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CAVEAT VENDOR—A TREND IN THE LAW OF REAL PROPERTY

What maxim is more familiar than *caveat emptor*? How many suits have been dismissed with hardly more than a *caveat emptor*? There is no duty upon a seller to disclose material facts—*caveat emptor*!¹ A seller is not liable for “puffing” or seller’s talk—*caveat emptor*!² A buyer cannot complain of being deceived by matters that a reasonable investigation would uncover—*caveat emptor*!³ Misrepresentations are not actionable unless dishonestly made—*caveat emptor*!⁴

Certainly this maxim in the language of Rome, the great lawgiver, carries with it the repute of the classics and the prestige of authority. How strange it is then, that as yet, no one seems to have discovered it in any of the Roman writings that have survived. It is not found within the Holy Church, or the administrative courts of guild, town or fair, nor is it found in the law merchant. In fact, the first time it seems to appear in print is well into the 16th century.⁵ Historically speaking, one would not find *caveat emptor* among the reputable ideas of the middle ages because of the ideology and teachings of the Church. All trade was considered worldly and sinful, and hence condemned. At a later date, men like St. Thomas Aquinas distinguished between a wrongful trade which was carried on for a profit and a rightful trade which served public necessity.

As time passed, the crafts increased in number, claiming more and more followers. In order to trade or sell their goods they created markets and fairs. These were distinctly marked by fair prices—an honest measure and good quality which conformed strongly to the early standards of Christian conduct. Following them came the market towns and the formation of the guilds, each becoming more crowded and complex with each passing year. It is here within these years that we see the break with the Church itself, the disintegration of the monarchical system, government regulation and the rise of industrialism. It is here that one finds the grad-

¹ In *Peek v. Gurney*, L.R. 6 H.L. 377 (1873), Lord Cairns said there is no legal duty to disclose facts, however morally censurable the failure to do so might be.

² *Vulcan Metals Co. v. Simmons Manufacturing Co.*, 248 Fed. 853, 856 (C.A. 2d, 1918), wherein Learned Hand said that seller’s talk, like the claims of campaign managers before election, are “rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.”

³ *Slaughter v. Gerson*, 13 Wall. (U.S.) 379, 383 (1872). The Supreme Court said, “a court of equity will not undertake, anymore than a court of law to relieve a party from the consequences of his own inattention or carelessness.”

⁴ The foundation of this rule is laid down in *Pasley v. Freeman*, 3 T.R. 51 (K.B. 1789).

⁵ Fitzherbert, *Boke of Husbandrie* (1534) § 118.

ual crumbling away of the early Christian standards of trade and in their stead we see rising an age of rugged individualism, the mother of *caveat emptor*.⁶ As one would expect, our maxim saw its greatest triumph here in America. Economically, our rugged individualism was reinforced by the raw spirit of the frontier. Our newly developed industrial system was not to be shackled by formal control. It was every man for himself in this country, *laissez faire* and *caveat emptor*.⁷

Ironically, at the turn of this twentieth century the decline of the maxim began because of the same mass production of goods and industrialism which gave rise to it. The government began imposing regulations to protect purchasers for the public welfare. The sellers began to stand behind their representations and their goods and found that such honesty was the best policy. Satisfied customers returned with more business, time was saved and more money was made. The result was beneficial to the seller, to the purchaser and to the country. Thus, the exceptions to our maxim in the sale of goods grew until it might, in many respects, be said, *caveat vendor*.⁸

Turning away from the law of sales wherein *caveat emptor* has been well trounced, it is paradoxical to find it still strong and commanding as a stern warning to all buyers of real estate.⁹ Land law does not seem to have developed as the law of sales. We find the maxim applied to title,¹⁰ quality and condition¹¹ of both leased¹² and purchased realty.¹³ The reason is obvious when one looks at factors affecting land law. There was no need for a change because there was no mass production of housing, no building

⁶ The origin, history and development of the maxim is very well covered by Walton H. Hamilton in *The Ancient Maxim Caveat Emptor*, 40 *Yale L. J.* 1133-1187 (1930-31).

