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The Case of the Unwary Home Buyer: The Housing Merchant Did It

E. F. Roberts
Cornell Law School, efr4@cornell.edu

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THE CASE OF THE UNWARY HOME BUYER: THE HOUSING MERCHANT DID IT

E. F. Roberts†

The author points up the decline of caveat emptor as a viable doctrine governing the sale of new homes and analyzes the emergence of implied warranty as a remedy for both structural deficiencies and personal injuries. He argues that the concept of implied warranty tends to obfuscate real distinctions between the builder-vendor's responsibility for the material integrity of a new home and for personal injuries occasioned by defects therein, concluding that legislation is needed to reestablish a system of order in the law.

"The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . ."*

I

INTRODUCTION

The law is not entirely devoid of its own brand of wry humor if, like Mencken, the connoisseur can enjoy a howler at someone else's expense. Indeed, when the law is seen making something of an ass of itself, change can be expected, lest the whole system lose that charisma so vital to its existence as a credible justice-dispensing institution. In order to gain a full appreciation of the present pickle, however, it may be better to launch this enterprise with a short, and somewhat exaggerated scenario.

Every intelligent layman seems to realize that, if he buys a new two-dollar fountain pen and the infernal thing just won't write, he can look to the law to get him his money back. In the good old days of Dickens, of course, the purchaser would have had no recourse. The motto *caveat emptor* stood for the charming proposition that, since the buyer had had his chance to inspect the merchandise at the counter, it was his tough luck if it turned out to be a lemon. Today we congratulate ourselves upon our

† A.B. 1952, Northeastern University; LL.B. 1954, Boston College. Professor of Law, Cornell Law School.

* Housing Act § 2, 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1964).

own enlightened era in which statutes impose upon the seller of chattels a promise that his merchandise is reasonably fit for the purpose for which it is sold.

Let us suppose, however, that the same purchaser withdraws his life's savings from his bank and goes in search of a new home. Let us further suppose that his efforts uncover a dreamhouse amidst several hundred split-level houses that a developer has erected in a new subdivision. This purchase will naturally entail a great deal of paper-work since the purchase of the house includes the parcel of land upon which it is situated. Indeed, to the legal mind, the transaction is seen as the purchase and sale of the land upon which the house rests. Inevitably, therefore, the transaction will culminate when the developer delivers the deed to the buyer. All of this is rather elementary and devoid of humor—but wait a year.

Let us imagine that a year later the happy homeowner is busily engaged in the kitchen mixing himself a martini when he hears a loud crash from the rumpus room. Lo and behold, there sits the master's bed atop the piano—the rumpus room ceiling has collapsed! Somewhat perturbed by this turn of events, the homeowner asks the developer either to repair or to pay for repairing what appears to have been a rather shoddy piece of workmanship. Here, however, comes the punch line: *caveat emptor* applies to the sale of a new home so that the developer is not liable for his substandard product. Indeed, the developer may well have been a collapsible corporation which, like Maeterlinck's bee, ceased to exist when the last house was sold. Consequently, the irate purchaser may be deprived even of the opportunity to attack the principle of *caveat emptor*.

As Holmes was wont to insist, in matters like this a page of history is apt to be more illuminating than a volume of law. In the medieval world, after all, the consuming public had been protected by preventive regulations according to which merchants were punished for selling substandard goods, although these regulations did not allow the consumer to sue. The raw fact of the matter seems to be that *caveat emptor* was manufactured by the judges pretty much out of whole cloth early in the nineteenth century, when conventional wisdom had turned away from paternalism and toward the creed of laissez faire. In Walter Hamilton's revealing phrase, the judges in 1800 had come to look upon purchasing as a "game of chance."[1] This creed took a sporting view of transactions. A buyer de-

[1] Hamilton, "The Ancient Maxim Caveat Emptor," 40 Yale L.J. 1133, 1187 (1931). Hamilton's survey of the lineage of caveat emptor is such a classic that there is no need to footnote in detail—the article speaks for itself. It is interesting to observe how the judges similarly structured liability in terms of negligence at the same time, thereby doing away with strict liability. Roberts, "Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein," 50 Cornell L.Q. 191 (1965). It would appear that we are living in an equivalent era in which the law is being restructured to reflect our own brand of conventional wisdom.

served whatever he got if he relied on his own inspection of the merchandise and did not extract an express warranty from the seller.

Caveat emptor, however, did not adversely affect the typical buyer of a new house during the nineteenth century. In those days, after all, the home-owner-to-be was commonly a middle-class fellow who purchased his own lot of land and then retained an architect to design a home for him. Once the plans were ready the landowner hired a contractor who built a house according to the plans. Quality control was assured because the builder was paid in stages as he completed each part of the house to the satisfaction of the architect. If the house did happen to collapse, the homeowner had a choice of lawsuits to recoup his losses: either the plans were defective, in which case the architect had been negligent, or the building job had not been workmanlike, in which case the contractor was liable.

If a buyer purchased a new home already put up on a parcel of land owned by the seller, *caveat emptor* applied as in any other sale. Indeed it became rote learning in legal circles that deeds contained no implied warranties of the fitness of the house for human habitation. During the twentieth century, of course, great reforms were made in the rules of the game pertaining to the sale of chattels, be they fountain pens or automobiles; but the sale of houses was overlooked and the old rules carried on. After World War II, however, the building industry underwent a revolution. It became common for the builder to sell the house and land together in a package deal. Indeed, the building industry outgrew the old notion that the builder was an artisan and took on all the color of a manufacturing enterprise, with acres of land being cleared by heavy machinery and prefabricated houses being put up almost overnight. Having learned their law by rote, however, the lawyers tended to insist that *caveat emptor* nonetheless applied to these sales.

Whatever wisdom lawyers might have about this whole subject, it became increasingly apparent that something was unfair in a system which conscientiously protected the purchaser when he bought small items but left him to the mercies of *caveat emptor* when he purchased a home. The law in this area was bound to change, and it has begun to change. The problem now is to acquire an appreciation of the current flux into which the law has been thrown.

II

The Rise of Implied Warranty as a Remedy for Structural Deficiencies in New Houses

With her tradition of strict stare decisis, England might not have been expected to provide the initial impetus toward change in the common law.

Change nonetheless began there with two cases in which purchasers had contracted to buy houses in the process of construction.[2] Upon occupation, each house proved to be a disappointment, one because the ubiquitous English damp penetrated it and the other because of leaking pipes and inoperative flues. The question presented for the first time was whether, in the instance of the purchase and sale of an unfinished house, the purchaser was entitled to an implied warranty that the finished house would be habitable. In both cases the purchasers were held entitled to damages.

The cases afford an interesting illustration of classical common law technique because the question presented fell between two bodies of settled law. On the one hand, *caveat emptor* clearly applied to the sale of a completed house. On the other, a landowner who retained a builder to construct a house for him was entitled to an implied term that the job would be done in a workmanlike manner with proper materials.[3] It may be profitable to watch MacKinnon, L.J., at work on the instant problem.

> There is obviously a difference in kind between a contract for the sale of a house which is an existing and complete structure and a contract for the sale of an uncompleted house which has to be completed by the vendor. . . . The other type of house, a house only partly erected, or to be completed, is different in two respects. In the first place, the maxim *caveat emptor* cannot apply, and the buyer, in so far as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, in so far as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly.[4]

In the instance of the sale of an unfinished home the builder-vendor had become so much a "builder" that he lost the usual vendor's protection of *caveat emptor*.

A subsequent case decided that the warranty covered the whole house and not merely that part unfinished at the time of the contract.[5] Notwithstanding this new development in the instance of unfinished houses, however, the maxim *caveat emptor* has continued to apply to the purchase and sale of completed houses.[6] The rationale remains that in the sale of a complete house the purchaser can either obtain an express warranty or have an independent examination made of the premises. Despite the press of stare decisis, however, this blind adherence to tradition has come under attack.[7]

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[2] Miller v. Cannon Hill Estates, Ltd., [1931] 1 All E.R. 93 (K.B.); Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390 (C.A.).

[3] Duncan v. Blundel [1820] 3 Stark. N.P. 6, 171 Eng. Rep. 749.

[4] Perry v. Sharon Dev. Co., supra note 2, at 395-96.

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

[6] Hoskins v. Woodham, [1938] 1 All E.R. 692 (K.B.).

[7] See Dworkin, "Consumer Protection and the Problems of Substandard New Houses," 28 Conv. & Prop. Lawyer 276 (1964).

This English mutation was not transplanted to America until after the Korean War. It first appeared on these shores in *Vanderschrier v. Aaron*[8] when a defective sewer line caused flooding in the cellar of a house which had been purchased before completion. Sustaining an award of damages against the builder-vendor, the Ohio Supreme Court, having "found but few cases bearing on the question," relied upon the English precedents, which it read as establishing that "there is an implied warranty that the house will be finished in a workmanlike manner."[9]

A year later *Hoye v. Century Builders, Inc.*[10] was decided in Washington. In this case the purchaser agreed to buy a lot and to have the vendor build a house on it according to one of several offered plans. Finding that the resultant house was not fit for human habitation, the purchaser sought rescission; but the trial court awarded money damages for the difference in value of the house as it was and as it should have been on the theory that the action was one for breach of an implied warranty. On appeal, the award was upheld on two theories. *First*, 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. Indeed, the authorities marshalled by the court were all construction contract cases, many of which turned on the question whether there had been "substantial performance."[11] *Second*, the court, relying on the English cases, held that there was an implied warranty in any contract for the sale of a house to be erected or in the course of erection. The case, which has since been cited as supporting the second proposition, sorely troubled a student commentator who read it as a landmark of some kind in the labyrinth of construction-contract law.[12]

The Illinois appellate court contributed mightily to the growing confusion by its 1962 decision in *Weck v. A:M Sunrise Constr. Co.*[13] The purchaser sued the builder-vendor to collect the cost both of correcting many defects in the house and of installing a driveway. At trial the decision apparently turned on whether the house had been completed before the purchaser contracted to buy it. On appeal the builder-vendor relied upon two arguments: that there was no implied warranty as to the condition of the house, and that the alleged agreement to build the driveway could not survive the merger of the contract into the deed. In a delightful potpourri of English precedents and construction-contract cases, the court sustained the purchaser's judgment. As to the defects in the house, the

8 103 Ohio App. 340, 140 N.E.2d 819 (1957).
9 Id. at 341-42, 140 N.E.2d at 821.
10 52 Wash. 2d 830, 329 P.2d 474 (1958).
11 Id. at 833-35 & n.4, 329 P.2d at 476-77 & n.4.
12 Note, 34 Wash. L. Rev. 171 (1959).
13 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

majority seems to have accepted the principle that the builder-vendor of an incomplete house warrants its habitability.

