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CAVEAT EMPTOR: A PIERCED SHIELD

BACKGROUND

Caveat emptor—let the buyer beware. In the absence of fraud, this ancient maxim¹ is still the rule of law in the sale of realty. Is this rule indicative of the bargaining ethics of today or is it merely the result of retarded development in this area of the law?

Even among the most eminent of legal scholars there is discord as to the position of the doctrine of *caveat emptor* in the law today. Prosser, in discussing the doctrine, states that there has been a "complete shift" away from this point of view,² while Pomeroy, a scholar of equal stature, had but a few years earlier restated the doctrine as the prevailing law.³ It would appear from these two seemingly inconsistent statements that the rule is not as well defined as stated above. Hence, examination of this doctrine is necessary, including its origin, its present status, and its future course of development.

The words themselves smack of some earlier age when each man was sufficient unto himself and did not seek a court of law to right the wrong someone had done him. It would seem as if the expression which cannot be found among any of the presently existing Roman writings,⁴ arose during the Medieval Age, or at the latest, during the England of the 1400's. But *caveat emptor* was not to be found there. It was not a legal doctrine of this period. "To priest and lord, to yeoman and villein and even to

¹ Taken from an article of that name, Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

² PROSSER, *TORTS* 552-53 (2d ed. 1955): "The last half-century has seen a marked change in the attitude of the courts toward the question of justifiable reliance. Earlier decisions, under the influence of the prevalent doctrine of 'caveat emptor,' laid great stress upon the plaintiff's 'duty' to protect himself and distrust his antagonist, and held that he was not entitled to rely even upon positive assertions of fact made by one with whom he was dealing at arms length. It was assumed that any one may be expected to overreach another in a bargain if he can, and that only a fool will expect common honesty. Therefore, the plaintiff must make a reasonable investigation and form his own judgment. The recognition of a new standard of business ethics, demanding that statements of fact be at least honestly and carefully made, and in many cases that they be warranted to be true, has led to an almost complete shift in this point of view."

³ 3 POMEROY, *EQUITY JURISPRUDENCE* § 904 at 558 (Symons, 5th ed. 1951) "In ordinary contracts of sale, where no previous fiduciary relationship exists, and where no confidence, express or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arms' length, and the purchaser is presumed to have as many opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine already stated applies: No duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment."

⁴ Comment, 5 DE PAUL L. REV. 263 (1956).

burgler and lawyer, it would have fallen strangely upon the ear. They did not talk that language."⁵ Actually, the institutions of that day and age were based on the foundation of church and state authority. The ideals of the period were religiously oriented and a mercantile system of any extent or importance had not yet developed. One author analyzed the development of the doctrine in this way:

In early days the church had put its curse upon trade; it was evil, all evil, and the manner of its conduct did not matter. One who trafficked was beyond its Christian fellowship. As it became respectable, a petty and disorderly commerce grew up beyond the reach of the many arms of mediaeval control. Away from the marts or organized trade were to be found the wayfaring palmer with his relics and trinkets, the peripatetic peddler with gew-gaws and ornaments, strangers here today and there tomorrow, wayfaring men of no place and without the law. . . . Among such persons without rank or of mean estate a redress of wrongs was practically not to be had. It took time and the bitterness of experience to subdue the idea into compact language; but here it came to be understood that one's unconsidered bargain was his own tough luck.

How the trick of phrase was turned, and *caveat emptor* came into being we do not know. The wisdom seems to be the afterthought of the good man who has bargained, perhaps in a horse trade, once too often; the manner suggests the lawyer regretfully stating that the grievance seems to be without redress. It has happened often enough that tinkers and butchers and brewers have won the favor of kings and have then walked unabashed among the nobly born. Surely a *caveat emptor* may emerge from the folk thought of the despised trades and stand without shame before judges as an ancient maxim of the common law.⁶

Thus, the proverb emerged in England, but it was the England of the seventeenth century. It was there also that it developed into a maxim of the law. But it was the early American courts which truly expanded the maxim so that by the middle of the nineteenth century, it had become fully entrenched in the United States as the rule of law pertaining to sales.⁷

THE RULE TODAY—EXCEPTIONS

Due, at least in part, to mass production techniques and enormous growth of business transactions which developed in the last half of the nineteenth century and first half of the twentieth, legislation was passed which broke the grip of *caveat emptor* on the sale of personal property.⁸

⁵ Hamilton, *supra* note I at 1136.

⁶ *Id.* at 1162-63.

