



Case Western Reserve Law Review

Volume 4 | Issue 4

1953

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Recommended Citation

Eugene I. Selker, *Right of Purchaser in Sale of Defective House*, 4 W. Res. L. Rev. 357 (1953)

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upon the Ohio courts is at best uncertain. However, in an attempt to evaluate the effect upon Ohio law of those cases in other jurisdictions which held charitable institutions vicariously liable for the torts of their employees, reference is made to other areas of public policy in which the Ohio Supreme Court has seen fit to reject established rules of law to conform with the statements of public policy of other jurisdictions. For example, although Ohio had long denied a husband or wife recovery from his spouse in tort,⁴⁷ this rule was completely discarded in a recent case.⁴⁸ Also, the right of a child to sue a parent in tort has recently been upheld⁴⁹ in Ohio in recognition of the modern tendency to allow such suits.⁵⁰

Both of these decisions were based upon considerations of public policy, and in each of these areas the Ohio Supreme Court has seen fit to terminate an existing immunity largely upon the basis of a public policy manifest in other jurisdictions. Why should not the immunity of charitable institutions be rejected upon the basis of a similar public policy to that which has been noted by the supreme court in the husband-wife and parent-child areas? Such a result would be in the interests of justice.

"Charity suffereth long and is kind, but . . . it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing."⁵¹

BERNARD ALLEN BERKMAN

Right of Purchaser in Sale of Defective House

MORE AMERICANS are purchasing houses today than ever before, and even the unprecedented building "boom" has failed to satisfy the demand for housing. In some instances the purchaser discovers that due to inferior materials or inefficient workmanship in the construction of a new house, or in the case of an older house due to damage or disrepair, the house is defective in one or more respects. It is the purpose of this article to discuss the rights and the remedies of the purchaser of a defective house.

NATURE OF GRANTOR'S LIABILITY

While the ancient maxim "caveat emptor" is an anachronism in the law of the sale of chattels,¹ it has tenaciously survived as to real estate.² The

¹ VOLD, SALES 445 (1931).

² Collier v. Harkness, 26 Ga. 362 (1858); Gimblen v. Harrison, 2 Sneed 315 (Ky. 1804); Lewy v. Clark, 128 N.Y. Misc. 16, 217 N.Y. Supp. 185 (1926); Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925); Hoskins v. Woodham, [1938] 1 All E.R. 692 (K.B.D.); 3 WILLISTON, CONTRACTS 2602 (1936); 29 HALSBURY'S

maxim has been applied not only to title³ but to the quality and condition⁴ of the real estate, and to both leased⁵ and purchased⁶ realty. Although "caveat emptor" is the initial response to a complaining purchaser, it does not preclude further inquiry, and the law does recognize various grounds upon which liability may be imposed. Liability of the grantor for damages resulting from some defect in a house may be predicated on the breach of an express contract, the breach of an express or implied warranty, negligence or fraud.

At the outset it must be noted that there is a judicially recognized distinction between the sale of an existing house, new or used, and the sale of a house not yet existing or in the process of construction.⁷ This distinction becomes especially important in the determination of liability for breach of contract and for breach of warranty. Following is a discussion of the grantor's liability under each of the four possible theories.

1. *Express Contract*

A contract for the sale of an existing house is considered one for the sale of real estate and is governed by the ordinary principles of contract law.⁸

A contract for the sale of a house not yet existing or in the process of construction may be analyzed as if there are two severable agreements, *viz.*, the sale of the land and the agreement to complete the house.⁹ This latter agreement constitutes a building or construction contract.¹⁰

LAW OF ENGLAND 249 (2d ed. 1938); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, PROCEEDINGS, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 4 (1952).

³ Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (1941).

⁴ Parker v. Moulton, 114 Mass. 99 (1873); Lewy v. Clark, 128 N.Y. Misc. 16, 217 N.Y. Supp. 185 (1926).

⁵ There is authority distinguishing unfurnished from furnished premises to the effect that in a lease of the latter there is an implied warranty of habitability. *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892); see Note, 4 A.L.R. 1453, 1456 (1918).

⁶ The leading English case of *Hart v. Windsor*, 12 M. & W. 68, 152 Eng. Rep. 1114 (Ex. 1843), involved the lease of a house which was so infested with bugs that it was unfit for habitation. An implied warranty as to fitness for habitation was rejected by the court. This rule has been followed unanimously in subsequent English and American decisions involving both the lease and sale of real estate. 1 *TIFFANY, REAL PROPERTY* 149 (3d ed. 1939) and cases cited therein. For a case recognizing an essential difference between the relationship of lessor-lessee and grantor-grantee, see *Smith v. Tucker*, 151 Tenn. 347, 270 S.W. 66 (1925).