In 1963, however, another department of the same court refused to find an implied warranty where the house, though incomplete when the purchaser contracted to buy it, was complete when title passed.[14] *Weck* was distinguished on the ground that it involved a unique situation in which the builder-vendor had agreed to construct a house according to certain specifications. In short, it was dismissed as a construction-contract case.

Jones v. Gatewood,[15] decided by the Oklahoma court early in 1963, was a neater situation. The purchaser had bought a house under construction which, upon occupancy, proved not to be waterproof. In a laconic opinion the court sustained the existence of an implied warranty, relying on *Hoye*, *Vanderschrier*, and, ultimately, upon *Miller v. Cannon Hill Estates, Ltd.*, one of the two early English cases.

This trend toward string-citing was continued in the Colorado case *Glisan v. Smolenske*.[16] Again the purchaser agreed to buy a house in the process of construction and the work was not finished until after the title was closed. Soon after the purchaser moved in, cracks began to appear in the house because of the builder's failure to remedy the unsatisfactory condition of the underlying soil. The court held that, where the house was incomplete when purchased, the builder-vendor impliedly warranted that it would be fit for habitation when finished. In this instance, however, the court was able to marshall an even greater number of citations to support its conclusions, namely, *Weck, Jones, Hoye, Miller*, and *Perry v. Sharon Dev. Co.*, the other English case.

Again the implied promise was set in terms of the contract to purchase an incomplete house, and the builder-vendor argued that any such promise must have merged into the deed and perforce have been extinguished. The court, however, observed that this line of reasoning represented "an inversion of the primacy of instruments."[17] That is, the deed in this situation was not the *culmination* of the transaction, as it would be in the case of a completed house, but was *merely one part* of the performance promised by the builder-vendor.

What do the American cases have in common? All of them involve homes. In each case the purchaser either contracted to buy an incomplete house or purchased a lot and agreed to have the vendor erect a house upon it. In each instance the defects did not manifest themselves until after the

14 Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963).
15 381 P.2d 158 (Okla. 1963).
16 153 Colo. 274, 387 P.2d 260 (1963).
17 Id. at 280, 387 P.2d at 263.

purchaser moved in. In each the defects rendered the house "uninhabitable," the complaints involving defective sewer lines, floodings, cracking walls and untoward settlings. In every instance it is clear that the vendor was the builder, but only in *Hoye* and *Glisan* does the builder appear clearly to be a developer of a whole neighborhood. Finally, in most of the cases the purchaser was held to be entitled to recover from his builder-vendor money damages sufficient to pay for setting things right, although in *Hoye* he was awarded the difference in value of the house as it should have been and the house as it was. The court in *Glisan*, however, suggests that when the purchaser remains in the house, the correct measure of damages is the cost of remedial measures.[18]

Hard cases make bad law. In 1944, *before* the series of American cases with which we have been concerning ourselves, an even more radical statement of the law of implied warranty was propounded by the Texas Court of Civil Appeals.[19] In this instance the developer sold a new house, complete except in minor detail, through a real estate broker. At an "open house" before the sale, the broker told the purchaser that (1) there would be no trouble with the foundation, (2) there would be no trouble with the fireplace because it was built by an expert, and (3) the place was worth $4500. Inevitably the foundation sagged and the fireplace smoked. The purchaser, citing the broker's assurances, sued the developer to recover the difference between $4500 and the real value of the house. The court dismissed all of the broker's jargon as mere "opinion" except the statement about the foundation, which it found to be a "representation of fact," and, on agency principles, a representation by the developer. By way of makeweight, the court went on to say:

> By offering the 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, and it was well within the scope of Jones' agency to represent to appellees or any other purchaser that the property had such a foundation. [Emphasis added.][20]

The judgment of the trial court was reversed for lack of evidence of damages, and an appeal was taken to the Texas Supreme Court which rendered judgment for the developer on agency grounds.[21] Therefore, the warranty talk was, at best, a preview of things to come.

With *Carpenter v. Donohoe*,[22] Colorado, which had decided the *Glisan* case in 1963, further extended the doctrine of implied warranty to com-

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18 Id. at 281, 387 P.2d at 263.
19 Loma Vista Dev. Co. v. Johnson, 177 S.W.2d 225 (Tex. Civ. App.), rev'd, 142 Tex. 686, 180 S.W.2d 922 (1944).
20 Loma Vista Dev. Co. v. Johnson, supra note 19, at 227.
21 Loma Vista Dev. Co. v. Johnson, 142 Tex. 686, 180 S.W.2d 922 (1944).
22 154 Colo. 78, 388 P.2d 399 (1964).

plete houses. After the cellar wall began to cave in and the purchaser began to live precariously above some shorings, he discovered that the builder-vendor's failure to follow the building code was the cause of the defective wall. In the Supreme Court the issue was whether the trial judge had correctly ordered the purchaser to elect to rely either on fraudulent concealment or on warranty. The cause was remanded for retrial on both theories. At the same time the court decided that the implied warranty doctrine extended to complete houses, noting that any other rule would be "incongruous."

> 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 warranties that the home was built in workmanlike manner and is suitable for habitation.[23]

Explicitly, the court was greatly influenced by a law review study of the situation.[24] Once more, however, the dispute concerned defects which depreciated the house's habitability and did not involve personal injuries.

More recently, Idaho entered the ranks and seems to have held that implied warranty applies to the sale by a builder-vendor of a completed house.[25] The purchaser bought an unfinished home and sought to rescind the transaction because the cellar was in a perpetual state of flood. The purchaser's fraudulent-concealment theory failed at trial on the facts presented. Although the trial judge ruled that there were no implied warranties in the sale of real estate, the purchaser did not assign the ruling as error. Nevertheless, after sustaining the trial court's findings of fact on the issue of fraud, the court went on to hold that the warranty issue was open on appeal and remanded the case for another trial on that issue. A fair reading of the decision indicates that the court was determined to restructure this kind of case in terms of implied warranty.

In support of its new position the court cited *Weck, Jones*, and *Hoye*, cases involving unfinished houses, together with the Colorado decision in *Carpenter*, applying warranty to completed houses.[26] At the same time, however, the court relied heavily upon the recent New Jersey decision in *Schipper v. Levitt & Sons*,[27] which "illustrates the recent change in the attitude of the courts toward the application of the doctrine of caveat

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23 Id. at 83-84, 388 P.2d at 402.

24 Bearman, "Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule," 14 Vand. L. Rev. 541 (1961).

25 Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966).

26 Id. at 710.

27 44 N.J. 70, 207 A.2d 314 (1965). Schipper was a personal injury case rather than a structural deficiency one. See text accompanying notes 48-49 infra.

emptor in actions between the builder-vendor and purchaser of newly constructed dwellings" and which drew an analogy between the cited cases and the "implied warranty of fitness in sales of personal property . . . ."[28]

Although dealing with the sale of an unfinished house and a record which technically did not even raise the warranty issue, the court, on the basis of the cited "trend," decided to invoke warranty doctrine in sales of new houses by builders.[29] At the same time, the court warned that such a warranty did not require the builder to deliver a perfect house. Therefore, only a defect which renders the house unfit for habitation entitles the purchaser to rescission. Whether a purchaser is entitled to money damages for lesser defects was not decided, although the authorities upon which the court relied indicate that he would be so entitled.

III

Personal Injuries: From Caveat Emptor to Negligence to Warranty.

Since communication itself seems to have become something of an intellectual fad, there is no reason why the game cannot be played on these pages in order to make a point. Thus the section discussing the rise of implied warranty as a remedy for structural deficiencies was of classic style, employing a case-by-case illustration of the chipping process that is currently undermining the foundation of *caveat emptor*. Another style better illustrates the phenomena inherent in the personal injury field, however, because events here are more readily seen, not so much in the staccato delineation of successive cases, but as a conceptual re-thinking of major ideas about the whole problem of personal injury liability.

Two cases from Tennessee most readily illustrate the changed outlook toward the liability of vendors for personal injuries. In 1925, the highest court in that state insisted that the "law" in this field was "clear":

> Whatever may be the reason, no case can be found in the books where the vendor has been held liable in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises.
>
> Whether this be on the grounds of public policy, or because the rule of *caveat emptor* governs, and no warranty will be implied . . . or whether it be because the precedent negotiations are supplanted by the deed when the vendee receives it . . . or whether the reason is to be found in the fact that the delivery of the deed practically terminates the relation of vendor and purchaser, whereas the relation of landlord and tenant is a continuing one, or whether such damages are not supposed to be within the reasonable contemplation of the parties—whatever be the reason, the fact remains.[30]

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28 Bethlahmy v. Bechtel, supra note 25, at 709.
29 Id. at 710-11.
30 Smith v. Tucker, 151 Tenn. 347, 362, 270 S.W. 66, 70 (1925).

Students of property lore, of course, will instantly recognize that this is the classic refrain from *Smith v. Tucker*,[31] in its day the "leading case" on the point.

