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THE WARRANTY OF HABITABILITY

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PART II†

STRICT LIABILITY VERSUS ABSOLUTE LIABILITY

IN THE EARLY DEVELOPMENT of strict liability, there were occasional statements indicating that "strict" and "absolute" were synonyms since they were used interchangeably as indicated in the following excerpt from the concurring opinion in *Escola v. Coca-Cola Bottling Co. of Fresno*:³⁶²

The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product. . . . The courts recognize, however, that the retailer cannot bear the burden of this warranty, and allow him to recoup any losses by means of the warranty of safety attending the wholesaler's or manufacturer's sale to him. . . . Such a procedure, however, is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty. . . . In the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer: that a warranty runs with

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Doctor Jaeger's publications include: *Collective Labor Agreements* (1962); *Cases and Materials on International Law* (with William V. O'Brien 1958); *Law of Contracts* (1953); *Cases and Statutes on Labor Law* (1939) (1959 Supp.); *Cases on International Law* (with James Brown Scott) (1937); *Trading Under the Laws of Great Britain* (1935); *Company Law and Business Taxes in Great Britain* (1933). He is also the author-editor of the third edition of *Williston on Contracts* of which thirteen volumes have been published to date.

† This article is based on an address delivered by Dr. Jaeger before the Supreme Court of Rhode Island and the Judicial Conference of that State.

The first part of Doctor Jaeger's article appeared in 46 *Chicago-Kent L. Rev.* 123.

³⁶² 24 Cal. 2d 453, 150 P.2d 436 (1944).

the chattel; that the cause of action of the dealer is assigned to the consumer; that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. . . . Such fictions are not necessary to fix the manufacturer's liability under a warranty if the warranty is severed from the contract of sale between the dealer and the consumer and based on the law of torts . . . as a *strict liability*.³⁶³

Some twenty years later, the Supreme Court of California took the opportunity presented by a clear-cut product liability case, *Greenman v. Yuba Power Products, Inc.*,³⁶⁴ to declare itself firmly and unequivocally in favor of *strict liability*.

As mentioned in Part I of this article, the Supreme Court of Illinois, in *Suvada v. White Motor Company*,³⁶⁵ has accepted the doctrine of strict liability and followed the lead of California in the case of *Greenman v. Yuba Power Products, Inc.*³⁶⁶ In California, this gradually developed from the case of *Escola v. Coca-Cola Bottling Co.*,³⁶⁷ until now, some twenty-five years later, the strict liability doctrine has emerged full fledged. In a number of other cases involving beverages or bottles, this doctrine or one similar to it has been applied in order to afford a recovery for the injured plaintiff.

While Missouri had held that privity of contract is not necessary to permit the purchasers of a gas range to recover on an implied warranty for fire damage against a manufacturer, *Morrow v. Caloric Appliance Corp.*,³⁶⁸ last year in *Keener v. Dayton Electric Manufacturing Co.*, the Supreme Court of Missouri adopted the rule of strict liability in tort as set forth in the Restatement:³⁶⁹

- (1) One who sells any product in a defective condition reasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product,
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

³⁶³ *Id.* at 464-66, 150 P.2d at 441-43, emphasis supplied.

³⁶⁴ 59 Cal. 2d 57, 377 P.2d 897 (1962), cited in *Pizza Inn, Inc. v. Tiffany*, 454 S.W.2d 420 (Tex. Civ. App. 1970).

³⁶⁵ 32 Ill. 2d 612, 210 N.E.2d 182 (1965), discussed in Part I of this article at 46 Chi.-Kent L. Rev. 123, 164-165 (1969).

³⁶⁶ 59 Cal. 2d 57, 377 P.2d 897 (1962).

³⁶⁷ 24 Cal. 2d 453, 150 P.2d 436 (1944).

³⁶⁸ 372 S.W.2d 41 (Mo. 1963), citing with approval Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne L. Rev. 1 (1963).

³⁶⁹ 445 S.W.2d 362 (Mo. 1969).

- (2) The rule stated in Subsection (1) applies although
- (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.³⁷⁰

Thereupon, the court quoted from the leading case, *Greenman v. Yuba Power Products, Inc.*³⁷¹ and stated that recovery may be had for wrongful death in a product liability case in Missouri. What had happened was that a widow brought this action against a wholesale distributor for the wrongful death of her husband. The latter had attempted to help a neighbor pump the water out of her basement. In so doing, he was electrocuted since there was no ground wire or "overload protector." The appellate court held that it would have to be shown that the pump was being used as was intended.³⁷² If the pump was being used for the purpose for which it was intended and death resulted, the plaintiff widow would be able to recover judgment.

Warranty of Seaworthiness and Absolute Liability

Although, as has been observed, there has been a substantial modification in the law of warranty, and perhaps an even greater one in the law of tort, holding the manufacturer, the vendor and others in "the distributive chain"³⁷³ liable for injuries to the consumer, and more recently, to his goods or chattels, no development of liability is comparable to that which has occurred in the warranty of seaworthiness.

Nowhere is the difference between strict liability as compared with *absolute* liability so vividly highlighted as in the cases dealing with breaches of the warranty of seaworthiness. The shipowner, and the steve-

³⁷⁰ Restatement (Second) of Torts 402A (1964), quoted in *Keener v. Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969).

³⁷¹ 59 Cal. 2d 57, 377 P.2d 897 (1962). Cf. *Pizza Inn, Inc. v. Tiffany*, 454 S.W.2d 420 (Tex. Civ. App. 1970), applying strict liability.

³⁷² *Keener v. Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969).

Cf. *Williams v. Brown Mfg. Co.*, 93 Ill. App. 2d 334, 236 N.E.2d 125 (1968) *rev'd and remanded*, — Ill. 2d.—, (1970) noted 1 *Loyola U. L. J.* 388 (1971); *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967); *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex 1969), applying the strict liability rule.

See also *Wyatt Industries, Inc. v. Publicker Industries, Inc.*, 420 F.2d 454 (5th Cir. 1969); *Green v. Sanitary Scale Co.*, 431 F.2d 371 (3d Cir. 1970), holding assumption of risk a valid defense which is effectively criticized in the dissenting opinion wherein assumption of risk and contributory negligence are defined and distinguished; *Beetler v. Sales Affiliates, Inc.*, 431 F.2d 651 (7th Cir. 1970), no defect shown citing the *Suvada* case; *Barbeau v. Roddy Mfg. Co.*, 431 F.2d 989 (6th Cir. 1970); *Hornung v. Richardson-Merrill, Inc.*, 317 F. Supp. 183 (D. Mont. 1970).

³⁷³ So described in *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

dore when engaged upon "the ship's service," as when loading or unloading cargo, are held to an absolute duty to provide a seaworthy ship. This means the vessel itself, gear, machinery and appurtenances, as well as the crew.

However, it has also been said that although there is an absolute duty to provide a safe and seaworthy ship, that does not require that the vessel be "accident-free" or "perfect."³⁷⁴ And in the case of strict liability, there must be a provable defect before the manufacturer or vendor can be held liable for any injury or damage his product may have caused:

A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all.³⁷⁵

Perhaps the following is a more adequate statement:

It is the duty of a manufacturer to use reasonable care under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended. This duty includes a duty to design the product so that it will fairly meet any emergency of use which can reasonably be anticipated.³⁷⁶

The leading case on *absolute* liability is *Italia Societa per Azioni*

³⁷⁴ *Boudoin v. Lykes Brothers SS Co.*, 348 U.S. 336 (1955), cited or discussed in numerous cases, e.g., *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964). See generally Norris, *The Law of Seamen* (3d ed. 1970).

³⁷⁵ In *Mondshour v. General Motors Corp.*, 298 F. Supp. 111 (D. Md. 1969), an action was brought against the manufacturer of a bus which did not have a right rearview mirror for injuries sustained by a child when trapped under the right rear wheels of the bus as it departed from its curbside loading platform. The court granted a motion to dismiss quoting *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966) and citing *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

In the *Campo* case *supra*, the court affirmed the dismissal of a complaint which alleged negligent design of an "onion topping" machine in failing to include a safety device or guard to prevent human hands from being caught in the exposed rollers.

In light of the subsequent cases, it seems most doubtful that the court would follow *Campo v. Scofield*, *supra*; cf. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

While *Campo v. Scofield* has become a landmark decision, it is true that a new awareness of the problem of safe automobile design has occurred This awareness has been primarily manifested by legislative action such as the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et. seq.* There has also been evidence of a shift in judicial thought which has eroded the *Evans* [*supra*] rationale. . . . *Mondshour v. General Motors Corp.*, 298 F. Supp. 111, 113 (D. Md. 1969).

Cf. *Tomicich v. Western-Knapp Engineering Co.*, 423 F.2d 410 (9th Cir. 1970), citing the *Campo* case.

³⁷⁶ *Gossett v. Chrysler Corp.*, 359 F.2d 84, 87 (6th Cir. 1966).

*di Navigazione v. Oregon Stevedoring Co., Inc.*³⁷⁷ decided by the Supreme Court of the United States just six years ago. The shipowner brought this action in admiralty against a stevedore company to recover indemnity for breach of the stevedore's "implied warranty of workmanlike service." The basic issue was whether this warranty was breached where the stevedore has supplied defective equipment (albeit without negligence) which injures one of the employees engaged in the stevedoring activity.

The contract between the shipowner and the stevedore required the former to furnish and maintain in safe and efficient working condition suitable booms, winches, steam, lights and similar equipment. In turn, the stevedore was to be responsible for damage to the ship or cargo, and for injury or death suffered by any person as a result of the stevedore's negligence.³⁷⁸

During the stevedoring operation in Portland, a longshoreman employee was injured on board the vessel when a hatch tent rope snapped and struck him. The employee recovered a judgment against the shipowner in a state court for negligence and unseaworthiness.³⁷⁹

³⁷⁷ 376 U.S. 315 (1964).

Neill v. Diamond M. Drilling Co., 426 F.2d 487 (5th Cir. 1970); *Guidry v. Texaco, Inc.*, 430 F.2d 781 (5th Cir. 1970); *Noble v. Bank Line, Ltd.*, 431 F.2d 520 (5th Cir. 1970); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970); *Burrage v. Flota Mercante Grancolombiana, S.A.*, 431 F.2d (5th Cir. 1970); *Drake v. E.I. DuPont deNemours & Co., Inc.*, 432 F.2d 276 (5th Cir. 1970); *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970), citing *Italia Societa* as a "celebrated" case; *Chagois v. Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970), citing *Law v. Victory Carriers, Inc. supra*.

³⁷⁸ In pertinent part, the contract reads:

It is mutually agreed between the parties hereto, that the [Oregon] Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement

Paragraph VIII of the agreement states:

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

³⁷⁹ The shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended and this

The federal district court found that unseaworthiness created by the defective rope furnished by the stevedore was the basis for the latter's liability. However, indemnity was refused because no negligence was proved, the defective condition of the rope not having been apparent.³⁸⁰

The Court of Appeals for the Ninth Circuit affirmed on the ground that a stevedore's implied warranty of workmanlike service is not breached in the absence of a showing of negligence in supplying defective equipment.³⁸¹ There being a conflict in the circuits, resolution of the conflict was deemed important and the Supreme Court granted certiorari.³⁸²

Beginning its analysis with one of the Court's earlier decisions, *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Corp.*³⁸³ it was pointed out that a stevedore's warranty of workmanlike service is comparable to a manufacturer's warranty of the soundness of its manufactured product.³⁸⁴ Also, it was emphasized that the shipowner's suit for indemnification is one for *breach of contract, not for tort.*³⁸⁵

Subsequent decisions make it eminently clear that the stevedore's obligation to perform his service with reasonable safety extends not only

liability extends to longshoremen and others who work aboard the vessel, including those in the employ of contracting stevedore companies. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953); *Mitchell v. Trawler Racer*, 362 U.S. 539 (1960). If the owner engages others who supply the equipment necessary for stevedoring operations, he must still answer to the longshoreman if the gear proves to be unseaworthy. *Alaska S. S. Co. v. Petterson*, 347 U.S. 396 (1954). This liability is strict and nondelegable. *Mitchell v. Trawler Racer*, *supra*; *Mahnich v. Southern S. S. Co.*, 321 U.S. 96 (1944).

³⁸⁰ The district court was apparently laboring under the misapprehension that negligence was necessary before there could be a breach of the warranty of seaworthiness; however, the opposite has been held.

The reason that indemnity was disallowed was that the vessel owner, not having proved negligence, it was thought that the contractual provision rendering the stevedore liable for injuries caused by its negligence was in effect an express disclaimer against an implied warranty of workmanlike service. See the contract as quoted *supra* note 378.

³⁸¹ *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 301 F.2d 481 (9th Cir. 1962).

³⁸² 372 U.S. 963 (1963).

³⁸³ 350 U.S. 124 (1956).

³⁸⁴ Citing:

George v. Willman, 379 P.2d 103 (Alaska); *Hessler v. Hillwood Mfg. Co.*, 302 F.2d 61 (C. A. 6th Cir.); *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla.); *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69. See Frumer and Friedman, *Products Liability*, § 10.01, and cases cited therein; Uniform Sales Act, Uniform Laws Annotated (1950 ed.), § 15 (1); Uniform Commercial Code, Uniform Laws Annotated (1962 ed.), § 2-315. See generally Williston, *Sales*, § 237 (Rev. ed. 1948 and Supp. 1963).

Cf. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

³⁸⁵ 4 and 10 Williston Contracts §§ 626, 1086A respectively (3d ed. Jaeger 1967).

to the handling and stowage of cargo but also to the use of equipment incidental thereto,³⁸⁶ including defective equipment supplied by the shipowner,³⁸⁷ and that the shipowner's negligence is not fatal to recovery against the stevedore.³⁸⁸ However, the Court pointed out that the implied warranty to supply reasonably safe equipment may be satisfied with something less than absolutely perfect equipment; nevertheless, the test is "whether the equipment was in fact safe and fit for its intended use."³⁸⁹ As the Supreme Court aptly phrased it:

What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.³⁹⁰

It is noteworthy that the contract between the shipowner and the stevedore gave the latter full control and supervision of the loading and unloading operations. This did not in any way alter the shipowner's liability to the injured employee, since the duty to supply a seaworthy vessel cannot be delegated; it extends "to those who perform the unloading and loading portion of the ship's work." The stevedore was considered to be "in a far better position to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedoring company."³⁹¹

Emphasizing the existence of the contract concept in warranties of seaworthiness, the Ninth Circuit had said:

In recent history liability for breach of warranty has been associated with contract more than anything else. . . . Concepts of privity of contract are ever more gradually giving way to sweeping coverage of warranty. . . . In *Waterman* and *Crumady*, the shipowner was allowed to recover for breach of warranty even though there was no direct contract relationship between him and the Stevedoring Company. However, the contract idea was adhered to since the ship or shipowner were considered to be the third-party beneficiaries of the contract

³⁸⁶ Citing *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

³⁸⁷ *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), and *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960).

³⁸⁸ Citing *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

³⁸⁹ *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 301 F.2d 481 (9th Cir. 1962).

³⁹⁰ *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

³⁹¹ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946).

between the stevedoring company and the one who contracted for its services.³⁹²

Reversing, the Supreme Court remarked that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."³⁹³

An examination of the more recent cases following the line of absolute liability laid down by the Supreme Court in *Italia Societa* may prove useful. Thus, in *Victory Carriers, Inc. v. Stockton Stevedoring Co.*³⁹⁴ the question arose in an action by a longshoreman against a shipowner-operator for injuries sustained while working aboard a ship. The shipowner sought indemnity from the stevedore as the longshoreman's employer for any liability of the shipowner to the longshoreman.

The trial court, sitting in admiralty, held that the shipowner was not entitled to indemnity from the stevedore. On appeal, however, this decision was reversed and the court quoted the Supreme Court decision in *Italia Societa*.³⁹⁵ In the course of its opinion, the appellate court noted:

[It] has been held that the failure of stevedore to remedy, or cause the ships crew to remedy, the condition of a missing safety pin in a ship's winch of which the stevedore had *constructive notice*, constituted breach of warranty requiring the stevedore to indemnify the shipowner against loss arising from the defect.³⁹⁶

Thus, in a recent case the same court reviewed the applicable

³⁹² *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 310 F.2d 481, 485 (9th Cir. 1962). See 2 Williston, Contracts Ch 14 (3d ed. Jaeger 1959).

³⁹³ 376 U.S. 315 (1964). Cf. *In Re Marine Sulphur Transport Corp.*, 312 F. Supp. 1081 (S.D.N.Y. 1970), citing the leading cases including *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) and *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

³⁹⁴ 388 F.2d 955 (9th Cir. 1968).

³⁹⁵ *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

Neill v. Diamond M. Drilling Co., 426 F.2d 487 (5th Cir. 1970); *Guidry v. Texaco, Inc.*, 430 F.2d 781 (5th Cir. 1970); *Noble v. Bank Line, Ltd.*, 431 F.2d 520 (5th Cir. 1970); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970); *Burrage v. Flota Mercante Grancolombiana, S.A.*, 431 F.2d (5th Cir. 1970); *Drake v. E.I. DuPont de Nemours & Co., Inc.* 432 F.2d 276 (5th Cir. 1970); *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970) citing *Italia Societa supra* as a "celebrated" case; *Chagois v. Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970), citing *Law v. Victory Carriers, Inc. supra*.

³⁹⁶ *Victory Carriers, Inc., v. Stockton Stevedoring Co.*, 388 F.2d 955, 959 (9th Cir. 1968) citing *Drago v. A./S. Inger*, 194 F. Supp. 398 (S.D.N.Y. 1961) *aff'd* 305 F.2d 139 (2d Cir. 1962) *cert. denied, sub nom. Daniels & Kennedy, Inc. v. A./S. Inger*, 371 U.S. 925 (1962).

performance which was stated in *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.*⁴⁰⁵ and *Kossick v. United Fruit Co.*⁴⁰⁶ Based on these cases, the Penn Tanker Company suggested that it was entitled to recover full indemnity from the United States Government under the Federal Tort Claims Act.⁴⁰⁷

However, the court answered this contention by quoting *Delta Engineering Corp. v. Scott*,⁴⁰⁸ where the court said, "While the maritime jurisprudence affords a fresh example that from little acorns big oaks may grow, we would doubt very much that the *Ryan* notion is to carry over to every conceivable relationship which might exist between a ship and a third party."⁴⁰⁹

The court then emphasized the fact that the right to indemnification in the *Ryan* type of case is based upon breach of a contractual obligation, citing *Italia Societa, Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Ocean Drilling and Exploration Co. v. Berry Bros. Oil-field Service Inc.*,⁴¹⁰ *Schwartz v. Compagnie Général Transatlantique*.⁴¹¹ "Here," said the court, "there was no express or implied contractual relationship between the parties."

Finally, the court pointed out that even were the court to assume that there was an implied warranty running from the United States to Penn Tanker Co., the court could find no admiralty jurisdiction to support it. "Admiralty jurisdiction of torts," said the court, "is limited to those which occur on the high seas or other navigable waters within admiralty cognizance."⁴¹² Since there was no admiralty jurisdiction, the *Ryan* case was not applicable.

In *Crosson v. N.V. Stoomvaart Mij "Nederland"*⁴¹³ the Second Circuit Court of Appeals stated that a stevedore is liable to a shipowner for counsel fees in defending the action brought against the ship. The court cited the leading cases including *Ryan Stevedoring Co. v. Pan-At-*

⁴⁰⁵ 350 U.S. 124 (1956).

⁴⁰⁶ 365 U.S. 731 (1961).

⁴⁰⁷ 42 U.S.C. § 249.

⁴⁰⁸ 322 F.2d 11 (5th Cir. 1963) cert. denied 377 U.S. 905 (1964).

⁴⁰⁹ *Id.* at 18.

⁴¹⁰ 377 F.2d 511 (5th Cir. 1967) cert. denied 389 U.S. 849 (1967).

⁴¹¹ 285 F. Supp. 473 (S.D.N.Y. 1968).

⁴¹² *Penn Tanker Co. v. United States*, 409 F.2d 514, 518 (1969), citing *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316 (1908).

⁴¹³ 409 F.2d 865 (2d Cir. 1969).

*lantic Steamship Corp., Crumady v. The Joachim Hendrick Fisser*⁴¹⁴ and *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.* As the court puts it: "Liability has not been placed on the stevedore casually, but as a matter of policy, national in impact." The court then quoted the Supreme Court opinion in *Italia Societa*:

We deal here with a suit for indemnification based upon a maritime contract, governed by federal law, * * in an area where rather special rules governing the obligations and liabilities of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, * * we think our decision today is in furtherance of these objectives.⁴¹⁵

The court then continued:

The contours of the indemnity doctrine have been developed in a series of skirmishes between shipowners and stevedores, which will doubtless continue. But it must be remembered that the theory of burdening the stevedore has been that it is in the best position to 'minimize the likelihood' of the accident.⁴¹⁶

The trial court had entered judgment for the shipowner⁴¹⁷ and the appellate court now affirmed.⁴¹⁸

In *Atkins v. Greenville Ship Building Corporation*⁴¹⁹ the court granted defendant's motion for summary judgment in an action for breach of the maritime warranty of seaworthiness brought by a shore-based worker who was injured when he fell from a ladder while climbing to a barge brought into drydock for major repairs.

The basis for dismissal was that the barge at the time of the accident was not "a vessel" for the purpose of applying the maritime warranty of seaworthiness. The barge had no motive power and could only proceed by being towed. The plaintiff cited *Reed v. The Yaka*⁴²⁰ as a basis for his contention that he should be entitled to recover by virtue of being on the "ship's service." The court, however, held that the plaintiff was "clearly within the compensation provisions of the longshoreman's com-

⁴¹⁴ 358 U.S. 423 (1959).

⁴¹⁵ *Crosson v. N.V. Stoomvaart Mij "Nederland,"* 409 F.2d 865, 867 (2d Cir. 1969).

⁴¹⁶ *Id.* at 867.

⁴¹⁷ 266 F. Supp. 409 (E.D.N.Y. 1967).

⁴¹⁸ *Crosson v. N.V. Stoomvaart Mij "Nederland,"* 409 F.2d 865 (2d Cir. 1969).

⁴¹⁹ 411 F.2d 279 (5th Cir. 1969).

⁴²⁰ 373 U.S. 410 (1963).

pensation Act.⁴²¹ Citing in support, *Avondale Marine Ways, Inc. v. Henderson*,⁴²² and *Travelers Insurance Co. v. Shea*.⁴²³

The court then traced the historical development of the warranty of seaworthiness from its humble beginnings in *The Osceola*⁴²⁴ through *Sieracki*,⁴²⁵ *Reed*⁴²⁶ and finally *Jackson v. Lykes Bros. Steamship Co.*⁴²⁷ However, even granted the great expansion in the concept of the warranty of seaworthiness in favor of "shore-based employees, including long-shoremen," the instant plaintiff was unable to bring himself within the enlarged scope of this warranty.

Significantly, the court said that the shore-based worker must be engaged in work traditionally "that of a seaman" citing *United New York and New Jersey Sandy Hook Pilots Association v. Halecki*,⁴²⁸ "excluding those persons performing such tasks as making major repairs requiring dry docking with special skills."⁴²⁹ Also, the craft or structure said to owe a warranty of seaworthiness to its seamen or longshoremen or others engaged upon "the ship's service" must fall within the traditional category of "vessels", as described in *Offshore Company v. Robison*.⁴³⁰

After a further discussion of various cases, the court concluded that a floating dry dock is not a "vessel" within the meaning of the warranty of seaworthiness.⁴³¹ The court also pointed out that the attempt to fix "unvarying meanings" having a firm legal significance to such terms as "seamen", "vessel", "member of the crew" and similar terms "must

⁴²¹ 33 U.S.C. § 902(4) and § 903(a).

⁴²² 346 U.S. 366 (1953).

⁴²³ 382 F.2d 344 (5th Cir. 1967).

⁴²⁴ 189 U.S. 158 (1903).

⁴²⁵ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), stating that the "unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act," 46 U.S.C. § 688; *Moragne v. States Marine Lines*, 398 U.S. 97 (1970).

⁴²⁶ *Reed v. The Yaka*, 373 U.S. 410 (1963), cited in *Chahoc v. Hunt Shipyard*, 431 F.2d 576 (5th Cir. 1970). *Cf. Burrage v. Flota Mercante Grancolombiana, S.A.*, 431 F.2d 1229 (5th Cir. 1970), citing most of the leading cases.

⁴²⁷ 386 U.S. 731 (1967).

⁴²⁸ 358 U.S. 613 (1959); the *Halecki* case is discussed in *Drake v. E.I. DuPont de Nemours & Co.*, 432 F.2d 276 (5th Cir. 1970).

⁴²⁹ Citing *West v. United States*, 361 U.S. 118 (1959), discussed in *Drake v. E.I. DuPont de Nemours & Co.*, 432 F.2d 276 (5th Cir. 1970).

⁴³⁰ 266 F.2d 769 (5th Cir. 1959).

⁴³¹ See Norris, *The Law of Seamen* (3d ed. 1970).

