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Landlord and Tenant - Implied Warranty of Habitability - Demise of the Traditional Doctrine of Caveat Emptor

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LANDLORD AND TENANT—IMPLIED WARRANTY OF HABITABILITY — DEMISE OF THE TRADITIONAL DOCTRINE OF CAVEAT EMPTOR

INTRODUCTION

The common law doctrine of caveat emptor is based on the theory that the vendor-lessor and the vendee-lessee deal at arm's length, and that the vendee-lessee possesses both the means and the opportunity to gain information concerning the real property involved in the transaction.[1] Common sense, say the proponents of caveat emptor, dictates that the vendee-lessee has the responsibility to lookout for himself; if he did not ascertain that the real property he was about to purchase or lease was not what he hoped it would be, and if he did not protect his own interests by obtaining an express warranty from the vendor-lessor, the law is under no duty to rescue him from his folly. Lord Coke, in drawing a comparison between the civil law[2] view of the problem and that of the common law stated:

> Note that by the Civil Law every man is bound to warrent the thing he selleth or conveyth, albeit there be no express warrenty, but the Common Law bideth him not, unlesse therebe a warrenty, either in Deed or in Law for Caveat Emptor. . . .[3]

The doctrine has remained practically unchanged since Lord Coke's pronouncement,[4] despite criticism by such renowned legal scholars as Justice Cardozo.[5]

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1. *See* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

2. In civil law countries, a doctrine which is the antipode of caveat emptor exists. Under the civil law the seller is the one who must beware, since a sound price implies a sound commodity. *See* Comment, *Builder-Vendor's Implied Warranty of Good Workmanship and Habitability*, 1 TEXAS TECH. L. REV. 111 (1969).

3. COKE, FIRST INSTITUTE 102 (3rd ed. 1633).

4. *See* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

5. Justice Cardozo stated: "In one field or another of activity, practices in opposition to the sentiments and standards of the age may grow up and threaten to entrench themselves if not dislodged. Despite their temporary hold, they do not stand comparison with accepted norms of morals. Indolence or passivity has tolerated what the considerate judgment of the community condemns. In such cases, one of the highest functions of the judge is to establish the true relation between conduct and profession. There are even times, to speak somewhat paradoxically, when nothing less than a subjective measure will satisfy objective standards. Some

The American Courts were quick to adopt the doctrine of caveat emptor once independence was won.[6] As early as 1836 Justice Story said that in spite of all the arguments raised against the application of caveat emptor it "is now too firmly established to be open to legal controversy."[7] In *Barnard v. Kellogg*,[8] Justice Davis, speaking for the Supreme Court, declared that with a single exception,[9] "the courts of all the States in the Union where the common law prevails, . . . sanction it."[10] The doctrine is still the prevailing rule in American jurisdictions.[11]

A significant trend against the continued applicability of the doctrine of caveat emptor is developing in situations dealing with the sale[12] and leasing[13] of real property. The most effective attack upon caveat emptor is being waged by the application of an implied warranty theory. This warranty promises that the premises in question are habitable or fit for the purpose for which they were bought or leased. The purpose of this comment is to examine the case law supporting this attack on caveat emptor and the rationale behind it.

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relations in life impose a duty to act in accordance with the customary morality and nothing more. In those the customary morality must be the standard for the judge. Caveat emptor is a maxim that will often have to be followed then the morality which it expresses is not that of sensitive souls. . . . But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the year." CARDOZO, NATURE OF THE JUDICIAL PROCESS 108, 150 (1921).

6. *See* Wright v. Hart, 18 Wend. 449 (N.Y. 1837); Sweet v. Eilgage, 20 Johns. 190 (N.Y. 1822); Seixas and Seixas v. Woods, 2 Cai. R. 48 (N.Y. 1804).

7. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 221 (1st ed. 1836).

8. 77 U.S. 383 (1870).

9. The lone exception was South Carolina.

10. *Supra* note 8, at 388-89.

11. *See* Valen v. Jewell, 88 Conn. 151, 90 A. 36 (1914); Luedtke v. Phillips, 190 Va. 207, 56 S.E.2d 80 (1949); Stewart v. Raleigh County Bank, 121 W. Va. 181, 2 S.E.2d 274 (1939).

12. *See* Routh v. Quinn, 20 Cal. 2d 488, 127 P.2d 1 (1942); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963).

13. *See generally* Note, *The Extension of Warranty Protection to Lease Transactions*, 10 B.C. IND. & COM. L. REV. 127 (1968).

THE IMPLIED WARRANTY THEORY AS APPLIED TO THE SALE OF REAL PROPERTY

Legal scholars today are enthusiastically congraulating themselves on the enactment of statutes, such as the Uniform Commerical Code, which impose upon the seller of chattels a promise that his merchandise is reasonably fit for the purpose for which it is sold. In the midst of all this enthusiam they seem to have forgotten about the purchaser of real property who has no such protection.

A man can go into his corner drugstore and purchase a thirty-nine cent pen, take the pen home and discover that it is defective; subsequent to this discovery he can return to the store and have his money refunded.[14] The purchaser of the thirty-nine cent pen has the protection of the warranty of merchantable quality, which is implied in every sale by a merchant.[15]

That same man can withdraw his life savings from his bank and purchase a new home amid several hundred houses that a developer has built in a new subdivision. The purchase of the house entails a great deal of paperwork, since the purchase of the house, in most instances, includes the parcel of land upon which it is situated. Legally, the transaction is seen as the purchase and sale of the land upon which the house rests. Hence the transaction will culminate when the developer delivers the deed to the buyer. A year or so after the purchase, the roof caves in and the walls collapse. What remedy can the buyer rely on? If the doctrine of caveat emptor is strictly applied, none, for the buyer, according to the doctrine, deserves whatever he gets. After all, he had an opportunity to inspect the premises, and if his inspection was not thorough enough to discover some structural defect, why punish the seller! In any event, the argument runs, the purchaser could always have acquired an express warranty from the innocent seller.

What accounts for the difference in legal protection provided the purchaser of real property? A possible answer is that the doctrine of caveat emptor as applied to the sale of real property is an example of the continuing application of nineteenth-century law to a twentieth-century situation.

Caveat emptor did not have the same adverse effect on the nineteenth-century home buyer. The typical home buyer would purchase his own

14. Official Text with Comments, U.C.C. §§ 2-711, 714, 715.

15. Official Text with Comments, U.C.C. § 2-315, which states: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." For a discussion of the application of the U.C.C. to real property, *see* Kratovil, *The Uniform Commercial Code and the Real Property Lawyer*, 18 DEPAUL L. REV. 101 (1968).

plot of land and then would retain an architect to design his home. Once the plans were drawn the buyer would then hire an independent contractor who would build the home according to the architect's plans. A unique type of "quality control" was developed, for the contractor was not paid a lump sum, but was paid in installments. As the contractor completed each part of the house, to the satisfaction of the architect who drew the plans, he was paid for that portion.[16] Hence, if the roof did cave in or the walls collapsed, the typical nineteenth-century buyer was fortunate enough to have a choice of remedies. The buyer could bring an action against the architect for negligence if the plans were poorly drawn or he could bring an action against the contractor if the construction work was poorly done.

It is important to note that the protection given the nineteenth-century buyer was brought about because the buyer had had the home constructed on property which he had owned prior to the time of construction. If our nineteenth-century buyer had purchased a new home which was built upon the vendor's land the doctrine of caveat emptor would apply and he would not be protected.

At the end of World War II houses were in great demand, and due to the heavy machinery developed and the prefabricated houses being put up almost overnight, they were produced in astounding quantities.[17] The vast majority of these were erected by builder-vendors. The "quality controls" available to the nineteenth-century were not available to these buyers. Due to the ever rising demand for new homes, the hurried construction and skimping on materials, an ever-increasing number of instances of poor quality resulted. When these buyers turned to the courts for relief, they found recovery blocked by the ancient maxim of caveat emptor. The building boom has continued to the present and buyers, when attempting to recover for defects in their new homes, must be prepared to combat the doctrine of caveat emptor in order to be successful.

England, despite her tradition of strict adherence to *stare decisis*, provided the impetus toward a decline in the application of caveat emptor to the sale of real property. The initial assault on the doctrine of caveat emptor came in the relatively obscure case of *Duncan v. Blundell*.[18] Plaintiff

16. *See* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORN. L.Q. 835 (1967).