⁷ *Oliver v. Hartzell*, 170 Ark. 512, 280 S.W. 979 (1926); *Perry v. Sharon Development Co., Ltd.*, [1937], 4 All E.R. 390 (C.A.); *Miller v. Cannon Hill Estates Ltd.*, [1931], 2 K.B. 113.

⁸ *Kutter v. Smith*, 2 Wall. (69 U.S.) 491 (1865).

⁹ *Whaley v. Milton Construct. & Supply Co.*, 241 S.W.2d 23, (Mo. App. 1951); *Raab v. Beatty*, 96 Pa. Super. 574 (1929); *Haynes v. Morton*, 32 Tenn. App. 251, 222 S.W.2d 389 (1949). This situation is identical in the eyes of the law to the traditional practice of hiring a builder to erect a house on one's own lot.

¹⁰ Such a contract, "or as it is otherwise termed, a working contract, is one under

The measure of damages recoverable for a defect due to the breach of an express provision in a building contract is the cost of repairing or completing the house to make it conform to the contract, unless the cost of correcting the defect would be greatly out of proportion to the increment in value to be attained.¹¹ If such be the case the purchaser is entitled as damages to the difference in value of the house as it is and that which it should have been according to the contract.¹²

2. *Warranty*

While warranty is a word of many connotations, it is traditionally considered a collateral agreement, referring to the main subject matter of a contract.¹³ Warranties are either express or implied.¹⁴

In the sense here used an express warranty is a representation or affirmation of a fact which naturally would, and in fact does, induce one to act in making a purchase.¹⁵ No special form of words is necessary to create an express warranty,¹⁶ but mere sales talk or "puffing" is not a warranty.¹⁷ In determining what words constitute an express warranty, there is no distinction between a sale of chattels and a sale of real estate.¹⁸ In response to a specific question by a prospective lessee, an affirmative answer that drains are in good order, when in fact they are not, subjects the lessor to damages for breach of warranty.¹⁹ Unlike an action for deceit, it is unnecessary to prove the warrantor's intent or his knowledge of the falsity of the representation.²⁰

An implied warranty is a promise, arising independently of the contract, imposed by law because of the conduct of the parties.²¹ In the sale of an existing house, new or used, the law is well settled that there are no implied

which work or labor is to be performed in the erection, construction, or repair of some building, edifice, structure, or other work." 9 C.J. 693 (1916).

¹¹ *Jacob v. Kent*, 230 N.Y. 239, 130 N.E. 933 (1921); *Sadler v. Bromberg*, 62 Ohio L. Abs. 73 (1950).

¹² *Madisonville v. Rosser & Castoe*, 8 Ohio C.C. (N.S.) 387 (1906).

¹³ 17 C.J.S. 795 (1939); PROSSER, TORTS 706, 739 (1941).

¹⁴ VOLD, SALES §§ 140 *et seq.* (1931).

¹⁵ *Cleveland Linseed Oil Co. v. A.F. Buchanan & Sons*, 120 Fed. 906 (2d Cir. 1903); *Hetteshimer v. Swisher*, 7 Ohio L. Rep. 629 (Licking Com. Pl. 1909).

¹⁶ *Hetteshimer v. Swisher*, 7 Ohio L. Rep. 629 (Licking Com. Pl. 1909); *Borg v. Downing*, 221 Wis. 463, 266 N.W. 182 (1936).

¹⁷ *Stovall v. Newell*, 158 Ore. 206, 75 P.2d 346 (1938).

¹⁸ *DeLassalle v. Guildford*, [1901] 2 K.B. 215 (C.A.).

¹⁹ *Ibid.*

²⁰ *Swayne v. Waldo*, 73 Iowa 749, 33 N.W. 78 (1887) (warranty as to the quality of land).

²¹ *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927).

warranties of any type, and recovery on a warranty theory is limited to proof of an express warranty.²² In the sale of a house not yet finished or in the process of construction, the implied warranties inherent in the sale thereof can best be understood by reference to a fact situation present in the merchandising of new houses.

It is common today for a purchaser to inspect a builder's "model" or "display" home, select a choice lot, and then enter into a contract for the purchase of a house on the selected lot. The house may be in the process of construction or perhaps not yet started. As previously noted, any such agreement may be said to consist of both a contract for the sale of real estate and a building contract.

It is a general principle of law that any person who holds himself out as specially qualified to perform work of a particular character impliedly warrants that the work which he undertakes shall be of proper workmanship.²³ It is also fundamental in the law of building contracts that one contracting to build a structure for a particular purpose impliedly warrants that the structure when completed shall be reasonably fit for its intended use.²⁴ These two principles have led to the rule that in the sale of a house to be constructed or in the process of construction there are implied warranties by the vendor that the house shall be built in a reasonably efficient and workmanlike manner and that the house when completed shall be reasonably fit for the intended habitation.²⁵ Although these are two separate warranties, the courts in allowing recovery have attached no significance to the distinction.²⁶

Performance in a "workmanlike manner" means that work which would be considered skillful by one capable of judging such work objectively in any place, not necessarily that which is acceptable in the particular community involved.²⁷ A breach of the implied warranty of proper workmanship has been held to exist where a chimney failed to carry out smoke because of the

²² See note 2 *supra*. *Contra*: *De Armas v. Gray*, 10 La. Rep. 575 (1837) (an implied warranty was recognized in the sale of a completed house). This case illustrates the absence of caveat emptor from the civil law.