⁷ In *Barnard v. Kellog*, 77 U.S. 383, 388-89 (1870), Mr. Justice Davis delivering the opinion of the court stated: "Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina) sanction it."

⁸ See generally, *The Uniform Sales Act* and the *Uniform Commercial Code*.

In the area of real property, however, where there has been no fraud, the doctrine still prevails, and mere nondisclosure, not being fraud, is not actionable.⁹ Hence, the buyer is stuck with his purchase, which may be much less than what he thought he was bargaining for, even though the vendor knew full well what he was selling, but said nothing.

Following the Second World War, there began a tremendous increase in sales and construction of houses, and mass production techniques began to be applied to the building of homes.¹⁰ Perhaps it was this growth, and the increased amount of litigation following it, which acted as a stimulus for the courts, because they began to turn away from the rule of *caveat emptor* and, while continuing to reiterate that *caveat emptor* was the existing law, began to formulate numerous exceptions to the rule. Seeking in each case to balance the equities between the vendor and the purchaser, the courts would find some reason not to apply the doctrine to the facts in the particular case before it. With a vast number of cases moving away from the rule, a body of concrete exceptions to the ancient doctrine was formed.

It had long been established that acts or conduct, if made with the intent to deceive, would constitute a misrepresentation.¹¹ Obviously then, this would be the most readily available method by which the courts could grant relief to the buyer. The courts began to seek out misleading statements or actions by the vendor, and where they could be found, they were considered tantamount to fraud, and therefore, *caveat emptor* would not apply. Thus, it was found that the doctrine was not applicable where the vendor stated the "house was fit for residential purposes," when the fill soil on the lot was saturated with oil which precluded building a basement without excessive cost.¹² The same result was reached where the vendor stated that the house was "well constructed" when, in fact, it was built on clay sub-soil and the house began to settle.¹³ It was also a misrepresentation where the seller revealed true facts but not all of them,¹⁴ a half truth

⁹ See, e.g., *Egan v. Hudson Nut Products Inc.*, 142 Conn. 344, 114 A.2d 213 (1955); *Haddad v. Clark*, 132 Conn. 229, 43 A.2d 221 (1945); *Fegeas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958); *Swinton v. Whitinsville Savings Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942); *Shubert v. Neyer* 165 N.E.2d 226 (Ohio App. 1959); *Dozier v. Hawthorne Development Co.*, 37 Tenn. App. 279, 262 S.W. 2d 705 (1953).

¹⁰ The value of yearly construction of private residential buildings was \$200,000,000 annually in 1945 compared to about \$15,000,000,000 in 1950, and about \$18,000,000,000 in 1959. For more complete details, see Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541, 542 at 6 (1960).

¹¹ *Kuelling v. Roderick Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1098 (1905); *Croyle v. Moses*, 90 Pa. 250 (1879).

¹² *Nolt v. Palumbo*, 235 Ore. 68, 383 P.2d 1015 (1963).

¹³ *Passero v. Loew*, 259 S.W.2d 909 (Tex. 1953).

¹⁴ *Gilbert v. Corlett*, 171 Cal. App. 2d 116, 339 P.2d 960 (1959).

being equivalent to a lie,¹⁵ or where the vendor took affirmative steps to conceal a defect.¹⁶ In *Herzog v. Capital Co.*,¹⁷ the vendors sold the vendee a house through an agent who stated that it was in "sound condition" and "perfectly intact." The buyer made an inspection of the premises, but was unable to find any defects since the house had been freshly painted. Soon after the closing of the transaction the house began to leak severely during a heavy rain, and on inspection, it was found that the leakage was the result of defective materials and improper bracing. The court held that the vendor had a duty to reveal material facts, and although he did not know of the defects, he was bound by the knowledge and misrepresentations of his agent. The vendor could not escape liability for the representations despite the fact that the contract provided that he was bound only by representations found in the contract itself.¹⁸

Another theory on which the courts have seized in order to provide means to avoid *caveat emptor* is to find a duty on the part of the vendor to divulge information. Many courts find that this duty exists even where there is no fiduciary relationship, and even though there was, in some cases, a thorough inspection of the premises by the vendee.¹⁹ Although most courts have applied this duty to disclose on an *ad hoc* basis, there are two jurisdictions, Kentucky,²⁰ and California,²¹ where this duty is consistently applied and has become the rule.²²

The duty to disclose is found in two separate but closely related areas.