Cf. Chahoc v. Hunt Shipyard, 431 F.2d 576 (5th Cir. 1970), holding that a drydock used as such was not a "vessel" and there was no warranty of seaworthiness to be breached.

come to grief on the facts."⁴³² Accordingly, the court affirmed the judgment of dismissal of the court below.⁴³³

In *Metcalfe v. Oswell Towing Co.*,⁴³⁴ a deckhand brought an action against the owner of a small woodenhulled tug boat for a shoulder injury he received while attempting to throw a safety line connecting the bow of a tug to a barge. The trial court rendered judgment for the defendant and the deckhand appealed. Affirming, the Fifth Circuit Court of Appeals held that the evidence supported the finding that the tug was seaworthy and that the deckhand had failed to prove any negligence on the part of the owner of the tug. Also it was established that the shipowner had satisfied the requirement of maintenance and cure. Significantly, the court pointed out that the mere fact that an accident occurs and a seaman is injured, without more "does not establish that a vessel is unseaworthy."⁴³⁵

In *Christman v. Maristella Compania Naviera*⁴³⁶ an action was brought involving an alleged breach of a charter party for a certain vessel. It was stated that the agent, in signing a contract without authority, had breached a warranty of authority which warranty resembles the warranty of workmanlike service arising from a contract between a shipowner and a stevedore.⁴³⁷

The court then rejected the defendant's argument that recovery of an agent's misrepresentation of his authority is founded "on the tort of deceit," and said, "We accept, instead, the majority view of the courts in the United States and England that when an agent signs a contract he impliedly warrants that he has authority to make the con-

⁴³² Citing *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), which is relied on in *Neill v. Diamond M. Drilling Co.*, 426 F.2d 487 (5th Cir. 1970); *Peck v. United States Steel Corp.*, 315 F. Supp. 905 (D. Minn. 1970), citing many of the leading cases including *Offshore Co. v. Robison supra*, and *West v. United States, supra* note 429.

⁴³³ *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir. 1969).

⁴³⁴ 417 F.2d 313 (5th Cir. 1969).

⁴³⁵ Citing *Mosley v. Cia. Mar. Adra, S.A.*, 314 F.2d 223 (2d Cir. 1963).

In *Di Paola v. International Terminal Operating Co.*, 418 F.2d 906 (1969), the district court had granted a motion for summary judgment made by a stevedore when a suit was brought in admiralty for damages for injuries suffered by a longshoreman when bags of coffee fell upon him while he was sweeping the floor of a warehouse on the pier.

The court of appeals held that the district court had not been presented with a complete and accurate record with respect to the relationship between the stevedore which stacked the bags of coffee in the warehouse and the employer of the longshoreman and accordingly the case would be remanded to the district court for further proceedings.

⁴³⁶ 293 F. Supp. 442 (S.D.N.Y. 1968).

⁴³⁷ Citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956).

tract. . .⁴³⁸ this warranty arises from the contract which the agent has signed on behalf of his principal."⁴³⁹

The warranty of authority is not unlike the warranty of workmanlike services arising from a contract between a shipowner and a stevedore. . .⁴⁴⁰ Recovery on the warranty of workmanlike services is cognizable in admiralty because the contract on which it is based is maritime in nature. Here too, the warranty should be cognizable in admiralty because the contract on which it is based is concededly maritime in nature.⁴⁴¹

Consequently, the motions to dismiss made by the defendant were denied "in all respects."

In a personal injury action brought against a shipowner by an injured shore worker, *McCown v. Humble Oil and Refining Co.*,⁴⁴² it appeared that the plaintiff was engaged in a complex technical operation requiring specialized shipyard equipment put aboard a vessel by the shipyard and was actually doing work which had never been done by seamen nor considered a part of a seaman's hazard. This was held not to be "a seaman's work" at the time of the injury. Consequently the plaintiff was not entitled to any recovery from the shipowner for breach of the warranty of seaworthiness.

Furthermore, it did not appear that the ship was "in navigation" at the time of the accident since the vessel was undergoing extensive repairs, renewals and renovations, including an overhaul of her main propulsion engines and accordingly, there could be no recovery by the plaintiff in an admiralty proceeding. The appellate court affirmed.⁴⁴³

In the course of its opinion, the court quoted from the leading Supreme Court decision in *Mahnich v. Southern S.S. Co.*⁴⁴⁴ where the standard to govern this type of action was stated: "He [the seaman] is subject to the rigorous disciplines of the sea, and all conditions of his service constrain him to accept, without critical examination and without protest, working conditions, and appliances as commanded by his superior officers."⁴⁴⁵

⁴³⁸ Citing Restatement (Second) of Agency § 329 (1957).

⁴³⁹ Citing Mechem, Agency § 325 (4th Ed. 1952).

⁴⁴⁰ Citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956).

⁴⁴¹ *Christman v. Maristella Compania Naviera*, 293 F. Supp. 442 (S.D.N.Y. 1968).

⁴⁴² 293 F. Supp. 444 (E.D. Va. 1967).

⁴⁴³ 405 F.2d 596 (4th Cir. 1969).

⁴⁴⁴ 321 U.S. 96 (1944).

⁴⁴⁵ *McCown v. Humble Oil & Refining Co.*, 293 F. Supp. 444 (E.D. Va. 1967), quoting *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

It was clear that the plaintiff McCown was not a member of the ship's crew, but was an employee of the Newport News Ship Building and Dry Dock Company and was working aboard the vessel on behalf of this company. To bring himself within the warranty of seaworthiness, it was essential for the plaintiff to establish the fact that he was engaged upon the ship's work since basically he was a shore worker. In point of fact, he was classified as a "rigger" engaged at the time in a part of a very complex and technical operation which was not at all a part of the seaman's regular duties.

From the facts that were adduced in the case, it was quite clear that the vessel was not "in navigation," since at the time it could not have been operated under its own power nor did the ships' officers and crew participate in the work that was being done, gave no orders nor supervised its progress. Quoting *Latus v. United States*⁴⁴⁶ the court said,

We can not agree * * * that a ship is progressively returned to service as to those parts of her on which the necessary restoration had been done. The warranty of seaworthiness has never been divided into fragments; a ship is either fit for duties in all respects, or she is not fitted at all.⁴⁴⁷

The court then distinguished certain of the cases that had been cited on behalf of the plaintiffs, specifically, *Lawler v. Socony-Vacuum Oil Co.*,⁴⁴⁸ *Allen v. Union Barge Line Corp.*,⁴⁴⁹ and *Morrell v. United States*,⁴⁵⁰ wherein the vessels had been in the shipyard for a short time for minor repairs, or for routine maintenance, or for an annual inspection. Accordingly, summary judgment was rendered for defendant company.

In the case of *Mroz v. Dravo Corp.*,⁴⁵¹ the plaintiff, a ship's cook, sought recovery for an aggravated illness, namely emphysema which she had contracted during her employment by the defendant corporation. The court was of the opinion that the plaintiff should have had a trial on the merits and that certain jury questions were presented, citing *Butler v. Whiteman*.⁴⁵² The basis for plaintiff's ailment was that fumes

⁴⁴⁶ 277 F.2d 264 (2d Cir. 1960).

⁴⁴⁷ McCown v. Humble Oil & Refining Co., 293 F. Supp. 444 (E.D. Va. 1967).

⁴⁴⁸ 275 F.2d 599 (2d Cir. 1960).

⁴⁴⁹ 239 F. Supp. 1004 (E.D. La. 1965).

⁴⁵⁰ 193 F. Supp. 705 (N.D. Cal. 1960).

⁴⁵¹ 293 F. Supp. 499 (W.D. Pa. 1968).

⁴⁵² 356 U.S. 271 (1958); *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

from the diesel engines constantly permeated the ship's galley and her quarters causing her malady. Referring to the responsibility of the captain for the members of his crew, the court observed that "unquestionably, a master has paternal responsibility to the members of his crew. The defendant, through its captains and doctor, occupies a position of guardianship to seamen as the wards of the admiralty."⁴⁵³ In conclusion the court said that "plaintiff was entitled to maintenance until she was cured as far as possible."⁴⁵⁴

In *Wilkes v. H. M. Wrangell and Co.*,⁴⁵⁵ a longshoreman brought an action against certain vessel owners for damages for personal injury alleged to have occurred as a result of the negligence and failure to provide a seaworthy vessel. A motion for summary judgment was filed on behalf of the vessel owners, but this was denied on the basis that there had been no showing of prejudice by a failure to bring the action within the two years that the Delaware Statute of Limitations provided.

Although recognizing that generally in determining what constitutes laches, founded on undue and prejudicial delay, a court in a suit in admiralty will have recourse to the time limitation fixed by the analogous state statute of limitations. Here there was no evidence that the vessel owners had been damaged by the delay in bringing the action. The court held that the presumption of prejudice which the libellant was required to disprove was actually rebutted by the record. Accordingly, the motion for summary judgment was denied.⁴⁵⁶

In *Solet v. M/V Capt. H. V. Dufrene*,⁴⁵⁷ the court examined with great particularity the warranty of seaworthiness and found that a seaman who brought this action against the owner of a fishing trawler had been injured when a winch broke rendering the vessel unseaworthy. The court rejected the argument that since the charter of the vessel was "bareboat" the vessel owner did not warrant seaworthiness to the person having the charter. Thus the court described this as "surely wrong on its face." The court cited *Mitchell v. Trawler Racer Inc.*,⁴⁵⁸ as a leading precedent.

⁴⁵³ Citing *Spellman v. American Barge Line Co.*, 176 F.2d 716 (3d Cir. 1949), and see *Williston Contracts*, §§ 626, 1018A, 1086A, 1564A (3d ed. Jaeger 1970).

⁴⁵⁴ *Mroz v. Dravo Corp.*, 293 F. Supp. 499 (W.D. Pa. 1968) at 508.

⁴⁵⁵ 293 F. Supp. 522 (D. Del. 1968).

⁴⁵⁶ *Wilkes v. H.M. Wrangell & Co.*, 293 F. Supp. 522 (D. Del. 1968).

⁴⁵⁷ 303 F. Supp. 980 (E.D. La. 1969).

⁴⁵⁸ 362 U.S. 539 (1960).

A vessel's unseaworthiness might arise from any number of individualized

In *Miller v. Union Barge Line Corp.*,⁴⁵⁹ a longshoreman brought an action for injuries sustained while on board a barge belonging to one defendant and chartered to another. The court held that before a bareboat charter could relieve the owner of liability, there would have to be a complete and outright transfer of ownership as described in *Guzman v. Pichirilo*.⁴⁶⁰ Here, the indemnity already paid the injured plaintiff was greater than the damages being claimed. Consequently, although there was judgment for the plaintiff, there could be no recovery of damages.

In *Zoldan v. American Export Lines*,⁴⁶¹ the seaman had given a "general" release and accordingly, there was no recovery. While recognizing that releases must be scrutinized with care, in this instance, the written release was so complete that there was no reservation or possible reservation of any rights whatsoever.

Finally, in *Fernandes v. United Fruit Co.*,⁴⁶² the court granted a motion to quash process against a vessel since there had been an election between proceeding against the ship or taking the remedy provided by the Jones Act with right of jury trial against the employer; however, the seaman could not have both.

These cases demonstrate the significant differences between strict liability, breach of the constructive warranty and absolute warranty. Basically, the product must be shown to be defective if there is to be recovery on theories of either strict liability or constructive warranty. There is no such requirement where a breach of the warranty of seaworthiness is alleged. Liability under this warranty is constantly being expanded, as the most recent cases clearly demonstrate.⁴⁶³ Repeatedly,

circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. *The method of loading her cargo*, or the manner of its stowage might be improper.

Morales v. City of Galveston, 370 U.S. 165.

Cf. Whisenant v. Brewster-Bartle Offshore Co., 319 F. Supp. 993 (E.D. La. 1970).

⁴⁵⁹ 299 F. Supp. 718 (W.D. Pa. 1969).

⁴⁶⁰ 369 U.S. 698 (1962).

⁴⁶¹ 302 F. Supp. 388 (S.D. N.Y. 1969).

⁴⁶² 303 F. Supp. 681 (D. Md. 1969); the court cited in support, *Plamals v. S.S. Pinar Del Rio*, 277 U.S. 151 (1928) and *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).

⁴⁶³ As the Supreme Court of the United States has said in one of its most recent pronouncements in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 97 (1970) squarely overruling *The Harrisburg*, 119 U.S. 199 (1886) a precedent of 85 years standing:

Nonseamen on the high seas could generally recover for ordinary negligence, but even this was virtually denied to seamen under the peculiar maritime doctrine of *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 487, 47 L. Ed. 760 (1903). . . .

Since that time the equation has changed drastically, through this Court's

it has been emphasized that this liability is absolute.

transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence. See, e.g., *Mahnich v. Southern S.S. Co.*, *supra*; *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960). The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death . . . and it has achieved equal importance for longshoremen and other harbor workers to whom the duty of seaworthiness was extended because they perform work on the vessel traditionally done by seamen. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

Cf. Epling v. M.T. Epling Co., 435 F.2d 732 (6th Cir. 1970) where the court cites the *Moragne* case, *supra*, and distinguishes it.

A number of other recent decisions are noteworthy, as, for example: *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306 (1970) extending protection of Jones Act, 46 U.S.C. § 688 (1920) to a Greek seaman who was injured on a Greek vessel in the port of New Orleans. The contract of employment was made in Greece, and the ship owner was a Greek corporation which had its largest office in New York and whose 95% shareholder lived in Connecticut. It was mutually agreed that Greek law was to govern and claims were to be adjudicated by a Greek court. Nevertheless, Mr. Justice Douglas, speaking for the majority, in an uncanny opinion, held for the seaman.

A dissenting opinion filed by Mr. Justice Harlan, joined by the Chief Justice and Mr. Justice Stewart, distinguished by its clarity, logic and adherence to precedents such as *Romero v. International Terminal Co.*, 358 U.S. 354 (1959) and *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963), reflects the Congressional intent that statutes such as the Jones Act should "apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law;" it reads in part:

I dissent from today's decision holding that a Greek seaman who signs articles in Greece for employment on a Greek-owned, Greek-flag vessel may recover under the Jones Act for shipboard injuries sustained while the vessel was in American territorial waters. *This result is supported neither by precedent, nor realistic policy, and in my opinion is far removed from any intention that can reasonably be ascribed to Congress.* (Emphasis supplied)

The dissent then discussed *Lauritzen v. Larsen*, 345 U.S. 571 (1953), also invoked by the majority, and concluded:

Today's decision suggests that courts have become "mesmerized" by "contracts," and notwithstanding the purported eschewal of a "mechanical" application of the *Lauritzen* "test," they have lost sight of the primary purpose of *Lauritzen* which, as I conceive it, was to reconcile the all-embracing language of the Jones Act with those principles of comity embodied in international and maritime law that are designed to "foster amicable and workable relations." 345 U.S., at 582, 73 S. Ct. at 928. *Lauritzen*, properly understood, should, I submit, be taken to focus the judicial inquiry on the purpose of Congress and the presence or absence of an adequate basis for the assertion of American jurisdiction, when that purpose may be furthered by application of the statute in the circumstances presented.

The lower federal courts have also been active in extending liability for breach of the warranty of seaworthiness:

Guidry v. Texaco, Inc., 430 F.2d 781 (1970), citing *Seas Shipping Co., Inc. v. Sieracki*, *supra* note 425; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, *supra* note 383; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

Noble v. Bank Line, Ltd., 431 F.2d 520 (5th Cir. 1970); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970), citing *inter alia* *Mitchell v. Trawler Racer*, 362 U.S. 539, to the effect that the duty to furnish "a seaworthy ship is absolute in the sense that negligence need not be shown."

Burrage v. Flota Mercante Grancolombiana, S.A., 431 F.2d 1229 (5th Cir. 1970), citing the leading cases, where the court observed in humorous vein:

With almost ironic coincidence this, as the earlier one of *Gutierrez*, is a bean-worthy case. *Burrage*, a *Sieracki-Ryan-Yaka* pseudo seaman, was injured on a New Orleans wharf while working as a longshoreman in the employ of Stevedore during the discharge of Shipowner's SS *Ciudad de Nieva* when he slipped on a coffee bean that had come from the ship's cargo earlier that morning or the day be-

This bears out the prediction in a leading treatise on contract law (Williston) that the Supreme Court of the United States would continue its extension of the protection afforded to the "wards of the admiralty courts" the outer limits of which seem not to have been reached as yet.

PRODUCT LIABILITY AND "LONG-ARM" STATUTES

One of the remarkable developments in connection with product liability litigation is the broadening jurisdictional policy manifested by the so-called "long arm" statutes.⁴⁶⁴ Among the most recent cases dealing with this question is *Gardner v. Q.H.S., Inc.*⁴⁶⁵ There, a product liability action was instituted by certain apartment house owners against a New York corporation which manufactured plastic hair curlers. When the curlers ignited, they caused a fire which damaged plaintiffs' apartment building in Charleston, South Carolina. Outside of the sale of the curlers through a local chain store, the manufacturer was not engaged in any activity in South Carolina although he was served with process pursuant to a state statute.⁴⁶⁶

Thus, there were two basic questions raised by the attempt to exercise personal jurisdiction over the manufacturer, an out-of-state non-resident: First, a state statute or rule of law would have to be invoked "permitting personal jurisdiction over an absent defendant under the particular circumstances";⁴⁶⁷ Second, the statute or rule must not exceed the limits upon a state's jurisdiction fixed by the Supreme Court's interpretation or construction of the Constitution of the United States.⁴⁶⁸

fore. The District Court in a judge trial held Shipowner liable for substantial damages and rejected Shipowner's plea of contributory negligence and its claim against Stevedore for WWLP [warranty of workmanlike performance] indemnity under *Ryan*. (Footnotes omitted.)

The appellate court affirmed judgment as to recovery by the injured plaintiff, but reversed as to recovery over from the stevedore.

Drake v. E.I. DuPont de Nemours & Co., Inc., 432 F.2d 276 (5th Cir. 1970); *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970), citing most of the leading cases; *Chagois v. Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970): "Unseaworthiness liability is 'essentially a species of liability without fault.'"

Cf. Weeks v. Alonzo Cothron, Inc., 426 F.2d 674 (5th Cir. 1970); *Mitchell v. American Export Isbrandtsen Lines, Inc.*, 430 F.2d 1023 (2d Cir. 1970); *Wheeler v. Lykes Bros. S.S. Co.*, 431 F.2d 570 (5th Cir. 1970); *In re Marine Sulphur Transport Corp.*, 312 F. Supp. 1081 (S.D.N.Y. 1970); *Interstate Steel Corp. v. S.S. Crystal Gem*, 317 F. Supp. 112 (S.D.N.Y. 1970).

⁴⁶⁴ 11 Williston, Contracts, § 1292B (3d ed. Jaeger 1968).

⁴⁶⁵ 304 F. Supp. 1247 (D. S.C. 1969).

⁴⁶⁶ South Carolina Code of Laws, 1962, § 12-23.14; *cf.* UCC § 10.2-806.

⁴⁶⁷ *Gardner v. Q.H.S., Inc.*, 304 F. Supp. 1247 (D. S.C. 1969).

⁴⁶⁸ As in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *McGee*

After a review of a number of cases dealing with the question of what constitutes "doing business," the federal court quoted the Supreme Court of South Carolina in *Boney v. Trans-State Dredging Co.*,⁴⁶⁹ to the effect that no universal formula has been devised to determine what constitutes "doing business" by a foreign corporation within a given state so as to subject it to the jurisdiction of the courts of that state. Only the facts in a particular case will resolve this question.⁴⁷⁰

The court points out that the more recent decisions of both federal and state courts have gradually broadened the jurisdiction of the latter and this seems especially true in product liability cases.⁴⁷¹ A continuing trend is clearly discernible. Quoting an opinion rendered by the Supreme Court of Arizona,⁴⁷² the court commented: "A rule limiting jurisdiction to defendants who 'purposefully' conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state."⁴⁷³

Along the same lines, the court discussed the leading Illinois Supreme Court decision in *Gray v. American Radiator & Standard Sanitary Company*,⁴⁷⁴ where the factual situation was substantially similar to that in the instant case. In both Arizona and Illinois, the jurisdiction of the local courts was upheld.⁴⁷⁵ Concluding that it, too, had jurisdiction, the court denied a motion to dismiss or to quash return of service of summons.⁴⁷⁶

In another significant case, *Eyerly Aircraft Company v. Killian*,⁴⁷⁷

v. International Life Ins. Co. 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958). These cases are discussed in *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315 (5th Cir. 1970) as is also the significant Illinois case of *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

⁴⁶⁹ 237 S.C. 54, 115 S.E.2d 508 (1960).

⁴⁷⁰ *Jones v. General Motors Corporation*, 197 S.C. 129, 14 S.E.2d 628 (1941).

⁴⁷¹ *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966); cf. *State v. Ford Motor Co.*, 208 S.C. 379, 38 S.E.2d 242 (1946).

⁴⁷² *Id.*, citing *Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1964).

⁴⁷³ *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966).

⁴⁷⁴ 22 Ill. 2d 432, 176 N.E.2d 761 (1961); it is interesting to note that Illinois was the first state to enact the so-called "single-act statute" or, as more colloquially described, "long-arm statute," Illinois Civil Practice Act § 17, Ill. Rev. Stat. ch. 110, § 17. Many jurisdictions have adopted similar legislation, 11 Williston, Contracts, § 1292B (3d ed. Jaeger 1968).

⁴⁷⁵ The court remarked: "The United States Supreme Court has not commented on these cases, or, apparently, upon cases involving similar facts." *Gardner v. Q.H.S., Inc.*, 304 F. Supp. 1247 (D. S.C. 1969).

⁴⁷⁶ *Gardner v. Q.H.S., Inc.*, 304 F. Supp. 1247 (D. S.C. 1969).

⁴⁷⁷ 414 F.2d 591 (5th Cir. 1969).

the Fifth Circuit Court of Appeals held that Texas had jurisdiction under its "long-arm" statute in a case filed by the injured plaintiff in a federal district court in Texas against an Oregon manufacturer of an amusement ride used in Dallas. The defendant corporation contended that its connection with Texas was insufficient to support *in personam* jurisdiction.

Holding that the defendant had "engaged in business" in Texas, even though it did not maintain a regular place of business there and did not have a designated agent to receive service of process, the court summarized the following as grounds for exercising jurisdiction:

1. Sales and deliveries of amusement devices and parts therefor directly into Texas;
2. Extension of credit in the State;
3. Retention of liens on the item sold;
4. Filing such liens with State and County authorities pursuant to local law;
5. Servicing machines located within the State; and
6. Solicitation of business in Texas.⁴⁷⁸

Since these connections with the State were, as the court found, "both continuous and substantial," the manufacturer came within the terms of the statute. The court then declared that the growing trend is to hold a corporation answerable when "it introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where the injury occurred."⁴⁷⁹

Citing with approval *Ehlers v. United States Heating & Cooling Manufacturing Company*,⁴⁸⁰ wherein a similar statute was held to permit

Cf. Florida Towing Corp. v. Oliver J. Olson & Co., 426 F.2d 896 (5th Cir. 1970), holding that Florida's "long arm" statute, F.S.A. § 48.181, did not make defendant "amenable to service"; dismissal of action affirmed: *Travelers Indemnity Co. v. Evans Pipe Co.*, 432 F.2d 211 (6th Cir. 1970); *Bollard v. Volkswagenwerke, A.G.*, 313 F. Supp. 126 (D.C. W.D. Mo. 1970). In *Dawkins v. White Products Corp.*, 317 F. Supp. 53 (D.C. Miss. 1970) the court observed, quoting *Eyerly Aircraft supra*:

When construing a state 'Long Arm' statute, a federal court in a diversity case is required under the doctrine of *Erie R. R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, to give the statute the same construction as would the highest court of that state. *Walker v. Savell*, 5 Cir. 1964, 335 F.2d 536, 540.

414 F. 2d at 598-599.

⁴⁷⁸ *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315 (5th Cir. 1970), quoting from *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (1969).

⁴⁷⁹ 414 F.2d at 596.

⁴⁸⁰ 124 N.W.2d 824 (Minn. 1963).

a product liability action in Minnesota against an Ohio corporation which had manufactured a boiler which was eventually transported to Minnesota, the court held that such statutes should be given as broad a construction as constitutional limitations will permit. The Oregon manufacturer of the amusement device was held amenable to suit in Texas.⁴⁸¹

An example of the attempt by a federal District Court to determine the pertinent state law is furnished by *Brendle v. General Tire & Rubber Co.*,⁴⁸² where, when a truck driver was killed, the surviving widow brought an action alleging negligence and breach of warranty on the part of the manufacturer. The tire had blown out and, in addition to causing the death of the driver, injured the relief driver and caused considerable property damage to the truck. The court examined the cases decided by the North Carolina courts since, pursuant to the decision in *Erie Railroad Co. v. Tompkins*,⁴⁸³ state law would govern. The court concluded that in spite of some indications to the contrary,⁴⁸⁴ *Wyatt v. North Carolina Equipment Co.*⁴⁸⁵ was still the leading precedent where breach of warranty is alleged and a privity "requirement" still persists.

Recognizing that certain federal courts "have exercised great freedom in their interpretations of the applicable state law," the court

⁴⁸¹ *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969).

In *Dawkins v. White Products Corp.*, 317 F. Supp. 53 (N.D. Miss. 1970), the court cites *Eyerly Aircraft Co. v. Killian*, *supra*, but concludes that it does not have jurisdiction. *Cf. Travelers Indemnity Co. v. Evans Pipe Co.*, 432 F.2d 211 (6th Cir. 1970); *Bollard v. Volkswagenwerke, A.G.*, 313 F. Supp. 126 (W.D. Mo. 1970), where the court observed:

It has, for instance, been widely held that a corporation entering into a contract contemplating significant activities or effects in another state is prima facie reasonably subjected to the jurisdiction of that state. See, e.g., *Corporate Development Specialists, Inc. v. Warren Teed Pharmaceuticals*, 102 N.J. Super. 143, 245 A.2d 517. Further, state law controls the issue of whether a foreign corporation is amenable to service within the state. *Jennings v. McCall Corp.* (C.A. 8) 320 F.2d 64. And recent Missouri cases indicate that Missouri has adopted the "minimum contacts" doctrine as the standard by which amenability of service is to be determined. See *Slivka v. Hackley, Mo.*, 418 S.W.2d 89; *Adams Dairy Co. v. National Dairy Products (W.D. Mo.)* 293 F. Supp. 1164; *Seven Provinces Ins. Co. v. Commerce and Industry Ins. Co. (W.D. Mo.)* 306 F. Supp. 259.