More recently, however, the court was given the opportunity to rethink the problem in *Belote v. Memphis Dev. Co.*,[32] which arose when a builder-vendor permitted a purchaser to move into a house while the purchaser was still waiting for his mortgage loan to be approved. While she was storing things in the attic, the purchaser's stepdaughter fell through a thinly covered opening in the floor that had been left for the possible future installation of a fan. The trial judge had dismissed the suit on the basis of *Smith v. Tucker* and, rather than meet that lofty precedent head on, the claimant appealed on the oblique argument that, on these facts, the builder-vendor was liable as a "landlord" who had negligently failed to reveal a latent defect to his tenant. Surprisingly enough, the court rejected this distinction and chose instead to meet the problem squarely as one involving a vendor-purchaser relationship. Suffice it to say, the court found an exception to the rule of *caveat emptor* where the vendor has failed to disclose a dangerous condition known to him and where he should have realized that the vendee did not know of it and probably would not discover it.

Superficially, at least, the most recent Tennessee position simply reflects the fact that the law of vendor and purchaser is falling into line with that of landlord and tenant in regard to personal injuries. That is, conventional wisdom has it that a landlord who is aware of a latent defect and who should realize that his tenant probably will not discover it is liable to persons injured as a result of the defect when, in fact, the lessee does not discover it.[33] The original Restatement of Torts applied the same reasoning to vendors,[34] but the actual cases involving vendors in which the doctrine has been announced appear to have lagged somewhat behind the landlord and tenant cases.[35] Nevertheless, this is all a rather mundane application of everyday principles of negligence law.

It is worth noting, however, that the defendant in *Belote* was a *builder-vendor*. Consequently, a gentle nuance of change permeates the equation. The pure vendor, after all, sins because he does not reveal latent defects, and his liability is simply an outgrowth of fraud.[36] Thus the cases involv-

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[31] 151 Tenn. 347, 270 S.W. 66 (1925).
[32] 208 Tenn. 434, 346 S.W.2d 441 (1961).
[33] Restatement, Torts § 358 (1934).
[34] Id. § 353.
[35] "As was said many years ago by this Court, under circumstances of the kind, 'The ground of liability upon the part of landlord . . . .'" Belote v. Memphis Dev. Co., 208 Tenn. 434, 440, 346 S.W.2d 441, 443 (1961).
[36] "The basis for liability in such a case is something like fraud in permitting the vendee and those whom he allows on the premises to enter in the face of a concealed and undisclosed hazard . . . ." Id. at 438, 346 S.W.2d at 443.

ing vendors speak of "the vendor [who] conceals a dangerous condition *known to him*,"[37] or "the vendor [who] *knows of the condition*."[38] In *Belote*, however, a new factor becomes involved: "[I]t must be presumed that the builders had knowledge of this trap, because the house was built by their workmen . . . ."[39]

The import of this nuance can be seen from Judge Holtzoff's opinion in *Caporalletti v. A-F Corp.*,[40] involving a builder-vendor who had constructed several hundred homes in the District of Columbia. At the rear entrance of the particular house which occasioned the litigation was a set of wooden stairs which led down to a concrete platform. The stairs, however, were not actually attached to this base, so that when the platform settled, the stairs were left resting in the air. The purchaser's wife, unaware of the danger, was injured within three or four months after the family moved in. Thereafter she prosecuted a negligence action against the builder-vendor. Denying the defendant's motion for judgment n.o.v., Judge Holtzoff stated:

> [A] builder who defectively constructs a house, is liable to the purchaser or any other invitee, for personal injuries sustained by the latter, if the defect could not have been discovered on inspection by the ordinary man in the street.[41]

The builder-vendor's "fault" is not that he fails to disclose a latent defect but that he constructs a house in which such a defect exists. If, however, the builder-vendor is to be held responsible for eliminating every significant defect which might cause personal injuries, then, as one commentator put it, Judge Holtzoff has, in effect, placed upon "the builder-vendor an implied warranty against structural defects upon which the vendee can sue should injury occur because of the defects."[42]

Also of interest is the rationale that Judge Holtzoff had for his result:

> Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise he would be at the vendor's mercy. The realities of modern life necessarily lead to the conclusion that the builder should be liable for injuries caused by his negligence under such circumstances, either to the purchaser or to an invitee. Any other result would be unjust and intolerable.[43]

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37 Kilmer v. White, 254 N.Y. 64, 70-71, 171 N.E. 908, 910 (1930). [Emphasis added.]
38 Restatement, Torts § 353 (1934). [Emphasis added.]
39 Belote v. Memphis Dev. Co., supra note 35, at 442, 346 S.W.2d at 444.
40 137 F. Supp. 14 (D.D.C. 1956), rev'd on other grounds, 240 F.2d 53 (D.C. Cir. 1957).
41 Id. at 19.
42 Bearman, supra note 24, at 570.
43 Caporalletti v. A-F Corp., 137 F. Supp. 14, 16 (D.D.C. 1956), rev'd on other grounds, 240 F.2d 53 (D.C. Cir. 1957).

Though the defendant in this instance might have congratulated himself when the decision was reversed on other grounds, it was clear that the evolving ideas would soon cause a restructuring of the duties of builder-vendors.

As the builder-vendor's liability became analogous to that of a manufacturer of a defective product, the problem of privity was bound to be raised. In the New York case of *Inman v. Binghamton Housing Authority*,[44] decided the same year as *Caporalletti*, a child fell from the back porch or steps of an apartment leased by his parents, and a negligence action was initiated against the landlord, the architect, and the builder. In reversing the special term dismissal of the claim against the architect and builder, the appellate division had this to say:

> The doctrine announced in the case of MacPherson v. Buick Motor Co. . . . is pressed upon us. We recognize that if the complaint of the infant against the architects and builder in this case is held to state a good cause of action we are in effect extending the doctrine of the MacPherson case, which dealt only with personal property, to structures erected upon real property. . . . The trend of modern legal scholarship appears to sustain the view that no cogent reason exists for continuing the distinction. . . .[45]

The decision was eventually reversed in the Court of Appeals, not because of the rationale, which was explicitly approved, but because the complaint failed to allege the presence of a "latent defect or a danger not generally known . . . ."[46]

Thus far, then, we have seen that, at the instance of the American Law Institute, vendors were held liable on negligence grounds where they failed to warn prospective purchasers of latent defects. This liability was extended to builder-vendors who were negligent not in failure to reveal defects but in producing a defective product. Indeed, "product" appears to be the correct word, because in dealing with the privity question, the courts began to deal with builder-vendors as "manufacturers." Thus, the manufacturing techniques adopted in the industry seem to have generated an intellectual environment that led to the demise of property law's anachronistic doctrine of *caveat emptor* and the imposition of run-of-the-mill product-liability concepts.

Environment was not the entire story, however; the accident of the facts of concrete cases pointed toward results adverse to the building industry. The Oklahoma court, which recently applied implied warranty even to the sale of completed houses, had wrestled with an interesting personal injury case even before *Caporalletti* and *Inman*. In *Leigh v. Wadsworth*[47] a

[44] 1 App. Div. 2d 559, 152 N.Y.S.2d 79 (3d Dep't 1956).
[45] Id. at 563, 152 N.Y.S.2d at 82-83.
[46] 3 N.Y.2d 137, 145, 143 N.E.2d 895, 899, 164 N.Y.S.2d 699, 704 (1957).
[47] 361 P.2d 849 (Okla. 1961).

porch roof fell in 1951 because the builder-vendor had attached the roof in 1949 with eleven 16-penny nails, of which only three or four actually penetrated the studdings. The injured party was the tenant of the person who had bought the house from the original vendee. Dealing with these facts, it is little wonder that the court dismissed the privity argument, citing, interestingly enough, a number of products-liability cases. Popular ideas and rather heart-rending facts all pointed to the conclusion that a house was nothing more than a manufactured commodity. Inevitably, the stage was being set for the application of implied warranty to personal injuries.

Schipper v. Levitt & Sons,[48] of course, marks the culmination of these events in a situation fraught with tragedy. The builder had provided for hot water heating, but, rather than reduce the temperature of the water before feeding it into the domestic water system, he simply provided single spigot faucets with instructions warning the new home buyer to turn on the cold water first and then gradually add hot water until the desired degree of warmth was achieved. The victim was the sixteen-month-old son of a new tenant of the original purchaser who, after his father discovered the danger but before remedial steps could be taken, ran afoul of the faucets on the bathroom sink and severely scalded himself. The upshot of the ensuing litigation was that the Supreme Court of New Jersey unanimously held that the victim was entitled to pursue the builder "on the implied warranty or strict liability principles . . . ."[49]

The New Jersey court in *Schipper* decided two points, one concerning warranty and the other concerning negligence. The crucial negligence question was whether the builder-vendor owed a duty of care to the child of the original purchaser's tenant. Applying the *MacPherson* rule to real property, the court cited, *inter alia, Caporalletti, Inman*, and *Leigh*.[50] In this situation, where the builder-vendor was a mass developer of homes who assembled a final product from component parts manufactured by others, the court was, in effect, willing to treat the builder-vendor as a manufacturer.[51]

The critical fact, however, was that the faucet was understood by the purchaser and the tenant, though not by the infant victim, to be a dangerous device. Thus, *Inman*-wise, the question arose whether the defect was really a "latent" one. Here, however, semantics become important. Prior to *MacPherson*, manufacturers were liable directly to consumers notwithstanding the absence of privity in those cases involving inherently danger-

[48] 44 N.J. 70, 207 A.2d 314 (1965).
[49] Id. at 96, 207 A.2d at 328.
[50] Id. at 82, 207 A.2d at 321.
[51] Id. at 90, 207 A.2d at 325.

ous chattels, such as poisons and explosives. It was part of Mr. Justice Cardozo's art in deciding *MacPherson* to rework the "inherently dangerous" concept so as to embrace more than poisons and explosives. This he accomplished in a sentence. "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[52] The question in *Schipper* became whether the latent-patent language of the judges in the recent cases was literally meaningful or merely rhetorical shorthand used in place of the Cardozo concept. The court, unfortunately, did not satisfactorily resolve its own line of inquiry.