¹⁵ Where there was an innocent misrepresentation made by the seller courts have generally not even allowed the buyer to rescind, if the information was equally available to the buyer. See *Shappirio v. Goldberg*, 192 U.S. 232 (1904); *Traverse v. Long*, 165 Ohio St. Rptr. 249, 135 N.E.2d 256 (1956); *Kalmans v. Powles*, 121 Wash. 203, 209 Pac. 5 (1922); *Contra: Yorke v. Taylor*, 332 Mass. 368, 124 N.E.2d 912 (1955); *Ham v. Hart*, 58 N.M. 550, 273 P.2d 748 (1954).

¹⁶ *Southern v. Floyd*, 89 Ga. App. 602, 80 S.E.2d 490 (1954); *Beagle v. Bagwell*, 169 So. 2d 43 (Fla. 1964); *Simmons v. Evans*, 185 Tenn. 282, 206 S.W.2d 295 (1947).

¹⁷ 27 Cal. 2d 349, 164 P.2d 8 (1945).

¹⁸ *Ibid.*

¹⁹ See KRATOVIL, *REAL ESTATE LAW* § 250 (4th ed. 1964); Goldfarb, *Fraud and Non-disclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 19 (1956).

²⁰ *Hall v. Carter*, 324 S.W.2d 410 (Ky. 1959); *Bryant v. Troutman*, 287 S.W.2d 918 (Ky. 1956); *Kaze v. Compton*, 283 S.W.2d 204 (Ky. 1955); *Weikel v. Stearnes*, 142 Ky. 513, 134 S.W. 908 (1911).

²¹ In *Lingsch v. Savage*, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963), there is a lengthy discussion of the rule of nondisclosure in California. See also, *Kallgren v. Steele*, 131 Cal. App. 2d 43, 279 P.2d 1027 (1955), *Rothstein v. Janns Inv. Corporation*, 45 Cal. App. 2d 64, 113 P.2d 465 (1941), *Clauser v. Taylor*, 44 Cal. App. 2d 551, 112 P.2d 661 (1941).

²² The old common law doctrine of *caveat emptor* does not apply in Louisiana where the civil law concept of redhibition allows a seller to avoid a sale because of a defect in the thing sold. LA. CIV. CODE ANN. art. 2520 (West 1952). See *Gabriel v. Jeansonne*, 162 So. 2d 798 (1964); *Perkins v. Chatry* 58 So. 2d 349 (La. App. 1952).

The first is where there is a latent material defect known to the seller and which the buyer will not be able to discover.²³ The rationale on which the courts generally base this exception is the difficulty of discovery by the vendee so that he is not really dealing on an equal footing with the vendor.

Typical of this situation is *Cohen v. Vivian*,²⁴ where plaintiffs, two elderly women, bought two identical duplexes from defendant. The contracts recited that the purchasers had inspected the property and that they relied on inspection, not representations of anyone, when entering into the contract. The houses were, in fact, built upon filled ground, and soon after the plaintiffs had begun occupancy, the houses began to crack, tilt and sink. This condition was so dangerous that the plaintiffs had to leave the premises. The trial court found that the vendor knew that the ground had been filled and rejected the defendant's contention that *caveat emptor* was applicable. The Supreme Court of Colorado, in affirming the judgments for the plaintiffs, did not consider the provision in the contract regarding inspection as altering liability and stated:

A latent soil defect, known to the seller of a house built on such soil, creates a duty of disclosure in the seller. His failures to disclose amounts to concealment, making him vulnerable to a suit based upon fraud. *Caveat emptor* in such a case is a pervious shield affording no protection to the seller.²⁵

Some courts have carried this duty on the part of the vendor one step farther. Although everyone is presumed to know the law, they have imposed liability on the vendor for failing to disclose a violation of a local ordinance.²⁶ Also, in some cases where the vendor has failed to reveal that he has used the property unlawfully, the court will grant relief to the buyer who has suffered loss therefrom.²⁷

The second area where there is a duty to disclose is where there is a latent defect known to the vendor, and not discoverable by the vendee,

²³ *Cohen v. Vivian*, 141 Colo. 443, 349 P.2d 366 (1960); *Holley v. Jackson*, 39 Del. Ch. 32, 158 A.2d 803 (1959); *Dugan v. Bosco*, 34 Del. Ch. 599, 108 A.2d 586 (1954); *Forest Preserve Dist. v. Christopher*, 321 Ill. App. 91, 52 N.E.2d 313 (1943). *Loghry v. Capel*, 132 N.W.2d 417 (Iowa 1965); *Darque v. Chaput*, 166 Neb. 69, 88 N.W.2d 148 (1958); *Wolford v. Freeman*, 150 Neb. 537, 35 N.W.2d 98 (1948); *Jackson v. Good*, 73 N.M. 19, 385 P.2d 279 (1963); *Brooks v. Ervin Constr. Co.*, 253 N.C. 214, 116 S.E.2d 454 (1960); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 689 (1934).