⁴⁸² 304 F. Supp. 1262 (D. N.C. 1969).

⁴⁸³ 304 U.S. 64 (1938).

⁴⁸⁴ *Tedder v. Pepsi-Cola Bottling Co.*, 270 N.C. 301, 154 S.E.2d 337 (1967); *Mendhall v. Carolina Garage, Inc.* 4 N.C. App. 226, 166 S.E.2d 513 (1969); *cf. Terry v. Double Cola Bottling Co., Inc.*, 263 N.C. 1, 138 S.E.2d 753 (1964), where there is an exhaustive survey of the diminishing vitality and significance of the so-called privity requirement, although the plaintiff was not permitted to recover when illness resulted from noxious matter in a soft drink; lack of privity was considered decisive. This, unfortunately, seems to represent an exercise in retrogression when most jurisdictions are striving to afford the consumer greater protection. See *Williston, Contracts* §§ 998 *et seq.* (3d ed. Jager 1964).

⁴⁸⁵ 253 N.C. 355, 117 S.E.2d 21 (1960).

quoted an opinion ventured by the Fifth Circuit Court of Appeals as to the law of Texas where there had been no decision by the supreme court of that state:

The Court is forced, therefore, to look to 'all available data,' for example, 'to such sources as the Restatements of Law, treatises and law review commentary, and the majority rule,' keeping in mind that it must 'choose the rule which it believes the state court, from all that is known about its methods of reaching decisions is likely in the future to adopt.'⁴⁸⁶

A defective wheel chair caused its occupant an injury and when this action was brought against the manufacturer, the defense of lack of privity was interposed. Reasoning by analogy, the court, in *Putman v. Erie City Manufacturing Co.*,⁴⁸⁷ concluded that the Texas courts would not find privity a bar to recovery since in the food cases, notably *Jacob E. Decker & Sons v. Capps*,⁴⁸⁸ privity had been discarded.

Still more striking, however, was the manner in which the First Circuit Court of Appeals disposed of privity in *Mason v. American Emery Wheel Works*,⁴⁸⁹ where Mississippi law was to be applied. The supreme court of that state had unequivocally held in an early case that privity was a prerequisite.⁴⁹⁰ Nevertheless, the federal court concluded that because of the trend in other states, the Supreme Court of Mississippi, when an appropriate case is presented, "will declare itself in agreement with the more enlightened and generally accepted modern doctrine."

Absent any specific precedent discarding privity in North Carolina, the court heeded the admonition in *Spector Motor Service, Inc. v. Walsh*,⁴⁹¹ and declined to speculate as to what the law will be. Nor would it "embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."⁴⁹² Summary judgment for the defendant manufacturer was accordingly granted.⁴⁹³

An unfortunate example of the failure of a federal court to seek

⁴⁸⁶ *Putman v. Erie City Manufacturing Co.*, 338 F.2d 911, 917 (5th Cir. 1964).

⁴⁸⁷ 338 F.2d 911 (5th Cir. 1964).

⁴⁸⁸ 139 Tex. 609, 164 S.W.2d 828 (1942).

⁴⁸⁹ 241 F.2d 906 (1st Cir. 1957) *cert. denied*, 355 U.S. 815 (1957).

⁴⁹⁰ *Ford Motor Co. v. Myers*, 151 Miss. 73, 117 So. 362 (1928).

⁴⁹¹ 139 F.2d 809 (2d Cir. 1944).

⁴⁹² *Id.* at 823.

⁴⁹³ *Brendle v. General Tire & Rubber Co.*, 304 F. Supp. 1262 (D. N.C. 1969).

guidance as to what a state court would hold under a given set of facts is furnished by *Green v. American Tobacco Company*.⁴⁹⁴ The case was originally brought in a federal District Court by the widow of a cancer victim whose death was caused by smoking cigarettes. From a judgment for the defendant company, the widow appealed and the case was referred to the Supreme Court of Florida for an advisory opinion⁴⁹⁵ upon petition for rehearing.⁴⁹⁶ Based on the state court's opinion, the federal appellate court reversed and remanded. Upon a new trial, judgment was rendered in favor of the manufacturer which was reversed by the Fifth Circuit Court of Appeals.⁴⁹⁷ However, upon a rehearing *en banc*, the panel decision was overruled, and the trial court's judgment was affirmed *per curiam*.⁴⁹⁸ As was to have been expected, there was a powerful and well reasoned dissent in which three judges, including the Chief Judge, joined. The basic criticism was that the case should again have been certified to the Supreme Court of Florida for further elucidation, and that a failure to do so was a failure to make a proper determination of Florida law. As one of the dissenting justices so aptly said:

The one inescapable consideration is that a jury found as a fact that Mr. Edwin Green, Sr. died of primary cancer of the lung, caused from smoking Lucky Strike cigarettes. The finding was *affirmed by this Court*.⁴⁹⁹ The decisive point is that when a jury so *found* there simply remained no further strict liability factual issue in the case.

This Court one time certified the case to the Supreme Court of Florida to settle a narrow question of Florida law. That Court responded. It later took occasion to state exactly what its reply stood for, to-wit, "*Green* can be summarized as a case which applied a rule of absolute or strict liability to the manufacturer of a commodity who had placed it in the channels of trade for consumption by the public generally," quoted in the prior opinion.⁵⁰⁰

Yet, our Court, *en banc*, is now about to hold that he who sells for profit a product which caused the dread disease of cancer and also caused that ultimate of all dreads, death itself, can wiggle out of it by convincing a lay jury in a swearing match among super-scientists that such a product may somehow be reasonably safe for personal consumption by the general public. Because I do not believe that the Supreme Court of Florida would approve such a result, I persist in my refusal to do so.⁵⁰¹

⁴⁹⁴ 409 F.2d 1166 (5th Cir. 1969).

⁴⁹⁵ 154 So. 2d 169 (1963); certification is provided for under F.S.A. § 25.031, FLORIDA STATUTES 1959.

⁴⁹⁶ 304 F.2d 70 (5th Cir. 1962); 325 F.2d 673 (5th Cir. 1963).

⁴⁹⁷ *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968).

⁴⁹⁸ 409 F.2d 1166 (5th Cir. 1969), discussed and criticized in 13 Williston, Contracts § 1564 (3d ed. Jaeger 1970) and in Part I of this article in note 219.

⁴⁹⁹ Citing 304 F.2d 70 (1962) and 325 F.2d 673 (1963).

⁵⁰⁰ *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968).

⁵⁰¹ *Green v. American Tobacco Co.*, 409 F.2d 1166, 1167 (5th Cir. 1969).

In the second dissenting opinion, the following appears:

My position, then, is a dual one. First I reject the idea that the enlightened Supreme Court of Florida will tolerate a commercial system that sells with impunity ostensibly innocuous products, but which in fact have lethal consequences.

Second, the question is so vital to Florida that the State should be given the opportunity to fashion its own policy standard through the available, workable mechanism of certification.

On all scores I therefore dissent.⁵⁰²

The final case in this section involves the applicability of the Massachusetts "long-arm" statute⁵⁰³ which has, as yet, not been before the Supreme Judicial Court of that state. In *deLeo v. Childs*,⁵⁰⁴ a Massachusetts resident brought an action against certain residents of New York in the federal district court for Massachusetts alleging breach of contract. What had transpired was that the plaintiff was retained as architect for the design and construction of "a nursing home complex" on land owned by the defendants on Martha's Vineyard.

When the defendants attempted to terminate their contract with the plaintiff, he filed this action based on diversity of citizenship and alleged that defendants were engaged in the "transaction of business" in Massachusetts which involved construction work "to be performed on . . . real property owned by the defendants" in Massachusetts. Defendants contended that the statute was inapplicable since they were not "transacting any business" or engaged in construction of a building on land in Massachusetts. Rejecting these arguments, the court laid down the basic guidelines:

As a guide in construing statutes a court should be mindful of the purposes for which the statute was enacted. Long-arm statutes are expressions of a legislative attempt to create a new basis of jurisdiction which, within constitutional limitations, will afford the citizens of a State a forum for causes of action arising from the activities of non-residents within the State.⁵⁰⁵ These statutes codify a new type of personal jurisdiction based on activities deemed more relevant than mere physical presence of a defendant or his agent in a State. As long as constitutional limits are not crossed, a court should interpret the statute to effectuate a State's legitimate desire to protect its citizens. In this case no constitutional infirmity is claimed and none is perceived.⁵⁰⁶

After citing *McGee v. International Life Insurance Company*,⁵⁰⁷

⁵⁰² *Id.* at 1170.

⁵⁰³ Mass. Gen. Laws ch. 223A (1968).

⁵⁰⁴ 304 F. Supp. 593 (D. Mass. 1969).

⁵⁰⁵ Citing Note, "The Virginia 'Long Arm' Statute," 51 Va. L. Rev. 719 (1965).

⁵⁰⁶ *deLeo v. Childs*, 304 F. Supp. 593 (D. Mass. 1969).

⁵⁰⁷ 355 U.S. 220 (1957).

the court concluded that "the service of process made upon defendant was sufficient,"⁵⁰⁸ although the defendant had pointed out that the "long-arm" statute had been enacted after the actual service of process. "This question," said the federal court, "appears never to have been decided by any Massachusetts State court," although similar statutes have been held to be retroactive in New York and Illinois, citing in support *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*⁵⁰⁹ and *Nelson v. Miller*,⁵¹⁰ and quoting the leading case, *Hanscom v. Malden & Melrose Gas Light Co.*⁵¹¹ as follows:

The general rule of interpretation is that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, contexts or objects when considered in the light of the subject-matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. * * * *It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action.*⁵¹²

While the *deLeo* case does not deal with a defective product, it is nevertheless of considerable interest since it concerns real estate and could well lead to the conclusion that if a defective product were to be installed in a house, as in *Schipper v. Levitt & Sons, Inc.*,⁵¹³ the jurisdiction of the state where this occurred might be invoked to hold the manufacturer of the product.

In the preceding pages, we have examined and discussed the great changes that have brought about increased consumer protection finally leading to an astonishing, but welcome, extension and expansion of the warranties of quality.

Law writers have had a field day with product (or as it is often described "products") liability.⁵¹⁴ In the past two or three decades, there

⁵⁰⁸ *deLeo v. Childs*, 304 F. Supp. 593, 595 (D. Mass. 1969).

⁵⁰⁹ 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965), *cert. denied sub nom.*, *Estwing Manufacturing Co., Inc. v. Singer*, 382 U.S. 905 (1965).

⁵¹⁰ 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

⁵¹¹ 220 Mass. 1, 107 N.E. 426 (1914).

⁵¹² *Id.* at 3 (emphasis supplied by the court).

⁵¹³ 44 N.J. 70, 207 A.2d 314 (1965).

⁵¹⁴ Among the numerous articles that abound in the literature of product liability, the following may be deemed of general interest: Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. Rev. 343 (1929); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961); Condon, *Progress of Products Liability Law*, 31 N.Y.S. B. Bull. 119 (1959); Feezer, *Tort Liability of Manufacturers and Vendors*, 10 Minn. L. Rev. 1 (1925); Feezer, *Tort Liability of Manufacturers*,

has been a veritable deluge of articles, comments and notes discussing, analyzing and often criticizing judicial opinions which have dealt with this topic. Nor is this activity on the wane. With the warranty of habitability being adopted by an increasingly respectable minority of the jurisdictions—perhaps soon to be a majority—further impetus has been given to the propagation of legal literature.

THE EMERGING WARRANTY OF HABITABILITY

So firmly was the doctrine of merger embedded in the law of real property that only *express* warranties embodied in the deed had any validity. These express warranties have been defined by the Supreme Court of the United States:

An affirmation of the quality or condition of the thing sold, (not uttered as a matter of opinion or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the facts affirmed, and inducing him to make the purchase, if so relied on by the purchaser, is an express warranty.⁵¹⁵

However, there has been a growing impatience with the doctrine of *caveat emptor* which has manifested itself not only in product liability cases but in the sale of new houses as well. While merger still applies quite generally in sales of real property, an implied warranty concept

19 Minn. L. Rev. 752 (1935); Fricke, *Personal Injury Damages in Products Liability*, 6 Villanova L. Rev. 1 (1960); Gillam, *Products Liability in a Nutshell*, 37 Ore. L. Rev. 119 (1958); Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 Tenn. L. Rev. 928 (1957); Hotes, *Advertised-Product Liability*, 8 Cleveland-Marshall L. Rev. 81 (1959); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne U. L. Rev. 1 (1963); Jaeger, *How Strict is the Manufacturers Liability? Recent Developments*, 48 Marquette L. Rev. 293; Jaeger, *Product Liability: The Constructive Warranty*, 39 Notre Dame Lawyer 501 (1964); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 Rutgers L. Rev. 493 (1962); James, *General Products—Should Manufacturers Be Liable Without Negligence?* 24 Tenn. L. Rev. 923 (1957); James, *The Liability of Manufacturers for Faulty Goods*, The Journal of Business Law 287 (1960); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 Va. L. Rev. 134 (1937); Lucey, *Liability Without Fault and the Natural Law*, 24 Tenn. L. Rev. 952 (1957); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L.J. 554 (1961); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 Tenn. L. Rev. 963 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products*, 24 Tenn. L. Rev. 938 (1957); Prosser, *The Assault Upon The Citadel (Strict Liability to the Consumer)* 69 Yale L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)* 50 Minnesota L. Rev. 791 (1966); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 Ky. L.J. 388 (1933); Ruud, *Manufacturers' Liability for Representations Made by Their Sales Engineers to Subpurchasers*, 8 U.C.L.A. L. Rev. 251 (1961); Skeel, *Advertised-Product Liability*, 8 Cleveland-Marshall L. Rev. 2 (1959); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. Rev. 551 (1941); Willis, *Product Liability Without Fault*, 15 Food, Drug, Cosmetic L.J. 648 (1960); Wilson, *Products Liability*, 43 Calif. L. Rev. 614 (1955). Cf. Noel, *Defective Products*, 38 Tenn. L. Rev. 1 (1970).

has been developed in an increasing number of decisions where the vendor of the new home is also the builder.

Merger

Before examining the individual cases wherein a *constructive* warranty was held to exist, a brief discussion of the doctrine of merger seems desirable, since this has been the principal obstacle to holding vendors of houses liable. No remedy was available for a breach by the vendor of any promise contained in the contract but omitted in the deed since the doctrine of merger was held applicable:

It is well settled that all agreements, whether oral or written, entered into by and between the parties to a deed prior to its execution are presumed to have been merged in the deed in the absence of pleading and proof that references thereto were omitted from the deed through mistake, accident, or fraud, and after delivery and acceptance of a deed in performance of a contract for the purchase or sale of land the deed is regarded as a final expression of the agreement of the parties and the sole repository of the terms on which they have agreed.⁵¹⁶

And in *Chicago Title and Trust Co. v. Wabash-Randolph Corp.*,⁵¹⁷ the Supreme Court of Illinois said:

The principles in reference to merger are well settled. If the terms of a contract for sale of real estate are fulfilled by the delivery of the deed there is a merger, but if there are provisions in the contract which delivery of the deed does not fulfill, then the contract is not merged in the deed as to such provision and the contract remains open for the performance of such terms.⁵¹⁸

Another court has stated the principle as follows: "A deed executed and delivered in proper form is the complete contract and merges all oral negotiations up to the time of delivery."⁵¹⁹

However, in *Pollyanna Homes, Inc. v. Berney*,⁵²⁰ the court held that there was no merger in the deed of conveyance of a home of certain oral promises to install off-site utilities. This question was posed by

⁵¹⁵ *Shippen v. Bowen*, 122 U.S. 575 (1887), quoting with approval *Osgood v. Lewis*, 2 Har. & G. (Md.) 495 (1829) which in turn has been quoted by the Fourth Circuit in *Distillers Distributing Corp. v. Sherwood Distilling Co.*, 180 F.2d 800 (4th Cir. 1950).

With respect to goods, the Uniform Commercial Code has adopted substantially the same principle in § 2-313.

⁵¹⁶ *Union Producing Co. v. Sanborn*, 194 F. Supp. 121 (E.D. Tex. 1961); *cf. Fitzpatrick v. Allied Contracting Co.*, 24 Ill. 2d 448, 182 N.E.2d 183 (1962).

⁵¹⁷ 384 Ill. 78, 51 N.E.2d 132 (1944).

⁵¹⁸ Citing *Weber v. Aluminum Ore Co.*, 304 Ill. 273, 136 N.E. 685 (1923).

⁵¹⁹ *Lincoln v. Wells*, 350 P.2d 589 (Okla. 1960).

⁵²⁰ 56 Cal. 2d 676, 365 P.2d 401 (1961).

the court: "Did the parol evidence rule preclude the receipt of extrinsic proof of an oral agreement to install offsite improvements adjacent to the real property sold by defendants to plaintiff?" The court answered its own question: "No. Evidence of an oral promise to install off-site improvements may be given to show an inducement to buy a lot adjacent to such improvements, since such promise is an independent, collateral one which need not be included in the deed conveying the property."⁵²¹

This doctrine of merger is related, however, to the question of whether or not a term of the contract of purchase or sale is merged into the deed. However, there is a different question when a party claims mutual mistake whereby no contract was ever formed. On this subject the court, in *Labasin v. President Realty Holding Corp.*,⁵²² stated that rescission on the ground of mistake was not subject to a defense that there had been merger of the contract of sale into the deed, declaring:

It is my opinion that in view of the nature of this action the terms of the contract did not merge into the deed. The authority cited by the defendant as to mergers all relate to actions in law in which the aggrieved party affirms the contract but charges a breach thereof or demands rights flowing therefrom. Here the aggrieved party claims lack of mutuality and disclaims the existence of the contract. The relief demanded is proper in form and scope.⁵²³

As to merger, it has generally been held that it is a factual question of intent, *Hammtree v. Tenworthy*.⁵²⁴ In *Mitchem v. Johnson*,⁵²⁵ the court specifically rejected the suggestion that in the absence of express warranties, there could be no implied warranties that the structure is suitable for the purposes ordinarily intended.

Caveat Emptor

It is of course, well understood that the majority of jurisdictions still adhere to the archaic and demodod concept of *caveat emptor* in the sale of houses:⁵²⁶ However, in *Caldwell v. Wells*,⁵²⁷ the court held

⁵²¹ *Pollyanna Homes, Inc. v. Berney*, 56 Cal. 2d 676, 678, 365 P.2d 401, 402 (1961) (citations omitted).

⁵²² 209 N.Y.S.2d 496 (1960).

⁵²³ 13 Williston, Contracts, §§ 1535-1600 (3d ed. Jaeger 1970).

⁵²⁴ 1 Ariz. App. 472, 404 P.2d 816 (1965).

⁵²⁵ 7 Ohio 2d 66, 218 N.E.2d 594 (1966).

⁵²⁶ In support, the following are deemed representative: *Druid Homes v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961); *Diaz v. Jeyes Co.*, 143 So. 2d 554 (Fla. App. 1962); *Waltton v. Petty*, 107 Ga. App. 753, 131 S.E.2d 655 (1963); *Contrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963); *Tudor v. Heugel*, 132 Ind. App. 579, 178 N.E.2d 442 (1961); *Steiber v. Palumbo*, 219 Ore. 479, 347 P.2d 978 (1959), 78 A.L.R.2d 440 (1961).

⁵²⁷ 228 Ore. 389, 365 P.2d 505 (1951).

that this rule was not applicable where defendant made a separate promise to drill a well which would furnish plaintiffs with a satisfactory supply of drinking water for domestic use.

Two Canadian cases deserve special attention as they illustrate the confusion which surrounds *caveat emptor*, especially where its application is being increasingly restricted—as indeed it should. In the first, *Dalladas v. Tennikat*,⁵²⁸ strict application of *caveat emptor* was adhered to by the court. Two years later, in *Chevertkin v. Romanelli*⁵²⁹ the court declined to apply the strict doctrine of *caveat emptor*. The cases specifically dealt with a question of merger and in the former, *Dalladas*, it was held that the contract of purchase and sale was merged in the deed, whereas in the latter, the holding was that there was no merger. Certainly, these decisions have done nothing to lessen the confusion which plagues this field of law.

Over the years, it has been increasingly perceptible that the courts are not in sympathy with *caveat emptor*, especially in the sale of a house that has not been completed. The rationale used being that this is more a warranty of workmanlike construction than a warranty of the quality of realty as is indicated in certain judicial language used by the Supreme Court of South Carolina in *Hill v. Polar Pantries*:⁵³⁰

It seems to be well settled that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use, and, if a party furnishes specifications and plans for a contractor to follow on a construction job, he thereby impliedly warrants their sufficiency for the purpose in view. . . .⁵³¹

With this background, and the realization that the courts have been faced with precedents⁵³² in many respects as inhibiting in their limita-

⁵²⁸ O.W.N. 169 (1958), noted in 5 Canada B.J. 92.

⁵²⁹ O.W.N. 199 (1960), noted in 5 Canada B.J. 92.

⁵³⁰ 219 S.C. 263, 64 S.E.2d 885 (1951).

⁵³¹ *Id.* at 271, 64 S.E.2d at 888, quoted in *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 833, 329 P.2d 474, 476 (1958).

⁵³² *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961), is typical. There, the court said: "The great weight of authority does not support implied warranties in real estate transactions but requires any purported warranties to be in written contractual form No decision has come to our attention which permitted recovery by the vendee of a house upon the theory of implied warranty." *Id.* at 416, 131 So. 2d at 885. It is interesting to note that had the decisions occurred a few years later, there would have been several decisions holding that a recovery could be had on the implied warranty where the subject matter of the sale was real property, specifically, a new house being sold by the builder.

See cases cited *supra* note 526.

tions upon implied warranties as those involved in product liability cases, the leading decisions which have broken with the past will be reviewed.

The Early Cases

It was in England (where all the mischief started⁵³³) that a break with the past was announced in *Miller v. Cannon Hill Estates, Ltd.*⁵³⁴ The plaintiff had entered into an agreement with the defendant for the purchase of a house and lot, although the building had not yet been finished. When construction was completed, the plaintiff occupied the dwelling but was obliged to leave because a penetrating dampness permeated the house endangering his health, according to medical advice. The court, making a somewhat artificial distinction between an incomplete house and one that was complete at the time of purchase, suggested by way of *obiter dictum* that upon purchase of an incomplete house, there was an implied warranty of fitness for habitation, whereas, in the case of a completed house, the buyer could, if he chose, obtain an express warranty.

Six years later, in *Perry v. Sharon Development Co. Ltd.*⁵³⁵ the court took a further step and declared that the implied warranty of quality and fitness would apply to a house that was substantially complete, although the so-called incomplete house doctrine of the *Miller* case was the one that was ostensibly being applied. This is, of course, a rather dubious distinction, and one that cannot be approved.

It was not until some twenty years later that an American jurisdiction undertook to follow in a guarded manner the example furnished by the English cases. In *Vanderschrier v. Aaron*,⁵³⁶ the court decided that when the buyer purchased a home not yet completed, the builder-vendor would be liable for a failure to connect properly a house sewer line with a city sewer. In consequence, the house and cellar were flooded with sewage which caused a most unhealthy condition and a decidedly unwholesome odor in the home. As the court observed: "In the law of England, we find the rule to be that, upon the sale of a house in the course

⁵³³ *Winterbottom v. Wright*, 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842).

⁵³⁴ [1931] 2 K.B. 113.

⁵³⁵ [1937] 4 All Eng. Rep. 390 (C.A.), noted in 81 Sol. J. 1021.

⁵³⁶ 103 Ohio App. 340, 140 N.E.2d 819 (1957).

of erection, there is an implied warranty that the house will be finished in a workmanlike manner."⁵³⁷

The reference to the "workmanlike manner" clearly indicates that the court has in mind the possibility of an implied warranty not necessarily connected with a sale. In that respect, it is reminiscent of some of the opinions of the Supreme Court of the United States in a distinct and different field, namely in regard to the warranty of seaworthiness. There, certain cases deserve particular mention: *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*,⁵³⁸ *Alaska Steamship Co. v. Petterson*⁵³⁹ and *Reed v. The Yaka*.⁵⁴⁰ In these cases, the Supreme Court found specifically that when a stevedore undertakes to load or unload cargo he makes an implied warranty that he will do so in a workmanlike manner. A breach of this warranty causes liability to arise on the part of the stevedore towards the steamship company. This warranty, it must be emphasized, is clearly an implied-in-law warranty or, perhaps better said, a *constructive* warranty.

The year after the decision in the *Vanderschrier* case,⁵⁴¹ the Supreme Court of Washington in *Hoye v. Century Builders, Inc.*,⁵⁴² also adopted the *Miller* exception to the general rule and held that where a contractor undertook to build a house for a buyer, the contract embodied an implied warranty of fitness for human habitation referring to an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use.⁵⁴³

In Colorado and Oklahoma, the courts undertook to permit a homeowner to recover where the construction of the house, or the condition of the land, was faulty or deficient. Three significant cases were decided under Colorado law: *F & S Construction Co. v. Berube*,⁵⁴⁴ which followed *Glisan v. Smolenske*⁵⁴⁵ in 1963, and was in turn followed by *Carpenter v. Donohoe*⁵⁴⁶ a year later. In Oklahoma, two significant

⁵³⁷ *Vanderschrier v. Aaron*, 103 Ohio App. 340, 341-2, 140 N.E.2d 819, 821 (1957), citing *Perry v. Sharon Development Co., Ltd.*, [1937] 4 All Eng. Rep. 390 (C.A.).

⁵³⁸ 376 U.S. 315 (1964), *supra* note 377 and text following.

⁵³⁹ 347 U.S. 396 (1953).

⁵⁴⁰ 373 U.S. 410 (1963), *supra* note 420.

⁵⁴¹ 103 Ohio App. 340, 140 N.E.2d 819 (1957).

⁵⁴² 52 Wash. 2d 830, 329 P.2d 474 (1958).