⁷ In *Barnard v. Kellogg*, 77 U.S. 383, 388 (1870), Mr. Justice Davis speaking for the Supreme Court declared *caveat emptor* to be of "such universal acceptance" that with a single exception, "the courts of all the states in the union, where the common law prevails, sanction it."

⁸ Lawrence Vold uses this expression in his handbook of the Law of Sales, p. 445 (1931); W. Page Keeton in his article, *Rights of Disappointed Purchasers*, 32 *Tex. L. Rev.* 1, 2 (1953) uses the term *caveat venditor*. This development away from *caveat emptor* in sales law is covered in Llewellyn, *On Warranty of Quality, and Society*, 36 *Col. L. Rev.* 699 (1936). Marrow, *Warranty of Quality: A Comparative Survey*, 14 *Tulane L. Rev.* 327 (1940).

⁹ *Collier v. Harkness*, 26 Ga. 362 (1858); *Gimblen v. Harrison*, 2 Sneed 315 (Ky. 1804); *Lewy v. Clark*, 128 N.Y. Misc. 16, 217 N.Y. Supp. 185 (1926); *Smith v. Tuckes*, 151 Tenn. 347, 270 S.W. 66 (1925); *Hoskins v. Woodlam* (1938) 1 All E.R. 692 (K.B.).

¹⁰ *Mosley v. Magnolia Petroleum Co.*, 45 N.M. 230, 114 P. 2d 740 (1941).

¹¹ *Parker v. Moulton*, 114 Mass. 99 (1873); *Lewy v. Clark*, 128 N.Y. Misc. 16, 217 N.Y. Supp. 185 (1926).

¹² *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892).

¹³ *Tiffany Real Property* § 99 p. 149 (3d Ed. 1939) and cases cited therein.

boom or industrialization of the building line. The mass production of goods which defeated *caveat emptor* in the law of sales did not take place in land law.¹⁴

Today, there exists a different situation. The post-World War II building boom saw a great increase in the building industry and the mass production of housing. Today, there is a tremendous surge in the sale of second-hand housing which is comparable to the mass production of goods which earlier affected sales law. Today, thousands of people are buying new homes and buying their homes by a new method, that is, from description and sample or "show house."¹⁵

Having thus discussed *caveat emptor* historically and economically and having some concept of its development, we might anticipate a movement to give more protection to the purchaser in the area of land law. It is with this thought in mind that we shall examine some of the recent decisions with an objective of sustaining this theory.

Let us begin then with some of the basic principles of *caveat emptor* and see how they have been affected today. As stated before, one basic rule was that there was no legal duty to disclose facts, however morally censurable the failure to do so might have been.¹⁶ In 1932, this position was modified by the Restatement of Contracts.¹⁷ It took the position that there was no legal duty of disclosure unless the fact concealed was one vitally affecting the very basis of the contract and was of such a nature that the mistake if mutual would render voidable a transaction caused by reliance thereon.

Following this, there arose a series of cases involving real property where the court further modified our basic proposition of non-disclosure. The cases hold that the vendor is under a duty of disclosing material facts which would not be discoverable by the exercise of ordinary care and diligence or which a reasonable investigation and inquiry would not uncover.¹⁸

¹⁴ The usual method of acquiring a house was to contract for one to be built according to plan and specification. These contracts protected the purchaser since they carried with them promises to perform in work-man-like manner. Hudson, *Building Contracts* 186 (7th Ed. 1946). In addition, a buyer of real estate was protected by the requisite, in the absence of contrary intent, of a marketable title.

¹⁵ See *Vendor's Obligation as to Fitness of Land For a Particular Purpose* by Allison Dunham in 37 *Minn. L. Rev.*, 110, (1953).

¹⁶ *Peek v. Gurney*, L.R. 6 H.L. 377 (1873).

¹⁷ Restatement of Contracts § 502 (1932).