²⁴ 141 Colo. 443, 349 P.2d 366 (1960).

²⁵ *Id.* at 447, 349 P.2d at 367.

²⁶ *Curran v. Heslop*, 115 Cal. App. 2d 476, 252 P.2d 378 (1953); *Milmore v. Dixon*, 101 Cal. App. 2d 257, 225 P.2d 272 (1950); *Barder v. McClung*, 93 Cal. App. 2d 692, 209 P.2d 808 (1949); *Gamel v. Lewis*, 373 S.W.2d 184 (Mo. 1963).

²⁷ *Burzillo v. Thompson*, 57 A.2d 195 (Mun. Ct. App. D.C. 1948); *Tucker v. Beazley*, 57 A.2d 191 (Mun. Ct. App. D.C. 1948); *Ikeda v. Curtis*, 43 Wash. 2d 449, 261 P.2d 684 (1948).

that involves the risk of personal injury.²⁸ Thus in the case of *Mei v. Tsokalas*,²⁹ the plaintiff-purchaser brought an action against the seller to recover for injuries sustained by plaintiff in a fall down the cellar stairway of her home. The plaintiff alleged that the fall was caused by the handrail on the stairway which was fastened so closely to the wall that it was impossible to hold the rail when using the stairs, and that she fell when her fingers became stuck in the space between the wall and rail. The plaintiff based her claim on the fact that this condition amounted to a concealed defect. The court upheld her contention saying that a vendor of land is liable for injuries to the seller if he fails to disclose conditions either natural or artificial which involve an unreasonable risk of harm to persons on the land where he knows of the condition and has reason to believe the buyer will not discover it.³⁰

This case was unusual in certain aspects. First, the house was constructed by the seller for the vendees, and therefore, the plaintiff could have brought her suit against the builder-vendor for negligence in creating the condition. Secondly, while a suit for negligence would have more readily lent itself to recovery under the circumstances here, since the vendor was the builder, both the plaintiff and court spoke in terms of a latent dangerous condition, even though it would appear from the facts as set out that the condition was not latent but readily discoverable at first sight, or first touch. While this case illustrates the duty to disclose a latent dangerous condition, it also serves to illustrate the willingness of some courts today to turn their back on *caveat emptor*.

In summing up the areas where there is a duty to disclose, it has been expressed as follows:

Two propositions are commonly stated: (1) If the material facts are accessible to the vendor only, and he knows that they are not known to and are not within the reach of the diligent attention, observation and judgment of the plaintiff, the vendor is bound to disclose them; (2) Where the conditions affect the personal health and safety the vendor's duty is greater than where they merely affect the value of the property.³¹

With respect to the duty to disclose, the buyer must be able to make some showing that the vendor knew of the defect in order to hold him liable for resulting injuries, since the ordinary vendor (a non-builder) is not responsible for conditions on the premises which cause injury unless

²⁸ *Mei v. Tsokalas*, 25 Conn. Sup. 114, 197 A.2d 527 (1961); *Bray v. Cross*, 98 Ga. App. 612, 106 S.E.2d 315 (1958); *Combaw v. Kansas City Ground Inv. Co.*, 358 Mo. 934, 218 S.W.2d 539 (1949); *Belote v. Memphis Development Co.*, 346 S.W.2d 441 (Tenn. 1961). See also, *U.S. v. Inman*, 205 E.2d 681 (5th Cir. 1953).

²⁹ *Mei v. Tsokalas*, *supra* note 28.

³⁰ *Ibid.*

³¹ Goldfarb, *supra* note 19 at 16.

he knew of them and failed to warn. Therefore, generally speaking, once the property is sold, the vendor's liability ends. However, this is not the case where there is a nuisance on the property created by the vendor, the theory being that the vendor owes a continuing duty to abate it which survives the sale, or to put it another way, the liability for nuisance survives the sale.³² Hence, if the purchaser cannot prove that his vendor knew of the condition, he might still be able to avoid the doctrine of *caveat emptor* by proceeding under nuisance. It is of interest to note that the distinction between dangerous condition and nuisance in this regard is sometimes vague, since often the nuisance is a dangerous condition. Therefore, if the vendee, a member of his family, or a guest is injured, the court will speak of the duty to disclose, while if someone on the right of way is injured, the vendor might be held to have created a public nuisance.