> Levitt contends that even if the *MacPherson* principles are applicable, the evidence here presented no jury question as to negligence and it rests heavily on the *Inman* requirement of latency. Earlier in this opinion, we questioned that requirement and indicated our support of the position that the obviousness of a danger does not necessarily preclude a jury finding of unreasonable risk and negligence; in any event the danger here was not patent in the sense of *Inman* or in the sense of the reference in Levitt's brief to the potential sources of danger to children which may be found in all homes, "ranging from stoves and ovens to electrical appliances, stairways, second-story windows, and porches without railings." Those dangers are generally incident to normal living, they generally create no unreasonable risks, and there are admittedly no obligations on builder vendors to make their houses danger-proof and fool-proof. However, here the hot water faucet had a special and concealed danger far beyond any danger incident to contact with normally hot water; certainly no one, whether he be adult or child, would have suspected from its appearance that the water drawn from it would be at the dangerously high temperature of 190-210 degrees.[53]

In effect, latency, like all other concepts, depends upon particular facts and is a question of degree.

Schipper must be seen, however, as something of an intellectual threat insofar as the court found a cause of action stated in terms of implied warranty. A casual reading of the case reveals an incomplete house at the time of purchase, a personal injury, and an implied warranty. The danger is that the two lines of cases we have reviewed will become commingled in a hopeless potpourri. Thus we are told that the purchaser's house "was evidently built for the Kreitzers after they had selected a model . . . ."[54] Also, to answer Levitt's hornbook-based argument that no implied warranties exist in the sale of real estate, the opinion is replete with a discussion of *Glisan, Jones, Weck, Hoye,* and *Miller,* none of which are personal injury cases.[55] The saving feature of the opinion, however, is the fact that the court speaks of this aspect of the case as one

[52] MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).
[53] Schipper v. Levitt & Sons, 44 N.J. 70, 87, 207 A.2d 314, 323-24 (1965).
[54] Id. at 74, 207 A.2d at 316.
[55] Id. at 92-93, 207 A.2d at 326.

involving "implied warranty *or* strict liability principles."[56] Also, the court relies heavily on its own decision in *Henningsen v. Bloomfield Motors, Inc.*,[57] and cites *Greenman v. Yuba Power Prods., Inc.*[58] The key to the case, as a matter of fact, seems to lie in these last named products-liability cases.

IV

Products Liability: Cauldron of Confusion

The *Schipper* decision brought together two very different sets of decisions involving the concept of implied warranty. One set consisted of "property" cases growing out of the construction contract analogy and involving the responsibility of builder-vendors to correct structural deficiencies in new homes. The other set dealt with the liability of manufacturers to remote consumers for personal injuries attributable to defects in manufactured chattels. These cases traditionally have been classified under the heading of either "torts" or "commercial law." The tendency seems to be to cast the liability of builder-vendors not in terms of the structural deficiency cases, but in terms of the products-liability cases. Any serious examination of this prospect requires at least some elucidation of products liability in general.

The logical starting point of this inquiry, of course, is the New Jersey court's own decision in *Hennsingsen v. Bloomfield Motors, Inc.*[59] In this instance the victim's husband purchased an automobile from a dealer. He neglected to read some fine print in the purchase contract in which the manufacturer expressly warranted that the vehicle was free from defects in material and workmanship, but in which the manufacturer also limited his liability to the replacing of defective parts. The contract also specified that the manufacturer's narrow warranty was *"in lieu of all other warranties express or implied, and all other obligations or liabilities on its part."*[60] Some ten days after the car was delivered and while the purchaser's wife was driving it, the steering mechanism failed and the vehicle ran off the road into a brick wall. The front end was so badly damaged that it was impossible to determine whether "parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident."[61] Since it was impossible to ascertain whether the detectable defects had caused, or were caused by, the accident, the trial judge sent the case to the jury solely on the warranty theory. The judg-

[56] Id. at 96, 207 A.2d at 328. [Emphasis added.]
[57] 32 N.J. 358, 161 A.2d 69 (1960).
[58] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
[59] 32 N.J. 358, 161 A.2d 69 (1960).
[60] Id. at 367, 161 A.2d at 74.
[61] Id. at 369, 161 A.2d at 75.

ment for the victim was affirmed on appeal, despite Dean Keeton's recent objection that, if the manufacturer is liable in warranty only when the product is defective, the same proof is necessary to establish the defect as would be necessary to prove negligence.[62]

The case was handled in terms of the Uniform Sales Act, which was then in force. Since the transaction involved the sale of goods by description, the court found the presence of an implied warranty of merchantability.[63] Since the buyer made known to the seller the purpose for which he wanted the article and since he relied on the seller's skill and judgment, the court also found the presence of an implied warranty that the article would be reasonably fit for that purpose.[64] Indeed, the court hastened to point out that the Uniform Act had ameliorated the "harsh doctrine of *caveat emptor*" and, more important, the courts had since recognized "the right to recover damages on account of personal injuries arising from a breach of warranty."[65]

Still, on its face, the Sales Act regulated the transaction between the purchaser and the seller, whereas the instant lawsuit involved the wife of the purchaser and the manufacturer. Even accepting the existence of an implied warranty, how was the manufacturer to be connected to the victim? Noting caustically the effort by manufacturers to exploit the Sales Act by withdrawing behind a shield of independent dealers, the court surveyed the market "realistically" and discovered that the manufacturer and not the dealer was the moving force creating both the demand for, and the image of, the product. The manufacturer could not hide behind the dealer; in reality, if not conceptually, he was in privity with the purchaser. At the same time the court concluded that the implied warranty ran beyond the purchaser to the victim-user, citing, *inter alia*, the soon-to-be-adopted Uniform Commercial Code.[66] Thus, "under modern marketing conditions," notwithstanding the "absence of agency between the manufacturer and the dealer," there is an implied warranty which is not dependent "upon the intricacies of the law of sales" but upon the "demands of social justice."[67]

But what of the carefully-worded express warranty which seemed to exclude any implied warranty? The court first reasoned that the express warranty as to parts and workmanship and the promise to replace defective parts were not inconsistent with the existence of an implied warranty,

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62 Keeton, "Products Liability—Some Observations About Allocation of Risks," 64 Mich. L. Rev. 1329, 1340-41 (1966).
63 Citing Uniform Sales Act § 15(2).
64 Citing Uniform Sales Act § 15(1).
65 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 372, 161 A.2d 69, 77 (1960).
66 Citing Uniform Commercial Code § 2-318.
67 Henningsen v. Bloomfield Motors, Inc., supra note 65, at 384, 161 A.2d at 83-84.

and, therefore, did not displace it.[68] In fact, the express warranty was "illusory" and "a sad commentary upon the automobile manufacturers' marketing practices."[69] The case turned, therefore, on that part of the express warranty which declared that it was the *only* warranty. The court did not disguise its feelings. "An instinctively felt sense of justice cries out against such a sharp bargain."[70] Referring to recent studies of "adhesion" contracts and noting that this was a standard form contract used not only by Chrysler but by the entire Automotive Manufacturers Association, the court stressed the practical impossibility of securing a different contract elsewhere or of modifying the disclaiming clause. It did not hesitate "to declare void as against public policy contractual provisions which clearly tend to the injury of the public . . . ."[71] Most significant for our purposes, however, is the court's conclusion that if the several manufacturers could so insulate themselves from liability for personal injuries, *"there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold."*[72]

Greenman v. Yuba Power Prods., Inc.[73] reflects a similar impulse upon the part of courts to hold manufacturers liable when their products are sold through an intermediate vendor and cause injuries to persons other than the purchaser. In this instance the victim's wife purchased for him a combination power tool which could be used as a saw, drill, or wood lathe. Two years later he purchased the attachments necessary to use the tool as a lathe for making a wooden chalice. After he had successfully completed several steps of the project, the block of wood suddenly flew out of the machine and hit him on the head. At trial, his experts testified that the machine was defectively designed and constructed, particularly because a set of screws holding parts of it together could not withstand normal vibration. The trial judge partially released the retailer from the case, there being no evidence that he was negligent or that he had breached any express warranty. He did, however, send the case against the retailer to the jury on a theory of implied warranty. At the same time, he sent the case against the manufacturer to the jury on both express warranty and negligence theories. Absolving the retailer, the jury returned a verdict against the manufacturer.

When the manufacturer appealed, the effect of the old adage "hard cases make bad law" was felt anew. California law required that prompt notice be given of any warranty claim. The victim in *Greenman* had not given

68 Citing Uniform Sales Act § 21(6).
69 Henningsen v. Bloomfield Motors, Inc., supra note 65, at 375-77, 161 A.2d at 78-79.
70 Id. at 388, 161 A.2d at 85.
71 Id. at 403-04, 161 A.2d at 95.
72 Id. at 391, 161 A.2d at 87. [Emphasis added.]
73 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

such notice, and, since it was impossible to tell whether the jury had relied upon warranty or negligence, the case arguably had to be retried on negligence alone. To this logical argument the gist of the court's response was to observe that there are warranties, and then there are warranties. That is, as between seller and buyer, there exist well known warranties common to the law of sales. This case involved the liability of the manufacturer, however, and, while in the past courts had talked of this in the traditional language of warranty, the fact of the matter was that this was more aptly designated a strict tort. The so-called implied warranty in *Henningsen* was not the outgrowth of an agreement between a buyer and seller but was a quite different obligation imposed by law.

Thus, the court warned that:

> [R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.[74]

Properly understood, sales warranties are designed to regulate the transaction between the seller and buyer. The court saw the current problem not as one of controlling the bargaining process but as one of allocating the cost of injuries resulting from defective products. Indeed, the ultimate goal here is to make sure that the cost of injuries is borne by the manufacturer "rather than by the injured persons who are powerless to protect themselves."[75] It seems, therefore, that, whereas disputes between a seller and buyer concern "sales," lawsuits brought by injured consumers against manufacturers involve "enterprise liability."

Chief Justice Traynor, the author of *Greenman,* relied again on this distinction between sales and personal injuries in *Seeley v. White Motor Co.*[76] This time the purchaser had entered into a conditional sales contract pertaining to a truck, the agreement containing the same kind of warranty encountered in *Henningsen.* As it turned out the truck bounced violently ("galloped") and for eleven months the dealer made earnest but unsuccessful efforts to cure the defect. Ultimately the truck tipped over and, after the purchaser spent a great deal of money repairing it, he simply stopped making payments and let the dealer repossess it. The purchaser then sued the manufacturer to recoup the cost of his repairs, his payments to date, and his lost profits attributable to the truck's malfunctioning. At trial the purchaser recovered his payments and profits, but not the cost of repairs.