17. The value of annual new construction of private residential building increased from less than $2,000,000,000 annually in 1945 to about $15,000,000,000 annually by September 1959. At the same time, the number of one family nonfarm dwelling units began in each year increased from about 10,000 units began in 1945 to about 1,150,000 units began in 1950. *See* FEDERAL RESERVE SYSTEM, CHART BOOK ON FINANCIAL AND BUSINESS STATISTICS (Historical Supp. 1959).

18. 171 Eng. Rep. 749 (N.P. 1820); *see also* The Moorcock [1889] 14 P.D. 64.

brought an action to recover wages to which he alleged he was entitled for installing a stove in defendant's shop. In defense of this allegation it was asserted that plaintiff had failed to follow defendant's instructions as to the stove's construction. After hearing the evidence as presented Justice Bayley found that plaintiff did not in fact follow the defendant's instructions and hence plaintiff, in his opinion, was not entitled to recovery.[19] The effect of Justice Bayley's ruling was the establishment of an implied term in construction contracts that the job would be done in a workmanlike manner with proper materials. This case paved the way for the courts to establish exceptions to strict adherence to caveat emptor.

An early exception to the general rule of caveat emptor, as applied to the sale of real property, was formulated in the English case of *Miller v. Cannon Hill Estates Ltd.*[20] The plaintiff contracted to purchase from the defendant a house that was still under construction at the time of sale. Upon completion the plaintiff moved in, only to find out a short time later that he was compelled to vacate the house because dampness in the house had a detrimental effect on his health. Although the court found an express warranty under which it held the vendor liable, it went on to say, by way of dictum, that when an uncompleted house is purchased, an implied warranty exists that it prove to be habitable. The court reasoned that this warranty was necessary because the property was bought to be lived in and sufficient opportunity to properly inspect the structure had not been given to the purchaser.[21]

In *Perry v. Sharon Development Co.*[22] the court indicated an additional reason for rejecting caveat emptor with respect to the sale of an uncompleted house while continuing to apply caveat emptor to the sale of a completed house, the court stated:

> [F]rom the point of the view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and insofar as it is a contract to do building work, it is only natural and proper that . . . [the work] . . . should be done properly.[23]

Hence, the court draws a distinction between the house as an entity and the work put into constructing that house. The warranty does not guarantee a house free from defects, but rather warrants that the construction of the

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As to implied stipulations as to workmanship and materials in a building contract *see* 3 HALSBURY'S LAWS 435 para. 818 (3rd ed. 1935).

19. Duncan v. Bludell, *supra* note 18, at 749.
20. [1931] 1 All E.R. 93 (K.B.).
21. *Id.* at 96.
22. [1937] 4 All E.R. 390 (C.A.).
23. *Id.* at 396.

house be done in a workmanlike manner. If the vendee contracts for the construction of a house, and that construction is not done in a workmanlike manner, he may sue for breach of the warranty. This distinction allows the courts to refuse to apply the warranty in a situation where a completed house is purchased. The courts reason that since the house is completed at the time of purchase no warranty as to construction of the house can exist.

In *Jennings v. Tavener*,[24] the plaintiff agreed to buy a bungalow from the defendant, who was building it without assistance of an architect, but according to plans originally prepared by an architect. A short time after plaintiff occupied the premises cracks appeared in the walls. A determination was made that the cracks were caused by the withdrawal of moisture from the clay soil of the site by the roots of some poplar trees thirty to forty feet from the back of the bungalow. This type of desiccation by such roots was a well-recognized danger in the construction industry. The basis of plaintiff's cause of action sounded in breach of contract, in that he alleged that the bungalow was unfit for habitation.

The court, in finding for plaintiff, reasoned that in a contract for the sale of a house in the course of construction an implied warranty exists that the house when completed will be fit for human habitation.[25] The danger presented by the tree roots was well-known to those in the construction business. Hence, the vendor's failure to take it into consideration rendered his construction of the house of less than a workmanlike quality. Once the court was able to establish that the house was not constructed in a workmanlike manner, it was possible for the court to conclude that the house was not fit for human habitation. The defendant argued that even if the warranty existed it would not apply to those portions of the house below the ground. The court dismissed this argument stating that the fact that the damage was to the foundation of the house is of no significance, for the warranty applied to portions of the house below as well as above the ground.[26] Certainly a defective foundation would be as detrimental to habitation as would cracks in the walls; defendant's argument was tenuous to say the least.

The English exception to caveat emptor has won acceptance in a number of jurisdictions in the United States;[27] however, many jurisdictions main-

24. [1955] 2 All E.R. 769 (Q.B.); *see also* Thompson v. Cremin,, [1953] 2 All E.R. 1185; *Re* Puckett & Smith's Contract, [1902] 2 Ch. 258, 71 L.J. Ch. 666, 87 L.T.R. 189.

25. Jennings v. Tavener, *supra* note 24, at 774.

26. Jennings v. Tavener, *supra* note 24, at 774.

27. *See* Glisan v. Smolenske, *supra* note 12; Week v. A.M. Sunrise Const. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Vanderschrier v. Aaron, 103

tain their allegiance to the traditional view of the all-encompassing applicability of caveat emptor.[28] The exception's initial recognition in the United States came in the case of *Vanderschrier v. Aaron.*[29] A defective sewer line caused flooding in the cellar of plaintiff's house, which had been purchased prior to completion. The court, in awarding damages against the builder-vendor, admitted that "[i]n this country, we have found but few cases bearing upon the question . . . [and] have found none in this state directly touching it."[30] Judge Doyle, in fact, admitted that his decision was based on the English case of *Perry v. Sharon Development Co., Ltd.*[31] In support of his decision he stated:

> In the law of England, we find the rule to be that, upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner.[32]

Thus, not only was the English exception to caveat emptor adopted, but its adoption was based on English precedent.

One year later *Hoye v. Century Builders, Inc.*[33] was decided in Washington. The Supreme Court of Washington held that the plaintiff, who contracted to purchase a house which was constructed in accordance with plans prepared by the developer, was entitled to recover money damages on account of defective plumbing and the subsequent damages caused by the discharge of raw sewage on the premises. The court treated the building aspect of the transaction as a construction contract and found therein an implied warranty that the finished product would be fit for human habitation.[34] This court, as the court in *Vandershrier* relied on English precedent as the basis of its decision.[35]

Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958). For early American criticism of caveat emptor *see* Note, 18 MD. L. REV. 332 (1958) and Comment, 5 DEPAUL L. REV. 263 (1956).

28. *See* Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Allen v. Reichert, 73 Ariz. 91, 237 P.2d 818 (1951); Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963); Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), which distinguished Weck v. A. M. Sunrise Const. Co., *supra* note 27; Tudor v. Heugal, 132 Ind. App. 579, 178 N.E.2d 442 (1961); Berger v. Burkoff, 200 Md. 561, 92 A.2d 376 (1952); Kerr v. Parsons, 83 Ohio App. 204, 82 N.E.2d 303 (1948); Sticker v. Palumbo, 219 Ore. 479, 347 P.2d 778 (1959).

29. *Supra* note 27.

30. Vanderschrier v. Aaron, *supra* note 27, at 342, 140 N.E.2d at 821.

31. *Supra* note 22.

32. Vanderschrier v. Aaron, *supra* note 27, at 341-42, 140 N.E.2d at 821.

33. *Supra* note 27.

34. Hoye v. Century Builders, Inc., *supra* note 27, at 832, 329 P.2d at 477.

35. Hoye v. Century Builders, Inc., *supra* note 27, at 834, 329 P.2d at 477. In the Oklahoma case of Jones v. Gatewood, *supra* note 27, the purchaser had

A complicating factor present in the application of the implied warranty theory to the sale of real property is that of merger. The doctrine of merger, as applied to real property law, considers the deed as the critical point in a conveyance. Under the doctrine of merger the agreement for purchase of the home and the sale of land become merged into the deed, and hence the deed is held to contain all the rights of the parties.[36] Therefore, the execution and delivery of the deed eliminate elements not expressly mentioned in the deed, unless fraud or mistake can be proven or unless collateral matters are involved.[37] The deed is regarded as the final expression and depositary of the agreed terms.[38]

In *Weck v. A. M. Sunrise Construction Co.*,[39] the purchaser sued the builder-vendor to collect the cost both of correcting defects in the house and for the installation of a driveway. At the trial level the purchaser recovered, the decision being based on the finding that the house was incomplete at the time of purchase and hence the implied warranty of fitness applied. The appellate court sustained the lower court's application of the

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bought a house under construction and upon occupancy discovered that the house was not waterproof. In a concise opinion the court sustained the plaintiff's cause based on an implied warranty. The court relied on Vanderschrier, *supra* note 27, Hoye, *supra* note 27, and Miller, *supra* note 20, as precedent.