In summary, the exceptions to the *caveat emptor* rule, as previously enumerated,³³ include the following: the duty to disclose latent and material defects known to the seller but not within the reach of the buyer; the duty to disclose conditions which may cause injury; non-disclosure of the vendor's unlawful use of the property; half-truths and acts of concealment; and nuisance created by the vendor. It should be kept in mind that despite these exceptions, the rule which prevails is that there is no liability for mere nondisclosure unless there was a duty to disclose arising from the relationship of the parties. The above-mentioned theories are not rigid propositions. They are merely methods which courts have used in order to put the parties on a more equal footing, and to avoid *caveat emptor*. Moreover, not all jurisdictions are united in applying these theories. Therefore, despite the fact that the decisions affording the buyer relief where he has made a bad bargain continue to multiply, in most cases he will still be out of luck. Although the law in this area is shifting away from the old maxim,³⁴ as far as the usual transaction between an ordinary buyer and seller dealing at arms-length, *caveat emptor* is still a shield for the seller. A

³² *Pharm v. Letuchy*, 283 N.Y. 130, 27 N.E.2d 811 (1940). Cf. *Leahan v. Cochran*, 178 Mass. 566, 60 N.E. 328 (1901), wherein the court distinguishes between private nuisance and public nuisance, holding defendant landowner liable to plaintiff who was injured on right of way by a nuisance on the land of defendant which nuisance had been created by his predecessors.

³³ Several writers have mentioned another exception to *caveat emptor* being that of marketable title, since where there is no agreement to the contrary the vendor of realty must give marketable title to the vendee. In effect, then, this would amount to an implied warranty, but all agreements in the contract are merged in the deed and therefore, the buyer could only advance this argument where he had accepted a warranty deed. See Bearman, *supra* note 10 at 555 and cases cited therein. See also, Dunham, *Vendors obligation as to Fitness of Land For A Particular Purpose*, 37 MINN. L. REV. 108 (1953).

³⁴ 5 DE PAUL L. REV. 263 (1956).

badly battered shield, but nonetheless a shield. In one area, however, the shield has been pierced, that is, where the seller of the building was also the one who constructed it.

THE BUILDER-VENDOR—IMPLIED WARRANTY

The liability of a builder who sells a house he is in the process of constructing, or who enters into a contract to build a house for a vendee, is different than that of the ordinary home owner who sells his house to another. When a builder sells a building not fully completed, there is an implied warranty which is imposed on him by all construction contracts. The implied warranty is that he will use reasonable skill in his work, that the job will be done in a workmanlike manner and that the building will be fit for the purpose intended.³⁵ This warranty is an implied one and will, therefore, be imposed on the builder even if not spelled out in the contract itself.

This implied warranty or "builder liability" was first established in *Miller v. Cannon Hill Estates Ltd.*,³⁶ wherein a builder-vendor sold a home to a buyer who entered into the contract of sale before the home was completed. The vendee subsequently sued the vendor to recover damages for structural defects. The court held the vendor liable on the basis of an express warranty which he had made, but stated that he was also liable on an implied warranty that the house was to be built of proper materials and in a workmanlike manner, and would be fit for habitation.³⁷

This implied warranty, to which the *Miller* court gave birth, has subsequently become the law in a number of jurisdictions.³⁸ And although the common-law courts have generally refused to allow implied warranties into the sale of realty, only one state has rejected the implied warranty theory,³⁹ and with the passing of time, it will most likely become the rule in the vast majority of states. New Jersey, the latest state to accept this theory,⁴⁰ had until recently also expressly denied the existence of implied warranties in the sale of real property.⁴¹ Thus in 1957, in *Levy v. C. Young*

³⁵ KRATOVIL, *op. cit. supra* note 19 at § 451.

³⁶ [1931] 2 K. B. 113.

³⁷ *Ibid.*

³⁸ *Glisan v. Smolenske*, 153 Col. 274, 387 P.2d 260 (1963); *Weck v. A & M Sunrise Construction Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Jose-Balz Co. v. De Witt*, 93 Ind. App. 672, 176 N.E. 864 (1932); *Lorasco v. Custom Built Homes, Inc.*, 144 So. 2d 459 (La. App. 1962); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Loma Vista Development Co. v. Johnson*, 177 S.W.2d 225 (Tex. Civ. App. 1944), *rev'd on other grounds*, 142 Tex. 686, 180 S.W.2d 922 (1944); *Hoye v. Century Builders Inc.* 52 Wash. 2d 830, 329 P.2d 474 (1958).