¹⁸ *Dugan v. Bosco*, 108 A. 2d 586 (Del. 1954). *Contra*: *Musgrave v. Lucas*, 193 Ore. 401, 238 P. 2d 780 (1951); *Simons v. Evans*, 185 Tenn. 282, 206 S.W. 2d 295 (1947); *Clausner v. Taylor*, 44 Cal. App. 2d 453, 112 P. 2d 661 (1941). *Cf.* *Hays v. McGuinness*, 208 Ga. 547, 67 S.E. 2d 720 (1951); *Swinton v. Whitinsville Savings Bank*, 311 Mass. 677, 42 N.E. 2d 808 (1942); *Dozier v. Hawthorne Development Co.*, 262 S.W. 2d 705

In California, the courts began treating this concealment or non-disclosure as actual fraud.¹⁹ In *Milmoe v. Dixon*,²⁰ the purchaser made a personal inspection of the premises and also had an architect and bank appraiser make an examination of the premises. In spite of these inspections, the court found the seller guilty of actionable fraud. It found the seller had a duty to disclose the structural defects present and also to disclose the fact that the building was constructed without a building permit. In a later case,²¹ the defendant concealed the fact of a building code violation from the plaintiff. The plaintiff inspected the premises and still the court allowed a rescission of the contract. It found a fraudulent concealment of fact which the vendor had a duty to disclose. The inspection of the premises was not enough to offset this duty. That there is a movement away from the privilege of non-disclosure cannot be denied. It is not a spectacular movement but a seller of real estate may not find it easy to rely on *caveat emptor* and thus remain silent.²²

Suppose the vendor does make a misrepresentation? Formerly, the misrepresentation had to be dishonest in order to hold the vendor.²³ Today, this requirement has been modified or abolished.²⁴ It is generally held that when a contract or other bargaining transaction such as a conveyance is induced by a material misrepresentation by one of the parties to the transaction, the other party may rescind the transaction without respect to the honesty or diligence of the representer.²⁵ This is usually based on the

(Tenn. 1953). Also see 3 Pomeroy, Equity Jurisprudence, 5th Ed., § 902, pp. 550-555. As to the effect of partial disclosure see *Kraft v. Lowe*, 77 A. 2d 554 (D.C. Mun. Ct. App., 1950). For a further analysis of the whole problem, see Keeton, Fraud, Concealment and Non-Disclosure, 15 Tex. L. Rev. 1 (1936).

¹⁹ *Dyke v. Zaiser*, 80 Cal. App. 2d 639, 182 P. 2d 344 (1947); *Milmoe v. Dixon*, 101 Cal. App. 2d 257, 225 P. 2d 273 (1950); *Curran v. Heslop*, 115 Cal. App. 2d 476, 252 P. 2d 378 (1953).

²⁰ 101 Cal. App. 2d 257, 225 P. 2d 273 (1950).

²¹ *Curran v. Heslop*, 115 Cal. App. 2d 476, 252 P. 2d 378 (1953). In *Watt v. Patterson*, 125 Cal. App. 2d 788, 271 P. 2d 200 (1954), the defendant had no actual knowledge of the building violation and rescission was refused. Also see *Barber v. McClung*, 93 Cal. App. 2d 692, 209 P. 2d 808 (1949) where the building violated a zoning ordinance. The purchaser inspected the premises and was not bound by constructive notice of the zoning ordinance. The purchaser recovered damages on the theory of fraud. Contra: *Egan v. Hudson Nut Products*, 142 Conn. 344, 114 A. 2d 213 (1955), where non-disclosure of a building violation was not actionable fraud. Also see Restatement Restitution § 8.

²² See, Rights of Disappointed Purchasers, W. Page Keeton, 32 Tex. L. Rev. 1 (1953).

²³ *Pasley v. Freeman*, 100 Eng. Rep. 450, 3 T. R. 51 (K.B. 1789).

²⁴ See *Byars v. Sanders*, 215 Ala. 561, 112 So. 127 (1927) where the statement is made, "He who affirms either what he does not know to be true or knows to be false, to another's prejudice and his own gain, is both in morality and law, guilty of falsehood and must answer in damages."