On appeal, the purchaser argued that the manufacturer was liable in

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[74] Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
[75] Ibid.
[76] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

strict tort for property damage as well as personal injury, and since the defect caused the upset, the purchaser was entitled to his repair costs. The court agreed that the doctrine of *Greenman* applied to property damage as well as personal injuries, citing the proposed changes in the Restatement of Torts.[77] But, lacking any evidence that the defect which caused the gallop caused the upset, the court denied the actual claim. Instead, it went to considerable lengths to show that the case at hand was one of warranty (sales) rather than strict tort (personal injury or property damage). In so doing, the court, having created the differentiation in *Greenman,* set about to distinguish the two areas of concern.

In *Seeley* the manufacturer had warranted to replace defective parts and to correct defective assembly; but he never did cure the gallop. Thus, there was a breach of the warranty, and the damages included returning the payments and making up lost profits. The bargain had been for a truck which didn't gallop, the bargain had not materalized, and, in brief, money damages had restored the *status quo*. This was the result, however, of the warranty; the maker could, after all, have sold the truck "as is" and not have been liable at all.[78] To argue that the galloping defect was actionable in tort would be quite a different matter, because in that event the manufacturer would be liable even if he had sold the truck "as is." Indeed, the *raison d'etre* of strict tort is "to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products."[79]

The key, therefore, is to see the distinction between the risks of a business bargain, governed by sales law, and the risks of personal injury, governed by tort law. A defect in the truck which is not a danger to the person is merely a threat to the bargain of buying the truck, *i.e.*, that the truck won't work and expected profits will be lost. The parties therefore could negotiate, and the sale might involve an express warranty, as here, or it might be a sale "as is." Whether the truck works out business-wise is a risk of buying a truck. A defect in the truck which is a danger to the person is not subject to the bargain, but rather is a risk against which the manufacturer must insure. Since the manufacturer is liable for personal injuries in tort, he will, according to Chief Justice Traynor, distribute to all truck purchasers the cost of so insuring himself. There is no need to make the manufacturer strictly liable for lost profits, however, because various kinds of trucks are available and the purchaser had a choice. Indeed, since putting this into tort terms by definition excludes disclaiming

[77] Id. at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23, citing Restatement (Second), Torts § 402A (Tent. Draft No. 10). This section has now been adopted. Restatement (Second), Torts § 402A (1964).

[78] Uniform Commercial Code § 2-316.

[79] Seeley v. White Motor Co., 63 Cal. 2d 9, 17, 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965).

liability, such a measure would unduly increase the costs of trucks generally, because the manufacturer "would be liable for damages of unknown and unlimited scope."[80]

This distinction, vague as it sounds, seems rooted in a willingness to let sales law govern the market place and in an unwillingness to let the chance result of any particular bargaining session affect liability for personal injury. Indeed, the Oregon Supreme Court, following California, saw this quite clearly. *Price v. Gatlin*[81] involved a suit by the purchaser of a tractor against a wholesaler for lost profits on the theory that the wholesaler was liable in tort for the defect. The court noted that the purchaser was "frankly searching for a solvent defendant," but refused to allow the claim because "the social and economic reasons which courts elsewhere have given for extending enterprise liability to the victims of physical injury are not equally persuasive in a case of a disappointed buyer of personal property."[82]

Why speak in terms of strict liability for personal injuries and yet allow economic loss to turn on the particular provisions of the sale involved? In a concurring opinion, Mr. Justice Holman attempted to answer.

> At first there seems to be no logical basis to distinguish them when they have resulted from the same thing—the defective product. *Probably the reason is social rather than legal,* if the two can be distinguished. In establishing liability in personal injury cases courts have been motivated to overlook any necessity for privity because the hazard to life and health is usually a personal disaster of major proportions to the individual both physically and financially and something of minor importance to the manufacturer or wholesaler against which they can protect themselves by a distribution of risk through the price of the article sold. There has not been the same social necessity to motivate the recovery for strictly economic losses where the damaged person's health, and therefore his basic earning capacity, has remained unimpaired.[83] [Emphasis added.]

There is more here than logic. The felt necessities of the time are at play.

Still, it must be borne in mind that this superficially attractive rationale oversimplifies the situation. There is, true enough, a trend toward strict tort as a remedy for personal injuries and, on the basis of *Seeley* and *Price,* a tendency to refuse extension of the tort to include lost profits. Yet, in *Seeley* the court did agree to include property damage within the tort. The line may be rather difficult to draw, therefore, between enterprise liability governed by strict tort and economic loss governed by the terms of a particular bargain in the context of prevailing sales law.

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[80] Id. at 17, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23.
[81] 241 Ore. 315, 405 P.2d 502 (1965).
[82] Id. at 318, 405 P.2d at 503.
[83] Id. at 318-19, 405 P.2d at 503-04.

Indeed, the New Jersey court, author of both *Henningsen* and *Schipper*, also decided *Santor v. A & M Karagheusian, Inc.*,[84] in which the court allowed the purchaser of a defective rug to maintain an action directly against the manufacturer, notwithstanding the lack of privity and notwithstanding the fact that plaintiff's damages were limited to the loss in value of the carpeting. Again, more than personal injuries were encompassed by strict tort.

> In this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. The quest has found sound expression, we believe, in the doctrine of strict liability in tort. Such doctrine stems from the reality of the relationship between manufacturers of products and the consuming public to whom the products are offered for sale. As we indicated in Henningsen, the great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously they must rely upon the skill, care and reputation of the maker. . . . The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.[85]

Thus it appears that if the article is defective the manufacturer is to be charged with the consequent property damage or injuries.

Confusion is compounded by the fact that in *Seeley* the California court specifically disapproved of *Santor* although it agreed that strict tort includes damage to the purchaser's property.[86] To California eyes the loss in value of the defective rug was a "commercial loss." It was a lost economic expectation, a risk of the bargain governed by sales law, rather than a physical injury to the buyer's property. In this regard, at least, the California decision is in line with the Restatement which requires physical harm.[87]

Thus, while the manufacturer's liability in strict tort has spread to include property damage, friction has developed over the question whether property damage is to be limited to physical harm or whether it can include economic disappointment as well. Still pervasive, however, is the

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[84] 44 N.J. 52, 207 A.2d 305 (1965).

[85] Id. at 64-65, 207 A.2d at 311-12.

[86] Seeley v. White Motor Co., 63 Cal. 2d 9, 17, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

[87] Id. at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23, citing Restatement (Second), Torts § 402A (Tent. Draft No. 10). This section has now been adopted. Restatement (Second), Torts § 402A (1964).

notion that the manufacturer, as a risk spreader, is chargeable with the personal injuries and property damage caused by the product. But if the user of an automobile involved in a collision can exploit the new doctrine, can a non-user who is run over by the user also apply the principle? The answer at the moment seems to be negative.[88] Since the user is relieved from the privity requirement, this distinction seems rather arbitrary. But the rationale at the moment seems only a pragmatic one; namely, the fear of subjecting the manufacturer to excessive liability.

Products liability is growing at a rapid rate. The difficulty is that it is growing both in terms of "strict tort" and "implied warranty," and the new tort is blossoming at the very same time in which the new Uniform Commercial Code is coming into effect. It remains to be seen whether the Code will be interpreted so that its implied warranty provisions consume still-born the doctrine of strict tort, or whether the Code will come to govern only those conflicts growing out of the sale seen as a bargaining game, leaving injuries and property damage cases to be siphoned off into the developing cauldron of enterprise liability. The Code, after all, recognizes that a warranty extends, not merely to the purchaser, but to his entire household.[89] At the same time, the Code does not, in plain language, cover the question whether an implied warranty extends from the manufacturer to the consumer, since, for the most part, the Code is couched in terms of seller and buyer. Indeed, the question was "deliberately left unanswered by the Code."[90] The truth of the matter is, therefore, that in products liability "the Code leaves the development to case law."[91]

The problem which excited the court in *Henningsen,* and the reason given in *Greenman* and *Seeley* for creating strict tort in the first place, was to prevent manufacturers from disclaiming certain warranties. The Code recognizes a discreet limit on the power to disclaim; that is, a disclaimer cannot be "unconscionable."[92] The difficulty is that the Code concept of unconscionability may only apply if the risk comes as a surprise result. Thus it is open to debate whether, under the Code, the automobile manufacturers might absolve themselves of all responsibility if they drafted the disclaimer to warn purchasers of the risk of personal injury.[93]

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88 Mull v. Colt Co., 31 F.R.D. 154 (S.D.N.Y. 1962); Berzon v. Don Allen Motors, Inc., 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dep't 1965); Wright v. Staff Jennings, Inc., 241 Ore. 301, 308-10, 405 P.2d 624, 628-29 (1965) (dictum).

89 Uniform Commercial Code § 2-318.

90 Hogan & Penney, "A New Law for Business Dealings: The Uniform Commercial Code" (1964).

91 Hogan, "Commercial Law," 17 Syracuse L. Rev. 225, 228 (1965).

92 Uniform Commercial Code § 2-302.

93 See, e.g., Boshkoff, "Some Thoughts About Physical Harm, Disclaimers and Warranties," 4 B.C. Ind. & Com. L. Rev. 285, 305-06 (1963); Franklin, "When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases," 18 Stan. L. Rev. 974 (1966).

V

MERGER: A COMPLICATING FACTOR

Before we can attempt to project the future evolution of the liability of builder-vendors for both personal injuries and structural deficiencies, we must take account of another factor. Under the doctrine of merger, a contract for the sale of land becomes merged in the deed which thereafter contains the entire rights of the parties. This innocent-sounding rule adds a peculiar dimension to the problem of creating a viable real-property synthesis of these cases.