³⁹ *Gilbert Construction Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957).

⁴⁰ *Schipper v. Levitt & Sons, Inc.*, *supra* note 38.

⁴¹ *Levy v. C. Young Construction Co.*, 46 N.J. Super 293, 134 A.2d 717 (1957).

Construction Co.,⁴² the plaintiff-vendee of a newly constructed house sued the vendor to recover damages caused by a defective sewerage system. Despite a vigorous dissent, the court held that absent any express warranties, the doctrine of *caveat emptor* applied, and the plaintiff could not recover on an implied warranty.⁴³ The reason behind this decision, as enunciated by the court, was public policy. It was felt that the cut-off point of the seller's liability had to be the acceptance of the deed, otherwise an element of uncertainty would prevail in the field of real estate, with sellers remaining liable for something that had passed out of their control. Nevertheless, by 1965, this same court had shifted to the viewpoint of the *Levy* dissent and found an implied warranty.⁴⁴

Notwithstanding the number of jurisdictions that have adopted the concept of implied warranty laid down in *Miller v. Cannon Hill Estates Ltd.*⁴⁵ the reasoning of the *Miller* court and the extent of the warranty which it created has become a subject of criticism.⁴⁶ The major contention of the critics is that the purchaser of a house bought one day before completion may have the protection of an implied warranty, while the man next door, who bought his house the following day, will not. Despite the fact that the implied warranty does not, so its critics feel, extend far enough, it almost goes without saying that as far as the vendee is concerned, some protection in this area is better than none. In light of the criticism of the implied warranty, it is significant to note that in three states this warranty may extend to a house which has been completed at the time of the contract.⁴⁷ However, it is doubtful if this extension to houses already completed will become very widely accepted, since many of the jurisdictions which have adopted the implied warranty theory, and even some which have not, have expressly ruled that the warranty does not arise when the house was completed at the time of the contract.⁴⁸

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Schipper v. Levitt & Sons, Inc.*, *supra* note 38.

⁴⁵ *Miller v. Cannon Hill Estates Ltd.*, *supra* note 36.

⁴⁶ KRATOVIL, *op. cit. supra* note 19 at 309. Bearman, *supra* note 10 at 545-47.

⁴⁷ *Carpenter v. Donohoe*, 154 Col. 78, 388 P.2d 399 (1964); *Loraso v. Custom Built Homes, Inc.*, *supra* note 38; *Loma Vista Development Co. v. Johnson*, *supra* note 38, wherein the house still needed minor work, and it was not readily apparent whether the courts of this state intended to extend the warranty to completed structures.

⁴⁸ *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961); *Allen v. Reichert*, 73 Ariz. 91, 237 P.2d 818 (1951); *Walton v. Petty*, 107 Ga. App. 753, 131 S.E.2d 655 (1963); *Coutrakon, v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963); *Tudor v. Heugel*, 132 Ind. App. 579, 178 N.E.2d 442 (1961); *Staff v. Lido Dunes Inc.*, 47 Misc. 2d 322, 262 N.Y.S.2d 544 (1965). The Appendix which follows this case sets out the status of the implied warranty in this county and England. *Rappich v. Altermatt*, 106 Ohio App. 282, 151 N.E.2d 253 (1957).

THE BUILDER-VENDOR AND STRICT LIABILITY

As in the case of the ordinary vendor, if the builder-vendor knows of a dangerous condition on the premises, he has an affirmative duty to reveal it.⁴⁹ The builder-vendor's liability is actually broader than the ordinary home seller's, since in most cases, he was also the one whose negligence caused or created the defect or dangerous condition.⁵⁰ But, as in the case of the ordinary vendor, the buyer must prove that the seller knew of the condition. In a few jurisdictions, however, this requirement has been side-stepped. In what may prove to be the most effective restriction yet upon the doctrine of *caveat emptor*, some courts have found builder-vendors liable under the rule of *MacPherson v. Buick Motor Co.*⁵¹ Thus, if the house is a "dangerous item" within the meaning of *MacPherson*, the builder-vendor will be liable for putting out a defective house which causes injury. Furthermore, with the requirement of privity no longer necessary,⁵² this liability will not only extend to the vendor's vendee, but to remote vendees or anyone else who suffers injury as a result of the defect. So, it seems that with the decision in *McPherson*, the dragon's teeth were sewn, and now a host of cases involving real property have sprung up, each one challenging the sway of the ancient maxim.⁵³