36. *See* United States v. Mojac Const. Corp., 190 F. Supp. 622 (E.D.N.Y. 1960); Christensen v. Slawter, 173 Cal. App. 2d 325, 343 P.2d 341 (1st Dist., Div. One, 1959); Carey v. Shellburne, Inc., 224 A.2d 400 (Del. 1966); Milu, Inc. v. Duke, 204 So. 2d 31 (Fla. 1967); Shetzen v. C.G. Aycock Realty Co., 93 Ga. App. 477, 92 S.E.2d 114 (1956); Jolley v. Idaho Securities Inc., 90 Idaho 373, 414 P.2d 879 (1966); Brownell v. Quinn, 47 Ill. App. 2d 206, 197 N.E.2d 721 (1964); Anderson v. King, 250 Iowa 208, 93 N.W.2d 762 (1958); Ballard v. Walsh, 353 Mass. 767, 233 N.E.2d 926 (1968); Bernard v. Schneider, 264 Minn. 104, 117 N.W.2d 755 (1962); Mississippi State Highway Comm. v. Cohn, 217 So. 2d 528 (Miss. 1969); Artman v. O'Brien App., 398 S.W.2d 24 (Mo. 1965); Schillinger v. Huber, 133 Mont. 80, 320 P.2d 346 (1958); Hoke v. Welsh, 162 Neb. 831, 77 N.W.2d 659 (1956); Kuzemchak v. Pitchford, 78 N.M. 378, 431 P.2d 756 (1967); Ferro v. Miller, 246 N.Y.S.2d 149, 41 Misc. 2d 331 (1963); Fuller v. Drenberg, 3 Ohio St. 2d 109, 209 N.E.2d 417 (1965); Watson v. Johnson, 411 P.2d 498 (Okla. 1966); Johnston v. Lindsay, 266 Ore. 243, 292 P.2d 495 (1956); Carsek Corp. v. Stephen Schiftes Inc., 431 Pa. 550, 246 A.2d 365 (1968); Commercial Bank, Unincorp. of Mason Tex. v. Satterwhite, 413 S.W.2d 905 (Tex. 1967); Kelsey v. Hansen, 18 Utah 2d 226, 419 P.2d 198 (1966); Jones v. National Bank of Commerce of Seattle, 66 Wash. 2d 314, 402 P.2d 673 (1965).

37. As to collateral agreements *see* Palos Verdes Corp. v. Housing Authority, 202 Cal. App. 2d 827, 21 Cal. Rptr. 225 (2nd Dist., Div. Four, 1962); Trapp v. Gordon, 366 Ill. 102, 7 N.E.2d 869 (1937); Stack v. Commercial Towel & Uniform Service, 120 Ind. App. 483, 91 N.E.2d 790 (1950); Dunseath v. Hallouer, 41 Wash. 2d 895, 253 P.2d 408 (1953). Where a deed is induced by false representations, the representations and the deed are distinct and the representations are not merged in the deed. Everett v. Gilliband, 47 N.M. 269, 141 P.2d 326 (1943).

38. *See* Union Producing Co. v. Sanborn, 194 F. Supp. 121 (E.D. Tex. 1961).

39. *Supra* note 27.

implied warranty. One of the defenses raised by the builder-vendor, as to the driveway, was that of merger. The court rejected this position reasoning that the doctrine of merger was not applicable where the collateral agreement was not inconsistent with the deed or where it appeared that the execution of the deed was only a partial execution of the contract.[40]

A significant blow to the defense of merger in implied warranty cases was struck in *Glisan v. Smolenske.*[41] As usual, the purchaser agreed to buy a house in the process of construction, and at the time title passed the house was incomplete. A short time after the plaintiff occupied the premises cracks began to appear in the walls. The cause of these cracks was found to be the builder's failure to remedy the unsatisfactory condition of the underlying soil. The court held that since the house was incomplete at the time title passed, an implied warranty of fitness for habitation protected the purchaser.[42]

The builder-vendor sought to avoid the application of the warranty by arguing that even if it did exist at some point in time, it had now been merged into the deed and therefore had been extinguished. The court labelled this argument as "an inversion of the primacy of instruments."[43] The court went on to reason that because the house was not complete at the time of closing, the deed was not the culmination of the sale, but was merely one step in the process of providing the purchaser with both possession and title of a finished house. The court concluded its opinion by

40. *Supra* note 27, at 396, 184 N.E.2d at 734; *see also* Laurel Realty Co. v. Himelfarb, 194 Md. 672, 72 A.2d 23 (1950); Edison Realty Co. v. Bauernschub, 191 Md. 451, 62 A.2d 354 (1948); City of Bend v. Title & Trust Co., 134 Ore. 119, 289 P. 1044 (1930). In 1963 the court in Courtakon v. Adams, *supra* note 28, refused to find an implied warranty where the house, as in Wecks, *supra* note 27, was complete when title passed. The court distinguished *Wecks* on the ground that it was a construction contract case.

41. *Supra* note 12, Price v. Woodward-Brown Realty Co., 190 N.Y.S. 561 (1st Dep't 1921), *aff'd mem.*, 201 App. Div. 837, 192 N.Y.S. 947 (1st Dep't 1922) seems to be the predecessor of the approach taken by the *Glisan* court. In that case a vendor argeed to convey a parcel of land to the purchaser and to erect on the land a house according to plans and specifications detailed in the sales contract. The purchaser accepted the deed before the house was completed. The court ruled that the purchaser could sue the builder-vendor for damages which resulted from the builder's failure to follow plans. The court reasoned that since the deed was accepted prior to completion of the house, it could hardly be the intent of the parties to regard the delivery of the deed as performance and therefore the doctrine of merger would not apply. *Cf.* Disbrow v. Harris, 122 N.Y. 362, 25 N.E. 356 (1890); *see* Comment, *Merger of Land Contract in Deed*, 25 ALBANY L. REV. 122 (1961). The role intent plays in the doctrine of merger is discussed in Terry v. Raif, 205 Misc. 1059, 130 N.Y.S.2d 159 (Broome County, County Ct. 1954).

42. Glisan v. Smolenske, *supra* note 12, at 280, 387 P.2d at 263.

43. Glisan v. Smolenske, *supra* note 12, at 280, 387 P.2d at 263.

stating: "If the terms of a sale and purchase agreement are fulfilled by the delivery of a deed, there is a merger. . . ."[44] However, it is questionable whether this case can be used as authority for that principle since the same court in a later case held the warranty applicable to a completed house.[45]

The cases which allowed recovery based on the implied warranty of fitness or habitability, prior to 1964, can be summarized as follows: (1) all the cases involved a purchaser who either contracted to buy a house not as yet completed or had purchased a lot and agreed to have a contractor build the house; (2) the defects were not discovered until the purchaser occupied the house; (3) the defects complained of rendered the house uninhabitable.

The very nature of the distinction between a finished and unfinished house, drawn by the courts in these cases, gives rise to problems. When, for example, is the house to be considered completed for the purpose of refusing to invoke the warranty? Nor does the distinction appear to have a logical basis. Does the purchaser of a completed home have a better opportunity to inspect the house? The courts themselves seemed so dissatisfied with this artificial distinction, that dissatisfaction soon ripened into action.