In the sale of an automobile, authority to sell is readily assumed and conditional sales contracts are readily available. The purchaser of real property, however, needs time to check his vendor's title and to arrange for financing. Home-buying, therefore, has become a two-stage transaction, beginning with a sales contract in which the parties commit themselves to the bargain, and ending with a closing at which the deed is exchanged for the purchase price.[94] Before the closing occurs the purchaser should be satisfied that his vendor has good title. He can, of course, require as part of the sales contract bargain that the deed contain covenants of title, but it is up to the purchaser to demand them. Once he accepts the deed it defines his rights thereafter. Covenants of title will not be read into it.[95] Similarly the purchaser must be satisfied that the vendor has performed all other promises in the sales contract. Again, once the purchaser accepts the deed, he absolves the vendor of further responsibility. In short, all of the vendor's obligations are merged into the deed. Premised as it is upon arm's length bargaining by people capable of looking after their own interests, this doctrinal matrix makes a great deal of sense in a simple environment involving the sale of a readily-examined, complete house. In other contexts, however, the concept of merger has threatened to bring about mischievous results, and it has been necessary to hedge it about with a maddeningly complex set of qualifications.

An example of this tendency to qualify the doctrine of merger has already been encountered in the case where an unfinished house was conveyed to a purchaser. In *Glisan v. Smolenske*[96] the builder-vendor, seeking

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[94] McDougal, "Title Registration and Land Law Reform: A Reply," 8 U. Chi. L. Rev. 63, 65 (1940):

> To a foreign anthropologist land transfer in the United States would probably look, as one of my former students forcefully put it, much like an aboriginal, ritualistic clambake. Like most other objects of "property," land is transferred by symbols, pieces of paper; but, unlike many of the other symbols, these particular symbols do not pass freely from hand to hand—their circulation is accompanied by much dilatory, costly, and extra-necessitous behavior of wise men.

[95] E.g., N.Y. Real Prop. Law § 251 (McKinney 1945).

[96] 153 Colo. 274, 387 P.2d 260 (1963).

to avoid an implied warranty in the sales contract, argued that it must have been merged into the deed and perforce have been extinguished. The court rejected the argument, because the house was not complete at the time of closing. It pointed out that in this instance the deed did not represent 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. Merger, therefore, would operate only if the house were completed prior to delivery of the deed. Even if *Glisan* stands for this oblique principle, it is noteworthy that the same court later went on to find implied warranties in the sale of a completed house.[97] Seemingly, therefore, the doctrine of implied warranty applicable to new construction is in some jurisdictions growing up outside of the old merger concepts.

The conventional technique of keeping the merger rule within the bounds of reason is illustrated in New York, where it is said that whether a vendor's obligation has merged into the deed is a question of intent. If intent can be garnered from express provisions in the sales contract or deed, this is a workable method of disposing of the problem. For example, if the sales contract provides a guarantee by the builder-vendor against any and all defects in the foundation, walk, and roof for a period of one year from the delivery date, together with an express proviso that the guarantee will survive the closing, the obligation does not merge.[98] If there had been a guarantee in the sales contract and an express provision in the deed disclaiming the guarantee, the guarantee, absent fraud, would presumably merge. As between the inconsistent indications of intent, the last enacted deed presumably embodies the final agreement.[99] The real trouble comes when the deed is silent about the vendor's obligations and there is no express survival clause in the contract.

Dealing in the abstract, the vendor's obligations are extinguished by a silent deed unless there is a survival clause in the sales contract. Early developments, however, modified this generalization so that, while obligations typically undertaken by vendors were merged into the deed, unusual promises were not. In the language of the day, "collateral promises" were not merged into the deed.[100] In its infancy this rule meant that typical undertakings, such as promises pertaining to title, possession, or quantity of the estate, merged; whereas something then regarded as *outré* was dealt with separately. Today it is probably fair to say that only promises relevant to title are still dealt with so mechanically. Thus, there no longer exists a categorical subject-matter litmus test of what is or what is not

[97] Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).
[98] Russ v. Lakeview Dev., Inc., 133 N.Y.S.2d 641 (N.Y. City Ct. 1954).
[99] Howes v. Barker, 3 Johns. R. 506 (N.Y. Sup. Ct. 1808).
[100] Bull v. Willard, 9 Barb. 641 (N.Y. Sup. Ct. 1850) (dictum).

"collateral." Instead, the term "collateral" signals a conclusion already reached. It is not a decision-helping device in its own right.[101] The problem now is to articulate the operational criteria by which that decision is in fact reached.

Disbrow v. Harris,[102] often referred to as a leading case, still reflected an effort to apply rules mechanistically. The vendor had contracted to convey a house "in good condition" and to install a sidewalk and some grates. The sidewalk and grates not having been installed at the time of closing, the parties entered into a separate written agreement in which it was arranged that the purchaser would retain a portion of the sale price pending their installation. The vendor subsequently installed the items and sued to collect the retained money. The purchaser attempted to counterclaim on the promise to convey a house in good condition, citing several defects in the house itself. The court would not countenance the counterclaim, stating that the retention-of-money agreement was limited in its effect to the expressly-mentioned grates and sidewalk. Thus the obligation to convey a house in good condition in other regards had been extinguished at the closing. Granting a more or less complete house and the fact that the parties expressly reserved certain items from the doctrine of merger, it is not surprising that the court decided as it did. Presumably the parties were cognizant of the merger effect of the deed and the purchaser had accepted delivery notwithstanding that doctrine.

In a case involving an incomplete house, however, the delivery of the deed did not ipso facto trigger a merger. In *Price v. Woodward-Brown Realty Co.*[103] a builder-vendor agreed 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. Although the purchaser accepted the deed prior to completion, the court held that he could subsequently sue the builder-vendor for damages resulting from a failure to conform to the plans in the sales contract. Citing *Disbrow*, the court reasoned that, since the deed was accepted prior to completion, the parties could hardly have intended to regard the delivery of the deed as performance. Hence, merger was inapplicable. Though the lack of an extensive rationale troubled one commentator,[104] the decision seems a rather clear precursor of the approach taken by the Colorado court in *Glisan v. Smolenske*.[105] Although the same commentator was troubled that the "careful" purchaser in *Disbrow* fell victim to merger and the "less diligent vendee" in *Price*

101 See Comment, "Merger of Land Contract in Deed," 25 Albany L. Rev. 122 (1961).
102 122 N.Y. 362, 25 N.E. 356 (1890).
103 190 N.Y. Supp. 561 (1st Dep't 1921), aff'd mem., 201 App. Div. 837, 192 N.Y. Supp. 947 (1st Dep't 1922).
104 Comment, "Merger of Land Contract in Deed," 25 Albany L. Rev. 122, 125 (1961).
105 153 Colo. 274, 387 P.2d 260 (1963).

did not, the fact that an unfinished house was involved in *Price* seems to be a factor of considerable importance in its own right.

This factor of the unfinished house seems to explain *Terry v. Raif*,[106] in which the contract called for certain grading work to be done prior to closing. The transaction was closed even though the grading was not complete and, subsequently, the purchaser sued the vendor for failing to complete the task. As in *Price* there was no reason to believe that the purchaser intended to waive his rights. The court therefore found the promise "collateral . . . and . . . binding on the vendor."[107]

The case nicely illustrates how the invocation of the term "collateral" marks a conclusion arrived at after examining the intent of the parties. At the same time, this "intent" in *Price* and *Terry* has become not the actual intent of the parties, if ever there was any, but the intent of reasonable men cognizant of practical affairs. It follows that these reconstructed bargainers would never have regarded delivery of the deed as complete performance in either *Price* or *Terry*; it would have been silly to do so.

The courts in *Price* and *Terry* also deduced from *Disbrow* the notion that, unless there is some express manifestation by the purchaser of his intention to waive his rights at closing, the intent perceived by reconstructing the transaction on common-sense principles will prevail. The notion was imminent that, at least in sales of unfinished houses, the burden of showing an express waiver by the purchaser had shifted to the builder-vendor who relied on merger.

It takes little imagination to foresee that the builder-vendors would react by interjecting express provisions into their arrangements to keep merger alive. Thus in *Staff v. Lido Dunes, Inc.*[108] a sales contract contained the following:

> Anything herein to the contrary notwithstanding, it is specifically understood and agree [sic] by the parties hereto that the acceptance and delivery of the deed of conveyance at the time of the closing of title hereunder, without specific written agreement which by its terms shall survive such closing of title, shall be deemed to constitute full compliance by the Seller with the terms, convenants and conditions of this contract on its part to be performed. It is further agreed that none of the terms hereof except those specifically made to survive title closing shall survive such title closing.[109]

Taken at face value, the agreement itself would restore the situation to the *status quo* of *Disbrow*. Thus the express reservations agreed upon at closing would become all-controlling, and, absent such an agreement, mer-

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106 205 Misc. 1059, 130 N.Y.S.2d 159 (Broome County Ct. 1954).
107 Id. at 1062, 130 N.Y.S.2d at 163.
108 47 Misc. 2d 322, 262 N.Y.S.2d 544 (Sup. Ct. Nassau County 1965).
109 Id. at 325, 262 N.Y.S.2d at 547-48.

ger would be restored to all of its pristine glory. But what of the reaction of the courts to this stratagem?

In *Cohen v. Pelora & Sons Constr. Corp.*,[110] a New York County Court decision, a purchaser sued his builder-vendor after discovering defects in workmanship and materials in his new home. The builder-vendor defended by relying upon the merger clause. Citing *Price*, the court noted that at common law a contract to construct a house was treated as a promise collateral to the sale of the land. The obligations of the building agreement did not merge into the deed, at least where neither the agreement nor the deed expressly called for merger. The clause quoted above did nothing more than restate the common law—the law applicable to the sale of land. This being so, it did not apply to the "collateral agreement" to build the house, and that agreement, governed by common-law principles, survived the closing. Thus, in order to avoid the impact of the merger clause, the building aspect of the contract was treated as a construction contract quite independent from the balance of the agreement. As a practical matter, this reconstituted construction contract was treated outside the doctrinal scheme of real property.