²³ *Somerby v. Tappan*, Wright 229 (Ohio 1833); *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950); 17 C.J.S. 781 (1939).

²⁴ *Florida Ry. v. Smith*, 21 Wall. (88 U.S.) 255 (1874); *Hall v. MacLeod*, 191 Va. 665, 62 S.E.2d 42 (1950); 9 C.J. 745 (1916).

²⁵ *Allen v. Reichert*, 73 Ariz. 91, 234 P.2d 818 (1951); *Schindler v. Green*, 7 Cal. Unrep. Cas. 233, 82 Pac. 631 (1905); *Jose-Balz Co. v. DeWitt*, 93 Ind. App. 672, 176 N.E. 864 (1931); *Minemount Realty Co. v. Ballentine*, 111 N.J. Eq. 398, 162 Atl. 594 (1932); *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.

²⁶ *Query*: Under what facts will a defect in a house result in a breach of one of the implied warranties without also being a breach of the other. *Cf. Younger v. Caroselli*, 251 Mich. 533, 232 N.W. 378 (1930); *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.

²⁷ *Anderson v. Whittaker*, 11 So. 919 (Ala. 1893); *Fitzgerald v. La Porte*, 64 Ark.

inadequate and odd sized flues;²⁸ where exterior stucco peeled off soon after completion of the house;²⁹ where floors were uneven and windows out of plumb;³⁰ where improper concrete footings under foundation walls resulted in cracked plaster, ill fitting doors and opening of joints in the woodwork;³¹ where a concrete garage floor cracked because poured in frosty weather;³² where second story windows were not placed in line with the first story windows;³³ and where a foundation built over a tree stump cracked in settling.³⁴

Although a builder impliedly warrants to perform in a workmanlike manner he is bound to exercise only ordinary care and skill and is not an insurer against loss due to latent defects in the materials used in construction.³⁵ In *Flannery v. St. Louis Architectural Iron Co.*³⁶ the plaintiff, a builder, voluntarily reconstructed a garage which collapsed as a result of a latent defect in a welded supporting post. In a suit against the supplier of the post it was held that, since the builder was not liable for defects in material which could not be discovered by the exercise of ordinary care, he was under no duty to reconstruct the garage and therefore could not recover the loss from the supplier. Similarly, where it is shown that the cause of uneven floors in a house is warpage due to a latent defect in the lumber, rather than inefficient workmanship, the builder is not liable.³⁷

A breach of the implied warranty of fitness for intended habitation or use has been held to exist where dampness penetrated the house;³⁸ where a

34, 40 S.W. 261 (1897); *Holland v. Rhoades*, 56 Ore. 206, 106 Pac. 779 (1910).
Contra: *Carter v. Adams, Wright* 471 (Ohio 1833).

²⁸ *Somerby v. Tappan, Wright* 570 (Ohio 1834); *Somerby v. Tappan, Wright* 229 (Ohio 1833).

²⁹ *Jose-Balz Co. v. DeWitt*, 93 Ind. App. 672, 176 N.E. 864 (1931).

³⁰ *Anderson v. Whittaker*, 11 So. 919 (Ala. 1893).

³¹ *Sparling v. Housman*, 96 Cal. App.2d 159, 214 P.2d 837 (1950).

³² *Minemount Realty Co. v. Ballentine*, 111 N.J. Eq. 398, 162 Atl. 594 (1932).

³³ "This being a small dwelling, the misplacement of the windows is not a trivial matter. Defendant is as much entitled to have the windows in his little home placed perfectly and in a workmanlike manner as is the owner of a more imposing structure." *Schindler v. Green*, 82 Pac. 631, 633, (Cal. 1905).

³⁴ *Raab v. Beatty*, 96 Pa. Super. 574 (1929).

³⁵ *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 69 N.W. 1091 (1897) (builder not liable for latent defects in brick purchased from a third person supplier).

³⁶ 194 Mo. App. 555, 185 S.W. 760 (1916).

³⁷ *Whaley v. Milton Construct. & Supply Co.*, 241 S.W.2d 23 (Mo. App. 1951).