The Supreme Court of Colorado, in *Carpenter v. Donohoe*,[46] was the first to recognize the unsoundness of the distinction drawn between completed and uncompleted homes for purposes of applying an implied warranty of fitness or habitability. Carpenter, the defendant, had built, and was offering for sale, a completed house. The Donohoes purchased the house; within four months of the purchase, the walls began to crack. The condition became progressively worse and in time the habitation of the house became extremely hazardous. The trial court found that the house was constructed in violation of county code provisions.[47] The court also found that the code violations resulted in the damage to the house and that at the time of sale Carpenter knew of them and the Donohoes did not.[48] The court held Carpenter liable, basing its decision on fraud.[49]

The Donohoes also had included, in their original complaint, a count based on implied warranty.[50] The trial court required an election of reme-

44. Glisan v. Smolenske, *supra* note 12, at 280, 387 P.2d at 263.
45. Carpenter v. Donohoe, *supra* note 12.
46. *Supra* note 12.
47. Carpenter v. Donohoe, *supra* note 12, at 80, 388 P.2d at 400.
48. Carpenter v. Donohoe, *supra* note 12, at 80, 388 P.2d at 400.
49. Carpenter v. Donohoe, *supra* note 12, at 80, 388 P.2d at 400.
50. Carpenter v. Donohoe, *supra* note 12, at 82, 388 P.2d at 401.

dies to be made by the Donohoes, and they decided to proceed on the fraud count.[51] The Supreme Court found the imposed choice of remedies improper and held that the implied warranty count should have been considered.[52] The court felt this to be an opportune time to levy an attack on the distinction made in applying the warranty between completed and uncompleted houses. Justice Frantz, speaking for the court, stated:

> 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.[53]

Reasoning from this premise the court held:

> [T]hat 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 warranties that the home was built in workmanlike manner and is suitable for habitation.[54]

The Colorado court had thus taken the initial step in the extension of the implied warranty to the sale of a completed house. The decision must have shocked the builder-vendor's attorney because of the lack of precedent available to the Colorado court. The court merely cited the cases which applied the warranty theory to the sale of uncompleted houses and flatly stated that the warranty also existed when a completed house was purchased. It is important to note that in the factual situation before the court the violations of the housing code played an important role in the decision. Would the decision by the Colorado court to extend the warranty to completed houses have been different if the violations of the housing code were not present? At any rate it seems questionable that the Colorado case would become very viable precedent for future decisions because of its lack of logical reasoning; the decision seemed to be based on name-calling and little else. Would this decision open the door for other courts who desired to reach the same result, but did not wish to take the initiative?

The Supreme Court of New Jersey indicated its approval of the decision in *Carpenter* in *Schipper v. Levitt & Sons, Inc.*[55] In that case the de-

51. Carpenter v. Donohoe, *supra* note 12, at 82, 388 P.2d at 401.

52. Carpenter v. Donohoe, *supra* note 12, at 82, 388 P.2d at 401.

53. Carpenter v. Donohoe, *supra* note 12, at 83, 388 P.2d at 402.

54. Carpenter v. Donohoe, *supra* note 12, at 83-84, 388 P.2d at 402.

55. 44 N.J. 70, 207 A.2d 314 (1965). Much of the groundwork for this decision was layed in the strong dissent of Justice Waesche in Levy v. C. Young Const. Co., 46 N.J. Super. 293, 134 A.2d 717 (App. Div. 1957), *aff'd*, 26 N.J. 330, 139 A.2d 738 (1958). Justice Waesche stated: "Since the defendant was in the business of creating houses to sell, it represented that it possessed a reasonable

fendent builder-vendor contracted with the vendee prior to the completion of construction of the home. In 1958, the vendee moved into the house and lived there until the year 1960, at which time the vendee leased the house to one of the plaintiffs for a period of one year. Two days after the plaintiff-lessee moved in, his sixteen-month-old son was severely scalded by hot water from the bathroom faucet. The plaintiff alleged the cause of injury to have been the faulty design of the hot water system, and in particular the absence of a mixing valve. The absence of this valve, it was alleged, resulted in abnormally hot water suddenly flowing from the faucet without notice or warning. One of the counts of plaintiff's complaint sounded in implied warranty of habitability. The trial court dismissed the action at the close of plaintiff's case.[56]

The Supreme Court reversed.[57] Justice Jacobs, in rejecting defendant's defense of caveat emptor, stated:

> 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 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. . . .[58]

Justice Jacobs went on to say:

> 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 advisor 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.[59]

It was the opinion of Justice Jacobs that if injury arises from improper construction the public interest dictates that the cost of the injury be borne by the builder-vendor.[60] The decision can be said to rest on the "deep pocket"

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amount of skill necessary for erection of a house. This representation was impliedly made to whomever purchased from the defendant a house. . . . Such a representation is indispensable to effectuate the sale of a house erected by a developer for the purpose of selling. Otherwise, there would be no sales. A person in the business of building houses to sell is fully aware that a purchaser relies upon such an implied representation. Since the defendant impliedly represented that it possessed a reasonable amount of skill requisite for the erection of a house, it follows that it also impliedly represented that the house was erected in a proper and reasonably workmanlike manner." *Id.* at 298, 134 A.2d at 720.

56. Schipper v. Levitt & Sons Inc., *supra* note 55, at 80, 207 A.2d at 316.
57. Schipper v. Levitt & Sons Inc., *supra* note 55, at 80, 207 A.2d at 314.
58. Schipper v. Levitt & Sons Inc., *supra* note 55, at 90, 207 A.2d at 325.
59. Schipper v. Levitt & Sons Inc., *supra* note 55, at 91, 207 A.2d at 325-26.
60. Schipper v. Levitt & Sons Inc., *supra* note 55, at 91-92, 207 A.2d at 326.

of the builder; in other words, he is thought to be in a better position economically to shoulder the loss than the vendee.[61] This argument is not logically sound. Our system of redress for civil wrong is based on causation and fault; the fact that a builder has a "deep pocket" cannot logically be considered a basis for holding the builder liable for the plaintiff's injury. Justice Jacobs' argument as to the lack of opportunity for the vendee to inspect the premises is much stronger, for, as he indicates, the vendee does not possess the expertise needed to discover most defects until they manifest themselves by obvious damage. This decision is considered a landmark decision because it illustrates the changing attitude of the courts toward application of the doctrine of caveat emptor in the sale of completed structures.

The Supreme Court of Idaho was next to fall into line. In *Bethlahmy v. Bechtel*,[62] the plaintiff purchased a home from the builder through a realtor. A short time after occupation of the premises it was discovered that the basement was not waterproof and also that an unsealed irrigation ditch ran under the garage. The plaintiff sued, basing his action on breach of the implied warranty of habitability. The court, endorsing the position taken by Justice Jacobs in *Schipper*, stated:

> The old rule of caveat emptor does not satisfy the demands of justice in such cases. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime.[63]

The court in rejecting the vendor's argument of equality of bargaining position stated, "[t]o apply the rule of caveat emptor to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, . . . is manifestly a denial of justice."[64]

The builder-vendor also attempted to argue that the implied warranty would place an unreasonable burden upon him, that is, the obligation to deliver a perfect house. Obviously no house is built without defects; however, minor defects must be distinguished from those which render the house unfit for habitation. It is the later situation in which the warranty is applied. The interests of the builder-vendor are protected by the rule that places the burden on the purchaser to establish the facts which give rise to the implied warranty and its breach.

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61. In the words of Justice Jacobs: "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. Schipper v. Levitt & Sons Inc., *supra* note 55, at 91, 207 A.2d at 326.

62. 91 Idaho 55, 415 P.2d 698 (1966).

63. *Id.* at 67, 415 P.2d at 710.

64. *Id.* at 67, 415 P.2d at 710.

Waggoner v. Midwestern Development, Inc.,[65] also involved an action to recover damages from the builder-vendor which resulted from water seeping into the basement. The trial court dismissed the implied warranty count before taking any evidence.[66] The Supreme Court of South Dakota reversed the decision and cited *Schipper* to support its ruling.[67] After concluding that an implied warranty of reasonable workmanship and habitability, surviving the delivery of the deed, existed in a situation where the vendor of a new house is also the builder, the court went on to answer the builder-vendor's individual arguments. First, the builder-vendor maintained that it was impossible to construct a perfect house. The court answered by stating that perfection was not required; all that was required was that the house be reasonably free of defects.[68] Applying this test the vendee could not claim a breach of warranty for a relatively minor defect and hence the builder-vendor would be protected. *Waggoner* can be said to endorse the decision in *Bethlahmy* in this regard.