⁵⁴³ *Id. Cf.* 7 Williston, Contracts §§ 926, 926A (3d ed. Jaeger 1963); 11 Williston §§ 1399A, 1399B; 12 Williston § 1506A; 13 Williston § 1565.

⁵⁴⁴ 322 F.2d 782 (10th Cir. 1963).

⁵⁴⁵ 153 Colo. 274, 387 P.2d 260 (1963).

⁵⁴⁶ 154 Colo. 178, 388 P.2d 399 (1964).

decisions, *Leigh v. Wadsworth*⁵⁴⁷ and *Jones v. Gatewood*,⁵⁴⁸ departed from the beaten track and granted recovery to the aggrieved homeowner.

Schipper v. Levitt & Sons, Inc.

But a truly gargantuan stride was taken in what has become a genuine classic in the field of real estate sales of new houses by the builder-vendor. The case, *Schipper v. Levitt & Sons, Inc.*⁵⁴⁹ marks the beginning of a new era. Boldly, and burning its bridges behind it, the Supreme Court of New Jersey unanimously overruled the earlier decisions and held that a warranty would be implied in law, and that lack of privity would be no defense to the builder-vendor of a defective home. This was indeed a giant step forward.

Harking back to an earlier precedent, *Henningsen v. Bloomfield Motors, Inc.*⁵⁵⁰ where public policy played the decisive role, the supreme court emphasized the fact that in the *Schipper* case, a corporate builder of homes, specializing in planned communities on an international scale, was actually engaged in *mass production*. One of the residences so constructed was sold to a homeowner who eighteen months later leased it to a family for one year. Two days after the tenants moved in, their infant son was badly scalded when he turned on the hot water faucet in the bathroom lavatory which was not equipped with a "mixing valve." The child was hospitalized for seventy-four days during which several skin graftings were performed. Plaintiff tenants brought this action against the builder and the manufacturer of the heating unit.⁵⁵¹

In a carefully considered and comprehensive opinion, the court rejected the defenses of no warranty and lack of privity, and decided, on the issue of negligence, the case should have gone to the jury. After an examination of a number of cases from other jurisdictions and several precedents from New Jersey, the court commented significantly:

The law should be based on current concepts of what is right and

⁵⁴⁷ 361 P.2d 849 (Okla. 1961).

⁵⁴⁸ 381 P.2d 158 (Okla. 1963).

⁵⁴⁹ 44 N.J. 70, 207 A.2d 314 (1965).

⁵⁵⁰ 32 N.J. 358, 161 A.2d 69 (1960).

⁵⁵¹ The court cited numerous examples of cases where the end product included parts and accessories furnished by other manufacturers stating that "such manufacturers may be held accountable under ordinary negligence principles [citing MacPherson] as well as under expanding principles of warranty or strict liability [citing Henningsen and other cases]," *Schipper v. Levitt & Sons*, 44 N.J. 70, 82, 207 A.2d 314, 321 (1965).

just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected as they were step by step in *Henningsen* and *Santor*.⁵⁵² We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field, at least in the aspect dealt with here. . . .⁵⁵³

⁵⁵² In regard to the various defenses interposed by the builder-vendor, short shrift has been made of their validity:

In fact, in the past in these situations we have not only tended to severely limit the factual area of recovery but we have shown an equally ready disposition to adopt and embrace the whole dreary legal apparatus and rhetoric so long employed in these situations to narrow or prevent any recovery at all. Some of these open sesame phrases are: whether there was privity or lack of it; whether the defect was latent or patent; whether or not the offending product was sold in the original package; whether a vague requirement of a "higher degree of care" might sometimes alter the application of "the rule"; or whether the defective product did or did not contain an "inherently or imminently dangerous" article or substance harmful to humans. We do not exhaust the list. There are other equally impressive and ominous catch-phrases, and awesome have been some of the semantic bogs negotiated by ours and other appellate courts when in particularly harsh cases they have attempted by such artificial "exceptions" to get around the barrier imposed by their own equally artificial "general rule" of nonliability.

Spence v. Three Rivers Builders & Masonry, Inc., 353 Mich. 120, 127, 90 N.W.2d 873, 877 (1958), discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 *Duquesne U.L. Rev.* 1 (1963).

⁵⁵³ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Santor v. A & M Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965). The *Henningsen* case is stated in some detail and discussed extensively in Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 *Rutgers L. Rev.* 493 (1962).

In the language of the court, "it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain." *Henningsen v. Bloomfield Motors, Inc.*, *supra* at 414-5, 161 A.2d at 100.

Cf. Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); the opinion cites *Henningsen v. Bloomfield Motors* and includes a comprehensive review of the most significant cases (as, for example, *Santor v. A & M Karagheusian*) where *strict* liability has been invoked. Beginning with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1937), and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1940), to determine "choice-of-law" and the resultant "conflict-of-law" rules to be applied, the court finds that Texas has adopted "the tort theory of strict liability," relying on *Restatement (Second) of Torts* § 402A (1964).

Of particular interest is the part of the opinion headed:

Policy Considerations

Initially, we review the policy considerations behind strict liability. With the technological revolution and modern marketing practices of this Century, Americans now enjoy the conveniences of many modern and beneficial products. These benefits to the many, however, have come at a high cost to a few. To combat the serious injuries visited on this minority, the law has re-examined its traditional reasons for imposing liability. This "rethinking" has caused many courts to abandon the traditional negligence analysis and impose liability without fault on the maker who puts

When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.

The arguments advanced by Levitt in opposition to the application of warranty or strict liability principles appear to us to lack substantial merit. Thus its contention that *caveat emptor* should be applied and the deed viewed as embodying all the rights and responsibilities of the parties disregards the realities of the situation. *Caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale. Levitt expresses the fear of "uncertainty and chaos" if responsibility for defective construction is continued after the builder vendor's delivery of the deed and its loss of control of the premises, but we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result.

Levitt contends that imposition of warranty or strict liability principles on developers would make them "virtual insurers of the safety of all who thereafter come upon the premises." That is not at all so, for the injured party would clearly have the burden of establishing that the house was defective when constructed and sold and that the defect proximately caused the injury. In determining whether the house

the product into the stream of commerce. The justification for rejecting privity is based on the realization that our technological society, with its proliferation of products and mass advertising, demands judicial protection of the consumer who has neither the capacity nor opportunity to discover latent dangers in products. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 848-49 (1967). Prosser cites, *inter alia*, Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne U.L. Rev. 1 (1963), noted in Keffe, *Practicing Lawyer's Guide to the Current Law Magazines*, 49 A.B.A.J. 701 (1963); Jaeger, *How Strict is the Manufacturer's Liability?*, 48 Marq. L. Rev. 293 (1964); Jaeger, *Product Liability: The Constructive Warranty*, 39 Notre Dame Lawyer 501 (1964); Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1961).

was defective, the test admittedly would be reasonableness rather than perfection.⁵⁵⁴

...

It is worthy of note that although the 1936 edition of *Williston, Contracts*, upon which Levitt places reliance, stated flatly that there are no implied warranties in the sale of real estate, the 1963 edition took quite a different approach. In this edition, Professor Jaeger pointed out that although the doctrine of *caveat emptor* is still broadly applied in the realty field, some courts have inclined towards making "an exception in the sale of new housing where the vendor is also the developer or contractor," since in such situation the purchaser "relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling."⁵⁵⁵ In concluding his discussion of the subject, the author remarked that "it would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."⁵⁵⁶

After concluding that the action against the manufacturer of the heating unit would have to be dismissed since there had been proved neither negligence nor breach of any implied warranty, the court reversed the judgment of dismissal as to the defendant builder-vendor of the house and remanded the case for trial.⁵⁵⁷

⁵⁵⁴ As was pointed out in *Courtois v. General Motors Corp.*, 37 N.J. 525, 182 A.2d 545 (1962), the comparable warranty of merchantability in the sale of goods means only that the article is reasonably fit for the purpose for which it is sold and does not imply "absolute perfection"; cf. *Jakubowski v. Minnesota Mining and Manufacturing*, 42 N.J. 177, 199 A.2d 826 (1964).

⁵⁵⁵ Citing 7 *Williston, Contracts* §§ 926, 926A (3d ed. Jaeger 1963).

⁵⁵⁶ *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90-5, 207 A.2d 314, 325-28 (1965). Citing and quoting 7 *Williston, Contracts* § 926A (3d ed. Jaeger 1963).

⁵⁵⁷ *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965), quoting Henningsen *supra* note 553.

The court cited *Goldberg v. Kollsman Instrument Corporation*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963), where the plaintiff's daughter, a passenger in an airplane, died as a result of its crash. Suit was instituted by the plaintiff as administratrix against the maker of the airplane, and against a company which supplied one of its component parts, for alleged breach of implied warranty of fitness. The court held that previous New York decisions discarding the requirement of privity should be extended so as to hold the maker of the airplane accountable under warranty or strict liability principles to remote as well as immediate users. But it declined, at least for the present, to do the same with respect to the maker of the component part, pointing out that "adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." 240 N.Y.S.2d, at 595, 191 N.E.2d, at 83. Similarly, here the plaintiffs have been afforded wholly adequate protection by the holding as against Levitt, the company which built and marketed the house with the allegedly defective design and installation. 44 N.J. 70, 97-8, 207 A.2d 314, 329.

"In any event," said the court, "we believe that under the plaintiff's own proofs it may not fairly be said that York had either breached any implied warranty, or had failed to give reasonably sufficient warning and direction, or had failed to exercise the measure of care required of it." *Id.* at 98, 207 A.2d at 329. In *Goldberg supra*, the court cited with approval Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 *Duquesne U. L. Rev.* 1 (1963).

The Most Recent Cases

In *Bethlahmy v. Bechtel*,⁵⁵⁸ a residential property was sold and the buyers instituted an action for rescission of the contract. The trial court held that there are no implied warranties in a sale of real property, relying on early precedents which can hardly be regarded as of continuing validity.⁵⁵⁹ According to the evidence, water seepage from an irrigation ditch which ran under the lot and garage purchased by the plaintiffs caused the house being purchased to be uninhabitable.⁵⁶⁰ Although the builder was experienced and aware of the soil and seepage conditions, he had failed to take the necessary precautions to make the basement waterproof.⁵⁶¹ The appellate court quoted at length from the earlier precedent discussed above⁵⁶² and held that the judgment of the lower court in favor of defendant builder would be reversed and the cause remanded for a new trial.⁵⁶³ As the court pointed out:

⁵⁵⁸ 91 Idaho 55, 415 P.2d 698 (1966).

⁵⁵⁹ Principally, *Levy v. C. Young Construction 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), and *Steiber v. Palumbo*, 219 Ore. 479, 347 P.2d 978 (1959).

⁵⁶⁰ Since there had been a representation that the basement was waterproof, and a non-disclosure of the presence of the ditch on the property, the issue of constructive fraud was also presented on appeal.

⁵⁶¹ The courts specifically rejected the contention of the builder that the plaintiffs had actually put the water in the basement, but found instead that he was aware of the condition, had failed to disclose it contrary to his duty to do so and had assured plaintiffs that they were acquiring a "quality" home built of the finest materials and by the finest workmen, in short "that the house would be fit for human habitation."

⁵⁶² *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965). On pages 326, 327, 207 A.2d, the New Jersey Court has collected recent authorities from other jurisdictions limiting or departing from the rule of caveat emptor and adds: ". . . Whether or not the cases may be differentiated, they undoubtedly evidence the just stirrings elsewhere towards recognition of the need for imposing on builder vendors an implied obligation of reasonable workmanship and habitability which survives delivery of the deed" *Bethlahmy v. Bechtel*, 91 Idaho 55, 66, 415 P.2d 698, 709 (1966).

The decision in *Schipper v. Levitt & Sons, Inc.*, *supra*, is vitally significant because:

1. It exemplifies the definite change in the attitude of the courts toward the application of the doctrine of caveat emptor in actions between the builder-vendor and purchaser of newly constructed dwellings;

2. It draws analogy between the present case and the long-accepted application of implied warranty of fitness in sales of personal property; and

3. The opinion had the unanimous approval of the participating justices.

⁵⁶³ In so doing, the court reviewed the later cases with similar holdings and quoted from *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964), as follows:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it

We hold that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied war-

The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution. The builder-vendor's legitimate interests are protected by the rule which casts the burden upon the purchaser to establish the facts which give rise to the implied warranty of fitness, and its breach.⁵⁶⁴

Shortly thereafter, in *Wagoner v. Midwestern Development*,⁵⁶⁵ the Supreme Court of South Dakota followed the leaders in departing from the narrow strictures of property law, and held for the plaintiff homeowners in their action for damages against the builder-vendor. What had happened was that a continuous flow of water seeped into the basement of the new house which the plaintiffs had bought, much to their dismay and chagrin. In the words of the Court:

There is, however, a notable lack of harmony in decisions as to the existence of an implied warranty of fitness upon the sale of a new house or one to be erected or in the course of erection.⁵⁶⁶

In the 1963 edition of Williston on Contracts, there is a review of recent decisions bearing on the question of implied warranty and discussion of the recent trend of decisional law. The author says:

Over the years, the number of cases which apply the rule of caveat emptor strictly appears to be diminishing, while there is a distinct tendency to depart therefrom, either by way of interpretation, or exception, or by simply refusing to adhere to the rule where it would work injustice. * * * Broad as is the application of the principle of caveat emptor in sales of real estate, a few courts have been inclined to make an exception in the sale of new housing where the vendor is also the developer or contractor. In such a situation, a purchaser relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling. * * * It would be much better if this enlightened approach were generally adopted with respect to the sale of new houses

rancies that the home was built in workmanlike manner and is suitable for habitation.

Id. at 83-4, 388 P.2d at 402.

⁵⁶⁴ *Bethlahmy v. Bechtel*, 91 Idaho 55, 68, 415 P.2d 698, 711 (1966). Citing *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965).

⁵⁶⁵ 154 N.W.2d 803 (S.D. 1967).

⁵⁶⁶ Such a distinction seems neither logical nor realistic if a warranty of habitability is to be implied in law. And it does appear that such a warranty is essential if the prospective homeowner's rights are to be protected as is well recognized in *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965). See also *supra* note 563.

Some of the cases involving building contracts are decided upon the theory of an implied warranty that the contractor will build the structure without material defects and that it will be suitable for the purpose for which it was constructed. *Caldwell v. Wells*, 228 Ore. 389, 394 n.1, 365 P.2d 505, 507 n.1 (1961).

for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years.⁵⁶⁷

After reviewing some of the more liberal holdings, the court adopted their reasoning in the following paragraph:

We conclude that where in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed. The builder is not required to construct a perfect house and in determining whether a house is defective the test is reasonableness and not perfection.⁵⁶⁸ The duration of liability is likewise determined by the standard of reasonableness.⁵⁶⁹

The Supreme Court of Texas, in *Humber v. Morton*,⁵⁷⁰ followed its earlier decision in *Jacob E. Decker & Sons v. Capp*,⁵⁷¹ and the decisions from other jurisdictions holding that there is an implied warranty which accompanies the sale of new houses, and quoted at length from *Kellogg Bridge Co. v. Hamilton*.⁵⁷² The Court commented: "By offering the (new) house for sale as a new and complete structure appellant impliedly warranted that it was properly constructed and of good material and specifically that it had a good foundation . . ."⁵⁷³

Very recently, the Supreme Court of Washington in an appropriately styled case, *House v. Thornton*,⁵⁷⁴ also reviewed the authorities,⁵⁷⁵ and concluded that the purchasers of a new home were entitled to maintain an action against the vendor-builders to rescind the sale when material defects developed. The trial court entered judgment for the plaintiffs and defendants appealed. Affirming, the court declared:

⁵⁶⁷ *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803, 807-8 (S.D. 1967), quoting 7 Williston, Contracts 926A (3d ed. Jaeger 1963).

⁵⁶⁸ Citing *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965).

⁵⁶⁹ *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803, 809 (S.D. 1967).

⁵⁷⁰ 426 S.W.2d 554 (Tex. 1968).

⁵⁷¹ 139 Tex. 609, 164 S.W.2d 828 (1942).

⁵⁷² 110 U.S. 108 (1884).

⁵⁷³ *Humber v. Morton*, 426 S.W.2d 554, 558 (Tex. 1968), quoting *Loma Vista Development Co. v. Johnson*, 177 S.W.2d 225 (Tex. Civ. App. 1944).

⁵⁷⁴ 457 P.2d 199 (Wash. 1969).

⁵⁷⁵ *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803 (S.D. 1967); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

Current literature on the subject overwhelmingly supports this idea of an implied warranty of fitness in the sale of new houses. See *Property—Implied Warranty of Fitness in the Sale of a New House*, 71 W. Va. L. Rev. 87 (1968); *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 Cornell L.Q. 835 (1967); *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541 (1961); *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L.J. 633 (1965). See also, *Denver L. Rev.* 379 (1966); 26 U. Pitt. L. Rev. 862 (1965); 44 N.C.L. Rev. 236 (1965); 1 Cal. West. L. Rev. 110 (1965).

The rule of implied warranty of fitness covering new construction or the sale of a partially constructed building, although closely related to the sale of a brand-new residence falls short of meeting the precise issues in the instant case. Frequently, the prospective purchaser of a house buys it with knowledge of its defects and makes no point whatever of their existence before consummating the deal *But the present trend is toward the implied warranty of fitness and away from caveat emptor when it comes to the things which rightly affect the structural stability or preclude the occupancy of the building.*

After citing the case of *Sain v. Nelson*,⁵⁷⁶ which followed the case of *Hoye v. Century Builders, Inc.*,⁵⁷⁷ the court added:

Nothing, of course, can be said to be more vital to a dwelling than the stability of its foundation. . . . The evidence amply supported the court's conclusion that the sliding, slipping, and cracking of the foundation and floors and the cracking and shifting of the walls, although due not to fault in design, installation or workmanship, but rather to the instability of the ground and terrain upon which the house stood, *rendered the premises unusable as a dwelling.*⁵⁷⁸

While the court found that there had been no fraud or misrepresentation, and there was no indication that the defendants failed to design and erect the building properly or that they used defective materials, or in any way rendered an unworkmanlike performance, yet the fact remained that they sold and delivered for occupancy to the plaintiffs a brand-new \$32,000 residence which turned out to be unfit for habitation. Certainly, these builder-vendors had a far better opportunity to examine the stability of the site and to determine the kind of a foundation to build than did the purchasers. If they failed to install the proper foundation and as a result the house began to crumble, there can hardly be any doubt where the liability should be placed. As the Supreme Court of Washington said:

To borrow an idea from equity, of the innocent parties who suffered, it was the builder-vendor who made the harm possible. If there is a comparable standard of innocence, as well as of culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer. *Thus, the old rule or caveat emptor has little relevance to the sale of a brand-new house by a builder-vendor to a first buyer for purposes of occupancy.*⁵⁷⁹

Kentucky has also joined the march of progress in *Crawley v. Ter-*

⁵⁷⁶ 57 Wash. 2d 217, 356 P.2d 302 (1960).

⁵⁷⁷ 52 Wash. 2d 830, 329 P.2d 474 (1958).

⁵⁷⁸ *House v. Thornton*, 76 Wash. 2d 428, 435, 457 P.2d 199, 203 (1969) (emphasis supplied).

⁵⁷⁹ *Id.* at 435-36, 457 P.2d at 204 (emphasis supplied).

hune, decided last year. Here, too, the plaintiffs, husband and wife, who had purchased a new home from the builder-owner were greatly annoyed to find that their basement was anything but dry. The court held that there was at law "an implied warranty in the sale, and the evidence showed a breach of it."⁵⁸⁰ The judgment as to the builder-vendor was affirmed.

And in Vermont, the supreme court, after citing and discussing the leading cases, has concluded that "the law will imply a warranty against structural defects" in the sale of a newly-constructed house by the builder-vendor. In *Rothberg v. Olenik*,⁵⁸¹ a newly-built residence developed a number of serious defects such as cracks in the walls, inadequate support for the foundation walls, uneven floors not properly finished and lack of waterproofing. Rejecting the defendant's argument of *caveat emptor*, the court commented:

In the case at bar the defendant's argument that there are sound reasons for retaining the doctrine of *caveat emptor* in this case lacks substantial merit. A reading of the cases in this area of the law affords numerous examples and situations illustrating the harshness and injustice of this ancient common law doctrine when applied to the sale of a new house by the builder-vendor.

The law should be based upon current concepts of what is right and just and the judiciary should be alert to the neverending need for keeping its common law principles abreast with the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected as they appear to have been step by step in the cases cited *supra*.

Thus, in three of the most recent cases dealing with implied warranties in the sale of new housing, Washington, Kentucky and Vermont have taken the important and necessary stride towards elimination of the artificial and wholly unrealistic distinction between the sale of partially completed dwellings and new homes.

Oregon will probably join the growing minority since the decision in *Macomber v. Cox*⁵⁸² presages imposition of a duty upon the builder-vendor by the court on the principles of *strict* liability. This may well

⁵⁸⁰ 437 S.W.2d 743 (Ky. App. 1969), at 745.

⁵⁸¹ 262 A.2d 467 (Vt. 1970) where the court cites and quotes the cases discussed in 7 Williston, Contracts § 926A (3d ed. Jaeger 1963) as well as those which appear in the latest volume, namely, 13 Williston, *opus cit.* §§ 1565, 1565A (1970), wherein the Third Edition of Williston is quoted.

⁵⁸² 435 P.2d 462 (Ore. 1967).

signify the overruling of *Steiber v. Palumbo*,⁵⁸³ decided along traditional lines of no implied warranty in sales of real estate.

As was to have been expected, California has joined the avant garde in its decisions in *Connor v. Great Western Savings & Loan Assn. Co.*⁵⁸⁴ and *Kriegler v. Eichler Homes, Inc.*⁵⁸⁵ based on strict tort liability. The homes in the development under consideration were mass produced and reflected the lack of adequate care and planning which resulted in various structural defects. As the appellate court said in *Connor*:

Public policy casts its persuasive shadow in this instance and we believe that low-income home purchasers are entitled to protection from substantial structural defects which would not be disclosed by a reasonable inspection.⁵⁸⁶

Even more significant is the decision in the *Kriegler* case. The home that was purchased had been constructed by the defendant in 1951 and instead of installing copper tubing in the heating system, steel was used because of the shortage occasioned by the Korean conflict. This deteriorated to the point where it was no longer serviceable and had to be replaced some eight years later. Nevertheless, the court gave judgment for the plaintiff:

We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. Law, as an instrument of justice, has infinite capacity for growth to meet changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that make no sense in today's society and that tend to discredit the law should be readily rejected as they were step by step in *Greenman* and *Vandermark*.⁵⁸⁷

In *Wawak v. Stewart*,⁵⁸⁸ by a sharply divided court, Arkansas adopted the warranty of habitability.⁵⁸⁹ The plaintiffs, who had bought

⁵⁸³ 219 Ore. 479, 347 P.2d 978 (1959).

⁵⁸⁴ 69 Cal. 2d 850, 447 P.2d 609 (1968).

⁵⁸⁵ 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Cal. App. 1969).

⁵⁸⁶ 61 Cal. Rptr. 333 (1967) at 344.

⁵⁸⁷ *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (1969).

⁵⁸⁸ 449 S.W.2d 922 (Ark. 1970), quoting 7 Williston, Contracts § 926A (3d ed. Jaeger 1963).

⁵⁸⁹ The Court was divided, 4 to 3.

a new home from the defendant, discovered that when the rains came, the heating and airconditioning system was fully flooded. In consequence, silt and sand were deposited in various rooms in the house causing substantial damage to the furnishings. In this case of novel impression, the trial court rendered judgment for the plaintiffs for breach of implied warranty. Affirming, the appellate court observed:⁵⁹⁰

The trial court was right. Twenty years ago one could hardly find any American decision recognizing the existence of an implied warranty in a routine sale of a new dwelling. Both the rapidity and the unanimity with which the courts have recently moved away from the harsh doctrine of caveat emptor in the sale of new houses are amazing, for the law has not traditionally progressed with such speed.⁵⁹¹

Yet there is nothing really surprising in the modern trend. The contrast between the rules of law applicable to the sale of personal property and those applicable to the sale of real property was so great as to be indefensible. One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a \$50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed into a heap of rubble.⁵⁹²

After citing various law review articles,⁵⁹³ the court continued:

In 1963 a new edition of Williston's Contracts added its weight to the movement, pointing out a practical advantage in the new point of view: 'It would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years.'

In the past decade six states have recognized an implied warranty

⁵⁹⁰ After reviewing the leading precedents including *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314, quoting 7 Williston, Contracts § 926A (3d ed. Jaeger 1963).

⁵⁹¹ Perhaps the Supreme Court of Arkansas should not have been too amazed at the speed with which the courts "have moved away from the harsh doctrine of caveat emptor in the sale of new houses" since all forms of communication and transportation are displaying an enormously increased rate of acceleration in this era of supersonic jets, atomic and hydrogen energized devices and moon forays.

⁵⁹² A decidedly similar view was expressed as to implied or constructive warranties accompanying the sale of new automobiles in the unanimous opinion of the Supreme Court of New Jersey, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne U.L. Rev. 1 (1963); Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962); Williston, Contracts §§ 643, 995A (3d ed. Jaeger 1963).

⁵⁹³ Several law review articles, of which the earliest was published in 1952, forecast the new developments. Their titles suggest their contents: Dunham, *Vendor's Obligation as to Fitness of Land For a Particular Purpose*, 37 Minn. L. Rev. 108 (1952); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vanderbilt L. Rev. 541 (1961); Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 Georgetown L.J. 633 (1965); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 Cornell L.Q. 835 (1967). See also *supra* note 575.