³⁸ *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113 (court spoke of both the implied warranty of proper workmanship and that of fitness for intended habitation).

roof leaked;³⁹ and where a driveway was too narrow for the passage of a car.⁴⁰

At what stage in the process of construction is a house so far complete as to preclude any implied warranties and bring its sale under the rule of caveat emptor? In the English case of *Perry v. Sharon Development Co., Ltd.*,⁴¹ where the plastering of two rooms and the installation of some plumbing fixtures remained to be done, the court stated that so long as the vendor's workmen are on the job the house remains one still in the process of completion, and a purchaser is entitled to the implied warranties of proper workmanship and fitness for intended habitation. Although no American case in point in regard to the sale of a house has been found, where leased premises were sufficiently completed to allow inspection an Arkansas court rejected the implied warranty of fitness for intended use.⁴² While the Arkansas case indicates that a warranty will be implied only against defects caused by work done subsequent to the contract and the presence of which could not be ascertained by an inspection, it is suggested that the policy of the *Perry* case be followed in extending, rather than restricting, the application of the doctrine of implied warranty.

Mere acceptance of a house and assuming possession thereof with knowledge of defects does not amount to a waiver of the cause of action for breach of warranty.⁴³

Damages recoverable for a breach of implied warranty have been held to include not only the cost of correcting the defect but also consequential damages such as the loss of use and enjoyment of the premises,⁴⁴ injury to household furniture⁴⁵ and injury to other articles normally present within the building.⁴⁶

³⁹ *Kuitems v. Covell*, 104 Cal. App.2d 482, 231 P.2d 552 (1951).

⁴⁰ *Younger v. Caroselli*, 251 Mich. 533, 232 N.W. 378 (1930).

⁴¹ [1937] 4 All E.R. 390 (C.A.).

⁴² *Oliver v. Hartzell*, 170 Ark. 512, 280 S.W. 979 (1926). A lease of hotel space for a barber shop was entered into at a time when the plastering and the cement floor of the premises were not yet completed. The defect complained of was seepage of water through the floor. The court held that since at the time of inspection by the lessee the work on the building had progressed sufficiently near to completion to afford an opportunity to the lessee to ascertain its suitability for the intended use, the lease came under the rule of caveat emptor.

⁴³ *Sparling v. Housman*, 96 Cal. App.2d 159 214 P.2d 837 (1950); *Stewart v. Fulton*, 31 Mo. 59 (1860). But *Cf. Glass v. Weisner*, 172 Kan. 133, 238 P.2d 712 (1951). (Where the owner expressly assumed the risk as to a particular method of bracing a building, it was held a waiver of the builder's implied warranty).

⁴⁴ *Somerby v. Tappan*, Wright 229 (Ohio 1833).

⁴⁵ *Ibid.*

⁴⁶ *Flint Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N.E. 503 (1906); *J.D. Young Co. v. McClintic*, 26 S.W.2d 460 (Tex. Civ. App. 1930).

3. *Negligence*⁴⁷

As a general rule the grantor of an existing house, new or used, is not liable either to purchaser or to third persons for personal injuries resulting from a defective or dangerous condition of the premises;⁴⁸ however, he is under a duty to disclose concealed defects involving an unreasonable risk of harm of which he has knowledge.⁴⁹ The fact that the defect on the premises is a violation of some statute or ordinance has been held not to constitute negligence per se.⁵⁰ If the defective condition constitutes a public or private nuisance, however, the grantor continues subject to liability for a reasonable length of time after the transfer of ownership.⁵¹

4. *Fraud*

A vendor's intentional misrepresentation as to the quality or condition of a house if justifiably relied on by the purchaser is actionable fraud.⁵² Thus, where the defendant, having knowledge of a leaky roof, assured the purchaser that all leaks had been fixed and that the house was in perfect condition, it was held fraudulent.⁵³ Mere silence when there is a duty to speak may amount to passive concealment and subject a vendor to liability for fraud.⁵⁴

If fraud can be shown in the purchase of real estate, the purchaser can affirm the contract and sue for money damages,⁵⁵ or he may assert his remedy by way of defense to an action for the balance of the purchase price.⁵⁶

⁴⁷ For a more comprehensive treatment of this subject see PROSSER, TORTS § 80 (1941).

⁴⁸ *Combaw v. Kansas City Ground Inv. Co.*, 358 Mo. 934, 218 S.W. 2d 539 (1949) (plaster falling from ceiling); *Otto v. Bolton & Norris*, [1936] 2 K.B. 46 (plaster falling from ceiling); *Mayer v. Winnepeg Elec. Co.*, [1948] 4 D.L.R. 301 (Man. K.B.) (purchaser's child killed from contact with exposed electric wire); RESTATEMENT, TORTS §§ 351, 352 (1938); 8 A.L.R. 2d 218; 41 A.L.R. 842. No personal injury cases have been found in which the house was still in the process of construction at the time of purchase and the cause of action brought was in negligence.

⁴⁹ *Kilmer v. White*, 254 N.Y. 64, 171 N.E. 908 (1930); RESTATEMENT TORTS § 353 (1938).