Judge Roberts placed a limitation on the duration of the builder-vendor's liability. He stated that the duration of liability should, as in the case of defects, be determined by the standard of reasonableness.[69] This was the first attempt by a court to set some sort of limitation on the duration of liability. However, it would probably be more beneficial to the administration of "justice" for some definite duration of liability to be established, *i.e.*, a statute of limitations. Granted that some builder-vendors will escape liability, but many defendants escape liability in personal injury cases because of the statute of limitations. And if injuries to the body can go unremedied for the sake of administrative purposes, certainly no objection can be raised to applying the same principle to defective property where the damages usually are purely monetary.

The Texas Supreme Court recognized the implied warranty theory as applied to the sale of new homes in *Humber v. Morton*.[70] Plaintiff purchased a new home from the builder-vendor; the first time she used the fireplace, the house caught fire and partially burned. The court based its decision on the reasoning employed in *Carpenter, Schipper* and *Waggoner*. In dispensing with the caveat emptor, Justice Norwell stated:

> The decisions and legal writings . . . referred to afford numerous examples and situations illustrating the harshness and injustice of the rule when applied to the

65. 83 S. Dak. 57, 154 N.W.2d 803 (1967).
66. *Id.* at 59, 154 N.W.2d at 804.
67. *Id.* at 68, 154 N.W.2d at 808.
68. *Id.* at 68, 154 N.W.2d at 808.
69. *Id.* at 68, 154 N.W.2d at 808.
70. 426 S.W.2d 554 (Tex. 1968).

sale of new houses by a builder vendor, ... The common law is not afflicted with the rigidity of the law of the Medes and Persians. . . .[71]

Therefore, the Texas court, after running through precedent, as did the other courts applying the implied warranty, seems to base its decision on the "justice" of applying the warranty. "Justice" and little else is what the court in *Carpenter* based its decision on, and it seems little has changed since 1964. Justice Norwell had strong feelings about applying caveat emptor to the sale of real property as evidenced by his words:

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.[72]

Obviously the builder-vendor did not feel that Justice Norwell had his best interests at heart in holding the way he did!

In *Crawley v. Terhune*,[73] the most recent "soggy-basement" decision, the court did not even bother going through the ritual of reciting precedent, but simply stated "the caveat emptor rule [as to the sale of a completed house] is completely unrealistic and inequitable,"[74] and decided for the vendee.

The Supreme Court of Washington in *House v. Thornton*,[75] held the implied warranty of habitability applicable to the sale of new homes. A short time after plaintiff-vendee purchased the house from defendant-vendor, the foundation slipped and caused cracks to occur throughout the house.[76] The plaintiff based his original claim on fraud and the trial court returned a verdict in his favor.[77] The Supreme Court found an absence of fraud, but sustained the trial court, basing its decision on the implied war-

71. *Id.* at 561.

72. *Id.* at 562. Professor Jaeger takes a similar position in 7 WILLISTON, CONTRACTS §§ 926m, 926 A (3rd ed. 1963). Professor Jaeger points 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 a situation the purchaser relies on the implied representation that the contractor does possess a reasonable amount of skill necessary for the erection of a house, and that the house will be fit for human dwelling. In concluding his discussion of the subject, Professor Jaeger stated that he felt 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 that has become apparent over the years.

73. 437 S.W.2d 743 (Ky. 1969).

74. *Supra* note 73, at 745.

75. 76 Wash. 2d 428, 457 P.2d 199 (1970).

76. *Id.* at 430, 457 P.2d at 200.

77. *Id.* at 431, 457 P.2d at 201.

ranty of habitability.[78] The court found that the warranty was breached despite the fact that:

> [T]here was no proof that the defendants failed to properly design and erect the building, or that they used defective materials or in any respect did an unworkmanlike job, and that they were innocent of any intentional wrong, the fact remains that they sold and turned over to plaintiffs a brand-new $32,000 residence which turned out to be unfit for occupancy.[79]

The court reasoned the vendor to be liable because he made the harm possible. The decision was reached by applying a comparative innocence standard; in the court's words, "the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer."[80] The decision in *House* goes further than any other decision in establishing a stringent standard of conduct for measuring the vendor's performance, a standard of strict liability. The vendor-builder, under the decision in *House*, is unable to assert the defense that his construction was workmanlike or that the materials he used were not defective; if the house is uninhabitable he is liable for breach of the implied warranty.

The Washington Supreme Court did, however, place one important limitation on the application of the implied warranty. As you will recall, the New Jersey Supreme Court in *Schipper* allowed a lessee of the vendee to maintain an action for breach of the implied warranty against the vendor, despite the absence of privity. The Washington Supreme Court stated in *House* that an action for breach of the implied warranty can only be maintained by the initial vendee.[81] Hence, the court adheres to the requirement of privity. The requirement can be justified by the fact that the builder-vendor has no control over future sales by the initial or future vendees. However, considering the abandonment of privity in the products liability field, one wonders how long this limitation will stand.

The cases which allowed the implied warranty of fitness and habitability to be applied to the sale of real property can be summarized as follows: (1) The decisions all emphasize the "injustice" of applying caveat emptor and the inequality of bargaining position between the builder-vendor and the vendee; (2) the warranty applies to substantial defects, those which render the property uninhabitable, and will not be applied to remedy minor defects—the test is one of reasonableness; (3) a determination as to the duration of the liability the builder-vendor has not been

78. *Id.* at 435-36, 457 P.2d at 203.

79. *Id.* at 435, 457 P.2d at 203-04.

80. *Id.* at 436, 457 P.2d at 204.

81. *Id.* at 436, 457 P.2d at 204. *See* Wamak v. Stewart, — Ark. —, 449 S.W.2d 922 (1970), were the court also limited the application of the warranty to the initial purchaser.

established, although one court proposes that a standard of reasonableness be imposed; (4) a split has developed as to whether the warranty extends to subsequent occupants beyond the original vendee; (5) at least one court holds the vendee to a strict liability standard of conduct.

The trend today is clearly towards placing limitations on the application of caveat emptor to the sale of real property.[82] As courts are faced with situations in which they feel that "justice" requires them to refuse to allow the defense of caveat emptor to be asserted, they can rely on an ever-expanding line of precedent to support their decision. This undoubtedly will make it easier for them to reach the "desired" results. Indications are that it is merely a matter of time before the exceptions to caveat emptor, as applied to sale of real property, swallow the rule.

THE IMPLIED WARRANTY THEORY AS APPLIED TO THE LEASING OF REAL PROPERTY

Caveat emptor is a favorite defense of the lessor when sued for rescission or cancellation of a lease on the basis that the premises are uninhabitable. The majority of American jurisdictions hold that there is no implied warranty that the premises, at the time the term commences, are in a tenantable condition or that they are adapted to the purpose for which they are leased.[83] The rationale behind this position is that the prospective tenant may inspect the premises and determine for himself their suitability, or he may secure an express warranty.

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82. *See* Rothberg v. Olinik, — Vt. —, 262 A.2d 461 (1970), as an indication of how anxious courts are to extend the warranty. The case before the court dealt with the sale of a uncompleted house, the court stated, "[a]lthough the contract of sale in this case was entered into before completion of the house, we find no rational doctrinal basis for differentiating between a sale of a newly constructed house by the builder-vendor . . . ." *Id.* at —, 262 A.2d at 467. *See generally* Hadkell, *The Case for an Implied Warranty of Quality in Sales of Real Property,* 53 GEO. L.J. 633 (1965); Note, *The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform,* 2 RUTGERS-CAMDEN L.J. 120 (1970).

83. *See* Parris v. Sinclair Refining Co., 359 F.2d 612 (6th Cir. 1966); Oliver v. Hartzell, 170 Ark. 512, 280 S.W. 979 (1926); Martin v. Grant, 90 Colo. 300, 8 P.2d 764 (1932); Cox v. Walter M. Lowney Co. of Ga., 35 Ga. App. 51, 132 S.E. 257 (1926); Hendricks v. Socony Mobil Oil Co., 45 Ill. App. 2d 44, 195 N.E.2d 1 (1963); Anderson Drive-In Theatre, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953); Carney v. Bereault, 348 Mass. 502, 204 N.E.2d 448 (1965); Causey v. Norwood, 170 Miss. 874, 156 So. 592 (1934); Shaw v. Butterworth, 327 Mo. 622, 38 S.W.2d 57 (1931); Gellis v. Claremount Masonic Ass'n., 85 N.H. 416, 159 A. 295 (1932); Widmar v. Healey, 247 N.Y. 94, 159 N.E. 874 (1928); Branham v. Fordyce, 103 Ohio App. 379, 145 N.E.2d 471 (1957); Stein v. Bell Telephone Co. of Pa., 301 Pa. 107, 151 A. 690 (1930); Corcione v. Riggier, 87 R.I. 182, 139 A.2d 388 (1958); Mallard v. Duke, 131 S.C. 175, 126 S.E. 525 (1925); Teglo v. Porter, 65 Wash. 2d 772, 399 P.2d 519 (1965).