The court in *Staff v. Lido Dunes, Inc.*[111] could not bring itself to follow the reasoning in *Cohen*. After all, the "collateral" agreement to construct the house was one of the "terms, covenants and conditions" of the sales contract and the new clause provided that "none of the terms hereof except those specifically made to survive title closing shall survive such title closing."[112]

Staff, turning on the new merger clause, is interesting for several reasons. *First*, the court, while pointing up the question of implied warranty, did not take this easy route around the merger thicket.[113] *Second*, with regard to the contract itself, the court refused to verbalize the problem of merger out of existence. The issue was squarely posed.

The purchaser contended that the builder-vendor had not complied

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110 140 N.Y.L.J., Sept. 30, 1958, p. 14, col. 4.

111 47 Misc. 2d 322, 262 N.Y.S.2d 544 (Sup. Ct. Nassau County 1965).

112 Id. at 326, 262 N.Y.S.2d at 548. [Court's emphasis omitted.]

113 Id. at 329, 262 N.Y.S.2d at 551:

> Though it seems clear that there is no implied warranty in the sale of a completed house . . . it has been held both that there is, Lutz v. Bayberry Huntington, Inc., 148 N.Y.S.2d 762 [(Sup. Ct. Nassau County 1956)] . . . . and that there is not, Eastman v. Britton, 175 App. Div. 476, 162 N.Y. Supp. 587 [(4th Dep't 1916)] an implied warranty of quality of a house in process of construction when the contract is made. While the trend of decisional law is toward holding that an implied warranty arises in the latter case (see Appendix), it is not necessary for the court to determine the question in the present case . . . .

The appendix follows the report and catalogs the structural deficiency cases. Id. at 331-32, 269 N.Y.S.2d at 553-55.

with his promise that workmanship and materials would conform to "generally accepted good practice." The tile wall in the shower, for example, rested on illusory supports; floors had been laid without making allowances for expansion; and some of the footings were not set at the proper depth—all of these things falling considerably short of accepted practices. The clause still had to be dealt with, however, since the builder contended that it had worked to merge the promise at the closing. Faced with the list of defects on the one hand and the merger clause on the other, the court chose to structure its approach to the conflict in terms of latent and patent defects.

As to patent defects, the clause made sense, since after inspection the purchaser could refuse to close unless his rights were preserved by a written agreement entered at the closing. Latent defects, however, were quite another matter. By definition, the unknowing purchaser would not be aware of the need to preserve his rights. Thus the clause as applied to latent defects was a mousetrap and began to take on the coloring of an unconscionable disclaimer. Mr. Justice Meyer, however, approached this issue obliquely, in terms of the statute of limitations. He argued that, whereas in New York parties can agree to a shortened period of limitations, an unreasonably short period is void. By analogy, the contract in this case was breached at closing when the builder conveyed a house which did not live up to his promise. But the act of closing itself extinguished the claims for this breach. This fact required the conclusion that, as to latent defects, the clause was void. Whatever the rationale, the case holds that a builder-vendor cannot exploit merger to disclaim responsibility for latent defects. Yet, couched as it is in terms of the limitations anology, the opinion seems to say that the parties can stipulate a period shorter than the statutory limit during which the purchaser may press his claims arising out of latent defects.

VI

Toward Order Reconstituted

The results under the doctrine of *caveat emptor*, though outrageous, were at least predictable. Insofar as a new house came to be looked upon as something analogous to a manufactured item, however, something had to be done to protect the purchaser from shoddy workmanship. The initial cases deviating from the *caveat emptor* norm in favor of the concept of implied warranty can be seen as sales-law cases, since they involved unfinished houses. The construction contract cases transplanted the mercantile idea of implied warranty to the real property field. Similarly, merchants dealing in a particular line and sellers of chattels by sample are

now burdened with implied warranties. An analogous treatment of builder-vendors of complete houses is simply the logical next step, once the builder-vendor becomes recognized as a merchant as well as an artisan. None of this is particularly startling. It reflects the simple fact that the sale of new housing in our contemporary environment has lost the mystique which once justified the use of a special body of law.

The *Schipper*[114] case is something else again. It did not involve a purchaser who was disappointed with his bargain because the paint had peeled, but rather a remote user who suffered personal injuries. Indeed, while talking in terms of warranty, the court itself was willing to admit that strict tort was involved.[115] Moreover, the whole products liability rationale in the chattel cases is interjected into the equation.

> 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.[116]

The costs of injury are now to be borne by the developer because he is in a better position to bear the loss. The question remains whether this new doctrine applies only to mass producers or also to all "manufacturers" of houses.

The situation is still more complicated, because the chattel cases involve a buyer and seller, presumably bargaining under the Code, together with a manufacturer, implicated either under the Code or through tort principles. In the real property cases, however, the manufacturer and the seller coalesce in the builder-vendor. Any builder-vendor impliedly warrants his unfinished products and, more recently, his finished ones, in the sense that he is liable to pay for correcting their defects. That is, he must fulfill his bargain. Added to this is the fact that the "manufacturer" of housing is liable, in terms of "enterprise liability," to remote consumers. The question naturally arises whether this is one and the same warranty.

History answers that it is not, since one was designed to police the fairness of bargaining and the other to impose social costs on the developer. Moreover, one applies to any builder-vendor, whereas the other, arguably, is imposed only upon the mass builder. The real distinction, however, is rooted in the effect of a disclaimer. A builder-vendor probably may sell a complete house "as is" to a forewarned purchaser and not be liable to correct defects in it. But disclaiming clauses probably would not immunize

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114 Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965).
115 Id. at 92, 207 A.2d at 328.
116 Id. at 90, 207 A.2d at 325.

a large-scale developer from the enterprise liability for personal injuries attributable to defects in the dwellings. It follows that the prudent course of conduct is to treat chattel sales and real property transactions as two separate problems.

Although, with real property, it may be best to separate the problem of quality control from the question of enterprise liability for personal injuries, the problem reduces itself to a search for a system which can channel these twin drives into a predictable pattern. The search for such a system needs some stepping stones, however, lest the matrix appear altogether too arbitrary. Three recent cases may aid this search, not because of their intrinsic substantive merits, but because of the ideas they contain about the proper structuring of law.

The first, *Goldberg v. Kollsman Instrument Corp.*,[117] involved the question whether, after a fatal airplane crash at LaGuardia Airport, a wrongful death action would lie against the airframe manufacturer and the altimeter maker on a theory of implied warranty. The claims were dismissed in the lower court on the ground that New York law always requires privity with the warrantor. Prior to the appeal, however, several intervening decisions indicated that "privity of contract is not always a requisite for breach of warranty recoveries."[118] Thus, although there was some question whether, under conflict of laws principles, New York or California law applied to the case, the court concluded that it made no difference, "since in this respect both States use the same rules."[119]

With this in hand, Chief Judge Desmond purported to state what those rules were.

> A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.[120]

Thus, with regard to things which may be a source of danger to persons if not properly manufactured, *MacPherson*[121] had long ago held that the manufacturer could be sued in negligence notwithstanding the lack of privity. The recent New York cases, along with *Henningsen*,[122] had extended the same treatment to actions for breaches of implied warranties, again in cases involving articles dangerous to persons. Including airplanes within the ambit of things dangerous to persons, therefore, was not even an extension of this principle. It merely ratified it.

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117 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
118 Id. at 435, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.
119 Id. at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.
120 Ibid.
121 MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
122 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

The rationale of *Goldberg*, however, was supplied by the court via a California decision. *Greenman*[123] was cited for its notion that the cost of personal injuries should be borne by the manufacturer; but in the very same paragraph the court refused to allow the action against the altimeter maker. The reason given was elementary. "Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft."[124] Lest the component manufacturers feel immune from suits by consumers, however, the court merely released them "for the present."[125]

The dissenters easily scored a number of debating points with the concept of enterprise liability. If, as suggested by the borrowed rationale, the purpose was to allocate the cost of injury to the enterprise concerned, it was American Airlines and not the airframe manufacturer who ought to bear the onus of injuries to air passengers. The dissenters suggested that the airline was excused because it was a regulated industry to which elementary ideas about apportioning the loss among all consumers by raising rates would not necessarily apply. But this illustrated the extreme complexities involved in enterprise liability, necessitating, as the dissenters believed, the leaving of this innovation to the legislature, with its built-in fact-gathering capacity, for a full-scale inquiry. Interestingly this was the reaction to *Schipper* expressed in a recent student note.[126]

The two Pennsylvania cases must be read together. In one, *Miller v. Preitz*,[127] an administrator brought an action in assumpsit against the seller and the manufacturer of a vaporizer-humidifier for alleged breaches of implied warranties of merchantability after the machine, purchased by the victim's aunt, "shot boiling water on decedent's body causing his death . . . ."[128] The Supreme Court held that the action lay against the seller because, under Section 2-318 of the Uniform Commercial Code, the "seller's" warranty ran to "any natural person who is in the family or household of his buyer."[129] That section, however, was held not to apply to "manufacturers." In the second case, *Webb v. Zern*,[130] the suit in trespass was brought against a beer distributor, a brewer, and a keg manufacturer after plaintiff was injured by the explosion of a keg of beer which had been purchased by his father and tapped by his brother. This time the

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123 Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
124 Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963).
125 Ibid.
126 Note, 51 Cornell L.Q. 389, 400 (1966).
127 422 Pa. 383, 221 A.2d 320 (1966).
128 Id. at 386, 221 A.2d at 322.
129 Id. at 388, 221 A.2d at 323.
130 422 Pa. 424, 220 A.2d 853 (1966).

Supreme Court held that the plaintiff stated a cause of action against the manufacturer in strict tort, relying upon dictum in *Miller* that "we recognize the social policy considerations behind imposing strict liability in tort upon all those who make or market any kind of defective product, notwithstanding an absence of negligence on their part."[131]

This is not the time or the place to suggest that the two opinions, insofar as the losing claimant in *Miller* must have been concerned, have something of the flavor of common law nit-picking over the forms of action.[132] The point is that the court did visualise a new system of order premised upon the Code governing sales and the law of torts governing manufacturer's liabilities. Be that as it may, the vast number of conflicting cases dealing with the problem, taken together with the Uniform Commercial Code and the new Restatement of Torts, suggest that a moratorium on solutions to the products liability question might be the best step at the moment, pending the development of some consensus about the problem. At the same time, the housing scene seems ripe for almost any rational solution before it falls victim to the same confusion now afflicting products liability in general.

