. *Estate of Talbott v. Swindler*, 184 Kan. 501, 337 P.2d 986 (1959); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951).

140. Cf. *MacKinnon, L.J.* concurring in *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 390 (C.A.); cf. also UNIFORM SALES ACT § 15 (1) and UNIFORM COMMERCIAL CODE § 2-315, which provide for warranties of fitness for purpose under such circumstances.

141. See, e.g., an article entitled *When You Move Into a New House in*

who should be informed.¹⁴² Furthermore, both sides of the argument as to whether a warranty of quality and fitness for purpose should be implied in the sale of realty are strong enough to be convincing.

The builder-vendor contends first that such a warranty is for the most part unnecessary. He will often take it upon himself to repair defects in a home he has sold when he feels that his negligence may have been the cause. This is simply a matter of his own pride in his work and good will to his customer. He will balk, however, when he feels that the defects occurred so long after the completion of the home that they could not be fairly traced to his lack of skill, but are simply the product of ordinary wear or the elements. He complains that the vendee's expectations of quality are often unreasonable. While the average department store customer would not expect the same performance from a one dollar fountain pen that he has reason to demand from a fifteen dollar model, this same person, when he buys an \$8,000-\$10,000 home, loses sight of the fact that, though it may be his castle, he cannot expect it to be built like one.¹⁴³

Further, the builder-vendor contends that he is dealing with a group of consumers who know little or nothing about the maintenance of a new home.¹⁴⁴ He argues that he should not be required legally to stand behind a product over which he has no control nor even a legal right to enter and repair. This is particularly true, he contends, since his creation is more heavily and continually subjected to the elements than almost any kind of chattel. Some structural shifting and wear is inevitable; it is inherent in the nature and use of the item bought. Finally, the builder-vendor points out that there is at

Redbook Magazine, Dec. 1959, p. 46, which informs its reader, without pointing out the important distinction between a contract with the builder-vendor to build and a contract just to buy: "The materials and workmanship in your house carry a guarantee. If possible, have the builder attest to this in writing. In some instances he will guarantee only part of the work and you will have to negotiate separate agreements with the subcontractors. Even if the terms are not spelled out, however, the law recognizes that there is an implied guarantee." *Id.* at 47.

142. See, e.g., the query by Albert Rains, chairman of the 1952 Subcommittee on Housing of the House Subcommittee on Banking and Currency: "Of course, in private industry, if a contractor builds you a house and it tumbles down within a year, within a reasonable time you would have the right to go into court and seek recovery, wouldn't you?" 1952 *Hearings* 85.

143. A prominent Memphis, Tennessee builder-vendor of many years experience summed up this point by lamenting to the author that today's buyers do not understand that "when you buy a \$10,000.00 house, you just can't expect gold doornobs."

144. See a portion of a letter sent by the Long Island Home Builders Institute to the 1952 Rains Subcommittee on Housing: "Many complaints arise out of a misunderstanding as to where the builder's responsibility begins and ends and where the owner's responsibility in maintenance begins. Many new home owners, never having previously lived in a home of their own, retain the viewpoint of the tenant and persist in the belief that the builder's responsibility continues even into items that are really matters of owner maintenance." N.Y. Times, Mar. 2, 1952, § 8, p.1, col. 4.

present no available insurance to cover such a warranty as is requested unless injury or property damage occurs. Such insurance or a bond would be necessarily expensive in view of the fact that the assured might be held liable for repairing buildings over which he has long since lost control. He would then have to pass the expense of insuring on to his buyers, and this would quickly take the "low" out of low cost housing.

The vendee, on the other hand, insists that he has a right to expect a warranted product in the realty field as well as in the field of chattel sales. The morals of the market place, he says, are now opposed to a caveat emptor philosophy. The purchase of a home is usually the most important and most expensive one he makes in a lifetime, and he has a right, he thinks, to expect his unit to be of good quality and to be constructed with the same care, though not with the same materials, as the \$100,000 mansion.

The vendee's strongest argument is reliance.¹⁴⁵ He is admittedly unskilled in the mysteries of house construction and must therefore rely heavily upon the superior skill and training of his builder-vendor. Inspection will be of little use, as has been argued previously, in protecting the vendee, both because of the expense and because the defects are usually hidden. Though the vendor-vendee relationship may not be technically a fiduciary one, the trust placed in the vendor coupled with the relative helplessness of the vendee make it one, contends the vendee, on which the law should impose that high standard.

The courts, as initial arbiters of this dispute, have apparently found the vendor's arguments more convincing. They have clung, at least verbally, to the rule of caveat emptor, feeling content to reach the opposite result in more devious fashion when the facts seem to require or allow it. The basic reasoning of the present judicial view seems to be the idea that inspection is available to the vendee before he contracts to buy and that, after the house changes hands, it would be unfair to hold the vendor responsible for it. Distinguishing between inspection opportunities for completed and incompletd houses, the English court in the *Miller* case made the only exception to date to the general caveat emptor rule, an exception founded upon a somewhat doubtful rationale. Perhaps, because the caveat emptor view has been reached and reaffirmed so often by the common law courts, the only forum likely to develop a different solution which is fair to both parties will be the legislature.