As in the sale of real property, exceptions to the application of caveat emptor developed in leasing situations. The initial exceptions to the application of caveat emptor was enunciated in the English case of *Smith v. Marrable*.[84] Smith agreed to lease a furnished house to Marrable for a five week period. Marrable soon discovered the house to be infested with bugs. Marrable registered a complaint with Smith, who dispatched an exterminator to remedy the situation, but the exterminator's efforts proved unsuccessful.[85] Marrable abandoned the premises and Smith sued for the rent he maintained was due. The court held that where the lessor rents a furnished house, he impliedly warrants that the house is in a fit state to be inhabited.[86] It is important to note that the court in *Smith* did not place any limitation on its holding as to the length of the lease; the *Smith* court apparently would find the implied warranty to exist no matter how long the lease ran.

The position taken by the court in *Smith v. Marrable* came under immediate attack from two cases decided in the same year: *Sutton v. Temple*[87] and *Hart v. Windsor*.[88] In *Sutton* an estate of grazing land was leased for a period of seven months. A number of cattle grazing on the land were poisoned by a paint which had accidentally been spread over the field without the lessor's knowledge.[89] The lessee refused to pay the rent and the lessor sued. In rejecting the lessee's defense of an implied warranty of fitness for the purpose for which it was leased, the court stated:

> [T]here is no implied warranty, on a demise of land, that it shall be fit for the particular purpose for which it is hired. No authority is to be found for such a proposition and it cannot be supported on principle. A contract for the demise of land, or of the vesture of land carries with it no further engagement on the part of the lessor, than that the lessee shall have quiet possession of the estate granted during the term: there is no undertaking that the land is of any particular quality or value, or fit for any particular purpose. The whole amount of the covenant or agreement is, that the lessee shall enjoy the estate, whatever be, during the term.[90]

The court went on to distinguish *Smith v. Marrable* by saying that there the lease contemplated a use by Marrable not only of the realty, but also of the personalty, that is, the furniture.[91] Therefore, reasoned the court,

84. 152 Eng. Rep. 693 (Ex. 1843).
85. *Id.* at 693.
86. *Id.* at 694.
87. 152 Eng. Rep. 1108 (Ex. 1843).
88. 152 Eng. Rep. 1114 (Ex. 1843).
89. *Supra* note 87, at 1109.
90. *Supra* note 87, at 1109.
91. *Supra* note 87, at 1112.

since this case dealt with land and involved no personalty, the exception formulated in *Smith v. Marrable* did not apply.

In *Hart v. Windsor*,[92] the court was presented with a factual situation quite similar to that in *Smith*. Plaintiff leased a furnished house with an adjoining garden to defendant. Just as in *Smith* the defendant was forced to leave the house because it was infested with bugs. The lone distinguishing fact was that the lease in *Hart* was for a three year period. The court reasoned to the conclusion that the exception to the application of caveat emptor enunciated in *Smith* was limited to a situation where a dwelling is rented for a short and definite time period.[93] Since the period of the lease was three years in *Hart*, the exception did not apply. In fact, the court in *Hart* favored doing away with the implied warranty theory rather than merely limiting its application. In the court's words:

> It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning.[94]

Hence, consistent with the rationale behind the application of the doctrine of caveat emptor the court deemed the parties to be in an equal bargaining position, and, therefore, if the defendant wanted a warranty he should have demanded one!

Despite the attack levelled on the exception by *Sutton* and *Hart*, it is now accepted in England as law. As stated in *Collins v. Hopkins*:[95]

> Not only is the implied warranty on the letting of a furnished house one which . . . springs by just and necessary implication from the contract, but is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted.[96]

The English exception has won acceptance in a number of American jurisdictions.[97]

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92. *Supra* note 88.

93. *Supra* note 88, at 1122.

94. *Supra* note 88, at 1122.

95. [1923] 2 K.B. 617,34 A.L.R. 703.

96. *Id.* at 705.

97. This exception is narrowly construed in the United States. Legere v. Asselta, 342 Mass. 178, 172 N.E.2d 685 (1961). The court in Legere states: "The implied condition is based upon the inference that the lessee intends immediately to occupy the premises as they stand. Moreover, the condition is implied only with regard to the state of the premises at the beginning of the tenancy and does not cover defects which arise later. . . . The house was fit for habitation when the [lessee] took possession. That is the extent of warranty." *Id.* at 179, 172 N.E.2d at 686. *See also* Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947); Hopkins v. Murphy, 233 Mass. 476, 124 N.E. 252 (1919); Ingalls v. Hobbs, 56 Mass. 348, 31 N.E. 286 (1892). *But see* Bowles v. Mahoney, 202 F.2d 320 (D.C.

A second exception to the general rule arises when the agreement to lease is made before the construction of the premises is completed. The court, in *J. D. Young Corporation v. Mc Clintic*,[98] found that it was impliedly warranted that a building would be suitable for the purposes for which it had been leased if progress in its construction had not reached the point at which inspection was possible at the time of the signing of the rental agreement.[99] This exception has won approval as the majority rule.[100] The underlying rationale behind this exception is the same as that underlying the distinction made between a completed and uncompleted home when applying the implied warranty of habitability in the sale of real property. The courts are of the opinion that where the lease is entered into prior to completion of construction the lessee has little or no opportunity to inspect the premises. *Quare,* whether the lessee has any greater opportunity to inspect the property after construction is completed? Can the lessee determine whether the basement is waterproof or whether the roof leaks unless he happens to inspect on a rainy day? Does the lessee have the expertise to detect rotten timber or a poor foundation? The lessee's presumed ability to inspect is a "legal fiction" in the true sense of the phrase.

The Wisconsin Supreme Court in *Pines v. Perssion*,[101] was not satisfied with the then existing exceptions and decided that the time was proper for further limitations to be placed on the application of caveat emptor. The plaintiffs leased a furnished house from defendant. Prior to leasing the house, plaintiffs inspected it and found it to be in a filthy condition. At the trial the plaintiffs testified that the defendant stated he would clean and fix the house prior to the time plaintiffs were to take possession. However, this was not to be done until after defendant received a signed lease and deposit. When the plaintiffs did take possession the same conditions existed that were present at the time of the inspection. The plaintiffs attempted to repair and clean the house themselves, but the task proved insurmountable. It was also discovered that the house contained numerous

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Cir. 1952), were Mr. Justice Bazelon in his dissent had the following to say about limiting liability to defects at the commencement of the term: "I think that rule is an anachronism which has lived on through stare decisis alone rather than through pragmatic adjustment to the 'felt necessities of [our] time.' I would therefore discard it and cast the presumptive burden of liability on the landlord. This, I think, is the command of the realities and mores of our day." *Id.* at 325.

98. 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd on other grounds,* 66 S.W.2d 676 (Tex. Com. App. 1933).

99. *Id.* at 461.

100. *See* Hyland v. Parkside Ins. Co., 7 N.J. Misc. 1123, 162 A. 521 (1932).

101. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

building code violations. Plaintiffs abandoned the premises under what they alleged was a statutory right in this type of situation.[102]

The Chief Justice rejected the argument that there was a statutory right to surrender,[103] but found the defendant in breach of the implied warranty of habitability in the lease. In dismissing defendant's defense of caveat emptor the Chief Justice stated:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché caveat emptor.[104]

Hence, in Wisconsin at least, caveat emptor is no more than an "obnoxious legal cliché." *Pines v. Perrsion* has therefore added the argument of social policy to the arsenal of the lessee's weapons to be used in combating the defense of caveat emptor. The court reasoned that if it were to allow the defense of caveat emptor to prevail in this situation, it would allow landlords to rent tumble-down houses, which, in the court's words, is a "contributing cause of such problems as urban blight [whatever that may be], juvenile delinquency and high property taxes for conscientious landowners."[105] The court, however, applies a non-sequential reasoning process. It is one thing to maintain that the legislature, through the enactment of building codes and health regulations, has requested landlords to fulfill certain duties in order to protect the health and safety of the lessees, and quite something else to jump from that to the conclusion that these duties necessarily create others—implied warranties in leasing transactions. *Pines* did indeed leave some logical gaps to be filled in by subsequent decisions.