²⁵ *Seneca Wire and Manufacturing Co. v. Leach and Co.*, 247 N.Y. 1, 159 N.E. 700 (1928).

theory that the rescission merely restores the parties to their previous positions and prevents the unjust enrichment of the misrepresenter.²⁶

In Texas, false and material misrepresentations are deemed to be actionable fraud though innocently made.²⁷ Thus, exemplary damages were granted against the vendor where he innocently made misrepresentations of fact.²⁸ In *Passero v. Loew*,²⁹ a house was represented to be well constructed when in fact it was constructed on faulty subsoil which caused the house to settle and crack. The vendor's innocence was held no defense to an action for damages for fraud. In New Mexico,³⁰ the fact that the vendor acted honestly and in good faith in making a misrepresentation was held to be immaterial. Damages were awarded for actionable fraud.

Further, let us suppose that a misrepresentation could be discovered by the vendee if he had made an investigation. A basic rule of *caveat emptor* is that if a reasonable investigation would uncover the misrepresentation, then the vendor would not be liable.³¹ However, if the vendor is dishonest it is generally held today that he will be liable.³² In *Bobak v. Mackey*,³³ misrepresentation by the vendor that the purchaser could lawfully carry on a light manufacturing business on the premises entitled the purchaser to recover damages for deceit. The premises were located in a city zone where such light manufacturing could not be carried on. The court found that this was a misrepresentation of *fact* and not law upon which the purchaser relied. In Oregon,³⁴ the vendor innocently made false representations that the house could be used as a multiple family dwelling. The city code permitted use of the house only as a two family dwelling. The court overruled the defendant's contention that the purchaser could have discovered the conditions imposed by the building code by merely looking at the record. The purchaser still had a right to rely on the ven-

²⁶ In *Dugan v. Bosco*, 108 A. 2d 586 (Del., 1954), the vendee discovered the misrepresentation after having converted the house he was sold into apartments. The court still allowed rescission though they would not be restoring the parties to status quo.

²⁷ This is the rule by statute. Tex. Civ. Stat. (Vernon, 1948) Art. 4004.

²⁸ *Smith v. Jordan*, 220 S.W. 2d 481 (Tex., 1949). The usual rule is that damages will not be awarded for innocent misrepresentations. *Terrene Ltd. v. Nelson*, 3 All E.R. 739 (1937).

²⁹ 259 S.W. 2d 909 (Tex., 1953).

³⁰ *Ham v. Hart*, 50 N.M. 550, 273 P. 2d 748 (1954).

³¹ *Slaughter v. Gerson*, 13 Wall. (U.S.) 379 (1872).

³² *Bishop v. Stout Realty Agency*, 182 F. 2d 503, 505 (C.A. 4th, 1950). The court said, "The principle underlying the *caveat emptor* rule was more highly regarded in former times than it is today; but it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed." See also *Walker v. Hustad*, 116 Mont. 495, 154 P. 2d 483 (1944), where a purchaser relied on the vendors fraudulent misrepresentations that the materials were the best. Contra: *Hays v. McGuiness*, 208 Ga. 547, 67 S.E. 2d 720 (1951).

³³ 107 Cal. App. 2d 55, 236 P. 2d 626 (1951).

³⁴ *Gamble v. Beahm*, 198 Ore. 537, 257 P. 2d 882 (1953).

dor's representations and rescission was allowed. In Massachusetts,³⁵ the vendor innocently misrepresented the assessed value of the real estate for the current year. The vendee could have ascertained the falsity of the representation by recourse to records in the assessor's office. Rescission was allowed.³⁶

Very closely allied to actionable misrepresentation is seller's talk or "puffing." Seller's talk has long been allowed on the theory that it is only a misstatement of the representer's opinion and as such is not actionable. There must be a misrepresentation of fact, otherwise *caveat emptor* applies.³⁷ Massachusetts recently took a dim view of seller's talk.³⁸ The Massachusetts supreme court felt the time had come to depart from *caveat emptor* in so far as certain kinds of seller's talk was concerned. They felt that the rule could not be justified on principles of ethics and justice. In *Passero v. Loew*,³⁹ the vendor made the statement that the house to be sold was well constructed when, in fact, it was not. The court considered this as a misrepresentation of fact and awarded the vendee damages. A statement such as this could easily be construed as "puffing" and thus not actionable as a misrepresentation of opinion. Yet, the court regarded it as a misrepresentation of fact. In *Hays v. McGinness*⁴⁰ this tendency was expressed. The courts are tending to restrict seller's talk by regarding some types of opinion as a misrepresentation of fact.