Toward this purpose a model act and accompanying "legislative

145. See Waesche, J., dissenting in *Levy v. Young Constr. Co.*, 46 N.J. Super. 293, 134 A.2d 717 (1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958).

history" is here proposed. The text of the act is set forth in Appendix A. Section 1 provides for two implied warranties of quality. The warranty in part (a) applies to sales of all buildings but is qualified by the requirement of proving that the vendor or his agents had actual knowledge of the defect when they sold. Part (b) imposes an additional warranty upon the vendor which is unqualified, in the sale of newly built homes, but it is imposed only against a vendor who is in the realty business because his superior knowledge and skill force the average vendee to rely heavily when buying. Thus the weightier responsibilities created by the act are imposed upon the builder-vendor and the business vendor, and not upon the non-business home owner who sells. Once the home has been "used," the act deems it unreasonable to hold the vendor, even if he is a professional, for any defects of which he or his agent is unaware.

Since the imposition of the unqualified implied warranty of quality is based upon the theory that it is the ordinary home buyer, relatively ignorant of the business of buying a home, who needs this statutory protection, the unqualified warranty is implied, as the definition of "dwelling" shows, only in purchases of one or two family homes. Anything larger than a two-family dwelling is often an apartment house, and these are commonly purchased by corporations or individuals with enough wealth to afford competent inspection or knowledge of the realty business to lower the important reliance factor considerably. For such sales, the warranty of part (a) should afford sufficient protection.

To meet the vendors' complaint that the ordinary vendee unfairly and unreasonably expects more than he pays for, the test for recovery built into the warranties is: Will this construction pass without objection in the trade?¹⁴⁶ Though this makes the test one with a sliding scale, it is still tight enough to allow the court to find in the vendee's favor on the basis of a minimal amount of opinion evidence given by a representative of the realty trade that the quality is poor in relation to the price of the house. Still, it should discourage outlandish claims which are brought solely with the hope of making enough of a case to get to the jury. The definition of "initial vendee" is drawn with the idea of giving the unqualified warranty of section 1(b) to the uninitiated purchaser who most needs it while at the same time preventing the builder-vendor from circumventing that warranty to get to the qualified one in section 1(a) (where proof of vendor's actual knowledge of the defect is necessary), by selling the dwelling first to a dummy.

Section 2 voids the warranties if the vendor can show that an

146. Cf. UNIFORM COMMERCIAL CODE § 2-314.

examination by the vendee himself (and not by an expert) at the time of contracting would have revealed the defect.¹⁴⁷ Section 3 prevents the vendor from using what is sometimes the superior bargaining position to induce a waiver of the warranties.

Section 4 gives the vendee, his heirs, or personal representatives a choice of remedies: damage or rescission. However, a proviso is added, based upon the belief, as previously argued, that rescission as a remedy in realty sales is often too harsh relative to the fault involved. If the cost of repairs is low enough, and if the time required for repairs is short enough so as not seriously to inconvenience the home owner, the vendor can in effect veto the rescission remedy and choose to pay only damages if he loses the suit. This result seems fairest to all, though the proviso has some inherent weaknesses which might bring problems of application.

The statute of limitation in section 5 is short, only one year. The act is primarily designed to protect home buyers from structural defects and improper workmanship in newly constructed homes. One year represents a full seasonal cycle and should bring out all defects in existence at the time of the deed, or, in case of an installment purchase, at the time the vendee took possession. Defects which manifest themselves later are much more likely due to ordinary wear and tear or the elements, and the one year limitation is designed to prevent the jury's speculating on this and arriving at unreasonable results.

If this act, or something similar, is not adopted by the legislatures, the pressure will shift back to the courts to meet the issue squarely. Perhaps, as Cardozo suggests, they will reflect a greater readiness to abandon the caveat emptor rule if it is discovered that "the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years."¹⁴⁸

APPENDIX A

Model Act

Section 1. *Warranties*

- (a) In every contract for the sale of a completed building and in every contract for the sale of a building to be completed, the vendor shall be held to warrant to the vendee that, at the time of the passing of the deed or the vendee's taking possession (whichever first occurs), the building, together with all its fixtures, is, to the best of the actual

¹⁴⁷. Cf. UNIFORM SALES ACT § 15 (3); UNIFORM COMMERCIAL CODE § 2-316 (3) (b).

¹⁴⁸. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 151 (1921).

knowledge of the vendor or his agents, sufficiently

(i) free from structural defects, and

(ii) constructed in a workmanlike manner,

so as to pass without objection in the trade.

(b) In addition, in every contract for the sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor, if he be in the business of building or selling such dwellings, shall be held to warrant to the "initial vendee" that, at the time of the passing of the deed or the "initial vendee's" taking possession (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently

(i) free from structural defects,

(ii) constructed in a workmanlike manner, and

(iii) fit for habitation

so as to pass without objection in the trade.

(c) The above warranties implied in the contract for sale shall be held to survive the passing of the deed or other final agreement concerning the building or dwelling.

Section 2. *Vendee's Knowledge*

The warranties set out in section 1 of this act shall not apply if the breach was such that an examination of the building by the vendee himself at the time of the signing of the contract to sell would have revealed it.