In *Reste Realty Corporation v. Cooper*,[106] the lease involved commercial office space. The leased premises had an undesirable propensity to flood when it rained. The plaintiff registered a complaint with the landlord, but to no avail. At trial the landlord asserted that "obnoxious legal cliché," caveat emptor, as his defense. The court found the defects to be latent, and

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102. The plaintiffs relied on WIS. STAT. ANN., tit. 20, § 234.17 (1957), which provides: "Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied, and he is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender."

103. *Supra* note 101, at 594, 111 N.W.2d at 412.

104. *Supra* note 101, at 596, 111 N.W.2d at 412-3.

105. *Supra* note 101, at 596, 111 N.W.2d at 413.

106. 53 N.J. 444, 251 A.2d 268 (1969).

that these defects were unknown to the lessee when the agreement to rent was consummated. The landlord, according to script, vigoriously contested the existence of any implied warranty of fitness.[107]

Justice Francis, writing for the court, conceded that historically no implied warranty had been imposed on the lessor, and that in the absence of an express warranty the lessee takes the property as he finds it.[108] It was his contention that the lessor is in a better position than the lessee to judge the condition of the premises, and any latent defects therein. In support of this contention he cited the fact that the penalties for violations of modern building code requirements are directed at the landlord and not the lessee. It only stands to reason that the prospective lessee of commercial property cannot be expected to know whether the building meets code requirements, nor should the lessee be required to hire experts to advise him of any defects in the building not readily detectable to the intelligent layman.[109]

In the court's opinion the lessor, who is more informed about the building's characteristics, should bear the risk that it might not turn out to be suitable for the purpose for which it was rented. The lessor knows the premises and the use to which they are to be put. Therefore, the risk of eventual unsuitability should be borne by him. Likewise, when the premises are leased for habitation and they prove to be uninhabitable the lessor should bear the risk.

The decision in *Reste* is on firmer grounds than the social policy arguments advanced in *Pines*—the grounds being the lessor's knowledge of the building he proposes to lease. The lessor, knowing more about the risks involved, is the party to assume the burden of liability if these risks turn out to be actual rather than potential. The immediate result of the application of this theory is the protection of the lessee from added financial burdens. This argument supports the court's conclusion that "present day demands of fair treatment for tenants with respect to latent defects remediable by the landlord . . . require imposition on him of an implied warranty against such defects. . . ."[110] The holding in *Reste* specifically overruled prior New Jersey decisions,[111] and extended the implied warranty theory to commercial leases.

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107. *Id.* at 451, 251 A.2d at 271.

108. *Id.* at 451, 251 A.2d at 272.

109. *Id.* at 451-52, 251 A.2d at 272.

110. *Id.* at 454, 251 A.2d at 273.

111. *See* Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 234 A.2d 415 (App. Div. 1967), *cert. denied*, 51 N.J. 276, 239 A.2d 664 (1968), in which the court declared that isolated lease or sales transactions should continue to be gov-

In *Marini v. Ireland*,[112] the New Jersey court extended the application of the implied warranty theory to residential leases. The lessee, after taking possession, discovered that the toilet was cracked and water was leaking onto the bathroom floor. After repeated complaints the lessee engaged a plumber to remedy the situation. The lessee presented the bill for repair to the lessor, who promptly refused to reimburse the lessee. The lessee then proceeded to deduct the cost of the repairs from his rent payments.

The court, after extensively quoting from *Pines* and *Reste*, stated that the lease expressly described the premises as "4 rooms and bath, apartment" and restricted the use thereof for one purpose—"dwelling."[113] The court held that the effect of this description was an agreement that the premises were habitable and fit for living.[114] The court went on to reason that since the very purpose of the rental was to furnish the defendant with quarters suitable for living purposes, "[i]t 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."[115] Ancillary to such a warranty, the court went on to hold, the landlord agrees to repair damage to vital facilities caused by ordinary wear and tear during the term.[116] The court held that the nature of vital facilities and the extent and type of maintenance and repair required is limited and governed by the amount of rent reserved.[117] Hence, *Marini* not only extended the implied warranty to residential leases in New Jersey, but also implied an agreement that the landlord was to repair defects to vital facilities [*i.e.*, a toilet] which arose after the execution of the lease; this is contrary to the majority of decisions which have held that the implied warranty would only extend to defects in existence at the execution of the lease.[118]

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erned by the traditional rule that there is no implied warranty that the premises are fit for the purposes specified. *See also* La Freda v. Woodward, 125 N.J. 489, 15 A.2d 798 (1940), which held that the doctrine of covenants implied in leasing property has been strictly construed in New Jersey and that caveat emptor generally applied.

112. 56 N.J. 130, 265 A.2d 526 (1970). *See generally* Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L. REV. 387, 394 (1966); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953).

113. Marini v. Ireland, *supra* note 112, at 144, 265 A.2d at 533.

114. Marini v. Ireland, *supra* note 112, at 144, 265 A.2d at 533.

115. Marini v. Ireland, *supra* note 112, at 144, 265 A.2d at 534.

116. Marini v. Ireland, *supra* note 112, at 144, 265 A.2d at 534.

117. Marini v. Ireland, *supra* note 112, at 144, 265 A.2d at 534.

118. *Supra* note 97, where this limitation is discussed in connection with one of the early exceptions to caveat emptor.

The Supreme Court of Hawaii recognized the implied warranty theory in *Lemle v. Breeden.*[119] The lessee leased a waterfront house from the lessor. Prior to the execution of the lease the lessee found no evidence of rodent infestation during a one-half hour inspection.[120] The lessee based its cause of action on an alleged breach of the implied warranty of habitability and fitness by the lessor.[121] In sustaining the lessee's action the court stated:

> From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication. It is a doctrine which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities. Legal fictions and artifical exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for use intended.[122]

The court in *Lemle*, as did its predecessors, justified the application of the implied warranty theory on the assumption that present day realities of leasing transactions require some protection for the lessee.

The majority of the decisions applying the implied warranty of habitability have dealt with the leasing of a house. However, *Javers v. First National Realty Corporation*[123] involved the leasing of an apartment. Through separate written leases each of the lessees rented an apartment in a three-building complex in Washington, D.C. The lessees withheld their rent payments because of the existence of an alleged 1500 housing violations. The lessees contended that the landlord was under a contractual duty to maintain the premises in compliance with the housing regulations.[124] The lower courts rejected this argument.[125] Circuit Judge Shelly prefaced his decision by stating:

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119. 51 H 426, 462 P.2d 470 (1969). *See* Note, *Landlord and Tenant—Implied Warranty of Habitability—How "Constructive" is "Eviction"?*, 19 DE PAUL L. REV. 619 (1970).

120. Lemle v. Breeden, *supra* note 119, at 427, 462 P.2d at 471.

121. Support in California was indicated in Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (App. Dep't., Super. Ct., Los Angeles County 1967), where the court held that the landlord had an obligation to keep the premises free from vermin. The landlord was held liable under the implied warranty theory, the court finding that the application of caveat emptor would be inconsistent with the legislative policy behind housing standards.

122. Lemle v. Breeden, *supra* note 119, at 433, 462 P.2d at 474.

123. 428 F.2d 1071 (D.C. Cir. 1970). For cases where the courts denied the application of the warranty to apartments, *see* Kearse v. Spaulding, 406 Pa. 140, 176 A.2d 450 (1962); Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S. 2d 321 (Civ. Ct., City of N.Y., Trial Term, New York County 1964).

124. Javins v. First National Realty Corp., *supra* note 123, at 1073.

125. Sauders v. First National Realty Corp., 245 A.2d 836 (D.C. 1968).

Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed.[126]

Reasoning from the premise that leases should be treated as contracts, the court went on to examine applicable property law and reappraise the application of caveat emptor to leasing situations.