—of inhabitability, sound workmanship, or proper construction—in the sale of new houses by vendors who also built the structures.⁵⁹⁴

Having quoted at some length from several of the earlier precedents,⁵⁹⁵ the court pointed out:

“The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.”⁵⁹⁶

Thereupon, various arguments advanced by the builder-vendor defendant were analyzed including the usual suggestion that a change so drastic should come from the legislature rather than the courts.⁵⁹⁷ Rejecting this contention, and citing “a famous case”⁵⁹⁸ abolishing the so-called requirement of privity—“accepted as commonplace throughout the nation”⁵⁹⁹—the court added: “We have no doubt that the modification of the rule of *caveat emptor* that we are now considering will be accepted with like unanimity within a few years.”

Joining the steadily growing number of jurisdictions (of which Illinois may be one⁶⁰⁰), the supreme court of Arkansas quite simply

⁵⁹⁴ Quoting 7 Williston, Contracts § 926A (3d ed. Jaeger 1963); the law review articles referred to by the court are listed *supra* notes 575, 593.

Citing *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Waggoner v. Midwestern Development Co.*, 154 N.W.2d 803 (S.D. 1967); *Humber v. Morton*, 426 S.W.2d 554, 225 A.L.R.3d 372 (Tex. 1968); *House v. Thornton*, 457 P.2d 199 (Wash. 1969).

As the court points out: “The near unanimity of the judges in those cases is noteworthy.” Of the 36 judges who sat in the six courts of final instance which reviewed these appeals, there was only one dissent, and that without opinion.

⁵⁹⁵ Including *Bethlahmy v. Bechtel*, *Schipper v. Levitt & Sons, Inc.*, *Humber v. Morton*, and *House v. Thornton*—all cited *supra*, note 594.

⁵⁹⁶ Quoting *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

⁵⁹⁷ As, for example, in *Goldberg v. Kollsman Instrument Corp.*, 107 N.Y.2d 432, 191 N.E.2d 81 (1963); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), *crit. in* Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne U.L. Rev. 1 (1963).

Cf. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1963) with *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970). In *Atkinson*, the majority concluded that if injunctive relief was to be granted in cases where there was a breach of a no-strike clause in a collective labor agreement, this should be done by legislative action. Seven years later, the Supreme Court re-examined the holding of *Sinclair Refining Co. v. Atkinson* and concluded that the case was erroneously decided and overruled the decision. Quite clearly, the Congress did not have to legislate—what the Supreme Court has done, it could undo!

⁵⁹⁸ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1015 (1916).

⁵⁹⁹ So described by the court in *Wawak v. Stewart*, 449 S.W.2d 922 (Ark. 1970).

See Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne U.L. Rev. 1 (1963).

⁶⁰⁰ *Weck v. A:M Sunrise Construction Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

adopted "the modern rule" which will probably become the weight of authority in due course: "To sum up, upon the facts before us in the case at bar we have no hesitancy in adopting the modern rule by which an implied warranty may be recognized in the sale of a new house by a seller who was also the builder."⁶⁰¹

The latest jurisdiction to join the steadily growing progressive minority is Michigan. There, in *Weeks v. Slavick Builders, Inc.*,⁶⁰² after quoting from the opinions in the leading cases including *Wawak v. Stewart*, *supra*, the appellate court observed:

The substitution of the doctrine of implied warranty of fitness for that of *caveat emptor* in the field of personal property has been firmly imbedded in our jurisprudence since the Uniform Sales Act and the recent adoption of the Uniform Commercial Code. Until recently, however, the doctrine of *caveat emptor* has continued to be almost universally applied to the sale of real property, see 78 A.L.R.2d 446 (Annotation). However, in the past ten years, eight states have moved away from the theory of *caveat emptor* and have adopted some form of implied warranty in the sale of new family dwelling houses. The

There the court held a contract to construct a residence implied a warranty of fitness for the intended purpose, and that the warranty survived passing of title by deed.

Cf. *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963).

⁶⁰¹ *Wawak v. Stewart*, 449 S.W.2d 922 (Ark. 1970); *cf.* 13 Williston, Contracts § 1565 (3d ed. Jaeger 1970). The *Wawak* case is discussed in Young & Harper, *Quaere: Caveat Emptor or Caveat Venditor?* 24 Ark.L. Rev. 245 (1970).

Based on their holdings in product liability cases [See Part I of this article, 46 *Chickent L. Rev.* 123 (1969)], it is probable that a number of other jurisdictions (in addition to those cited *supra* note 594) have held or will hold the builder-vendor liable for defects in construction, either on the theory of breach of constructive warranty or strict liability in tort; among these may be included: California, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, New York, Ohio, Oklahoma, Oregon, South Carolina, and Vermont.

⁶⁰² 24 Mich. App. 621, 180 N.W.2d 503 (1970) citing:

Wawak v. Stewart (1970), Ark., 449 S.W.2d 922; *Carpenter v. Donohoe* (1964), 154 Colo. 78, 388 P.2d 399; *Bethlahmy v. Bechtel* (1966), 91 Idaho 55, 415 P.2d 698; *Schipper v. Levitt & Sons, Inc.* (1965), 44 N.J. 70, 207 A.2d 314; *Waggoner v. Midwestern Development, Inc.* (1967), 83 S.D. 57, 154 N.W.2d 803; *Humber v. Morton* (Tex. 1968), 426 S.W.2d 554; *Rothberg v. Olenik* (1970), Vt., 262 A.2d 461; *House v. Thornton* (1969), Wash., 457 P.2d 199.

The court added:

Beginning in 1952, a host of law review articles predicted the trend which the law was bound to take in doing away with the illogical distinctions between purchasers of personal property and the purchasers of new residential real property. See Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 *Minn. L. Rev.* 108 (1952); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 *Vanderbilt L. Rev.* 541 (1961); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 *Georgetown L.J.* 633 (1965); Robert, *The Case of the Unwary Home Buyer; The Housing Merchant Did It*, 52 *Cornell L.Q.* 835 (1967).

As suggested in the 1963 edition of Williston regarding the recent trend:

"It would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years." 7 Williston, Contracts (3d [Jaeger] ed.), § 926A, p. 802.

states who have joined the vanguard in interring the ancient doctrine have recognized that in many cases, especially where there are large developments involved, the individual buyer is not on an equal footing and is not in a position to bargain at arm's length with the builder-vendor. The individual purchaser of a newly constructed home is no more able or competent to inspect for latent defects or to protect himself than is the buyer of a mass-produced automobile.

The foregoing examination of the case law indicates that a distinct form of action is emerging which may be known, without reference to contract or tort, as an action for breach of constructive warranty.⁶⁰³ And the constantly growing significance of new housing construction is perhaps best indicated by the fact that between two and three billions of dollars were spent for new homes each month during 1969-1970 according to the United States Department of Commerce.

And in Louisiana, where the Civil Law controls, the Code expressly provides that where there is a sale, whether of chattels or realty, there are warranties which protect the buyer. The doctrine of redhibition,⁶⁰⁴ as it is called, is defined as "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."

This article of the code was applied in *Sikes v. B&S, Inc.*⁶⁰⁵ The significant point is that under the code the seller "warrants" what he sells, including real property, so a newly-built house which has defects or vices renders the builder liable to the purchaser for damages measured by the reduction in value of the property when the defects developed which were not apparent at the time of the purchase and which, if then known, would have prevented the sale. This doctrine applies equally to the sale of realty and personalty even when the house was

⁶⁰³ *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964), citing numerous cases and suggesting that where the "warranty" is imposed by law, even if the action is framed in contract, it is not limited by any privity requirement and is comparable "to a manufacturer's warranty of the soundness of its manufactured product."

This solution of the difficulties attendant upon the use of either a *contract* or *tort* remedy is strongly advocated in Jaeger, *Product Liability: The Constructive Warranty*, 39 *Notre Dame Lawyer* 501 (1964).

Cf. *Peck v. United States Steel Corp.*, 315 F. Supp. 905 (D. Minn. 1970), citing many of the leading cases including *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959); *In Re Marine Sulphur Transport Corp.*, 312 F. Supp. 1081 (S.D. N.Y. 1970) citing *Montgomery v. Goodyear Aircraft Corp.*, 392 F.2d 777 (2d Cir. 1968), *cert. denied* 393 U.S. 841 (1968).

⁶⁰⁴ La. Civ. Code, Art. 2520 (1952).

⁶⁰⁵ 164 So. 2d 81 (La. App. 1964).

already completed before the contract of sale was signed.⁶⁰⁶ This, of course, furnishes the vendee with the protection to which he is entitled under modern housing conditions.⁶⁰⁷

While Rhode Island has not committed itself specifically with regard to adoption of the warranty of habitability, its supreme court has shown an inclination to extend consumer protection.⁶⁰⁸ In its most recent case, one of novel impression, *Halpert v. Rosenthal*, the vendor of a house sought specific performance or, in the alternative, damages for breach of contract when the vendee refused to complete the transaction.⁶⁰⁹ Defendant vendee filed a counterclaim for return of his \$2,000

⁶⁰⁶ *Sterbcow v. Peres*, 222 La. 850, 64 So. 2d 195 (1953).

⁶⁰⁷ *Loraso v. Custom Built Homes, Inc.*, 144 So. 2d 459 (La. App. 1962).

⁶⁰⁸ This view is based on the concurring opinion of Mr. Justice Joslin, joined by Mr. Justice (now Chief Justice) Roberts, in *Henry v. John W. Eshelman & Sons*, 99 R.I. 518, 209 A.2d 46 (1965). In this product liability case, the plaintiffs had bought a quantity of feed for their chickens. When this proved unsuitable and defective, they brought an action for breach of the warranties of merchantability and fitness for use, and the defendant manufacturer demurred on the ground of lack of privity. When the trial court sustained the demurrer, this appeal followed. Refusing to overrule its earlier decisions on this point, affirming, the Supreme Court of Rhode Island declared: "In the absence of legislation modifying the law laid down in those cases [requiring privity] the trial justice did not err in following them." *Id.* at 524, 209 A.2d at 49. In a separate concurring opinion, Mr. Justice Joslin ably reviewed the gradual development of exceptions to the doctrine of privity in tort actions, criticized the suggestion of the principal opinion that legislative action was required and demonstrated that the change could be accomplished by judicial means:

While a deferral to the legislature in the initiation of changes in matters affecting public policy may often be appropriate, it is not required where the concept demanding change is judicial in its origins. The requirement of privity in suits against a manufacturer is such a concept. It is of judicial making and was first enunciated in *Winterbottom v. Wright*, [10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842)] where Lord Abinger said not to insist upon it could result in "absurd and outrageous consequences, to which I can see no limit," and Alderson, B., opined that "The only safe rule is to confine the right to recover to those who enter into the contract"

If historically there were a distinction between an action in tort and one in assumpsit for a breach of warranty, I would not be troubled by the dichotomy resulting from our judicial relaxation of the privity requirement in tort cases and the majority's insistence that any change in that requirement as to cases sounding in contract must come from the legislature. Such, however, is not the case for in early times an action for breach of warranty sounded in tort and it was not until *Stuart v. Wilkins*, 1 Douglas 18, was decided in 1778 that it was settled that such an action could be brought in assumpsit I agree with the statement that "Alteration of the law in such matters has been the business of the . . . courts" *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961).

I have deemed it advisable to set forth my views notwithstanding that I do not believe that considerations of public policy justify a departure from our requirement of privity on the facts of this case. How far those considerations will influence my views in the future must necessarily depend on the cases which may come before us. I am not yet, however, prepared to adopt a rule of strict liability which would make every producer a guarantor of the fitness of his product.

Henry v. John Eshelman & Sons, 99 R.I. 518, 528, 209 A.2d 46, 51-2 (1965), concurring opinion.

⁶⁰⁹ 267 A.2d 730 (R.I. 1970).

deposit.⁶¹⁰ When the trial court rendered judgment for the defendant, the plaintiff appealed.

In a skillful and carefully reasoned opinion, Mr. Justice Kelleher, following the modern enlightened trend, denied and dismissed the appeal.⁶¹¹ The facts, which were reviewed by the appellate court, indicated that an agreement was reached whereby a house situated in Providence, Rhode Island, was sold for \$54,000 with a down payment or deposit of \$2,000 being made by the vendee. Three months later, a termite inspection was made at the instance of the defendant vendee.⁶¹²

The inspection revealed a rather comprehensive termite infestation; thereupon, the vendee informed the vendor that he would not complete the transaction. He did not appear for the title closing some six weeks later. The basic issue was presented on appeal: Is an honest misrepresentation of a material fact upon which there has been reliance a proper ground for rescission of a contract?⁶¹³ There being no precedent in Rhode Island jurisprudence, the court had recourse to other authorities, and discussed the arguments of both plaintiff and defendant.

In seeking a directed verdict, the plaintiff contended

. . . to sustain the charge of fraudulent misrepresentation, some evidence had to be produced showing that either she or her agent knew at the time they said there were no termites in the house, that such a statement was untrue. Since the representations made to defendant were made in good faith, she argues that, as a matter of law, defendant could not prevail on his counterclaim.

The defendant concedes that there was no evidence which shows

⁶¹⁰ "On February 21, 1967, the parties hereto entered into a real estate agreement whereby plaintiff agreed to convey a one-family house located in Providence on the south-easterly corner of Wayland and Upton Avenues to defendant for the sum of \$54,000. The defendant paid a deposit of \$2,000 to plaintiff. The agreement provided for the delivery of the deed and the payment of the balance of the purchase price by June 30, 1967." 267 A.2d 730, 732 (R.I. 1970).

⁶¹¹ Halpert v. Rosenthal, 267 A.2d 730 (R.I. 1970) where the court pointed out: "This case is unique in that plaintiff made no motion for a new trial. Her appeal is based for the most part on the trial court's refusal to direct a verdict in her favor on the counterclaim. She has also alleged that the trial justice erred in certain portions of his charge to the jury and in failing to adopt some 15 requests to charge submitted by plaintiff." *Id.* at 732.

⁶¹² Several inquiries regarding the presence of termites were addressed to the plaintiff and to her real estate agent at different times; both stated there were no termites in the house.

⁶¹³ While recognizing that there is authority to the contrary, Mr. Justice Kelleher adopted the majority rule:

However, the weight of authority follows the view that the misrepresenter's good faith is immaterial. We believe this view the better one. 267 A.2d 730, 735 (R.I. 1970).

that plaintiff or her agent knowingly made false statements as to the existence of the termites but he maintains that an innocent misrepresentation of a material fact is grounds for rescission of a contract where, as here, a party relies to his detriment on the misrepresentation.⁶¹⁴

The trial court denied the motion for a directed verdict and this holding was affirmed. The appellate court added:

The plaintiff, when she made her motion for a directed verdict, stated that her motion was restricted to the issue of "fraud." The word "fraud" is a generic term which embraces a great variety of actionable wrongs.⁶¹⁵ It is a word of many meanings and defies any one all-inclusive definition. Fraud may become important either for the purpose of giving the defrauded person the right to sue for damages in an action for deceit or to enable him to rescind the contract.⁶¹⁶ In this jurisdiction a party who has been induced by fraud to enter into a contract may pursue either one of two remedies. He may elect to rescind the contract to recover what he has paid under it, or he may affirm the contract and sue for damages in an action for deceit.⁶¹⁷

After discussing the difference between a claim for damages for intentional deceit and a suit for rescission based on reliance on an innocent misrepresentation of a material fact,⁶¹⁸ the court commented:

When he denied plaintiff's motion, the trial justice indicated that a false, though innocent, misrepresentation of a fact made as though of one's knowledge may be the basis for the rescission of a contract. While this issue is one of first impression in this state, it is clear that the trial judge's action finds support in the overwhelming weight of decision and textual authority which has established the rule that where one induces another to enter into a contract by means of a material misrepresentation, the latter may rescind the contract. It does not matter if the representation was "innocent" or fraudulent.

In 12 Williston, *supra*,⁶¹⁹ § 1500 at 400-01, Professor Jaeger states:

⁶¹⁴ Halpert v. Rosenthal, 267 A.2d 730 (R.I. 1970).

⁶¹⁵ Citing LaCourse v. Kiesel, 366 Pa. 385, 77 A.2d 877 (1951).

⁶¹⁶ Citing 12 Williston, Contracts § 1487 at 322 (3d ed. Jaeger 1970).

⁶¹⁷ Citing Goodwin v. Silverman, 71 R.I. 163, 43 A.2d 50 (1945); Robinson v. Standard Stores, Inc., 52 R.I. 271, 160 A. 471 (1932); Moran v. Tucker, 40 R.I. 485, 101 A. 327 (1917).

⁶¹⁸ As the court is careful to point out:

The distinction between a claim for damages for intentional deceit and a claim for rescission is well defined. Deceit is a tort action, and it requires some degree of culpability on the misrepresenter's part. Prosser, Law of Torts (3d ed.) § 100. An individual who sues in an action of deceit based on fraud has the burden of proving that the defendant in making the statements knew they were false and intended to deceive him. Cliftex Clothing Co. v. DiSanto, 88 R.I. 338, 148 A.2d 273; Conti v. Walter Winters, Inc., 86 R.I. 456, 136 A.2d 622. On the other hand, a suit to rescind an agreement induced by fraud sounds in contract. It is this aspect of fraud that we are concerned with in this case, and the pivotal issue before us is whether an innocent misrepresentation of a material fact warrants the granting of a claim for rescission. We believe that it does.

Halpert v. Rosenthal, 267 A.2d 730, 733 (R.I. 1970).

⁶¹⁹ *Supra* note 616.

"It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust and inequitable to permit a person who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations."

Finding that the aforequoted statement is in accord with the rule enunciated by the courts in at least ten other states,⁶²⁰ and the Restatement of Contracts,⁶²¹ Mr. Justice Kelleher notes, while some courts require proof of *scienter* that the representation relied on is false before declaring an agreement invalid,⁶²² "the weight of authority follows the view that the misrepresenter's good faith is immaterial. We believe this view the better one.

A misrepresentation, even though innocently made, may be actionable, if made and relied on as a positive statement of fact. The question to be resolved in determining whether a wrong committed as the result of an innocent misrepresentation may be rectified is succinctly stated in 12 Williston, *supra*,⁶²³ § 1510 at 462 as follows:

"When a defendant has induced another to act by representations false in fact although not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?"

⁶²⁰ As indicated by the court:

. . . many courts have also adopted this rule including the following: *Lehnhardt v. City*, 105 Ariz. 142, 460 P.2d 637; *Prudential Ins. Co. v. Anaya*, 78 N.M. 101, 428 P.2d 640; *Lanners v. Whitney*, 247 Ore. 223, 428 P.2d 398; *Hudspeth v. Zorn (Mo.)*, 292 S.W.2d 271; *Keeton Packing Co. v. State (Tex. Civ. App.)*, 437 S.W.2d 20; *Chesapeake Homes, Inc. v. McGrath*, 249 Md. 480, 240 A.2d 245; *Yorke v. Taylor*, 332 Mass. 368, 124 N.E.2d 912; *Whipp v. Iverson*, 43 Wis. 2d 166, 168 N.W.2d 201; *Seneca Wire & Mfg. Co. v. A. B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700; *Berger v. Pittsburgh Auto Equipment Co.*, 387 Pa. 61, 127 A.2d 334, 267 A.2d 730, 734 (R.I. 1970).

⁶²¹ This statement of law is in accord with Restatement of Contracts, § 476 at 908 which states:

Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud or material misrepresentation, the transaction is voidable as against the latter

Misrepresentation is defined as:

. . . any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. Restatement of Contracts, § 470 at 890-91.

The comment following this section explains that a misrepresentation may be innocent, negligent or known to be false. A misrepresentation becomes material when it becomes likely to affect the conduct of a reasonable man with reference to a transaction with another person. Restatement of Contracts, § 470(2) at 891. Section 28 of Restatement of Restitution is also in accord with this proposition of law that a transaction can be rescinded for innocent misrepresentation of a material fact.

⁶²² Citing *Wilkinson v. Appleton*, 28 Ill. 2d 184, 190 N.E.2d 727 (1963); *Classic Bowl, Inc. v. AMF Pinspotters, Inc.*, 403 F.2d 463 (6th Cir. 1968); *Southern Roofing & Petroleum Co. v. Aetna Ins. Co.*, 293 F. Supp. 725 (D.C. 1968).

⁶²³ *Supra* notes 616 and 619.

The question we submit is rhetorical. The answer is obvious. Simple justice demands that the speaker be held responsible.⁶²⁴

Accordingly, the court held that the defendant could maintain his counterclaim for the return of his deposit.

The plaintiff's final substantive argument has a familiar ring: Even if an innocent misrepresentation without knowledge of its falsity may under certain circumstances justify relief by way of rescission, the defendant cannot prevail here because of a merger clause.⁶²⁵ Earlier cases discussed above advanced this contention with varying degrees of success;⁶²⁶ rejecting this argument with his customary vigor and logic, Mr. Justice Kelleher observed:

The plaintiff argues that in order to enable a purchaser to rescind a contract containing a merger clause because of a misrepresentation, proof of a fraudulent misrepresentation must be shown. We find no merit in this argument.

If, as plaintiff concedes, a merger clause, such as is found within the sales contract now before us, will not prevent a rescission based on a fraudulent misrepresentation,⁶²⁷ there is no valid reason to say that it will prevent a rescission of an agreement which is the result of a false though innocent misrepresentation where both innocent and fraudulent misrepresentations render a contract voidable.⁶²⁸ As we observed before, the availability of the remedy of rescission is motivated by the obvious inequity of allowing a person who has made the innocent misrepresentation to retain the fruits of the bargain induced thereby.

In these days of equivocation and hesitant speech, it is refreshing to see the Supreme Court of Rhode Island take a firm stand on the na-

⁶²⁴ The court reviews several cases holding that innocent misrepresentations where material will warrant intervention by the courts: *Williams v. Benson*, 3 Mich. App. 9, 141 N.W.2d 650 (1966); *Watkins v. Grady County Soil & Water Cons. Dist.*, 438 P.2d 491 (Okla. 1968); *Ham v. Hart*, 58 N.M. 550, 273 P.2d 748 (1954), where the court said:

Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive; for it operates as a surprise and imposition upon the other party.

58 N.M. 550, 552, 273 P.2d 748, 749, quoting 1 Story, *Equity Jurisprudence*, § 272 (14th ed. 1918).

⁶²⁵ This provision immediately precedes the testimonium clause and provides that the contract ". . . contains the entire agreement between the parties, and that it is subject to no understandings, conditions or representations other than those expressly stated herein."

⁶²⁶ *Supra Merger*, p. 28, especially notes 516-532.

⁶²⁷ In *Bloomberg v. Pugh Bros. Co.*, 45 R.I. 360, 121 A. 430 (1923), the contract contained a merger clause similar to the one before us. Such a provision, this court said, would not bar the introduction of evidence designed to show that the contract had been procured by fraud.

⁶²⁸ Citing *Restatement of Contracts*, § 476.

ture of innocent misrepresentation as being an example of *absolute liability*,⁶²⁹ not a species of fraud, actual or constructive.⁶³⁰

Before leaving this phase of plaintiff's appeal, we think it appropriate that we allude to the tendency of many courts to equate an innocent misrepresentation with some species of fraud. Usually the word "fraud" connotes a conscious dishonest conduct on the part of the misrepresenter. Fraud, however, is not present if the speaker actually believes that what he states as the truth is the truth. *We believe that it would be better if an innocent misrepresentation was not described as some specie of fraud.*⁶³¹ Unqualified statements imply certainty. Reliance is more likely to be placed on a positive statement of fact than a mere expression of opinion or a qualified statement. The speaker who uses the unqualified statement does so at his peril. The risk of falsity is his. If he is to be liable for what he states, the liability is imposed because he is to be held strictly accountable for his words. Responsibility for an innocent misrepresentation should be recognized for what it is—an example of absolute liability rather than as many courts have said, an example of constructive fraud.⁶³²

The court reviewed several other objections registered by the plaintiff as to the conduct of the trial; rejecting one of these, Mr. Justice Kelleher commented:

The plaintiff states that the trial judge should have instructed the jury that misrepresentations had to be proved by "clear and convincing evidence" and not by a "preponderance of the evidence" as they were charged. We disagree. Long ago . . . we stated in clear and express language that fraud must be proved by a preponderance of the evidence, and there is no reason why we should require a higher degree of proof when the good faith of the misrepresenter is unquestioned.⁶³³

Other allegations of error fared no better;⁶³⁴ they were all overruled and the plaintiff's appeal was denied.⁶³⁵

⁶²⁹ As to absolute liability, see *Warranty of Seaworthiness and Absolute Liability*, *supra* p. 3.

⁶³⁰ See 12 Williston, Contracts, Ch. 45 (3d ed. Jaeger 1970).

⁶³¹ Emphasis supplied. Cf. 13 Williston, Contracts, Ch. 46 (3d ed. Jaeger 1970).

⁶³² Citing 12 Williston, Contracts, § 1510 (3d ed. Jaeger 1970); 1 Harper & James, The Law of Torts § 7.7 (1956).

⁶³³ Citing *Smith v. Rhode Island Co.*, 39 R.I. 146, 98 A. 1 (1916).

⁶³⁴ The court said:

The plaintiff complains that the trial justice erred when he told the jury that defendant could recover even though he might have been "negligent" in signing the sales agreement. The thrust of this objection is plaintiff's contention that either defendant's neglect to include in the contract a clause which would have protected his interest in the event termites were found on the property or his failure to have the premises inspected for termites prevent his recovery of the deposit. Such an argument is really aimed at the question of whether or not defendant was justified in relying on the representations made by plaintiff and her agent. We can see nothing patently absurd or ridiculous in the statements attributed to them which would warrant us in saying that defendant should be denied relief because of his failure to do what plaintiff now says he should have done. On the record before us, defendant

Leaseholds and the Warranty of Habitability

A truly astonishing, perhaps amazing extension of the warranty of habitability appears in the opinion in *Javins v. First National Realty Corporation*⁶³⁶ and its companion cases.⁶³⁷ In each, the individual appellants rented apartments by written lease in a building in Washington, D.C. As each of the tenants had defaulted in the payment of rent, the corporate landlord sought possession. The tenants alleged that the Housing Regulations of the District of Columbia had been violated repeatedly.⁶³⁸

The trial court entered judgment for the landlord; the District of Columbia Court of Appeals affirmed,⁶³⁹ and the tenants appealed to the United States Court of Appeals for the District of Columbia. Reversing with an opinion at times almost bizarre, not to say weird, the United States Court of Appeals rode roughshod over the rules of property law showing its preference for the applicable principles of contract law:⁶⁴⁰

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases.⁶⁴¹

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself.⁶⁴²

was amply justified in believing that the home he was purchasing was free of termites.