From all of these cases it can be seen that if a seller of real estate makes a representation about his property, he will have to stand behind it.⁴¹ Is this not the same movement that took place in the law of sales?⁴²

Looking elsewhere in the field of land law there is a movement in the federal government to protect the purchaser. The Federal Housing Ad-

³⁵ *Yorke v. Taylor*, 124 N.E. 2d 912 (Mass., 1955).

³⁶ But see *Kazwell v. Reynolds*, 250 Ill. App. 174 (1928), where the court indicates that a purchaser might have a duty to examine building codes and zoning laws. Another interesting case on misrepresentation is *Woldow v. Dever*, 374 Pa. 370, 97 A. 2d 777 (1953). In this case the court indicates that the physical appearance of the premises alone without any affirmative action by the vendor can be an actionable misrepresentation. See also *Morrow v. Rennie Process, Inc.*, 222 App. Div. 100, 225 N.Y. Supp. 250 (1st Dep't, 1927).

³⁷ *Vulcan Metals Co. v. Simmons Manufacturing Co.*, 248 Fed. 853 (C.A. 2d, 1918).

³⁸ *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E. 2d 692 (1952). Followed in *Yorke v. Taylor*, 124 N.E. 2d 912 (Mass., 1955).

³⁹ 259 S.W. 2d 909 (Tex., 1953).

⁴⁰ 208 Ga. 547, 67 S.E. 2d 720 (1951). See also *Lewis v. White*, 2 Vt. 2d 101, 269 P. 2d 865 (1954) which while recognizing "puffing" restricts it.

⁴¹ The Pennsylvania Supreme Court in a recent misrepresentation case, *Lake v. Thompson*, 366 Pa. 352, 77 A. 2d 364 (1951), said that "the law leans toward protecting even the foolishly credulous against the machinations of those who would defraud." See also *Keeton, Rights of Disappointed Purchasers*, 32 Tex. L. Rev. 1 (1953).

⁴² See *Vold, Law of Sales* (1st ed., 1931), § 142.

ministration and the Veterans' Administration, acting primarily as sureties, require certain standards of construction before they will insure a loan. Other non-federal groups like the National Association of Home Builders have proposed a standard written warranty to be given by builders to the purchaser of a new house.⁴³

Also, it would seem that a vendor is liable for permissive waste between the time of contracting and the time of closing.⁴⁴ This is sustained either on a theory of equitable conversion or by an interpretation of the contract which obligates the seller to deliver the property to the buyer in the condition in which it was, at the time of contracting, reasonable wear and tear and possible loss from casualty excepted.

The opening of a "show house" for inspection and the selling of other houses from this model, plans and pictures is comparable to description selling in the law of sales.⁴⁵ By this theory we invoke the warranty that exists on goods sold by description, i.e., an express warranty that the goods conform to the description.⁴⁶ We can also treat the transaction as a contract to sell a lot and a contract to build a house. This construction would carry with it promises to perform in a workman-like-manner.⁴⁷ By either theory the purchaser is protected as long as a reasonable inspection would not uncover the defect.⁴⁸

Another interesting development in land law is in the area of zoning law violations. It is well known as a general rule that in the absence of stipulation, a seller must give a buyer a marketable title.⁴⁹ What, then, is a marketable title? It has been said that every buyer of land has a right to demand a title which shall put him in all reasonable security against loss or annoyance by litigation. He should have a title which will enable him not only to hold his land, but to hold it in peace and if he wishes to sell it, to be reasonably sure that no flaw will arise to disturb its market value.⁵⁰

⁴³ See 4 *Western Reserve Law Review* 357 (1953).

⁴⁴ See *Vendor's Liability for Permissive Waste*, 48 *Harv. L. Rev.* 821 (1935).

⁴⁵ *Williston, Sales* § 223 art. 223 (Rev. Ed. 1948).