The court took into consideration the seller's liability in the sale of chattels, where without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which they are used, and that they are at least of reasonably average quality. The court saw no reason why the same theory should not apply to the leasing of apartments, and hence found for the lessees.[127]

An interesting approach to the problem is taken by the Model Residential Landlord-Tenant Code.[128] The adoption of this code would place duties on the landlord which, taken as a whole, would require him to keep the premises in an habitable condition.[129] Failure of the landlord to remedy a defective condition, including defects caused by the lessee or his family or guests, within seven days after written notification from the lessee, gives the lessee the immediate right to terminate the lease.[130] The practical effect of this code would be the elimination of caveat emptor as far as leases are concerned.

The cases which have allowed the implied warranty to be asserted in leasing situations, involving real property, can be summarized as follows: (1) The decisions all express the opinion that the application of caveat emptor would be inconsistent with public policy as expressed in modern housing codes; (2) the courts emphasize the stronger bargaining position of the lessor due to the present housing shortage; (3) the courts also feel the lessor to be in a superior bargaining position because of his knowledge of the characteristics of the property; (4) one court has extended the warranty to cover defective vital facilities, including defects which arise after

126. Javins v. First National Realty Corp., *supra* note 124, at 1074. *See* Spencer v. General Hospital of the District of Columbia, 425 F.2d 479 (D.C. Cir. 1969); Schipper v. Levitt & Sons Inc., *supra* note 55; Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960).

127. *Supra* note 15.

128. TENTATIVE DRAFT (1969); *see* Comment, *Proposed Alterations of the Landlord-Tenant Relationship for the State of Illinois,* 19 DE PAUL L. REV. 752 (1970).

129. *See* MODEL RESIDENTIAL LANDLORD-TENANT CODE, TENTATIVE DRAFT § 2.1 (1969).

130. *See* MODEL RESIDENTIAL LANDLORD-TENANT CODE, TENTATIVE DRAFT § 2.3 (1969).

the execution of the lease; (5) the warranty applies to apartments as well as houses.

Regardless of the approach taken, whether it be through court decisions or statutory enactment, the trend today is away from the application of caveat emptor in the leasing of real property.

CONCLUSION

The arguments advanced by the proponents and opponents of caveat emptor in both the sale and leasing situations are basically the same. The most frequent argument put forth for the continued application of caveat emptor is that if the doctrine were abandoned an element of uncertainty would pervade the entire real estate field. The proponents of the doctrine argue that real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. The vendors could never be certain as to the limits or termination of their liability.[131]

It can be conceded that some confusion will initially result from the abandonment of caveat emptor and the application of the implied warranty. However, the confusion that will arise because of the application of the implied warranty will not be of such magnitude as to justify the continued exemption of the vendor from liability for defective construction work. As to chaos resulting from the abandonment of caveat emptor, one need only look to the fields of personal property sales and leasing to reach the conclusion that the abandonment of caveat emptor does not necessarily result in chaotic conditions. As stated by the court in *Schipper*,[132] in answering the defendant's "chaos argument," "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."[133]

Another frequent argument advanced in support of the continued application of caveat emptor is that since the parties are dealing at arm's length, the lessee or vendee has sufficient opportunity to inspect the property to discover any defects. This reasoning is invalid for two reasons. First, the implied warranty is applied in order to protect the vendee or lessee from latent defects, defects which are not discoverable by ordinary inspection. Therefore, caveat emptor would continue to govern situations involving patent defects.

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131. Levy v. C. Young Const. Co., *supra* note 55, provides an example of the type of case where the argument met with success.

132. *Supra* note 55.

133. Schipper v. Levitt & Sons Inc., *supra* note 55, at 91, 207 A.2d at 326.

Secondly, this line of reasoning brings into focus the strongest argument in favor of application of the implied warranty, that of reliance. The vast majority of vendees or lessees do not have the expertise necessary to inspect the property in question. They are in effect given no choice but to rely heavily on the greater skill and knowledge of the vendor or lessor. No matter how diligently a prudent layman may attempt to discover possible latent defects, his efforts will rarely meet with success, for by definition, these defects are not readily discoverable. In order to meet with any type of success the vendee or lessee would have to seek and pay for expert advice. Few people, considering the cost of purchasing or renting today, could afford these additional expenses. It appears far less unreasonable to attribute knowledge of the defects to the owner of the property, for it is he who stands to profit and not the prospective vendee or lessee.

The argument that the transaction is at arm's length is also used to support the contention of the vendor or lessor that if the vendee or lessee had wanted protection against latent or other defects he could have obtained an express warranty. Even conceding the fact that when the doctrine of caveat emptor developed the parties were in an equal bargaining position and could readily be expected to protect themselves in the deed or lease with an express warranty, that situation does not exist today. Despite the vast amount of building that has taken place in this country since World War II, supply has not been able to keep up with demand. Vendees or lessees are no more able to protect themselves in the deed or lease than the purchaser of an automobile is through a bill of sale. One need only examine the dilemma of the low income urban dweller to realize that the situation created by the present levels of supply and demand strongly favor the party seeking to sell or lease over the party seeking to buy or rent.

Caveat emptor, argues the vendor or lessor, is justified because the individuals who buy or lease the property do not know how to properly care for it. Moreover, real estate is constantly exposed to the elements of nature and hence it should be treated differently from other property for liability purposes. It is not contested that defects may be brought about by the vendee's or lessee's improper care of the property, or by the elements; however, the implied warranty would not be applicable to these situations. The protection afforded by the implied warranty extends only to defects caused by improper construction by the vendor and improper maintenance by the lessor; hence, this argument is tenuous at best.

The proponents of caveat emptor further contend that an implied warranty is unnecessary because, in their opinion, vendors and lessors motivated by personal pride and the need to preserve their good reputation will themselves repair defects in the property. One need only look at the num-

ber of law suits filed in this area to reach the conclusion that the preservation of pride and good reputation are poor substitutes for legal sanctions.

Vendors and lessors also raise the argument that the imposition of a warranty would make them virtual insurers of all who thereafter come upon the premises. This argument is faulty, for the plaintiff would still have the burden of showing the existence of the defect and would have to prove causation as to any damages alleged.

The proponents of caveat emptor next contend that if an implied warranty be imposed in real property dealings, it would be necessary for the vendor or lessor to have adequate insurance coverage. The cost of this insurance, it is contended, would be very high, since the insured might be held liable for repairing buildings over which he no longer has any control. Undoubtedly, the cost of this insurance would be passed on to the buyer or lessee and the cost of housing would rise commensurately. This is one of the strongest arguments in favor of the continued application of caveat emptor. However, in the long run, the cost of insurance may force the vendor or lessor to be more "workmanlike." As a result of being more "workmanlike," houses will contain fewer defects and the reduction of defects will result in fewer claims, which in turn will result in lower insurance premiums. Even if the insurance costs remain high it seems to be a more "just" solution than that of having the entire burden placed on the vendee or lessee.

The proponents of caveat emptor predict that if an implied warranty were recognized a rash of litigation would follow. This argument must be rejected even if it be true, for if "just" claims cannot be remedied in a court of law, where can they be remedied? The satisfaction of "just" claims must take precedence over the desire to have uncrowded court dockets.

A builder of a house can be compared to a manufacturer of a product. The builder-vendor puts together the house from various components, as does the manufacturer of a product. Since the construction process is similiar in both instances, it only seems logical that the warranty protection offered in both instances should be the same. Likewise, the lessor holds out the premises which he intends to lease as being fit for the purposes for which the lessee intends to use them. The manufacturer of a product holds out his product as being fit for the purpose the purchaser intends to use it. The warranty protection should be equal in both instances. When the real property is sold or leased a warranty of fitness for a particular purpose should attach, provided the vendee or lessee makes the intended use known and relies on the vendor's or lessor's skill and knowledge concerning the property.

The building boom which followed World War II resulted in radical changes in the American building industry. The builder who emerged from this boom was no longer the craftsman who predominated when the doctrine of caveat emptor was formulated. The American builder has become a mass producer. The mass production techniques which have been utilized have resulted in shoddy construction, due to haste and skimping on materials. This situation has not only had a bad effect on the vendee of real property, but also on the lessee of the property constructed in such a manner. Whereas caveat emptor at one time may have worked fairly well in an era when housing was built with care, it has now been rendered obsolete due to shoddy construction and the housing shortage. Stated simply, "[t]he morals of the market place . . . are now opposed to a caveat emptor philosophy."[134]

Chet Maciorowski

134. Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541, 574 (1961).