⁵⁰ *Stone v. Heyman Bros.*, 124 Cal. App. 46, 12 P.2d 126 (1932); *Mercer v. Meinel*, 290 Ill. 395, 125 N.E. 288 (1919); *Upp v. Darner*, 150 Iowa 403, 130 N.W. 409 (1911).

⁵¹ *Rufo v. South Brooklyn Sav. Bank*, 268 App. Div. 1057, 52 N.Y.S.2d 469 (1945); *Kibiuk v. Windsor Residences*, 183 N.Y. Misc. 499, 52 N.Y.S.2d 326, *aff'd in part*, 184 N.Y. Misc. 186, 54 N.Y.S.2d 117 (1944). *Contra*: *McQuillan v. Clark Thread Co.*, 12 N.J. Misc. 409, 172 Atl. 370 (1934).

⁵² *Herzog v. Capitol Co.*, 27 Cal.2d 349, 164 P.2d 8 (1945); *Blackman v. Howes*, 82 Cal. App.2d 275, 185 P.2d 1019 (1947); *Macart v. San Joaquin Bldg. & Loan Ass'n*, 45 Cal. App.2d 395, 114 P.2d 395 (1941).

⁵³ *Herzog v. Capitol Co.*, 24 Cal.2d 349, 164 P.2d 8 (1945).

⁵⁴ *See Vendt v. Duenke*, 210 S.W.2d 692, 699 (Mo. App. 1948) (house was built on fill dirt without footings).

Where the sale of a house is negotiated through a third party real estate agent hired by the vendor, there is a split of authority on the question of the vendor's liability in damages for the fraudulent misrepresentations of his agent. The better view seems to be that the purchaser can not maintain an action for damages against the vendor, the rationale being that the agent was without authority to make misrepresentations.⁵⁷ However, most courts agree that the defrauded purchaser is at least entitled to a rescission of the contract, the vendor not being allowed to retain the fruits of his agent's fraud.⁵⁸ Since fraud is never presumed or imputed,⁵⁹ and proof of all its elements is usually difficult, the purchaser should not overlook the possibility of recovery based on warranty.⁶⁰

PROBLEMS IN PROOF

In seeking to impose liability upon the vendor of a defective house, the plaintiff purchaser may encounter two distinct problems in proof—the Statute of Frauds and the parol evidence rule.⁶¹

1. *Statute of Frauds*

The Statute of Frauds requires contracts for the sale of an interest in land to be in writing.⁶² Since an existing completed house when attached to land is realty,⁶³ any contract for the sale thereof is within the purview of the Statute of Frauds.⁶⁴ However, as previously noted, the purchaser of a house in the process of construction enters into two severable contracts, one for the sale of the lot and one for the building of the house. The latter, a building contract, is one which merely *relates to land* and is not the *sale of an in-*

⁵⁵ *Kaluzok v. Brisson*, 27 Cal.2d 760, 167 P.2d 481 (1946); *Welch v. Reeves*, 142 Neb. 171, 5 N.W.2d 275 (1942); *Weigel v. Cook*, 237 N.Y. 136, 142 N.E. 444 (1923).

⁵⁶ *Freggens v. Clark*, 100 N.J. Eq. 389, 135 Atl. 681 (1927).

⁵⁷ *Light v. Chandler Improvement Co.*, 33 Ariz. 101, 261 Pac. 96 (1928); *Dieterle v. Bourne*, 57 N.E.2d 405 (Ohio App. 1943). *Contra*: *Taylor v. Wilson*, 44 Ohio App. 100, 183 N.E. 541 (1932). See also note, 57 A.L.R. 112; LATTY, INTRODUCTION TO BUSINESS ASSOCIATIONS 259 *et seq.* (1951).

⁵⁸ *Light v. Chandler Improvement Co.*, 33 Ariz. 101, 261 Pac. 96 (1928); *Loma Vista Development v. Johnson*, 180 S.W.2d 922 (Texas Civ. App. (1943)); RESTATEMENT, AGENCY § 259 (1933).

⁵⁹ *Dobbin v. Pacific Coast Coal Co.*, 25 Wash. 2d 190, 170 P.2d 642 (1946).

⁶⁰ In *Vendt v. Duenke*, 210 S.W.2d 692 (Mo. App. 1948), the plaintiff may well have recovered had he alleged a breach of the implied warranty inherent in the sale of a house under construction.

⁶¹ For a discussion differentiating the two problems see 3 CORBIN, CONTRACTS 227 (1951).

⁶² RESTATEMENT, CONTRACTS §§ 178, 193 (1932); *e.g.*, OHIO GEN. CODE § 8620.

⁶³ *Kutter v. Smith*, 2 Wall. (69 U.S.) 491 (1865); 22 AM. JUR. 778 (1939).