267 A.2d 730, 737.

⁶³⁵ Halpert v. Rosenthal, 267 A.2d 730 (R.I. 1970).

⁶³⁶ 428 F.2d 1071 (D.C. Cir. 1970).

The *Javins* case is cited with approval in *Clarke v. O'Connor*, 435 F.2d 104 (D.C. Cir. 1970) and *Cooks v. Fowler*, 437 F.2d 669 (D.C. Cir. 1971).

⁶³⁷ *Saunders v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Gross v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁶³⁸ Defendant tenants allege that there were "approximately 1500 violations."

⁶³⁹ *Saunders v. First National Realty Corp.*, 245 A.2d 836 (1968).

⁶⁴⁰ Referring to *Jones v. United States*, 362 U.S. 257, at 266 (1960). However, the *Jones* case is not actually in point at all.

⁶⁴¹ Adverting to the judicial "duty to reappraise old doctrines in the light of the facts and values of contemporary life," the court cites *Spencer v. General Hospital of the District of Columbia*, 425 F.2d 479 (D.C. Cir. 1969); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) stated *supra* p. 33, and suggests:

Cf. 11 S. Williston, *Contracts*, 1393A at 461 (3d ed. W. Jaeger 1968) ("Most of the leading jurisdictions have not hesitated to undo a judicially committed blunder . . . by employing the same means—judicial decisions") and cases cited therein at n.20.

⁶⁴² Here, the court adds:

But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even

The opinion then discussed the rules governing the interpretation and construction of "predominantly contractual" covenants in leases which were described as having "too often remained rooted in old property law."⁶⁴³ It was recognized that some courts have realized that the ancient rules of property law governing leases are no longer appropriate for the complexities of the modern era.⁶⁴⁴

In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that *leases of urban dwelling units should be interpreted and construed like any other contract.*⁶⁴⁵

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.⁶⁴⁶ In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability. . . .⁶⁴⁷

Today most states⁶⁴⁸ as well as the District of Columbia⁶⁴⁹ have codified and enacted these warranties into statute, as to the sale of goods, in the Uniform Commercial Code.⁶⁵⁰

Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of goods and services must rely upon the skill and honesty of the supplier to at least the same extent as a purchaser of goods.⁶⁵¹ Courts have not hesitated to find implied warranties of fitness

in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek shelter today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

428 F.2d 1071, 1074.

⁶⁴³ *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) at 1074. 7 Williston, Contracts, Ch. 32, especially § 926 (3d ed. Jaeger 1963).

⁶⁴⁴ Citing *Medico-Dental Building Co. v. Horton & Converse*, 21 Cal. 2d 411, 418, 132 P.2d 457, 462 (1942); 1 American Law of Property § 3.11 at 202-205 (A. Casner ed. 1952); *The California Lease—Contract or Conveyance?*, 4 Stan. L. Rev. 244 (1952); Friedman, *The Nature of a Lease in New York*, 33 Cornell L.Q. 165 (1947).

⁶⁴⁵ Emphasis supplied. "We believe," the opinion adds, "contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations."

As is also recognized, the civil law views the lease as a contract and in the court's judgment, "that perspective has proved superior to that of the common law."

⁶⁴⁶ The court suggests:

See generally 8 S. Williston, Contracts §§ 983-989 (3d ed. W. Jaeger 1964); W. Prosser, Torts § 95 (3d ed. 1964).

⁶⁴⁷ *See* Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962); Uniform Commercial Code § 2-314, 2-315 (1968).

⁶⁴⁸ In fact, all except Louisiana.

⁶⁴⁹ Citing 28 D.C. Code, Subtitle I (1967).

⁶⁵⁰ *Supra* note 643, 647.

⁶⁵¹ For the leading cases, see Part I of this article, note 4, p. 124.

and merchantability in such situations. In most areas product liability law has moved far beyond "mere" implied warranties running between two parties in privity with each other.⁶⁵²

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate.⁶⁵³ Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product. For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness.⁶⁵⁴ In other cases courts have held builders of new homes liable for breach of an implied warranty that all local building regulations have been complied with.⁶⁵⁵

Most recent decisions indicate the extension of liability to parties other than the vendor where residential real estate developments show defective or improper construction.⁶⁵⁶

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal; rather they have relied without

⁶⁵² Citing *e.g.* *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963). See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960); Jaeger, *Product Liability: The Constructive Warranty*, 39 Notre Dame Lawyer 501 (1964).

To these citations might well be added Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne U.L. Rev. 1 (1963).

⁶⁵³ Citing "Fegeas v. Sherill, 218 Md. 472, 147 A.2d 223 (1958); 7 S. Williston, *Contracts* § 926 at 800-801, § 926A (3d ed. W. Jaeger 1963)."

⁶⁵⁴ Citing "Waggoner v. Midwestern Development, Inc., S.Dak., 154 N.W.2d 803 (1967); *Bethlahmy v. Bechtel*, Idaho, 415 P.2d 698 (1969); *Schipper v. Levitt & Sons, Inc.* n. 641; *Carpenter v. Donohoe*, Colo., 388 P.2d 399 (1964); *Loraso v. Custom Built Homes, Inc.*, La. App., 144 So. 2d 459 (1962). Other cases still continue the older limitation on the vendor's liability to homes sold before construction is complete. See, *e.g.*, *Hoye v. Century Builders*, Wash., 329 P.2d 474 (1958)."

More recent decisions that might well have been added to the first category cited above include: *Wawak v. Stewart*, 449 S.W.2d 922 (Ark. 1970), stated *supra* notes 588-602; *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969) stated *supra* note 580; *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) stated *supra* notes 570-573; *House v. Thornton*, 457 P.2d 199 (Wash. 1969) citing *Hoye v. Century Builders*, *supra* and discarding the notion that construction of the home must not have been completed if the warranty is to attach. The *House* case is stated *supra* notes 574-579.

⁶⁵⁵ Citing *Schiro v. W. E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960); *Annot.*, 110 A.L.R. 1048 (1937).

⁶⁵⁶ *Connor v. Great Western Savings and Loan Ass'n*, 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968) (in bank); Chief Justice Traynor's excellent opinion utilizes tort doctrines to extend liability beyond the immediate seller. *Cf.* *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (1969) *supra* note 587. Both cases are discussed in 13 Williston, *Contracts*, § 1565 (3d ed. Jaeger 1970).

discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract. . . .⁶⁵⁷ In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

The opinion, as rendered by Mr. Justice J. Skelly Wright, then suggests that the common law must recognize an obligation on the landlord's part to keep his premises in a habitable or tenantable condition. With this conclusion there can be no quarrel; however, if it is the duty of the federal court to utter the local law (of the District of Columbia in this case), then a real question presents itself: Has the federal court accomplished its mission?⁶⁵⁸ Or is this a matter which should have been left to the Congress which legislates for the District? In support of its conclusion (which must have mystified or at least astonished the courts of the District), the appellate court cites three bases:

First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.⁶⁵⁹

The court noted that there was considerable dissatisfaction with the common-law property rule. In an early case,⁶⁶⁰ New York made an exception by holding that an upper story tenant was not obliged to pay

⁶⁵⁷ "However, the Supreme Courts of at least two states, in recent and well-reasoned opinions, have held landlords to implied warranties of quality in housing leases. *Lemle v. Breeden*, S. Ct. Hawaii, 462 P.2d 470 (1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969). See also *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961)." *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁶⁵⁸ If the local law of the District of Columbia is to be enunciated by the courts of the District, much as the state courts are expected to declare the pertinent law as directed by the Supreme Court of the United States in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), then it is hard to understand the appellate decision unless *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) may be considered a precedent. Certainly the courts of the District must have been almost as much at sea to account for the reversal in the *Williams* case as in *Javins*.

⁶⁵⁹ The common law rule absolving the lessor of all obligation to repair in the early Middle Ages and was considered "settled" by 1485, 3 Holdsworth, *A History of English Law*, 122-3 (6th ed. 1934). Such a rule was well suited to an agrarian economy; the land was more important than whatever small structures were included in the leasehold, and the tenant farmer was fully capable of making repairs himself. These historical facts were the basis on which the common law formulated its rule; they also provided the necessary prerequisites for its application.

⁶⁶⁰ *Graves v. Berdan*, 26 N.Y. 498 (1863).

rent after his apartment was destroyed.⁶⁶¹ Another exception was created by the Supreme Judicial Court of Massachusetts described by Mr. Justice Wright as "a court not known for its willingness to depart from the common law"⁶⁶² in the following language:

* * * [A] different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. * * * It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. * * *⁶⁶³

The court then concludes that its approach ought to be assisted "by principles derived from the consumer protection cases . . . the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer."⁶⁶⁴

To bolster its argument, the court cited and quoted *Henningsen v. Bloomfield Motors, Inc.*⁶⁶⁵ where Mr. Justice John J. Francis rendered the unanimous opinion of the Supreme Court of New Jersey in a classic precedent a decade ago followed in a steadily increasing number of jurisdictions.⁶⁶⁶ There, the court sounded the deathknell of privity of warranty in product liability cases thereby evoking much academic comment, mostly favorable.⁶⁶⁷

⁶⁶¹ This in spite of the early case of *Paradine v. Jane*, Aley 26, 82 Eng. Rep. 897 (K.B. 1647).

⁶⁶² *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁶⁶³ *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892).

⁶⁶⁴ *Javins v. First National Realty Corp.*, *supra* note 662.

⁶⁶⁵ 32 N.J. 358, 161 A.2d 69 (1960).

⁶⁶⁶ Many of these are listed in Part I of this article at note 4, p. 124.

⁶⁶⁷ Among the articles that may be mentioned are the following cited in 8 Williston, *Contracts* § 995A (3d ed. Jaeger 1964):

"*Henningsen v. Bloomfield Motors, Inc.* *supra* is noted in: 26 Albany LR 349; 12 Baylor LR 345; 2 Boston College Ind & Com LR 133; 48 Calif. LR 873; 46 Cornell LQ 607; 65 Dick LR 64; 29 Fordham LR 183; 74 Harv. LR 630; 59 Mich. LR 467; 7 New York LF 59; 39 NC LR 299; 36 Notre Dame Law 233; 40 Ore LR 364; 14 Rutgers LR 829; 16 Rutgers LR 559; 35 St. John's LR 178; 36 St. John's LR 123; 39 Tex LR 694; 8 UCLA LR 658; 29 U Cin LR 519; 8 UCLA LR 658; 38 U Det LJ 218; 109 U Pa LR 453; 14 Vand LR 681; 18 Wash & Lee LR 124; 7 Wayne LR 382; 12 Western Res LR 387."

The *Henningsen* case *supra* is discussed and approved in Jaeger, *Products Liability*, NEWSLETTER, General Practice Section, ABA, Vol. 1, No. 4, p. 6, where other leading cases are analyzed.

See also Lambert, *Justice Francis and Products Liability Law*, in Justice John J.

After a review of some of the earlier cases such as *Edwards v. Habib*,⁶⁶⁸ *Brown v. Southall Realty Co.*,⁶⁶⁹ *Whetzel v. Jess Fisher Management Co.*,⁶⁷⁰ and *Kanelos v. Kettler*,⁶⁷¹ the court commented as to the *Brown* case that there "the premises were let in violation of Sections 2304 and 2501 of the [Housing] Regulations and that the lease, therefore, was void as an illegal contract."⁶⁷² This expression is certainly a contradiction in terms, since by definition, a contract is an enforceable agreement.⁶⁷³

Thereafter, the court concentrated on a decision of the Illinois Supreme Court, *Schiro v. W.E. Gould & Co.*⁶⁷⁴ Careful examination of this case does not quite indicate how it is in point, except that it does involve violations of the Chicago building code.⁶⁷⁵ Nevertheless, the *Schiro* opinion is quoted to the effect that the law existing at the time and place of the "making of the contract" is deemed to be a part of the agreement.⁶⁷⁶ Properly qualified, this is nothing new and has long been a canon of interpretation or construction.⁶⁷⁷

Francis Symposium, 24 Rutgers L. Rev. 426 (1970); Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962).

⁶⁶⁸ 397 F.2d 687 (D.C. Cir. 1968).

⁶⁶⁹ 237 A.2d 834 (D.C. Cir. 1968).

⁶⁷⁰ 282 F.2d 943 (D.C. Cir. 1960).

⁶⁷¹ 406 F.2d 951 (D.C. Cir. 1968).

⁶⁷² Emphasis supplied.

⁶⁷³ See 1 Williston, Contracts, §§ 1 et seq. (3d ed. Jaeger 1957).

⁶⁷⁴ 18 Ill. 2d 538, 165 N.E.2d 286 (1960); the case is discussed in 4 Williston, Contracts, § 615, pp. 619-621 (3d ed. Jaeger 1961).

⁶⁷⁵ Chicago Building Code.

The *Schiro* case was concerned with granting a decree of specific performance to the vendee of a building in Chicago. There were various violations of the city code including a failure to install a separate drainage and plumbing system, no independent connection with a private or public sewer, and no *direct* connection of the water mains with the city water supply system. In granting the equitable remedy, the court noted:

These violations of the city code were tantamount to a breach of contract. This contract was further breached by the fact that defendants could not give a deed free and clear of all encumbrances, in accordance with their agreement, since, as a result of defendants' improper construction of the building plaintiff was required to share the sewerage and water systems with the owners of the adjoining property.

Notwithstanding these contract breaches, it is well established that a court of equity will, at the option of the purchaser, order specific performance of a contract to convey property so far as the vendor is able to perform, with an abatement out of the purchase money for any deficiency in title, quality or quantity of the estate. *Schiro v. W.E. Gould & Co.*, 18 Ill.2d 538 (1960), at 546, 165 N.E.2d 286.

⁶⁷⁶ *Von Hoffman v. Quincy*, 71 U.S. (4 Wall.) 535 (1867) is probably the leading case so holding; cf. *Unsinn v. Wilson*, 285 F.2d 273 (D.C. Cir. 1960); leading Illinois decisions include *People v. Ortman*, 353 Ill. 427, 187 N.E. 470 (1933); *American Nat. Bank v. General Out. Adv. Co.*, 11 Ill. App. 2d 602, 153 N.E.2d 110 (1958).

⁶⁷⁷ Williston criticizes the broad language used in *Von Hoffman v. Quincy*, *supra* preceding note, to the effect that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into it and form a part of it, as if they were expressly referred to or incorporated in its terms."

This is substantially the purport of the *Schiro* opinion quoted by Judge Wright, "the

We follow the Illinois court in holding that the housing code must be read into housing contracts—a holding also required by the purposes and the structure of the code itself. The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor. . . .⁶⁷⁸

After discussing a leading Wisconsin precedent, *Pines v. Persion*,⁶⁷⁹ dealing with the impact of a housing code on the common law rule, the court concluded: “We therefore hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.”⁶⁸⁰

In *Javins v. First National Corporation*,⁶⁸¹ the landlord sought possession of the leasehold for nonpayment of rent. Contrary to common law principles, the court declared that in extending “all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord’s implied warranty of habitability.”⁶⁸²

law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.”

As Williston puts it, the method of statement used by the Supreme Court (as well as by the Illinois Supreme Court and Judge Wright) “is obviously artificial; and it seems unfortunate, as a matter of terminology, to put in the form of a fiction matters which may be stated accurately. To assume, first, that everybody knows the law, and, second, that everybody thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement, is indeed to *pile a fiction upon a fiction* . . .” (Emphasis supplied); Williston, *Contracts*, § 615, pp. 602, 605. The italicized language and Williston’s criticism are adopted in a well reasoned opinion, *Grace Line, Inc. v. United States*, 255 F.2d 810 (2d Cir. 1958) *affg* 144 F. Supp. 548 (S.D.N.Y. 1956): “This labyrinthine argument is an attempt ‘to pile a fiction upon a fiction.’” To the same effect, see *Deerhurst Estates v. Meadow Homes, Inc. supra* preceding note, discussed in Williston, *Contracts*, § 602, *Interpretation and Construction Distinguished*, pp. 320-323.

⁶⁷⁸ In footnotes, the court observes:

The housing and sanitary codes, especially in light of Congress’ explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city’s slum dwellers decent, or at least safe and sanitary, places to live. *Edwards v. Habib*, 397 F.2d 687, at 700 (D.C. Cir. 1968).

Any private agreement to shift the duties would be illegal and unenforceable. The precedents dealing with industrial safety statutes are directly in point:

* * * * [T]he only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute * * * *

Narramore v. N. Cleveland, C., C. & St. L. Ry. Co., 96 F. 298, 302 (6th Cir. 1899). See W. Prosser, *Torts* § 67 at 468-469 (3d ed. 1964) and cases cited therein.

⁶⁷⁹ 14 Wis. 2d 590, 111 N.W.2d 409, 412-413 (1961).

⁶⁸⁰ *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); emphasis supplied.

⁶⁸¹ *Id.*

⁶⁸² This statement appears in footnote 61, *Javins v. First National Realty Corp.*, *supra* note 680. Does this mean that the tenant may file suit to compel the landlord to make repairs necessary to make the premises habitable? So it would appear. However, there might be some difference of opinion as what repairs are essential, and which ones are merely desirable. Of course, the courts will resolve these differences after the usual course of litigation.

According to principles of contract law, the obligation to pay rent for the premises "is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition."⁶⁸³

At trial, the finder of fact must make two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail.⁶⁸⁴

Landlords may derive some consolation from the foregoing excerpt. If the lessor has done his part, and furnished an inhabitable tenement, the lessee must pay the rent or face eviction.⁶⁸⁵ To afford greater consumer protection is certainly a desirable result. But should it have been done by overruling half a millenium of precedent?

In the meantime, the same court, speaking through the same judge in *Bell v. Tsintolas Realty Company*,⁶⁸⁶ has held that when a tenant refuses to pay rent because of the landlord's violations of the housing code the court may require the rent to be paid into the registry of the court.⁶⁸⁷

However, the court indicated that this power of equity is to be

⁶⁸³ "Habitable condition" may mean pursuant to the pertinent requirements of the building code; the court added:

In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.

To be relevant, of course, the violations must affect the tenant's apartment or common areas which the tenant uses. Moreover, the contract principle that one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action. However, violations resulting from inadequate repairs or materials which disintegrate under normal use would not be assignable to the tenant.

⁶⁸⁴ *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); in a footnote, the court indicated the limits of its holding:

As soon as the landlord made the necessary repairs rent would again become due. Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground.

⁶⁸⁵ The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord. In these circumstances, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due. If the tenant refuses to pay the partial amount, a judgment for possession may then be entered, *id.* at 1083.

⁶⁸⁶ 430 F.2d 474 (D.C. Cir. 1970).

⁶⁸⁷ *Id.* at 482.

sparingly exercised, and should be ordered only when the tenant has requested a jury trial or asserted a defense involving violations of the building code by the landlord, and following a motion of the landlord and opportunity for oral argument by both parties. The court cited and relied on *Javins v. First National Realty Corporation*⁶⁸⁸ discussed above, and declared:

Certainly such a protective order represents a noticeable break with the ordinary processes of civil litigation, in which, as a general rule, the plaintiff has no advance assurance of the solvency of the defendant.

Moreover, imposing on litigants who are eligible to proceed *in forma pauperis* the requirement that a defense may be maintained only upon payment of a given sum of money—whether this sum is characterized as a rental prepayment or an appeal bond—seems incongruous. Recent decisions of this court, which have enhanced the opportunities for indigents to participate meaningfully in the judicial process, highlight this incongruity.⁶⁸⁹

After a further discussion of the rights of indigents, especially as to being furnished “a free transcript,” the court concluded that it is desirable to enlarge proceedings *in forma pauperis*, lest tenants be discouraged from asserting valid defenses when landlords seek eviction or the payment of back rent.⁶⁹⁰

However, the court concedes that there are situations where it becomes essential to protect the rights of landlords.⁶⁹¹ In this connection, it is pointed out that—

The action for possession has traditionally been characterized as a summary proceeding, the landlord foregoing the past due rent in order to recover possession and effect a substitution of tenants. Recent practice has, however, altered the summary nature of such actions: a tenant may, upon timely request and a statement of facts underlying his defense, proceed to a jury trial with the inevitable delay in the ultimate disposition of the case; a tenant may interpose the defense that no rent was owed either because the landlord breached his contractual obligations to the tenant, or because the lease was illegal and void *ab initio*. The tenant, of course, remains in possession during the pendency of a suit for possession.

In short, the landlord has lost the advantage of the summary proceeding and is instead exposed to a prolonged period of litigation

⁶⁸⁸ 428 F.2d 1071 (D.C. Cir. 1970), *supra* notes 636 et seq.

⁶⁸⁹ *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970); emphasis supplied, citing *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970).

⁶⁹⁰ The cost of the litigation might be out of all proportion to the amount, if any, recoverable.

⁶⁹¹ This concession should prove somewhat reassuring to the landlords who might otherwise be forced to conclude that private property rights no longer have any real significance.

without rental income. And, realistically, the likelihood of this occurring cannot be ignored when the tenant has been allowed to proceed *in forma pauperis*.

.....

Thus, in recognition of the emerging non-summary nature of the suit for possession, the concomitant severe disadvantage in which the landlord has been placed during such litigation, and the potential for dilatory tactics which judicial innovation in this area has bred, we conclude that the prepayment of rent requirement as a method of protecting the landlord may be employed in limited fashion. Indeed, we have already endorsed prepayment of rent pending disposition of landlord-tenant litigation involving the breach of warranty defense.⁶⁹²

But the court declined to lay down a rule:

However, not all litigation in which the tenant requests a jury or asserts a defense based on violation of the Housing Regulations will be equally appropriate for imposition of the protective order, and it is not our intent to promulgate so inflexible a rule. Indeed, we promulgate no rule at all, believing that the preferable course is to leave the decision on a case-by-case basis to the discretion of the trial judge.⁶⁹³

As to the application of the cost of repairs to the rent by the tenant, the opinion of the Supreme Court of New Jersey in a recent case⁶⁹⁴ was quoted with approval:

"If, therefore, a landlord fails to make the repairs and replacements of vital facilities necessary to maintain the premises in a livable condition for a period of time adequate to accomplish such repair and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents. * * * This does not mean that the tenant is relieved from the payment of rent so long as the landlord fails to repair. *The tenant has only alternative remedies of making the repairs or removing from the premises upon such a constructive eviction.*"⁶⁹⁵

Action was brought by the landlord to dispossess the tenant who had a one-year lease contract for an apartment in Camden, New Jersey. There was no specific covenant for repairs by the lessor. Defendant tenant discovered that the toilet in the bathroom was cracked and that

⁶⁹² Quoting *Javins v. First National Realty Corp.*, 428 F.2d 1071, at (D.C. Cir. 1970):

Appellants in the present cases offered to pay rent into the registry of the court during the present action. We think this is an excellent protective procedure. If the tenant defends against an action for possession on the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent payments into the registry of the court as they become due; such a procedure would be appropriate only while the tenant remains in possession. The escrowed money will, however, represent rent for the period between the time the landlord files suit and the time the case comes to trial. In the normal course of litigation, the only factual question at trial would be the condition of the apartment during the time the landlord alleged rent was due and not paid.

⁶⁹³ *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970).

⁶⁹⁴ *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

⁶⁹⁵ *Id.* at 146, 265 A.2d at 535. (Emphasis supplied.)

water was leaking all over the floor. After repeated efforts to notify the landlord were unsuccessful, she called a plumber who repaired the damaged fixture and was paid therefor by the tenant.

When the next instalment of rent was due, the tenant mailed the landlord a check from which was deducted the cost of the repairs. The latter then demanded full payment of the rent; when this was refused, summary dispossession of the tenant was demanded.⁶⁹⁶ The trial court rendered judgment for the plaintiff and the defendant appealed.⁶⁹⁷ The appellate court held that "equitable defenses as well as legal defenses" are available to the tenant in this type of action. The lack of an express covenant to repair was emphasized; the question then arose, Was there an implied covenant which would require the landlord to make repairs?⁶⁹⁸

A lease was originally considered a conveyance of an interest in real estate. Thus, the duties and obligations of the parties, implied as well as express, were dealt with according to the law of property and not of the law of contracts.⁶⁹⁹

Historically a lease was viewed as a sale of an interest in land. The concept of *caveat emptor*, applicable to such sales, seemed logically pertinent to leases of land. There was neither an implied covenant of fitness for the intended use nor responsibility in the landlord to maintain the leased premises.⁷⁰⁰ This principle, suitable for the agrarian setting in which it was conceived, lagged behind changes in dwelling habits and economic realities.⁷⁰¹ Exceptions to the broad immunity inevitably developed.⁷⁰²

The court then concentrated its attention on modern developments in the law of real property, and the emerging tendency of the courts to apply principles of contract law to leases:⁷⁰²

The guidelines employed to construe contracts have been modernly applied to the construction of leases. 3 Thompson on Real Prop-

⁶⁹⁶ Pursuant to N.J.S.A. 2A:18-53(b).

⁶⁹⁷ The trial judge conceived the issue as entirely a legal one and determined that the facts which defendant alleged did not create a duty upon the landlord to make repairs. Thus, without trying out the issues tendered by defendant, he found a default in payment of rent of \$85.72 (July) and \$95 (August) plus costs and rendered a judgment for possession.