Dealing with the builder-vendors who are both manufacturers and sellers, and taking into account the peculiar doctrine of merger, the real property sales present more fertile ground for the Pennsylvania experiment than does the classic chattel market. The New York Law Revision Commission has recently marched into this maelstrom and unveiled a solution for the housing scene which blends the *Goldberg* dissenters' call for a legislative approach with the Pennsylvania court's dichotomy between sales and manufacture.[133] This has necessitated the creation of a new character in the law's dramatis personae, the "housing merchant," *i.e.* any person or business entity which constructs dwellings for the purpose of sale. The housing merchant is subjected to two distinct kinds of responsibilities.

First, insofar as personal injuries are concerned, the housing merchant is made liable in tort, notwithstanding the absence of fault, for personal injuries of the purchaser or any other user of the premises by defects in the dwelling. The defects, however, must be such as would place life and limb in peril and not be noticed by the victim in time to avoid

131 Miller v. Preitz, 422 Pa. 383, 393, 221 A.2d 320, 325 (1966).

132 Compare Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N.E. 396 (1918); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918). Again the cases were decided the same day and went into casebooks to illustrate the fallibility of lawyers. See, e.g., Scott and Simpson, Cases on Civil Procedure 127, 130 n.1 (1950), where the cases appeared under the ironic caption "Abolition of Forms of Action."

133 N.Y. Law Revision Comm'n, Recommendation to the Legislature Relating to the Liability of Housing Merchants For Personal Injuries and Breach of Warranty. 1967 N.Y. Leg. Doc. No. ——.

harm. This liability only covers accidents which occur during the three-year period after the sale, and it terminates even earlier if the purchaser discovers the danger and has a chance to eliminate it. This is not a statute of limitations but a period during which the housing merchant, like an insurer, is liable for certain injuries. Indeed, should a liability-causing event transpire during the three-year cycle, there is a one-year limitations period thereafter during which the claim must be filed. This is an effort to rationalize the market in terms of enterprise liability, losses being centered upon the housing merchant, who presumably will spread them across the housing market in general.

The solution does little more than render articulate a reasonable reading of the recent cases. It brings the law into accord with the new conventional wisdom about the proper allocation of loss for personal injuries attributable to manufactured commodities. Very much on the plus side of the ledger is the fact that this solution provides a standard of predictability and recreates a matrix to replace the defunct litmus test of *caveat emptor*. The sour note lies in the fact that the Commission expressly preserved the traditional negligence claim, on which the statute of limitations apparently does not begin to run until an injury occurs.[134] This undermines the possibility that the housing merchant might arrive at a valid costing estimate after gaining risk experience under the new system.

Second, the housing merchant, as a seller in a competitive market, warrants his houses to be free from construction defects, built according to sound engineering standards in a workmanlike manner, and fit for habitation. Disclaimers and the doctrine of merger will no longer function to eliminate the housing merchant's responsibilities in this regard. Although the tort liability of the housing merchant can never be abrogated, this implied warranty is not absolute. Recognizing that the merchant and the buyer who negotiate about a completed house have a right to hammer out a price based upon the building "as is," the Commission recognized that absolutes ill-befit the bargaining process. Thus, implied warranties can be eliminated if the purchaser of a completed house agrees in writing to forego warranties, and if the writing spells out carefully the warranty being eliminated.

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134 Prosser seems to have been taken aback by this. Prosser, Torts § 62, at 410 (3d ed. 1964): "A corporation, still in existence, can scarcely be required to pay for damages which occur a century after the grant. There are, however, very few cases which have considered the question." But see Gouldin, "Liability of Architects and Contractors to Third Persons: Inman v. Binghamton Housing Authority Revisited," 33 Ins. Counsel J. 361, 365 (1966): "Lacy had designed the building and Smith had constructed the building pursuant to a contract entered into in 1948 and had completed the building and turned it over to the owner five years before the accident."

When such an explicit overhaul of the law once dominated by *caveat emptor* is spread out on paper, however, even the most casual reader must inquire whether there is any guarantee that the housing merchant will have the money with which to answer the judgments to be obtained under this kind of legislation. It is common knowledge, after all, that many builders are individual tradesmen with few assets other than their own skills, and that many larger builders operate behind the facade of collapsible corporations. Minimum capital and reserve requirements, which are common in the insurance industry, are unheard of in manufacturing. Perhaps recognizing that it had no precedents to operate with, the Commission attacked this problem by simply bringing the problem to the light. It did this by suggesting that henceforth housing merchants should not be entitled to specific performance of sales contracts unless they tender along with the deed a bond equal to the sale price of the house and conditioned upon failure to answer judgment obtained under the new system.[135] While the liability system itself reflects a distillation of what appears to be the developing law, this part of the Commission's program presents the real question for the future. It poses a challenge to the whole rationale of enterprise liability as a viable economic concept outside the realm of heavy industry.

VII

Postscript

All those whose mistress is the law ought to congratulate themselves for the good fortune of living in such exciting times. If stare decisis were the rule of the day, the mutation reflected in implied warranty as a remedy for structural deficiencies in unfinished houses would have been the end of the matter. As it was, facts and environment conspired, at least in America, to illustrate that rules and logic are not the whole of the law story. Facts involving roofs sustained by several nails, together with an environment in which building has become an assembly-line affair, have conspired to undermine everyman's respect for *caveat emptor* as the distillation of justice. The law's high priests, the judges, have come to recognize that new idols must be fashioned to meet the needs of the day.

The crunch must come, however, upon sober reflection's insight that the business of the day, the construction and sale of new houses, must necessarily be carried on within the framework of some rule system which

135 The National House-Builders Registration Council in England has provided for a system of inspections to counter the problem of shoddy construction. Interestingly, it has been suggested that "no outside inspection was needed provided the builder was compelled to give a proper form of warranty and that adequate insurance was made against the builder going bankrupt." The Times (London), Jan. 16, 1967, p. 9, col. 7.

guarantees a minimum of predictability. Except for idealists who believe the law to be either divinely or economically determined, terrestrial justice requires man-made rules that change in the light of new facts and an evolving enviroment, and at the same time serve as provisional polestars illuminating the here and now so that the day's business can be done. The shock of recognizing that there may be no pragmatically sanctioned rules, even in the short run, has hit the housing-merchant scene with full force. The job now is to restructure the market in light of the bits and pieces of conventional wisdom found in the decisions which shattered the repose of *caveat emptor*.

The New York Law Revision Commission has performed the job of restructuring the matrix of rules governing the housing scene. If this were the whole story, of course, a clean-cut ending could be made to it, and all concerned could find comfort in the new security founded in certainty. This is not the end of the story, however, because the legislation has yet to be enacted.[136] Indeed, the scene is now fraught with a number of paradoxes well worth brooding over if some moral is to be drawn from this tale.

First, it seems that the judges are able to abolish simple rules like *caveat emptor*, but that the process of restructuring a new set of rules in their place is beyond them. Since society has become more complex and a number of problems are now seen to have been shielded behind the easy answer of *caveat emptor*, a simple litmus-like rule no longer suffices, and a matrix of rules tailored to each facet of the problem is in order. This matrix, however, seems to require the intervention of the legislature. New cases do not make new law in the sense that classic common-law judges could substitute a new rule for an old one. Instead, new cases tend to create a flux which coerces the legislature to act. Paradox upon paradox, this coercion to become involved in private law comes at a time when the legislatures are bogged down dealing with the sweeping social issues of the day.

Second, it appears that the plan to secure order in this instance was not structured at the behest of the building industry itself. Indeed, the Commission has lived up to Mr. Justice Cardozo's dream and actually has mediated between the courts "with powers of innovation cabined and confined" and the legislature, "its powers of innovation adequate to any need, preoccupied, however, with many issues more clamorous than those of courts, viewing with hasty and partial glimpses the things that should be

136 The Law Revision Commission's scheme was introduced into the legislature early in 1967 but was not acted upon prior to adjournment. Senate Intro. Nos. 4219, 4222, Assembly Intro. Nos. 3799, 3811, 1967 N.Y. Legislative Record & Index at S377-78, A359-60.

viewed both steadily and whole."[137] This is in itself, sadly enough, something of a paradox since the American experience is that the industry to be regulated tends to control the regulation.

Third, the question arises whether this particular solution will ever be enacted into law. At first blush the law appears to protect the interests of the suburban classes who are the principal purchasers of new homes. It should, therefore, prove attractive to them as a "reform" measure. Second thoughts must arise, however, in light of the bonding provision, which may spell doom for many small and relatively unknown builders unable to gain access to bonding centers. In time the measure could lead to an oligopoly situation in the industry. The paradox here is that the new suburbanites, if there is any truth to conventional wisdom, tend to acquire something of the prejudices of a successful and conservative yeoman class, and their reaction to the potential destruction of small entrepreneurs remains to be seen.

Thus it is that the courts have generated chaos, and if *caveat emptor* is today seen as the villain, chaos in a mercantile setting is at least the delinquent offspring. The Commission thinks that it has collared the delinquent and has solved his social problem by the imposition of a new discipline. Analysis of the Commission's success, however, must await the verdict of time and of chance. A new, and less liability-fraught measure may be substituted in the legislative mill. A house may collapse killing a child, and the present bill may be swept through amidst public clamor. A politician eager to make a name in the suburbs may champion the measure; a rival may take the opposite course. The final paradox is that predicting what the law will be, the so-called science of reading the cases and estimating the character and prejudices of the judges, is now reduced to subjective introspection about political and social realities. Thus we have not only witnessed the shift of the center of lawmaking activity from the courts to the legislature, but we have seen the politicalization of the private law-making function. The life of law reform proves to be more than logic operating upon experience, for pure chance may largely determine how the sundry factors eventually coalesce.

[137] Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 114-15 (1921).