Section 3. *Waiver*

No agreement between any vendor and his vendee, designed to waive any warranty given under this act, shall be effective.

Section 4. *Remedies*

If there be a breach of any warranty given under this act, the current vendee, or his heirs or personal representatives in case of his death, shall have a cause of action against his vendor for damages or for rescission of the deed or contract to sell; *Provided that*, if the reasonable cost of correcting the breach is less than fifteen per cent of the total sales price attributed to the building (not including sales tax and financing charges), and if the corrections can be completed within one month of the date judgment is entered in the suit, the vendee, his heirs, or his personal representatives shall be entitled only to the remedy of damages, unless both parties to the suit agree to a remedy of rescission.

Section 5. *Limitation of Action*

In no event shall the vendee, his heirs, or his personal representatives maintain a cause of action based upon any warranty given in this act more than one year from the date on which the deed passes or on which the vendee takes possession, whichever first occurs.

Section 6. *Definitions*

As used in this act:

(a) "Initial vendee" means "the person who first contracts to purchase a dwelling for fair consideration with the intent of living in it for a period of at least six months."

(b) "Vendee" means "any vendee of a building" and includes the "initial vendee."

- (c) "Dwelling" means "a building constructed for the purpose of habitation by one or two families."
- (d) "Trade" means "the business of building, buying, and selling buildings for profit."
- (e) "Building" includes a "dwelling."

APPENDIX B

Standard Federal Housing Administration and Veterans Administration Form
For Warranty Of Completion of Construction In Substantial Conformity
With Approved Plans And Specifications.

WARRANTY OF COMPLETION OF CONSTRUCTION IN SUBSTANTIAL
CONFORMITY WITH APPROVED PLANS AND SPECIFICATIONS
Property Location: Purchaser(s)/Owner(s):

For good and valuable consideration, and in accordance with section 801 of the Housing Act of 1954, the undersigned Warrantor hereby warrants to the Purchaser(s) or Owner(s) identified in the caption hereof, and to his (their) successors or transferees, that:

The dwelling located on the property identified in the caption hereof is constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein) which have been approved in writing by the Federal Housing Commissioner or the Administrator of Veterans Affairs on which the Federal Housing Commissioner or the Administrator of Veterans Affairs based his valuation of the dwelling: *Provided, however,* That this warranty shall apply only to such instances of substantial nonconformity as to which the Purchaser(s)/Owner(s) or his (their) successors or transferees shall have given written notice to the Warrantor at any time or times within 1 year from the date of original conveyance of title to such Purchaser(s)/Owner(s) or the date of initial occupancy of the dwelling, whichever first occurs: *Provided further, however,* That in the event the Purchaser(s)/Owner(s) acquired title to the captioned property prior to the completion of construction of the dwelling thereon, such notice of nonconformity to the Warrantor may be given at any time or times within 1 year from the date of completion or initial occupancy of such dwelling, whichever first occurs.

The term "dwelling" as used herein shall be deemed to include all improvements or appurtenances set forth in the plans and specifications upon which the Federal Housing Commissioner or the Administrator of Veterans Affairs has based his valuation of the property, excepting those constructed by a municipality or other governmental authority.

This warranty shall be in addition to, and not in derogation of, all other rights and privileges which such Purchaser(s)/Owner(s) may have under any other law or instrument, and shall survive the conveyance of title, delivery of possession of the property, or other final settlement made by the Purchaser(s)/Owner(s), and shall be binding on the Warrantor notwith-

standing any provision to the contrary contained in the contract of purchase or other writing executed by the Purchaser(s)/Owner(s) heretofore or contemporaneously with the execution of this agreement or prior to final settlement.

IN TESTIMONY WHEREOF, the Warrantor has signed and sealed this warranty this _____ day of _____, 195_____.

(Warrantor's Address) By _____ (SEAL)
WARRANTOR

This warranty is executed for the purpose of inducing the Federal Housing Commissioner or the Administrator of Veterans Affairs to make, to guarantee or to insure a mortgage on the captioned property, and the person signing for the Warrantor represents and certifies that he is authorized to execute the same by the Warrantor and by his signature the Warrantor is duly bound under the terms and conditions of said warranty.

WARNING

Section 1010 of Title 18, U. S. C., "Federal Housing Administration transactions," provides: "Whoever, for the purpose of influencing in any way the action of such Administration—makes, passes, utters, or publishes any statement, knowing the same to be false—shall be fined not more than \$5,000 or imprisoned not more than two years, or both." Other Federal Statutes provide severe penalties for any fraud as intentional misrepresentation made for the purpose of influencing the issuance of any guaranty or insurance or the making of any loan by the Administrator of Veterans Affairs.

NOTICE TO PURCHASER: ANY NOTICE OF NONCONFORMITY MUST BE DELIVERED TO THE WARRANTOR NO LATER THAN _____
(Warrantor shall insert date 1 year from initial occupancy, date of conveyance of title or date of completion, whichever event is applicable.)

Receipt of this warranty is acknowledged this _____ day of _____, 195_____.

PURCHASER(S)/OWNER(S)