⁶⁴ *Long v. White*, 42 Ohio St. 59 (1884).

terest therein. Therefore, although the house when completed will be real estate, the Statute of Frauds has no application to a purchaser seeking recovery for the alleged breach of an oral building contract or oral warranty collateral thereto.⁶⁵

2. *Parol Evidence Rule*

In the sale of any house, the practical inexpediency of reducing all the details into one written contract often results in many verbal understandings to which a purchaser is subsequently forced to resort. If there exists an integrated written contract any evidence of additional promises or warranties, oral⁶⁶ or written,⁶⁷ is generally held to be excluded by the parol evidence rule. However, parol evidence is always admissible to show fraud,⁶⁸ a collateral contract⁶⁹ or that the written document is but a partial integration of the entire agreement.⁷⁰

In what would seem to be but a specific application of the parol evidence rule many courts have stated that all prior negotiations both oral and written are merged in an executed deed.⁷¹ However, most of these courts go on to hold that as a practical matter a formal document such as a deed is usually only a partial integration, and that collateral agreements, not a part of the main purpose of the transaction, which show an intent that they should not be merged into the deed are, therefore, not extinguished by an acceptance of the deed.⁷²

Although few courts have expressly noted the distinction, the nature of the written document involved, either a written contract of sale or a formal conveyance of real estate, is an important factor in determining the ad-

⁶⁵ *Haynes v. Morton*, 32 Tenn. App. 251, 222 S.W.2d 389 (1949); *Scales v. Wiley*, 68 Vt. 39, 33 Atl. 771 (1895); *Cf. Laurel Realty Co. v. Himmelfarb*, 191 Md. 462, 62 A.2d. 263 (1948) (court rejected the defense of the Statute of Frauds by applying the doctrine of part performance); 2 WILLISTON, CONTRACTS 1422 (1936).

⁶⁶ *Eastman v. Britton*, 175 App. Div. 476, 162 N.Y. Supp. 587 (1916); *Warren v. Pulley*, 193 Okl. 88, 141 P.2d 288 (1943) (in these cases the courts rejected testimony of an oral warranty as to the basement and foundation walls of a house); RESTATEMENT, CONTRACTS § 237, Illustration 2 (1932).

⁶⁷ *Clay v. Connecticut Gen. Life Ins. Co.*, 69 F.2d 156 (5th Cir. 1934).

⁶⁸ *Hansen v. Daniel Hays Co.*, 152 Minn. 222, 188 N.W. 317 (1922); *Bauer v. Taylor*, 96 N.W. 268 (Neb. Sup. Ct. 1903); Note, 56 A.L.R. 13 (1927).

⁶⁹ *Roof v. Jerd*, 102 Vt. 129, 146 Atl. 250 (1929); RESTATEMENT, CONTRACTS § 240 (1) (a) (1932).

⁷⁰ 3 CORBIN, CONTRACTS 262 (1951); RESTATEMENT, CONTRACTS § 239 (1932); Note, 70 A.L.R. 746 (1930).

⁷¹ *Haas v. United States Insulating Co.*, 65 N.Y.S.2d 497 (1946); Note, 84 A.L.R. 1008 (1931).

⁷² *Corn v. McDowell*, 185 S.W. 235 (Mo.App. 1916); *Greenfield v. Liberty Construct. Corp.*, 81 N.Y.S.2d 550 (1948); *Price v. Woodward-Brown Realty Co.*, 190 N.Y. Supp. 561 (1921); 3 CORBIN, CONTRACTS 298 (1951).

missibility of parol evidence of an oral agreement or warranty. Upon analysis, the cases disclose four possible fact situations:

Where there is a sale of an existing house, new or used, and there is both a written contract of sale and a subsequently executed deed, most of the cases reject parol evidence of an alleged oral agreement or warranty.⁷³

If there is a sale of a house in the process of construction and there is both a written contract of sale, including a written building contract, and a subsequently executed deed, the cases are in conflict on the question of the admissibility of an alleged oral agreement or warranty as to the house or its manner of completion. While some courts reject the parol evidence,⁷⁴ others admit it either on the theory that there was a collateral contract,⁷⁵ or that the written contract was only a partial integration.⁷⁶

When there is a sale of a house still in the process of construction and there is both a written contract of sale accompanied by an oral building contract and a subsequently executed deed, most courts hold that the building contract, including any warranties, may be shown by parol evidence because it is a collateral contract.⁷⁷

Where there is only an oral contract for the sale of a house (completed or otherwise) followed by an executed deed, most courts allow parol evidence of agreements or warranties on the ground that the deed is but a partial integration of the entire contract.⁷⁸

Since an implied warranty is one imposed by law apart from the contract, facts raising an implied warranty may be proved by any evidence for the parol evidence rule has no application.⁷⁹ This is so despite acceptance of the deed.⁸⁰

While it has been suggested that, if a false promise or statement would make the seller liable as a warrantor, evidence of such statement should be admitted even though the contract was reduced to writing,⁸¹ the writer sub-

⁷³ *Tufford v. Gordon*, 217 Mich. 658, 187 N.W. 264 (1922); *Ball v. Grady*, 267 N.Y. 470, 196 N.E. 402 (1935).