The cases which have applied the law of products liability to builders have all been of post-World War II vintage. In 1948, in *Hale v. Depaoli*,⁵⁴ one of the earliest decisions to apply the rule of *MacPherson*, the court found that the plaintiff should have been allowed to go to the jury on her first count, which alleged the defendant builder was negligent in construction of a railing which collapsed and injured her. In arriving at this decision, the court made a radical break with the general rule that a builder who has completed a house, which has been accepted by the owner, is not liable for injury to third persons.⁵⁵ This decision was all the more startling,

⁴⁹ *Mei v. Tsokalas*, *supra* note 28; *Bray v. Cross*, *supra* note 28.

⁵⁰ *Ibid.* ⁵¹ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁵² The cases applying the *MacPherson* doctrine to builder vendors have not overly concerned themselves with the concept of privity. For a discussion of privity in the products liability field, however, see Burns, *The Implied Warranty in the Law of Torts: A New Dimension to Airline Litigation*, Trial Law. Guide 115, 115 at n. 2 (1964).

⁵³ *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956) *cert. denied*, 351 U.S. 989 (1956). See also, *Pastorelli v. Associated Eng'rs, Inc.*, 176 F.Supp. 159 (D.R.I. 1959); *Dow v. Holly Mf. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958); *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1 (1948); *Carter v. Livesay Window Co.*, 73 So. 2d 411 (Fla. 1954); *Leigh v. Wadsworth*, 361 P.2d 849 (Okla. 1961); *Schipper v. Levitt & Sons, Inc.*, *supra* note 38.

⁵⁴ *Hale v. Depaoli* *supra* note 53.

⁵⁵ See generally, Annot. 58 A.L.R.2d 865 (1956).

since the railing gave way eighteen years after its construction and was not, the defendant argued, "imminently dangerous." The court, however, said the test for liability under the *MacPherson* doctrine was not "imminent danger," but whether the object was "reasonably certain to place life and limb in peril when negligently made."⁵⁶

In 1954, *MacPherson* was invoked to allow a mother to recover for the death of her son when a concrete window frame fell on him.⁵⁷ The child did not live in the building, but privity was no longer a prerequisite and the court held a contractor was liable to third persons, despite the general rule, if the contractor had created an inherently dangerous condition.⁵⁸ In *Dow v. Holly Mfg. Co.*,⁵⁹ a 1958 case, the third vendee in the chain of title was allowed to recover from the builder-vendor. In 1959, a federal district court applied *MacPherson* and held the builder-vendor liable when an employee in the building was injured.⁶⁰ In 1961, in *Leigh v. Wadsworth*,⁶¹ the same rule was applied when a porch roof fell on a tenant of a remote purchaser.

In Illinois, the court has expressed a willingness to apply the *MacPherson* rule to a builder-vendor, and would have held him liable but for the fact that the injuries to a member of the vendee's family were caused by an apparent defect.⁶² However, even this obstacle has now been hurdled. In speaking of *Pastorelli v. Associated Eng'rs, Inc.*,⁶³ wherein the court applied the dangerous item test, but was subsequently reversed because the plaintiff's complaint contained no allegation of a latent defect. The New Jersey Supreme Court said "[t]his requirement has been the subject of critical comments which soundly point out that dangers may be unappreciated though patent and risks may be unreasonable though uncealed."⁶⁴

The New Jersey court, which made this statement in *Schipper v. Levitt & Sons, Inc.*,⁶⁵ found for plaintiff on both the theory of implied warranty and strict liability in what appears to be a landmark case. The plaintiffs were a young boy and his father who were suing for damages suffered by the child as a result of a severe scalding from water in the bathroom sink of

⁵⁶ Hale v. Depaoli, *supra* note 53 at 232, 201 P.2d at 3.

⁵⁷ Carter v. Livesay Window Co., *supra* note 53.

⁵⁸ *Ibid.*

⁵⁹ Dow v. Holly Mfg. Co., *supra* note 53.

⁶⁰ Pastorelli v. Associated Eng'rs, Inc., *supra* note 53. However, this case was reversed.

⁶¹ Leigh v. Wadsworth, *supra* note 53.