⁴⁶ See *Weinberg v. Wilensky*, 26 N.J. Super 301, 97 A. 2d 707 (1953); *Ace Development Co. v. Harrison*, 196 Md. 357, 76 A. 2d 566 (1950). These cases also indicate that the warranties survive acceptance of the deed. Also see *New Houses and Warranties* 85 L. J. 219 (1938).

⁴⁷ *Re v. Magness Construction Co.*, 117 A. 2d 78 (Del., 1955). See also, *Hudson, Building Contracts* 186 (7th Ed., 1946).

⁴⁸ In *Weinberg v. Wilensky*, 26 N.J. Super 301, 97 A. 2d 707 (1953), the purchaser made periodic inspections of the premises. Later he discovered water seepage into the cellar. Damages for breach of contract were allowed. Also see *Laurel Realty Co. v. Himelfarb*, 191 Md. 462, 72 A. 2d 23 (1950).

⁴⁹ *Firebaugh v. Wittenberg*, 309 Ill. 536, 141 N.E. 379 (1923). Also see 55 *Amer. Jur.* 702 and cases thereunder.

⁵⁰ *Firebaugh v. Wittenberg*, 309 Ill. 536, 141 N.E. 379 (1923).

A purchaser who has bargained for a good title will not be compelled to take one subject to suspicion; that it must be free from reasonable doubt, a title to which no reasonable man would object and which a prudent man would not hesitate to purchase at the market price for a good title.⁵¹ Thus, restrictions upon the use of land or the location and character of buildings that may be erected thereon, fixed by covenants or other private restrictive agreements, constitute encumbrances rendering the title unmarketable.⁵²

However, it has been consistently held that a zoning ordinance is not an encumbrance affecting the marketability of title.⁵³ The reasons given to support this theory are varied. In *Kazwell v. Reynolds*,⁵⁴ the court seems to base its decision on the fact that the ordinance was a matter of record. They feel it was the duty of the purchaser to have advised himself of such an ordinance and aptly quote, "ignorantia legis neminem excusat."⁵⁵ In the leading case, *Lincoln Trust Co. v. Williams Bldg. Corp.*,⁵⁶ the court said the ordinance simply regulates the use of property and does not discriminate between owners. A person enters into a contract subject to these ordinances.

What if a seller is using the property in violation of a zoning ordinance and then sells it? In *Moyer v. DeVincentis Construction Co.*,⁵⁷ there was an ordinance requiring buildings to be set back 25 feet from the street. The building was only 23 feet from the street. The contract provided that the property was to be conveyed "free and clear" of all liens and encumbrances excepting existing restrictions and easements if any and that "title is to be good and marketable and such as will be insured at regular rates by any respectable insurance company." The court found the title unmarketable not because of an existing zoning ordinance, but because a building had been constructed upon the lot in violation of that ordinance. The title was in such condition that the purchaser would be

⁵¹ *Brown v. Cannon*, 10 Ill. 174 (1848). *Deer Park Civic Ass'n. v. City of Chicago*, 347 Ill. App. 346, 106 N.E. 2d 823 (1952).

⁵² See decisions to be found in American Digest System, Vendor and Purchaser 134 (4); 66 C.J. 588 § 909; 55 Am. J. 7020 § 246; Maupin, *Marketable Title to Real Estate* (3rd Ed.) § 106; Kratovil, *Real Estate Law* § 174 (1947).

⁵³ *Wheeler v. Sullivan*, 90 Fla. 711, 106 So. 876 (1925); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920); *Hall v. Risley*, 188 Ore. 69, 213 P. 2d 818 (1950); *Miller v. Milwaukee Odd Fellows Temple*, 206 Wis. 547, 240 N.W. 193 (1932); *Kazwell v. Reynolds*, 250 Ill. App. 174 (1928); 175 A.L.R. 1056 § 2; 55 Am. Jur. 705 § 250.

⁵⁴ 250 Ill. App. 174 (1928).

⁵⁵ 250 Ill. App. 174, 177 (1928). But see *Gamble v. Beahm*, 198 Ore. 537, 257 P. 2d 882 (1953) where the court rejected "record notice."