⁷⁴ *Eastman v. Britton*, 175 App. Div. 476, 162 N.Y. Supp. 587 (1916); *Warren v. Pulley*, 193 Okl. 88, 141 P.2d 288 (1943).

⁷⁵ *Whaley v. Milton Construct. & Supply Co.*, 241 S.W.2d 23, (Mo. App. 1951); *Sale v. Figg*, 164 Va. 402, 180 S.E. 173 (1935).

⁷⁶ *Laurel Realty Co. v. Himmelfarb*, 191 Md. 462, 62 A.2d 263 (1948); *Luck v. Wood*, 144 Va. 355, 132 S.E. 178 (1926).

⁷⁷ *Blahnik v. Small Farms Improvement Co.*, 181 Cal. 379, 184 Pac. 661 (1919); *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948); *Haynes v. Morton*, 32 Tenn. App. 251, 222 S.W.2d 389 (1949).

⁷⁸ *Corn v. McDowell*, 185 S.W. 235 (Mo. App. 1916); *DeLassale v. Guildford* [1901] 2 K.B. 215 (C.A.).

⁷⁹ 3 CORBIN, CONTRACTS 287 (1951).

⁸⁰ *Raab v. Beatty*, 96 Pa. Super 574 (1929); *Lawrence v. Cassell*, [1930] 2 K.B. 83 (C.A.).

mits that extended imposition of an implied warranty in the sale of an existing new house would in many cases obviate any such direct violation of the parol evidence rule.

PURCHASER'S RIGHT TO RESCIND

As an alternative to the recovery of money damages the purchaser of a defective house may rescind the contract of sale and recover the purchase price paid thereunder, where there has been misrepresentation,⁸² mistake⁸³ or a substantial breach⁸⁴ by the vendor. The courts have traditionally considered rescission as an equitable remedy and have been reluctant to extend its application. The criterion as established by the better reasoned cases seems to be that rescission should be granted only in the instance where the house in question is substantially incapable of being utilized for the intended purpose and where the awarding of money damages, although compensatory of the defect, would involve much hardship on the part of the purchaser in completing the house as contemplated.⁸⁵

As illustrative of this judicial attitude, the results in the following two cases may be compared. In *McMahon v. Cooper*,⁸⁶ the plaintiff contracted to purchase from the defendant a lot upon which there was an unfinished house in the process of construction. In the written contract of sale it was stipulated that the defendant was to complete the house in a workmanlike manner. Among the defects apparent upon completion of the house were the absence of cupboards above the sink, the absence of closets in the bedroom, crumbling cement work and inadequate exterior paint. In granting a rescission because there was not a substantial compliance with the contract, the court noted the hardship that would be placed upon the purchaser in properly completing the house.

In *Labar v. Lindstrom*⁸⁷ the plaintiff sought rescission on the ground that there was misrepresentation. The defect complained of was a leaky roof, the repair of which was a minor and relatively inexpensive job. The basis

⁸¹ 3 WILLISTON, CONTRACTS 1850 (1936).

⁸² *Freggens v. Clark*, 100 N.J. Eq. 389, 135 Atl. 681 (1927) (misrepresentation as to dampness in basement of house). That the law recognizes an innocent as well as a fraudulent misrepresentation of a material fact as a ground for rescission see 5 WILLISTON, CONTRACTS § 1500 (1936).

⁸³ *Richardson Lumber Co. v. Hoey*, 219 Mich. 643, 189 N.W. 923 (1923); 5 WILLISTON, CONTRACTS § 1557 (1936).

⁸⁴ *McMahon v. Cooper*, 70 Idaho 139, 212 P.2d 657 (1949). For breach of warranty see note 91, *infra*.

⁸⁵ *McMahon v. Cooper*, 70 Idaho 139, 212 P. 2d 657 (1949); *Labar v. Lindstrom*, 158 Minn. 453, 197 N.W. 756 (1924); *cf. McMillan v. American Suburban Co.*, 136 Tenn. 53, 188 S.W. 615 (1916).

⁸⁶ 70 Idaho 139, 212 P.2d 657 (1949).

⁸⁷ 158 Minn. 453, 197 N.W. 756 (1924).

of the court's decision in allowing money damages and refusing rescission was that a rescission in equity depends upon the materiality of the breach or misrepresentation.