⁶² Kordig v. Northern Constr. Co., 18 Ill. App. 2d 48, 151 N.E.2d 470 (1958).

⁶³ Pastorelli v. Associated Eng'rs, Inc., *supra* note 53.

⁶⁴ Schipper v. Levitt & Sons, Inc., *supra* note 38 at 82, 207 A.2d at 322.

⁶⁵ Schipper v. Levitt & Sons, Inc., *supra* note 38.

a house built by defendant. The defendant had not supplied mixing valves on the faucets in the houses he had built in a mass housing development and the hot water drawn from the sinks was unusually and excessively hot. Although the mixing valves were only a few dollars apiece, defendant omitted them and put a warning in the homeowner's guide instead, explaining the necessity of opening the cold water tap prior to the hot. Under these circumstances, the plaintiff sued for negligence, pointing out that the defendant "was not just an ordinary vendor of a house but was also the architect, the engineer, the planner, the designer, the builder and the contractor."⁶⁶ In a second count, the plaintiffs asked that the defendant be held liable for breach of a warranty of habitability. The court held that the plaintiffs could rely on both counts and speaking of the defendant, stated that "[i]n this respect it was not unlike the manufacturers of automobiles, airplanes, etc., whose products embody parts supplied by others. When their marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under ordinary negligence principles."⁶⁷

Thus, it can be seen by the slow but steadily developing number of cases, that a new area of law is gradually unfolding. Whether or not it will be incorporated into the developing field of products liability,⁶⁸ or whether the cases dealing with real property will grow into a separate but parallel area of law, remains to be seen. Whatever its eventual status, this is an area alive with possibilities, as illustrated by one commentator who speculates:

The extension of the MacPherson theory to realty in effect places upon the builder-vendor an implied warranty against structural defects upon which the vendee can sue should injury occur because of the defects. It would not seem too great a step for future courts to take, to reason that if such a "warranty" exists when an injury has occurred, there is no reason to say that it does not exist when the vendee sues his vendor who is also the builder, not to redress an injury, but simply to establish the structural quality and good workmanship in his house, the lack of which may lead to injury at some later time. For this reason, the black-letter law to the effect that there are no implied warranties of quality in the sale of a new house is most likely to fall in the situation in which the vendor of the house is also its builder.⁶⁹

CONCLUSION

It is more than readily apparent that the trend today is to limit *caveat emptor* wherever possible. This is so obvious that it does not even warrant

⁶⁶ *Id.* at 80. 207 A.2d at 320.

⁶⁷ *Ibid.*

⁶⁸ See generally, PROSSER, TORTS § 97 (3rd ed. 1963); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

⁶⁹ Bearman, *supra* note 10 at 57.

mentioning. Moreover, in the last two decades, courts and writers have continued to report this trend⁷⁰ while conceding that the law is still what it has been for the past century.⁷¹ What is of significance, however, is the recent shape this trend is taking. It is branching off into two separate areas of exceptions to *caveat emptor*; one for the ordinary person selling his home or building, and the other applied where the vendor is the builder. This divergence seems desirable. The doctrine of *caveat emptor* arose when men dealt on an equal footing, and even today, when a buyer deals with the average homeowner, despite the difficulty of making a thorough examination of the premises, the positions are not grossly unequal. The old doctrine is not necessarily undesirable or primitive under these circumstances. On the other hand, where the buyer deals with a construction company which erects scores of homes a year, he is, as it were, standing in a ravine. Here, the imposition of implied warranties and strict liability will help once more to raise the buyer to the same level as the seller, and pierce the shield of *caveat emptor*.⁷²

Eric Cahan

⁷⁰ Goldfarb, *supra* note 19; Bearman, *supra* note 10; 5 DE PAUL L. REV. 263 (1956).

⁷¹ Goldfarb, *supra* note 19 at 43. See generally, Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439 (1960).

⁷² Although it may be harsh to hold the builder liable where he can no longer exercise control over the building, as between him and the innocent vendee, he is far better able to shoulder the burden. Perhaps one of the underlying reasons for the recent applications of implied warranties and strict liability upon the builder is revealed by the *Schipper* Court which stated: "There is presumably available to such modern entrepreneurs, as there is in the products liability field generally, wholly adequate extended insurance coverage and the builder vendors are admittedly in a much better economic position than the injured party to absorb crippling losses caused by their own negligence or defective construction." (*Schipper v. Levitt*, *supra* note 38 at 87, 207 A.2d at 323.)