⁵⁶ 229 N.Y. 313, 128 N.E. 209 (1920).

⁵⁷ 107 Pa. Super. 588, 164 Atl. 111 (1933).

exposed to litigation. It was pointed out that any substantial encroachment of a building on adjoining land of a private owner or the public renders the title to the land on which the building is located unmarketable. By this analogy, the court found an encroachment in front of the house. The defendant's contention that the plaintiff had record of the zoning ordinance and could have ascertained the setback was denied. The purchaser, even with knowledge, was not required to take such a title when the contract specifically provided it was marketable.

In *Lobmeyer v. Bower*,⁵⁸ on practically the same facts the court relied on the *Moyer case*, emphasizing the point that a marketable title must be one that does not expose the party holding it to the hazards of litigation. Again, there was a clause in the contract guaranteeing a marketable title subject to "all restrictions and easements of record." The court reasoned that it was not the existence, but the violation of the ordinance that rendered the title unmarketable.

In *Oatis v. Delcuze*,⁵⁹ the court found that the title would be unmarketable if the building violating the ordinance was constructed after the zoning ordinance came into being. They said the purchaser "agreed to purchase the property and not the property plus a probable law suit."⁶⁰

What then is the effect of these decisions? It would seem that title companies which insure marketability would be liable on their policies as well as a grantor upon his covenants for title.⁶¹ Neither a seller nor a title is relieved from a duty concerning a violation by a contract term excepting covenants and zoning from the title obligation. Only a clause negating any duty as to compliance of existing uses would clearly protect a title examiner insuring marketable title.⁶²

There is some case law supporting the theory that there is an implied representation by a vendor that the existing condition of the premises is legal.⁶³ In *Barder v. McLung*,⁶⁴ the court held that the vendor had a duty

⁵⁸ 170 Kan. 442, 227 P. 2d 102 (1951).

⁵⁹ 226 La. 751, 77 S. 2d 28 (1954). See *Lasker v. Patrovsky*, 264 Wis. 589, 60 N.W. 2d 336 (1953).

⁶⁰ 226 La. 751, 753, 77 2d 28, 31 (1954). Also see *Hebb v. Severson*, 32 Wash. 2d 159, 201 P. 2d 156 (1948); *Hartman v. Rizzuto*, 266 P. 2d 539 (Cal., 1954); *Josefowicz v. Porter*, 32 N.J. Super 585, 108 A. 2d 865 (1954).

⁶¹ See *Roberts v. Larsen*, 264 App. Div. 880, 35 N.Y.S. 2d 597 (2d Dep't, 1942).

⁶² See *Building Covenants and Zoning Ordinances*, 27 Rocky Mountain L. R. 255 (1955). Also note that many building codes and zoning ordinances provide that a violation is a nuisance and it would seem clear that the existence of a nuisance is an encumbrance. See N.Y. Multiple Dwelling Law § 4 (30); Building Code of Chicago (1951) 39-7, 90-4.

⁶³ See *Dunham, Vendors' Obligation as to Fitness of Land for a Particular Purpose*, 37 Minn. L. Rev. 108 (1953).

⁶⁴ 93 Cal. App. 692, 209 P. 2d 808 (1949). Also see *Bobak v. Mackey*, 121 Cal. App. 2d 554, 263 P. 2d 626 (1951); *Gamble v. Beahm*, 198 Ore. 537, 257 P. 2d 882 (1953).

to disclose to the plaintiff that the apartment being sold was maintained and used in violation of an existing zoning ordinance. The vendor's silence was a fraudulent misrepresentation upon which the vendee relied. The court refused the defendant's argument that the vendee had inspected the premises and was bound by record notice. They said "the purpose of the recording act is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value."⁶⁵ The court awarded damages for fraud. In *Morrow v. Rennie Process Inc.*,⁶⁶ where an existing multiple dwelling violated the occupancy standards of the New York Multiple Dwelling Law, the court said: "It is thus evident that the physical appearances of the property was sufficient to constitute a representation that the property could be applied to the use for which it ostensibly was designed."⁶⁷

Suppose a building permit is issued and then subsequently a zoning ordinance is passed revoking the permit. In *Graham Corp. v. Board of Zoning Appeals of Town of Greenwich*,⁶⁸ the Connecticut Supreme Court held that there was no vested right in a mere building permit. Unless work is substantially in the course of construction, the building permit may be invalidated as a valid exercise of police power.⁶⁹ In Illinois,⁷⁰ the court found there was a vested right in a building permit when the forms for the foundation had been installed.⁷¹ The subsequent zoning ordinance could not revoke this vested right and the purchaser was protected.