Although the rule at common law was otherwise,⁸⁸ in most American jurisdictions today rescission will be granted in the proper case for breach of warranty in the sale of chattels.⁸⁹ It is suggested that the above rule be extended to the sale of houses and that rescission be granted for a breach of warranty, express or implied, regarding some defect in a house.⁹⁰

Where the purchaser has taken possession of the house, he is allowed rescission only upon payment to the vendor of an amount equal to the value of the use of the premises during his period of occupancy.⁹¹ According to the more liberal and practical view, this amount need not be tendered as a prerequisite to rescission, but may be adjusted by the court in awarding final restitution to the purchaser.⁹²

In the same respect that the purchaser is accountable for rent, the vendor, in addition to a restoration of the purchase price, is liable for interest on the purchase price,⁹³ amounts paid for taxes⁹⁴ and improvements placed on the land by the purchaser.⁹⁵

When, in a given case, the purchaser has established a right to rescind, a valuable aid in gaining restitution is the enforcement of a vendee's lien in equity. By the use of this device, the purchaser may impress a lien against the land and thus assure restitution of all moneys due him.⁹⁶

CONCLUSION

The subject of warranty has received much attention within the building industry itself. The National Association of Home Builders has pro-

⁸⁸ At common law a purchaser could not rescind an executed contract of sale for breach of warranty because of the theory that the warranty was collateral to the main contract, and therefore its breach did not constitute a failure of consideration under the contract.

⁸⁹ *Alberti v. Jubb*, 204 Cal. 325, 267 Pac. 1085 (1928); 5 WILLISTON, CONTRACTS § 1462 (1936).

⁹⁰ The writer has found no cases exactly in point, *i.e.* where suit for rescission was brought for breach of warranty regarding some defect in a house. *Cf. Freggens v. Clark*, 100 N.J. Eq. 389, 135 Atl. 681 (1927).

⁹¹ *Elrod-Oas Home Bldg. Co. v. Mensor*, 120 Cal. App. 485, 8 P.2d 171 (1932); *Skinner v. Scholes*, 49 N.D. 181, 229 N.W. 114 (1930).

⁹² *McMahon v. Cooper*, 70 Idaho 139, 212 P.2d 657 (1949); *Chase v. Wolgamot* 137 Iowa 128, 114 N.W. 614 (1908).

⁹³ *Skinner v. Scholes*, 59 N.D. 181, 229 N.W. 114 (1930); *cf. French v. Freeman*, 191 Cal. 579, 217 Pac. 515 (1923).

⁹⁴ *Skinner v. Scholes*, 59 N.D. 181, 229 N.W. 114 (1930).

⁹⁵ *McMahon v. Cooper*, 70 Idaho 139, 212 P.2d 657 (1949); *Skinner v. Scholes*, 59 N.D. 181, 229 N.W. 114 (1930).

⁹⁶ *Ibid.*

posed a standard written warranty to be given by builders to the purchaser of a new house, but it is far from universally accepted even by the members of the association itself.⁹⁷ The fact that this warranty is usually given, if at all, after the consummation of the contract of sale may raise the technical objection of lack of consideration or detrimental reliance.⁹⁸

The federal government is an important participant in home building and selling today. The two federal agencies most directly connected with new housing and the problem under consideration are the Federal Housing Administration and the Veterans Administration. These agencies function primarily in the capacity of a surety. As a prerequisite to the FHA's or the VA's becoming the insurer of a loan made to the purchaser of a new house, certain practices and standards of construction are required. To assure compliance with the standards as established by agency regulations, inspections are periodically made during the process of construction. Although these precautions in themselves are beneficial to the ultimate purchaser, there are at present no federal regulations imposing a warranty upon the builder of a house on which there is a federally insured loan.⁹⁹ However, the power of FHA and the VA to refuse to insure future loans on the houses of an irresponsible builder is often effective in persuading the builder to remedy any defects, so the purchaser of a new house under an FHA or VA insured loan is in a somewhat protected position.

Although not recognized by the law at present, there is a distinction between the sale of an existing *new* house and the sale of a *used* house. Many of the common defects in a house are of such a nature as to become apparent only at quite some time subsequent to completion of the house. For example, the natural settling of a house, changes in temperature and exposure to the elements are often the processes which reveal defects in construction such as improper footings, inadequate waterproofing of basement walls and leaky roofs. Thus, the purchaser of an older house which has been subjected to these processes can ascertain such defects in construction more readily than can the purchaser of a new house. This, coupled with the fact that used houses are almost invariably sold by the owner rather than

⁹⁷The main objections raised to any standard warranty are the different building practices in various sections of the country and the different local laws applicable to such warranty. The NAHB realizing this has since recommended a Home Owners Service Policy which, although well intended, seems legally inadequate. See Brockland, *Why A Service Policy*, 6 N.A.H.B. CORRELATOR 2 (September 1952).

⁹⁸Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, PROCEEDINGS, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 10 (1952).

⁹⁹However, the local VA in the New Jersey district, for example, requires the builder to give a guaranty of the roof and basement as a condition of VA approval. See Veterans Administration Newark Regional Office, Loan Guaranty Issue No. 121, February 25, 1952.