⁶⁹⁸ 7 Williston, Contracts § 946 (3d ed. Jaeger 1963).

⁶⁹⁹ This approach is gradually yielding to the modern concept of regarding the lease as a contract and interpreting it as such, 4 Williston, Contracts, §§ 600 et seq. (3d ed. Jaeger 1961).

⁷⁰⁰ Citing *Bauer v. 141-149 Cedar Lane Holding Co.*, 24 N.J. 139, 130 A.2d 833 (1957); *Bolitho v. Mintz*, 106 N.J.L. 449, 148 A. 737 (E. & A. 1930).

⁷⁰¹ Citing 1 American Law of Property (1952), § 3.78, p. 347.

⁷⁰² Quoting *Michaels v. Brookchester, Inc.*, 26 N.J. 379, at 382, 140 A.2d 199, at 201 (1958).

erty 377 (1959). See also 6 Williston on Contracts, 3d ed. Jaeger, § 890A, p. 592 (1962):

"There is a clearly discernible tendency on the part of the courts to cast aside technicalities in the interpretation of leases and to concentrate their attention, as in the case of other contracts, on the intention of the parties, * * *."⁷⁰³

After quoting extensively from *Pines v. Perssion*,⁷⁰⁴ also relied on by Judge Wright in *Javins v. First National Realty Corporation*,⁷⁰⁵ and *Reste Realty Corporation v. Cooper*,⁷⁰⁶ the court suggests that:

A covenant in a lease can arise only by necessary implication from specific language of the lease or because it is indispensable to carry into effect the purpose of the lease. In determining, under contract law, what covenants are implied, the object which the parties had in view and intended to be accomplished, is of primary importance. The subject matter and circumstances of the letting give at least as clear a clue to the natural intentions of the parties as do the written words. It is of course not the province of the court to make a new contract or to supply any material stipulations or conditions which contravene the agreements of the parties.⁷⁰⁷

Discussing the all important question of when covenants or other provisions are to be *implied* in a contract, the court quotes the opinion in a leading case, *William Berland Realty Co. v. Hahne & Co.*,⁷⁰⁸ stating:

Terms are to be implied not because "they are just or reasonable, but rather for the reason that the parties must have intended them and have only failed to express them * * * or because they are necessary to give business efficacy to the contract as written, or to give the contract the effect which the parties, as fair and reasonable men, presumably would have agreed on if, having in mind the possibility of the situation which has arisen, they contracted expressly in reference thereto."⁷⁰⁹

In *Marini v. Ireland*,⁷¹⁰ here under consideration, the lease restricted the use of the premises to "dwelling." The natural inference

⁷⁰³ 6 Williston, Contracts, § 890A (3d ed. Jaeger 1962).

⁷⁰⁴ 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

⁷⁰⁵ 428 F.2d 1071 (D.C. Cir. 1970).

⁷⁰⁶ 53 N.J. 444, 251 A.2d 268 (1969).

⁷⁰⁷ Citing *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 161 A.2d 717 (1960); *Washington Construction Co., Inc. v. Spinella*, 8 N.J. 212, 84 A.2d 617 (1951); *City of Camden v. South Jersey Port Commission*, 4 N.J. 357, 73 A.2d 55 (1950); *McBride v. Maryland Casualty Co.*, 128 N.J.L. 64, 23 A.2d 596 (E. & A. 1942).

⁷⁰⁸ 26 N.J. Super. 477, 98 A.2d 124 (1954). See also *Silverstein v. Keane*, 19 N.J. 1, 115 A.2d 1 (1955); *Cragmere Holding Corp. v. Socony-Mobil Oil Co.*, 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961); 12 Am. Jur., Contracts, § 239; 14 Am. Jur., Covenants, Conditions and Restrictions, § 14.

⁷⁰⁹ *Id.* at 487, 98 A.2d at 129.

⁷¹⁰ 56 N.J. 130, 265 A.2d 526 (1970).

reasonable people would be led to was the apartment was habitable and tenantable:

The very object of the letting was to furnish the defendant with quarters suitable for living purposes. This is what the landlord at least impliedly (if not expressly) represented he had available and what the tenant was seeking. In a modern setting, the landlord should, in residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness.

. . . ⁷¹¹

And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.

It is eminently fair and just to charge a landlord with the duty of warranting that a building or part thereof rented for residential purposes is fit for that purpose at the inception of the term and will remain so during the entire term.

. . . Where damage has been caused maliciously or by abnormal or unusual use, the tenant is conversely liable for repair. The nature of vital facilities and the extent and type of maintenance and repair required is limited and governed by the type of property rented and the amount of rent reserved. Failure to so maintain the property would constitute a constructive eviction.⁷¹²

It should be remembered that historically, the landlord's covenant to alter or repair premises and the tenant's covenant to pay rent were generally regarded as independent covenants. The landlord's failure to perform did not entitle the tenant to make the repair and offset the cost thereof against future rent. It only gave rise to a separate cause of action for breach of covenant.⁷¹³

This result is also brought about by the application to leases of real property law rather than the principles of contracts. Originally, the concept of mutually dependent promises was not applied to the ascertainment of whether covenants in leases were dependent or independent. However, an increasing number of jurisdictions recognize that cove-

⁷¹¹ Citing *Hyland v. Parkside Investment Co., Inc.*, 10 N.J. Misc. 1148, 162 A. 521 (Sup. Ct. 1932). The court added:

It is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness." Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage.

Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

⁷¹² *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

⁷¹³ *Duncan Development Co. v. Duncan Hardware, Inc.*, 34 N.J. Super. 293, at 298, 112 A.2d 274, at 277 (App. Div. 1955), *cert. denied* 19 N.J. 328, 116 A.2d 829 (1955); *Stewart v. Childs Co.*, 86 N.J.L. 648, 92 A. 392 (E. & A. 1914).

nants are dependent or independent according to the intention of the parties and the good sense of the case.⁷¹⁴ And the court continued, reversing the trial court:

It is of little comfort to a tenant in these days of housing shortage to accord him the right, upon a constructive eviction, to vacate the premises and end his obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction where as here the cause is the failure to make reasonable repairs.⁷¹⁵ This latter course of action is accompanied by the right to offset the cost of such repairs as are reasonable in the light of the value of the leasehold against the rent. His pursuit of the latter form of relief should of course be circumscribed by the aforementioned conditions.

Finally, a word of encouragement or consolation was vouchsafed the landlord:

We realize that the foregoing may increase the trials and appeals in landlord and tenant dispossession cases and thus increase the burden of the judiciary. By way of warning, however, it should be noted that the foregoing does not constitute an invitation to obstruct the recovery of possession by a landlord legitimately entitled thereto. It is therefore suggested that if the trial of the matter is delayed the defendant may be required to deposit the full amount of unpaid rent in order to protect the landlord if he prevails.⁷¹⁶

As this article goes to press, the supreme court of Illinois has just handed down two decisions which are diametrically opposed to the judgment rendered in *Javins v. First National Realty Corporation*.⁷¹⁷ In

⁷¹⁴ *Higgins v. Whiting*, 102 N.J.L. 279, 280, 131 A. 879, 880 (Sup. Ct. 1925); the court held that "covenants are to be construed as dependent or independent according to the intention and meaning of the parties and the good sense of the case. Technical words should give way to such intention. 7 R. C. L. 1090, § 7. So, the rule is thus stated; where the acts or covenants of the parties are concurrent, and to be done or performed at the same time, the covenants are dependent, and neither party can maintain an action against the other, without averring and proving performance on his part.

"In the present-case, the covenant to pay rent and the covenant to heat the apartment are mutual and dependent. In the modern apartment house equipped for heating from a central plant, entirely under the control of the landlord or his agent, heat is one of the things for which the tenant pays under the name 'rent.'"

The courts have on a case-by-case basis held various lease covenants and covenants to pay rent as dependent and under the guise of a constructive eviction have considered breach of the former as giving the right to the tenant to remove from the premises and terminate his obligation to pay rent. *McCurdy v. Wyckoff*, 73 N.J.L. 368, 63 A. 992 (Sup. Ct. 1906); *Weiler v. Pancoast*, 71 N.J.L. 414, 58 A. 1084 (Sup. Ct. 1904); *Higgins v. Whiting*, 102 N.J.L. 279, 131 A. 879 (Sup. Ct. 1925); *Stevenson Stanoyevich Fund v. Steinacher*, 125 N.J.L. 326, 15 A.2d 772 (Sup. Ct. 1940).

⁷¹⁵ Citing *Reste Realty Corp. v. Cooper*, 53 N.J. 462, 251 A.2d 268 (1969).

The *Reste* case *supra* is discussed in Laird, *Reste Realty Corporation—The Landlord Meets His Tenant*, in the Justice John J. Francis Symposium, 24 Rutgers L. Rev. 508 (1970).

⁷¹⁶ *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); the judgment of reversal was unanimous.

⁷¹⁷ 428 F.2d 1071 (D.C. Cir. 1970).

these cases,⁷¹⁸ the high court rejected the contention that the tenants against whom the actions were brought could properly refuse to pay rent where it was alleged that the landlord had failed to make necessary repairs. Thus, there was a specific refusal to overrule the 500-year old real property principle that covenants to pay rent and to repair are independent, and *not* concurrent conditions.⁷¹⁹ This leaves to the legislature a determination of whether any change in the existing law governing housing is necessary or desirable. In the meantime, a rehearing has been granted by the court.

In *Jack Spring, Inc. v. Little*,⁷²⁰ (consolidated with *Sutton & Peterson, Inc. v. Price*⁷²¹ "because of the similarity of the facts and the issues involved"), lessee-defendants refused to pay rent because of the landlords' failure to make necessary repairs. The latter brought these actions under the Forcible Entry and Detainer Act⁷²² to evict the defendants. The trial court entered summary judgment for the plaintiffs; the defendants appealed.⁷²³

After reviewing the facts, which indicated that certain repairs were promised by the landlord but were not made, and furthermore, that there were numerous violations of the housing code of Chicago which made "the premises unfit and unsafe for habitation," the court summarized the basic contentions of the defendants:⁷²⁴

The principal thrust of the defendants' argument on this appeal is that a lease is a series of "expressed and implied bilateral covenants" between the landlord and the tenant, and that the latter's promise to pay monthly rent is not to be considered independent of the landlord's oral promises and obligations to repair defects and maintain the leased premises consistently with the requirements of the city building code. Defendants contend that they are not actually refusing to pay rent but

⁷¹⁸ *Jack Spring, Inc. v. Little*, No. 41730 (1970), — Ill. —, — N.E. —; *Alexander v. Hamilton Corp.* No. 42882 (1970), — Ill. —, — N.E. —. (Rehearing allowed Jan. 27, 1971; now under advisement for September Term, 1971).

⁷¹⁹ *Means v. Dierks*, 180 F.2d 306 (10th Cir. 1950); *Hosang v. Minor*, 205 Cal. App. 2d 269, 22 Cal. Rptr. 794 (1962); *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N.Y. 34, 39 N.E. 7 (1894); cf. *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959).

⁷²⁰ No. 41730 (1970), — Ill. —, — N.E. —.

⁷²¹ No. 41739 (1970). — Ill. —, — N.E. —.

⁷²² Ill. Rev. Stat. 1967, ch. 57.

⁷²³ The trial court granted a motion to strike the answer in each case based on its construction of the Forcible Entry & Detainer Act, Ill. Rev. Stat. 1969, ch. 57, para 5, which is quoted.

⁷²⁴ These contentions were remarkably similar to those advanced by defendant and accepted by the court, in *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

are simply "withholding" their monthly rental payments until the landlords fulfill their promises to repair the alleged defects. *To allow the landlords to summarily evict them for nonpayment of rent under the Forcible Entry and Detainer Act, argue defendants, would be out of keeping with modern standards of contract law, equal protection and due process of law, and public policy.*⁷²⁵

In answer to this, the plaintiffs simply pointed out that "the decided cases in Illinois clearly hold"⁷²⁶ that the lessee's obligation to pay rent at stated intervals and the promise by the landlord to make repairs are, and have been traditionally for some five centuries, independent covenants.⁷²⁷ At common law, breach by a landlord of his express covenant to repair the premises could not be construed as a defense to a defaulting tenant where the suit was for possession of the leasehold.⁷²⁸

Quoting a leading Illinois decision⁷²⁹ wherein the landlord was suing for possession, the court declared:

The covenant to pay rent was not upon condition that plaintiff comfortably heat said premises, but was a separate and independent covenant; and when he failed to perform it, the landlord had the right, after notice and demand, to declare the lease forfeited, and to sue for possession. "The whole question in actions of this nature is, does the defendant unlawfully withhold possession of the premises sought to be recovered in the action."⁷³⁰

While expressing its sympathy for the "low-income" tenants who are victimized by rapacious and unscrupulous landlords, the high court nevertheless felt that the change in the law advocated by the defendants would be legally unsound and might do more harm than good in the

⁷²⁵ In *Jack Spring, Inc. v. Little*, *supra* note 718; emphasis supplied. But the court pointed out that the defendants had not cited any Illinois decisions, nor were any found in support of their theory that promises to pay rent and to make repairs are bilateral and mutually dependent covenants; indeed, the defendants' briefs candidly acknowledge that they are seeking a change in the established law of leasehold conveyances (see *Gibbons v. Hoefeld*, 299 Ill. 455, 132 N.E. 425 (1920)), which they characterize as "medieval." Defendants contend that present-day housing conditions and the limited availability of housing to low-income groups in urban areas compellingly favor adoption of a new rule allowing tenants to avoid or "withhold" payments of rent until previously promised repairs of the leased premises have been made. Such a rule, the defendants argue, would afford a remedy where none is now available against those landlords who make a practice of leasing run-down or defective dwellings to low income persons upon false promises of making repairs in the future.

⁷²⁶ Citing *Truman v. Rodesch*, 168 Ill. App. 304 (1912); *Geiger v. Brown*, 167 Ill. App. 534 (1912).

⁷²⁷ 3 Holdsworth, *A History of English Law* 122-123 (6th ed. 1934).

⁷²⁸ 6 Williston, *Contracts* § 820 (3d ed. Jaeger 1963).

⁷²⁹ *Truman v. Rodesch*, *supra* note 726 at 306.

⁷³⁰ Quoting *Woodbury v. Ryel*, 128 Ill. App. 459 (1906).

attempted improvement of housing conditions for tenants in the lower income brackets. As stated by the majority:⁷³¹

We cannot agree with defendants in their assumption that lessees now have no remedy under the law against landlords who promise repairs in order to induce entry into a lease and later renege on the promise. It is well established under past decisions that a tenant aggrieved by his lessor's breach of an express covenant or a statutory obligation to make repairs, furnish heat or provide services, may treat the lease as terminated and vacate the premises, with no further obligation to pay rent. This rule, known as the doctrine of constructive eviction, requires that there be an actual abandonment of the leased premises within a reasonable time; the tenant may not remain in possession indefinitely and refuse or withhold payment of rent.⁷³²

After reviewing a number of significant Illinois precedents, the court quoted *Automobile Supply Co. v. Scene-In-Action Corporation*:⁷³³

There can be no constructive eviction, however, without the vacating of the premises. Where a tenant fails to surrender possession after the landlord's commission of acts justifying the abandonment of the premises the liability for rent will continue so long as possession of the premises is continued.⁷³⁴

From the standpoint of fostering availability of leasehold dwellings in urban areas, we believe that the existing doctrine of constructive eviction has far more to recommend it than the new rule urged by defendants herein. If tenants were permitted to remain in possession while paying no rent until such time as the lessor fulfills alleged promises to repair defects, we feel that many landlords would be reluctant, if not wholly unwilling, to engage in the business of renting residential dwelling places, particularly in congested or low income urban areas. Moreover, if the refusal-of-rent rule proposed by the defendants for residential dwellings were to be adopted, we perceive no legal or rational basis for excluding from it other classes of leased premises, such as stores, offices, warehouses and other properties. The constructive eviction doctrine applies equally and uniformly to all kinds of leasehold properties, whether residential or business, and we think it affords a reasonable remedy to the tenant without discouraging lessors from engaging in business.⁷³⁵

The court then pointed out that none of the cases cited by the defendant was "in point."⁷³⁶ This is especially noteworthy since these

⁷³¹ Three judges dissented.

⁷³² Citing *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930); *Giddings v. Williams*, 336 Ill. 482, 168 N.E. 514 (1929); *Gibbons v. Hoefeld*, 299 Ill. 455, 132 N.E. 425 (1921); see also 1 *American Law of Property*, § 3.51.

⁷³³ 340 Ill. 196, at 201-202 172 N.E. 35 at (1930).

⁷³⁴ *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930).

⁷³⁵ *Jack Spring, Inc. v. Little*, *supra* note 718.

⁷³⁶ Referring to *Gula v. Gawel*, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966); *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968).

cases include *Pines v. Perssion*,⁷³⁷ upon which great reliance was placed by Mr. Justice Wright in *Javins v. First National Realty Corporation*,⁷³⁸ although it was not "a possessory action."⁷³⁹

There, the tenants entered into a lease of a house on the representation of the landlord that the premises would be made habitable, cleaned and repaired prior to their taking possession. When this was not done, the tenants moved in, attempted to make the repairs and then vacated the premises. They sued to recover their security deposit, plus the cost of labor performed in attempting to make the premises habitable.

While the high court of Wisconsin mentioned "an implied warranty of habitability" in the course of its opinion, it was actually not necessary to its decision, since the tenants vacated the premises and it was held quite simply that under the circumstances, there was no obligation to pay rent.⁷⁴⁰ In short, the result was the same as constructive eviction.⁷⁴¹ Thus, the case is clearly inapposite.

Proceeding to an examination of the argument advanced by the defendants that they had been deprived of their constitutional rights to a considerable extent by the "disparate economic power of the landlord and individual tenant, induced by the lack of standard low and moderate income housing in our urban centers" the court declares it to be "nebulous at best."⁷⁴² Thereupon, it added significantly:

It is not as if there were a paucity of remedies for the tenant to pursue. Not only does he have the benefit of constructive eviction referred to above but he also has the right to enforce the lessor's express covenant to repair by a suit on the lease. Allowing rent withholding as a means of forced compliance with the lessor's covenant to repair would in effect create an unconscionable situation whereby tenants could, by seeking to enforce frivolous claims, deprive the landlord of means to properly maintain the premises.⁷⁴³

These observations are in sharp contrast to the comments made in *Javins v. First National Realty Corporation* by the federal tribunal.⁷⁴⁴

⁷³⁷ 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

⁷³⁸ 428 F.2d 1071 (D.C. Cir. 1970).

⁷³⁹ Consequently, the case was not in point.

⁷⁴⁰ *Cf. Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930).

⁷⁴¹ When there is constructive eviction, the tenant must leave the premises otherwise he remains liable for the payment of rent.

⁷⁴² *Jack Spring, Inc. v. Little*, *supra* note 718.

⁷⁴³ Compare this statement in text with *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁷⁴⁴ 428 F.2d 1071 (D.C. Cir. 1970).

The basic difference appears to stem from the unwillingness of the Supreme Court of Illinois to usurp the powers of the Springfield legislature, in short, to engage in far-reaching legislation. This reluctance is graphically illustrated by the following clear and logical quotation:

Any action on our part in creating an implied covenant of habitability on the part of the landlord throughout the period of tenancy and allowing lessee abstention of rent payments could very well cause more problems than benefits. Assuming *arguendo* that we adopt the rule that the covenant of habitability, express or implied, is mutual with the covenant to pay rent, we are then faced with innumerable problems far beyond the capability of this or any other court to deal with. Not only is there a problem with determining the scope of any such covenant (*e.g.* at the outset or continuing, the substantiality of the breach necessary to prompt withholding), but also what procedures are to be followed so as to make this rule effective and yet protect the property and rights of the parties pending and during litigation. *E.g.* Who decides when a violation exists? What happens to the rent money that has been withheld? If the tenants are to be permitted to undertake repairs, who supervises the reasonableness of their conduct? May rents be withheld if violations are prompted by the conduct of the tenants?⁷⁴⁵

Should there be a requirement that the reasonable value of the premises being occupied be tendered, certain questions present themselves:

1. Who is to determine what is reasonable?⁷⁴⁶
2. When is the amount to be paid?⁷⁴⁷
3. To whom is the money to be paid?⁷⁴⁸

It is possible that the economic consequences to the landlord of allowing tenants to withhold rent may be so grave as to drive the latter out of business if deprived of the income necessary to maintain the premises.⁷⁴⁹

The claim also is made that the defendants were entitled to remain in possession and withhold their rental payments because violations of the Chicago Housing Code were alleged in their answers. . . .⁷⁵⁰

⁷⁴⁵ Jack Spring, Inc. v. Little, *supra* note 718, citing *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801 (1965).

⁷⁴⁶ According to the Javins case, *supra* note 743, the amount to be paid is based on the rent.

⁷⁴⁷ The rent may be paid at the commencement of the suit.

⁷⁴⁸ Into the registry of the court, *supra*.

⁷⁴⁹ This might well leave the low-cost tenant without any habitation.

⁷⁵⁰ At this point, the court added:

Both of the defendants' answers averred that defective conditions in their apartments violated certain provisions of the Housing Code (Municipal Code of Chicago, §§ 78—11 through 78—20), and that the said Code prohibits the letting

Defendants seek support for this novel contention from the general principle in the law of contracts that contractual provisions in violation of existing law invalidate and nullify the contract. . . .⁷⁵¹ The courts in applying this general principle have held that leases are comparable or equivalent to contracts. Leases held void and unenforceable under this principle have typically involved instances where the leased premises were used for purposes of prostitution or gambling with the knowledge of the lessor.⁷⁵² No case in this jurisdiction has ever held, to our knowledge, that a lessee who claims the lease void or unenforceable because of an alleged violation of law can *both* remain in possession of the premises and withhold payment of rent from the lessor. Indeed, it would seem most anomalous for a lessee being sued for eviction to set up as a defense the invalidity and voidness of the lease on the basis of illegality for any reason, and claim the right to stay in possession under the illegal lease and withhold rent because entry into the lease was prohibited by law. If the lessee can prove the allegation that defects in the leased premises were in violation of the Housing Code, it does not follow, and has never been held in this State, that the claimed illegality gives the lessee the right to remain in possession and withhold rent until the prohibited defects are corrected.⁷⁵³

As the courts have repeatedly pointed out, so long as the lessee elects to remain in possession of the premises, even though the lessee may ultimately establish a right to rescind the lease,⁷⁵⁴ vacate the lease-hold or obtain other relief, the obligation to pay rent continues. The rule is the same where the lessee claims constructive eviction but continues to occupy the premises.⁷⁵⁵ And quoting *McNally v. Moser*,⁷⁵⁶ the court observed:

“One may not rely on illegality or invalidity where the doing of that said to be forbidden may reasonably be made legal and possible through administrative or judicial action.” Here the alleged violations of the Housing Code in the leased premises may be made legal or cor-

of dwellings or family units that are not in compliance with §§ 78—13.1 through 78—13.12 of the Code. Defendants' answers further alleged that the plaintiff-lessors knew of the prohibited defects when the leases were executed or extended and that the leases therefore were void and unenforceable.

Jack Spring, Inc. v. Little, *supra* note 718.

⁷⁵¹ Citing *Schiro v. W. E. Gould & Co.*, 18 Ill.2d 538, 165 N.E.2d 286 (1960) (contract for purchase of real estate); *Illinois Bankers Life Assn. v. Collins*, 341 Ill. 548, 173 N.E. 465 (1930) (life insurance policy).

⁷⁵² Citing *Fields v. Brown*, 188 Ill. 111, 58 N.E. 977 (1900); *Harris v. McDonald*, 194 Ill. 75, 62 N.E. 310 (1901).

⁷⁵³ *Jack Spring, Inc. v. Little*, *supra* note 718; *cf.* with the statements appearing in the *Javins* case, *supra* note 743.

⁷⁵⁴ See 13 *Williston, Contracts* (3d ed. Jaeger 1970), Chapter 46, especially § 1557. *When Is Rescission Available As a Remedy?* *Cf.* *Lipkin v. Burnstine*, 18 Ill. App.2d 509, 152 N.E.2d 745 (1958); *Goldblatt v. Sixty-Third & Halsted Realty Co.*, 338 Ill. App. 543, 88 N.E.2d 100 (1949).

⁷⁵⁵ See 7 *Williston, Contracts*, § 946 (3d ed. Jaeger 1963), for a discussion and cases on constructive eviction. *Cf.* *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805 (1893).

⁷⁵⁶ 210 Md. 127, 122 A.2d 555 (1956).

rected through resort to available administrative or judicial procedures.⁷⁵⁷

After having concluded that it was not necessary to determine whether violations of the Housing Code, as alleged by the defendants, would relieve them of the payment of rent, the court observed:

The defendants have *not* vacated but insist upon the right to both remain in possession and withhold rent. If such a right were to be recognized and adopted, tenants of leased dwellings in default of rent payments could very easily avoid or postpone eviction for lengthy periods of time by alleging various defects under the Housing Code, whether fancied or real. While abuse in this regard might well be safeguarded against by administrative machinery for inspection of dwelling places and the payment of rents into an administrative or judicial escrow fund, *we believe that such a procedure is within the peculiar province of the legislature to adopt and should not be judicially formulated and imposed by edict or fiat of this court.*⁷⁵⁸

After an extensive discussion of the state statutes that have been adopted, especially the so-called "repair and deduct" laws⁷⁵⁹ which allow the tenants to repair the premises and then deduct the costs from the rent payment, the following observation appears:

We believe the legislative branch is in a manifestly better position

⁷⁵⁷ *Id.* at 138, 122 A.2d at 561; as to what constitutes *constructive eviction*, the court commented:

The eviction which will discharge the liability of the tenant to pay rent is not necessarily an actual physical expulsion from the premises or some part of them, but any act of the landlord which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the premises constitutes a constructive eviction of the tenant, which exonerates him from the terms and conditions of the lease and he may abandon it.

Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. at 201-202, 172 N.E. at 37 (1930).

⁷⁵⁸ Jack Spring, Inc. v. Little, *supra* note 718; emphasis supplied. Cf. O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436 at 441, 155 N.E.2d 545, at 547 (1958); see also *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801, 842-849 (1965).

⁷⁵⁹ In California (Cal. Civ. Code secs. 1941, 1942), Montana (Mont. Rev. Code Ann. secs. 42-20k, 202), North Dakota (N.D. Cent. Code sec. 47-16-12, 13), Oklahoma (Okla. Stat. Ann. tit. 41, sec. 31, 32) and South Dakota (S.D. Code secs. 38.0409-.0410) so-called "repair and deduct" laws have been enacted which, under certain circumstances, allow the tenants to repair the premises and deduct the costs thereof from the rent payments.

Another approach which has been taken is the "Rent Strike" law of New York. Article 7A of the Real Property Actions and Proceedings Law provides: "A special proceeding by tenants of a multiple dwelling [defined as six or more apartments] in the City of New York for a judgment directing the deposits of rents into court and their use for the purpose of remedying conditions dangerous to life, health or safety may be maintained in the civil courts of the City of New York."

Under the New York statutory scheme, it appears that at the very least some form of administrative action must be sought and that self-help rent withholding is not permitted. This is justifiably so, for where self-administered rent withholding is employed there is absolutely no guarantee that it will be consistently or rationally applied. Such conduct depends solely upon the tenant's own initiative and might impose a heavier burden totally out of proportion to the remedy it seeks to accomplish, without any assurances to the landlord that upon correction of the abuse the rent withheld will be available.

than is this court to consider the numerous problems involved and that any changes in well-settled common-law doctrine can and should be made by appropriate legislation.⁷⁶⁰

This undoubtedly represents the view of the great majority of jurisdictions which are in the process of correcting judicial blunders, such as committed in *Winterbottom v. Wright*,⁷⁶¹ but are wholly disinclined to go to extremes of judicial legislation as in *Javins v. First National Realty Corporation*.⁷⁶² However, a rehearing has been granted in *Spring v. Little*.

In both the *Javins* and the *Jack Spring* cases, the defendants relied on *Schiro v. W.E. Gould & Co.*⁷⁶³ A brief analysis of the case will reveal how little it supports *Javins v. First National Realty Corporation*.⁷⁶⁴ In the first place, it concerns a sale, not a lease. Furthermore, the remedy sought was specific performance of the written contract. The only resemblance lies in the violation of building code provisions in each case.⁷⁶⁵ A short summary of the facts may be helpful.

The plaintiff and defendant company entered into an agreement for the purchase and sale of certain land upon which the vendor was to build a certain structure, and vendee was to make certain payments as specified. When the deed was tendered by the vendor company, the plaintiff refused to accept it because of a failure to comply with various provisions of the City Code of Chicago.⁷⁶⁶

The defendant company would not accede to the plaintiff's request to make the necessary changes, or to allow an abatement of the purchase price to cover these. Suit for specific performance was instituted requesting that defendant company be required to make the necessary alterations to conform to the City Code. The superior court of Cook

⁷⁶⁰ *Jack Spring, Inc. v. Little*, *supra* note 718.

⁷⁶¹ 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842).

⁷⁶² 428 F.2d 1071 (D.C. Cir. 1970).

⁷⁶³ 18 Ill.2d 538, 165 N.E.2d 286 (1960); the case is discussed in 4 Williston, Contracts § 615, at 619-621 (3d. ed. Jaeger 1961).

⁷⁶⁴ 428 F.2d 1071 (D.C. Cir. 1970).

⁷⁶⁵ Violations of the D.C. Building Code and of the City Code of Chicago were alleged.

⁷⁶⁶ Thus, defendant company did not construct a sewer solely for the use of plaintiff's premises, as required by the City Code of Chicago, but had constructed a system whereby the sewerage from plaintiff's property drained into the sewer on the adjoining lot 7; the catch basin on plaintiff's property was used by the adjoining lot 7, contrary to the requirements of the code; and defendants did not connect the water pipes on plaintiff's premises directly with the city water system, as required by the code, but rather connected them through the system installed on the adjoining lot 7.

County dismissed the suit since the contract did not provide for the alterations being sought, nor would equity decree the making of "alterations or repairs." The plaintiff appealed.⁷⁶⁷ After reviewing the situation and the contentions of the parties, the court observed:⁷⁶⁸

It is settled law that all contracts for the purchase and sale of realty are presumed to have been executed in the light of existing law, and with reference to the applicable legal principles. . . . Thus, the law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.⁷⁶⁹

The rationale for this rule is that the parties to the contract would have expressed that which the law implies "had they not supposed that it was unnecessary to speak of it because the law provided for it."⁷⁷⁰ Consequently, the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties.

Reviewing the holding in *Economy Fuse & Manufacturing Co. v. Raymond Concrete Pile Co.*,⁷⁷¹ the court concluded that the pertinent provisions of the City Code were as much a part of the contract as if they had been expressly incorporated therein. Failure to comply therewith constituted breaches of contract. But, as the court pointed out:

Notwithstanding these contract breaches, it is well established that a court of equity will, at the option of the purchaser, order specific

⁷⁶⁷ The plaintiff relied on the principle that specific performance of a contract for the sale of real estate will be ordered, at the election of the purchaser, even though the vendor may be unable to convey all of the property included in the contract, with an abatement of the purchase price for slight defects in quantity and quality of the estate. *Baker v. Puffer*, 299 Ill. 486, 499, 132 N.E. 429, 431 (1921); *Gravelot v. Skender*, 9 Ill. 2d 15, 20, 135 N.E. 2d 756, 758 (1956); *Mitchell v. White*, 295 Ill. 135, 128 N.E. 803 (1920).

See 11 Williston, Contracts, Ch. 43 Specific Performance and Other Equitable Remedies (3d ed. Jaeger 1968).

⁷⁶⁸ It is therefore incumbent upon this court to examine and construe the controverted contract. It is axiomatic that contracts must be construed to give effect to the intention of the parties as expressed in the agreement, and to this end the contract should be construed as a whole, giving effect to every portion of the instrument and preferring that construction which renders the agreement legal rather than void.

Schiro v. W. E. Gould & Co., 18 Ill.2d 538, 165 N.E.2d 286 (1960).

Cf. 4 Williston, Contracts, Ch. 22 Interpretation and Construction of Contracts (3d ed. Jaeger 1961).

⁷⁶⁹ Citing I.L.P. Contracts § 229; *Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co.*, 111 F.2d 875 (7th Cir. 1940); *Illinois Bankers Life Ass'n v. Collins*, 341 Ill. 548, 173 N.E. 465 (1930); *Hindu Incense Mfg. Co. v. MacKenzie*, 403 Ill. 390, 86 N.E.2d 214 (1949); *Robertson v. Huntley and Blazier Co.*, 351 Ill. App. 378, 115 N.E.2d 533 (1953).

⁷⁷⁰ Quoting I.L.P. Contracts § 230.

⁷⁷¹ 111 F.2d 875 (7th Cir. 1940) applying Illinois law; the court held that it must read into every written contract the law governing the parties at the time the contract was made; criticized *supra* note 677.

performance of a contract to convey property so far as the vendor is able to perform, with an abatement out of the purchase money for any deficiency in title, quality or quantity of the estate.⁷⁷²

Finally, in a *per curiam* opinion, the supreme court of Illinois had occasion to consider the issue of constitutionality of Sections 18 and 19 of the Forcible Entry and Detainer Act⁷⁷³ insofar as it provides that "notice of appeal and bond must be filed within 5 days from the rendition of the judgment (for possession)," *Alexander v. Hamilton Corporation*.⁷⁷⁴

Among the arguments presented by defendants was that the bond posting requirement had the effect of denying poor persons access to "State courts of review."⁷⁷⁵ Reviewing the case law, the court concluded that there was no denial of due process or the equal protection of the laws in requiring the kind of bond here under consideration.

A similar argument was advanced in an earlier case, *Rosewood Corporation v. Fisher*,⁷⁷⁶ which had been taken under advisement. The defendants had defaulted on their contracts for the purchase of certain properties and had failed to post appeal bonds as required by law. Thereupon, their appeals were dismissed. However, constitutional issues having been raised, the supreme court reviewed the cases.⁷⁷⁷

Referring to the "equal protection" contention, the court was satisfied that a waiver of the required security bonds under Section 19 of

⁷⁷² Citing *Baker v. Puffer*, 299 Ill. 486; *Gravelot v. Skender*, 9 Ill.2d 15, 20. In the *Baker* case the court stated, at p. 492, that this rule, authorizing specific performance with an abatement in the purchase price, applies in all cases where there is an encumbrance, or a slight defect in the quantity or quality of the estate to be sold, and has been followed by this court and those of other jurisdictions.

⁷⁷³ 111 Rev. Stats. ch 57, § 19 (1967).

⁷⁷⁴ 46 Ill.2d 249, 263 N.E.2d 833 (1970).

⁷⁷⁵ The court's comment on this point is of more than passing interest:

In what must be viewed as a belated effort to create standing to raise the constitutional point they seek to make, defendants have, however, filed so-called "poverty affidavits" in this court. We say "so-called" because in our opinion the affidavits, with few if any exceptions, fail to establish defendants as indigent persons. Indeed, one of them claiming to be impoverished admits to a take-home pay of \$1,250 per month, savings of \$3,000, and the ownership of two automobiles, including a 1970 Cadillac.

⁷⁷⁶ 46 Ill.2d 249, 263 N.E.2d 833 (1970).

⁷⁷⁷ The present appeals have been prosecuted from the orders dismissing the appeals and, with one exception to be noted, such orders of dismissal are sufficient to give defendants standing to present the constitutional issues they seek to raise. *Cf.* *Air Line Stewards and Stewardesses Ass'n v. Quinn*, 35 Ill. 2d 106; *Burket v. Reliance Bank and Trust Co.*, 367 Ill. 196.

Alexander v. Hamilton Corp., *supra* note 774.

the statute⁷⁷⁸ should not be ordered. Citing a similar case, *Williams v. Shaffer*,⁷⁷⁹ it was pointed out that a statute requiring the posting of "a bond with good security, payable to the landlord" in order to permit the tenant to remain in possession and obtain a trial was held valid. The Supreme Court of the United States denied certiorari.⁷⁸⁰ The Illinois Supreme Court concluded that the statute under consideration was constitutional.⁷⁸¹

LIABILITY INSURANCE MAY BE THE SOLUTION

It has been suggested by various authorities that an appropriate method for spreading the loss resulting from defective products and housing is by contracting for liability insurance.⁷⁸² This, however, is subject to a *caveat*. In many of the policies there are so many exceptions, exclusions and exemptions that doubt often exists as to the extent of the coverage.⁷⁸³ In an economy which boasts of so many labor saving devices, household and similar appliances, wherein defects are mostly latent and rarely patent, some sort of protection for the user is essential. And this is certainly true of new housing, where the buyer is quite dependent upon the knowledge and skill of the builder-vendor.

⁷⁷⁸ This section reads:

"§ 19. If the defendant appeals, the condition of the bond shall be that he will (a) prosecute such appeal with effect; and (b) regardless of the outcome of such appeal, pay all rent then due or that may become due before the final determination of the suit; and (c) in case the judgment from which the appeal is taken is affirmed or appeal dismissed, pay all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue; which said bond shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court. And the court in which the appeal may be pending may require a new bond in a larger amount, if necessary to secure the rights of the parties; and in case of continuance, may require another bond to be given to further secure the same." Ill. Rev. Stat. 1967, ch. 57, pars. 19, 20.

⁷⁷⁹ 222 Ga. 334, 149 S.E.2d 668 (1966).

⁷⁸⁰ *Williams v. Shaffer*, 385 U.S. 1037 (1967).

⁷⁸¹ *Alexander v. Hamilton Corp.*, *supra* note 774.

Cf. Sanks v. Georgia, — U.S. —, 91 S. Ct. 593 (1971), where the constitutionality of a Georgia statute requiring the tenant to post a bond in double the amount of the rent that might be due at the end of the trial which would be forfeited to the landlord should the tenant lose the case. Although the Supreme Court of Georgia had upheld the constitutionality of the statute, the Supreme Court of the United States was not convinced, but concluded that since the act had been repealed, there was no occasion for review.

⁷⁸² 7 Williston, *Contracts*, Ch. 31 *Contracts of Insurance* (3d ed. Jaeger 1963) and 11 Williston, *op. cit.* § 1399B; Jaeger, *Privty of Warranty: Has the Tocsin Sounded?* 1 *Duquesne U.L. Rev.* 1, 137 (1963).

⁷⁸³ See 7 Williston, *op. cit.* §§ 917-918.

Any number of defects do not become apparent until some time after the buyer has entered upon possession.⁷⁸⁴

The development of special insurance appears to parallel the evolution of distinct airplane travel coverage; it was developed because of the frequency with which standard life policies excluded death or injury resulting from the use of or travel in aircraft.⁷⁸⁵ However, even where products liability risks are covered, this coverage is often so limited because hedged about and ringed around with exceptions that its utility becomes doubtful.⁷⁸⁶ An analysis and review of some of the leading cases may prove helpful and instructive.⁷⁸⁷

Thus, where the insured was denied coverage by the insurance carrier, he sought a declaratory judgment that the insurer was required to defend him under a "Comprehensive General Liability policy,"⁷⁸⁸ *Sears, Roebuck & Co. v. Travelers Insurance Co.*⁷⁸⁹

The facts indicated that when a customer sat in a cane chair which was on display in the vendor's store in Ft. Lauderdale, Florida, the chair collapsed and the customer was injured. The insurance company denied coverage and refused to defend the action unless defendant company agreed to hold the insurer harmless.⁷⁹⁰ The court, however, held that under the terms of the endorsement, the insurance company was clearly obligated to defend the action and although the plaintiffs were unsuccessful, the insured was nevertheless entitled to a recovery for the expenses of litigation.⁷⁹¹

⁷⁸⁴ These are examined in the cases discussed *supra* pp. 33-47.

⁷⁸⁵ As, for example, in *Lachs v. Fidelity & Casualty Co. of New York*, 306 N.Y. 357, 118 N.E.2d 555 (1954) which involved the interpretation of special "Airline Trip Insurance," and held the insurer liable in spite of an apparent exclusionary provision.

⁷⁸⁶ Exceptions, exclusions and exemptions are discussed in 7 Williston, *Contracts* §§ 917-918 (3d ed. Jaeger 1963).

⁷⁸⁷ *E.g.*, *Bundy Tubing Co. v. Royal Indemnity Co.*, 298 F.2d 151 (6th Cir. 1962); *American Surety Co. v. Rodek*, 128 F. Supp. 250 (D. Conn. 1954); *Hauenstein v. St. Paul Mercury Indemnity Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954).

⁷⁸⁸ In this case, the policy provided in pertinent part:

"6. Definitions.

* * * * *

"(c) Products Hazard. The term 'products hazard' means

"(1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, * * * if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented, or controlled by the insured * * *." *Sears, Roebuck & Co. v. Travelers Ins. Co.*, 261 F.2d 774 (7th Cir. 1958) at 776.

⁷⁸⁹ 261 F.2d 774 (7th Cir. 1958).

⁷⁹⁰ See 7 Williston, *Contracts*, Ch. 31 (3d ed. Jaeger 1963).

⁷⁹¹ Although *Sears* prevailed in the original *White* litigation, while this appeal was

In an action on an insurance contract which expressly excluded liability for "products hazard," defined in the policy as meaning the handling or use of goods or products manufactured, sold, handled, or distributed by the insured if the accident should occur after the insured had relinquished possession, judgment was for the insurer, *Bitts v. General Accident Fire & Life Assurance Corp.* Vendor-insured's customer had been injured when the latter opened the end of a refrigerator coil and it exploded. As the insured no longer had possession of the coil, the appellate court affirmed.⁷⁹²

In two other cases, the insured fared no better. In *United Pacific Insurance Co. v. Schaecher*,⁷⁹³ the insurer brought this action for declaratory relief to interpret products liability coverage of a comprehensive policy where the damage was caused by the emergence of live beetles in wood used in finished homes based on breach of a warranty of quality.⁷⁹⁴ The insurer was held not liable since this was not an accident within the meaning of the policy, and the insured had not sustained the burden of proving coverage.⁷⁹⁵

In the other case, *Liberty Building Co. v. Royal Indemnity Co.*,⁷⁹⁶ the trial court dismissed the case and this appeal resulted. Again the question as to the meaning of "accident" was before the court. It was held that if the insured was obliged to repair or replace some product of work which proved defective, this was not within the coverage of the policy.⁷⁹⁷ It appeared that substantial damage to the stucco finish of

pending, this matter was not rendered moot. Sears seeks to recover its expense in defending the White suit, for which Sears contends Travelers is liable, *supra* note 789, at 777.

⁷⁹² 167 F. Supp. 506 (N.D. Cal. 1958). Furthermore, the coil was no longer on the premises of the insured, a condition precedent to the insurer's liability.

⁷⁹³ 282 F.2d 542 (9th Cir. 1960).

⁷⁹⁴ See 8 Williston §§ 973 et seq. (3d ed. Jaeger 1964).

⁷⁹⁵ The court observed that: "The term 'accident' has been variously defined. In *United States Mutual Acc. Ass'n. v. Barry*, 1889, 131 U.S. 100, at page 121, 9 S.Ct. 755, at page 762, 33 L. Ed. 60, 'accidental' is defined as 'happening' or chance, unexpectedly taking place, not according to the usual course of things or not as expected. In *Richards v. The Travelers Ins. Co.*, 1891, 89 Cal. 170, at page 176, 26 P. 762, at page 763, 'accident' is defined to include 'any event which takes place without the foresight or expectation of the person acted upon and affected by the event.'" *United Pacific Insurance Co. v. Schaecher*, *supra* note 793, 709 at 508.

⁷⁹⁶ 2 Cal. Rptr. 329 (Cal. App. 1960).

⁷⁹⁷ As the court observed: "In this connection, Exclusion (f) expressly excludes from liability under the policy, damages sustained by any 'goods or products * * * or premises alienated * * * or work completed * * * out of which the accident arises.' (Emphasis added.) This Exclusion means that if the insured becomes liable to replace or repair any 'goods or products' or 'premises alienated' or 'work completed' after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not

certain houses was caused by a defect in the soil upon which the houses were built. Since this was expressly excluded, there could be no recovery.

However, to counterbalance these adverse decisions, there is a case of novel impression wherein the insurer sought a declaration of non-coverage of a claim being made against its insured which arose under a "dram shop" act.⁷⁹⁸ But the court, in *American Surety Co. v Rodek*,⁷⁹⁹ found that the policy had been issued to defendants in connection with the operation of their restaurant. They were alleged to have sold liquor to an intoxicated patron thereby violating the Connecticut Dram Shop Act.⁸⁰⁰ Holding that the statute in question was "primarily compensatory in purpose rather than penal,"⁸⁰¹ the court held that there was no prohibition on insurance coverage. As to the second defense claimed by the company, namely an exception under the products liability provision, it was pointed out that this exception would only cover a defect in the product sold, but did not cover assaults committed by an intoxicated person to whom liquor was sold. The insurance company was held liable.⁸⁰²

A rather more representative type of products insurance case, one from which prospective policy holders may take heart, is *Bundy Tubing Company v. Royal Indemnity Company*.⁸⁰³ There, the insured was faced with three actions in California and five in Michigan based on alleged defects in certain tubing he had installed; the contractor called on his products liability insurer to defend or settle these actions.

Thin steel tubing, used by building contractors and plumbers for radiant heating, was installed in the concrete floors of houses or other buildings without basements.⁸⁰⁴ Hot water from a boiler flowed through the tubing; when leaks developed, the aforementioned actions for breach of warranty or negligence were filed against Bundy, the insured. He settled several of these claims and then brought this action against the insurance company. The trial court held that since the law suits in

recoverable under the policy." *Liberty Building Co. v. Royal Indemnity Co.*, *supra* note 796 at 331.

⁷⁹⁸ Connecticut Dram Shop Act, § 4307, G.S.1949.

⁷⁹⁹ 128 F. Supp. 250 (D. Conn. 1954).

⁸⁰⁰ *Supra* note 798.

⁸⁰¹ Illinois has a similar statute; Ill. Rev. Stats. ch. 43, § 135.

⁸⁰² *American Surety Co. v. Rodek*, 128 F. Supp. 250 (D. Conn. 1954).

⁸⁰³ 298 F.2d 151 (6th Cir. 1962).

⁸⁰⁴ *Cf. Krieglger v. Eichler Homes, Inc.*, 269 Cal. App.2d 224, 74 Cal. Rptr. 749 (19—).

question against the insured involved negligence or breach of implied warranty, the damages were not caused by accident and were therefore, not covered by the policies. The insurer appealed and the United States Court of Appeals for the Sixth Circuit reversed, holding:

The fact that the claims here involved breach of warranty or negligence did not remove them from the category of accident.⁸⁰⁵ Bundy would not be legally obligated to pay a claim arising out of an accident occurring without its negligence or breach of warranty. If the liability policy were construed so as to cover only accidents not involving breach of warranty or negligence, then no protection would be given to the insured. The insured would not need liability insurance which did not cover the only claims for which it could be held liable. The word accident is common in most liability policies and should not be construed in this type of case as not including claims involving negligence or breach of warranty.⁸⁰⁶

In support, the court cited *Hauenstein v. St. Paul Mercury Indemnity Co.*,⁸⁰⁷ particularly as to the definition and meaning of the word "accident" as used in an insurance policy:

There is no doubt that the property damage to the building caused by the application of defective plaster was 'caused by accident' within the meaning of the insurance contract, since the damage was a completely unexpected and unintended result. *Accident*, as a source and cause of damage to property, within the meaning of an accident policy, is an unexpected unforeseen or undesigned happening or consequence from either a known or an unknown cause.⁸⁰⁸

The court held for the insured and noted that a similar result was reached in *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.*,⁸⁰⁹ where "recovery was allowed for the cost of removal of defective aluminum doors" and the cost of installation of new ones.⁸¹⁰

⁸⁰⁵ See 7 Williston, Contracts § 917 (3d ed. Jaeger 1963).

⁸⁰⁶ *Bundy Tubing Co. v. Royal Indemnity Co.*, 298 F.2d 151 (6th Cir. 1962).

⁸⁰⁷ 242 Minn. 354, 65 N.W.2d 122 (1954).

⁸⁰⁸ *Hauenstein v. St. Paul Mercury Indemnity Co.*, *supra* note 807.

⁸⁰⁹ 51 Cal.2d 558, 334 P.2d 881 (1959).

⁸¹⁰ In *Bundy Tubing Co. v. Royal Indemnity Co.*, *supra* note 803, the court cited the following cases: "Diefenbach v. Great Atlantic & Pacific Tea Co., 280 Mich. 507, 273 N.W. 783 (1937); Pawlicki v. Hollenbeck, 250 Mich. 38, 224 N.W. 626 (1930); Hunt v. United States Accident Association, 146 Mich. 521, 109 N.W. 1042 (1906); New Amsterdam Casualty Co. v. Jones, 135 F.2d 191 (6th Cir. 1943)."

The insurer was also held liable in *General Casualty Co. v. Larson*, 196 F.2d 170 (8th Cir. 1952); *Reed Roller Bit Co. v. Pacific Employers Ins. Co.*, 198 F.2d 1 (5th Cir. 1952) *cert. den.* 344 U.S. 920; *Liberty Mutual Insurance Co. v. Hercules Powder Co.*, 224 F.2d 293 (3d Cir. 1955); *Nielson v. Travelers Indemnity Co.*, 174 F. Supp. 648 (D. Iowa 1959), *aff'd* 277 F.2d 455 (8th Cir. 1959); *King v. Macon*, 5 So.2d 705 (La. App. 1957), *aff'd* 234 La. 299, 99 So.2d 117; *McAllister v. Century Indemnity Co.*, 24 N.J. Super. 289, 94 A.2d 345 (1953), *aff'd* 12 N.J. 395, 97 A.2d 160, where the policy was characterized as "most

SUMMARY AND CONCLUSION

From what has been said, it must be apparent that a growing number of jurisdictions are giving the new homeowner who buys his dreamhouse from a builder-vendor a remedy for defective construction, or latent defects in the land upon which the residence is built.

In some jurisdictions, the remedy, whether in damages or for rescission, is based on breach of a constructive warranty (not dependent on the contract) or on principles of strict liability. One thing is certain—a substantial expansion of consumer protection in home-buying is the growing and desirable trend.

To summarize:

1. The warranty of habitability as presently applied by the courts is based largely on the public policy which dictates recovery by the injured party in product liability cases;
2. There is a growing trend to hold the builder-vendor responsible for defects in new houses or for improper soil conditions based on the buyer's reliance on the builder's skill and knowledge;
3. This newer form of consumer protection seems destined to become the majority rule in the near future;
4. In landlord and tenant situations, several jurisdictions have adopted legislation authorizing the lessee to make necessary repairs and deduct the cost from the rent payment; finally,
5. Spreading or sharing the risk by means of liability insurance has been suggested as the realistic solution of what otherwise may become an intolerable burden.

In any event, adoption and enforcement of the warranty of habitability should do much to discourage the shoddy construction and jerry-building that has become increasingly perceptible over the years.

ambiguous" and accordingly, all doubts were resolved in favor of the insured; *Philadelphia Fire & Marine Ins. Co. v. Grandview*, 42 Wash.2d 357, 255 P.2d 540 (1953).

And see cases cited in 7 Williston, *Contracts* § 901, pp. 97-98 (3d ed. Jaeger 1963).