We began with *caveat emptor*. We have looked at some of the cases in the various fields of land law which affect our maxim. Nowhere have we found a case specifically renouncing it.⁷² There has been no spectacular break away from *caveat emptor*. As time changes, our economy and society must also change. In order to meet a new legal problem, we do not cast away our old legal principles. This would leave us with nothing to rely and depend on. The result would be chaos. Thus, as time and society change, it is inevitable that a maxim born of time, economy and society must change. Principles of law such as *caveat emptor* must be modified to meet new situations. Today, the situation demands that we

⁶⁵ 93 Cal. App. 692, 209 P. 2d 808, 811 (1949).

⁶⁶ 222 App. Div. 100, 225 N.Y. Supp. 250 (1st Dep't, 1927).

⁶⁷ *Ibid.* at 102 and 252.

⁶⁸ 140 Conn. 1, 97 A. 2d 564 (1953).

⁶⁹ See *Lee Builders v. Wells*, 95 A. 2d 692 (Del., 1953).

⁷⁰ *Deer Park Civic Ass'n v. City of Chicago*, 347 Ill. App. 346, 106 N.E. 2d 823 (1952).

⁷¹ *Contra: Brett v. Building Commissioner*, 250 Mass. 73, 145 N.E. 269 (1924).

⁷² Judge Parker in *Bishop v. Stout Realty Agency*, 182 F. 2d 503, 505 (C.A. 4th, 1950) said: "The principle underlying the *caveat emptor* rule was more highly regarded in former times than it is today."

modify *caveat emptor*—that we give more protection to the purchaser. It has been the purpose of this comment to show that his modification has begun—*Old maxims never die, they just fade away.*

SALE BY DESCRIPTION—THE WARRANTY OF MERCHANTABILITY

Under the Uniform Sales Act, as adopted by Illinois and 32 other states, a sale of goods “by description” has the special legal consequence of imposing upon the seller a “warranty of merchantability”:

Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.¹

Identification of sales by description which would give rise to this warranty is important. The Uniform Sales Act does not define the term, and, therefore, cases must provide the definition.

HISTORICAL DEVELOPMENT

*Gardiner v. Gray*² is a very early case involving a warranty of merchantability. Two dealers in silk contracted to buy and sell “waste silk.” The subject matter of the sale was in transit to England, and not subject to the buyer’s inspection. The waste silk when it arrived was not resaleable as such and the court found that the seller impliedly warranted that it would be so. In the later case of *Jones v. Just*,³ Manila hemp was the subject of a similar sale. This hemp was, at the time of sale, on board ship many miles from buyer and seller. Upon arrival, the hemp was found to have been partially ruined by sea water, and therefore not resaleable as Manila hemp. The court held that the seller by describing the hemp as Manila hemp impliedly agreed to sell Manila hemp *fit for resale*. Again the parties were dealers in the type of goods bought and sold, and not growers or manufacturers.

As the warranty arose, in England it was implied between dealers who intended to resell the goods. Thus specific goods,⁴ not subject to the scrutiny of the parties, could apparently be the subject of a sale by description. In both the *Gardiner* and *Jones* cases the goods were specific in that they were identified and agreed upon but not subject to inspection. The seller offered a certain type of goods to the buyer who wished to resell

¹ Uniform Sales Act § 15(2).

² 4 Camp. 144, 171 Eng. Rep. 46 (1815).

³ [1868] 3 Q.B. 197 (L.R.).

⁴ Those goods “identified and agreed upon at time a contract to sell or sale is made.” Uniform Sales Act § 76(1).