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Product Liability for a Defective House

Joseph A. Valore

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IN 1967 THERE WERE CONSTRUCTED in the United States, 845,000 [1] new, private, residential, single dwellings, with a total cost to the builder in land, labor and materials of 14.6 billion dollars.[2] This is obviously a big business. Many of these dwellings are of the mass produced or tract variety.

Sale of these dwellings is generally in one of two ways. The developer may construct a model house, or several different model houses within the development which are completely finished. Prospective purchasers view these models and select one which they desire, or the purchaser may select a basic style and incorporate features he desires to serve his own needs. After selection of the style desired, the prospective purchaser then views the lots available in the development, and chooses one for the site of his house. Once the style and lot are selected the prospective purchaser and the builder or his agent enter into an agreement for the sale of the new house.

The second common method of sale is much the same. It differs in that the builder may start building the dwelling before the purchaser is known. While the house is under construction, the purchaser arrives on the scene, and negotiates for the purchase of the dwelling upon completion.

In either situation the purchaser, having signed the agreement, may wonder what guarantees he has that the dwelling will be completed in a workmanlike fashion,[3] free from defects,[4] and inhabitable.[5]

To understand the current attitude of the courts regarding the rights and liabilities as between a builder-vendor and a vendee, a look at the historical development of the law of real property is essential.

During the feudal period, land was the basis of power.[6] He who controlled the land controlled the people. So it developed that transactions involving the sale of land were solemn occasions,[7] whereby the seller and the buyer performed certain rituals clearly evidencing their intention regarding the transaction. Once they had completed the sale,

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1 United States Department of Commerce Construction Report; Sales of New One Family Homes: Annual Statistics, No. C-25-67-13 (1967).

2 *Ibid.*

3 Jones v. Gatewood, 381 P. 2d 158 (Okla., 1963).

4 Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E. 2d 819 (1957).

5 Carpenter v. Donahoe, 158 Colo. 78, 388 P. 2d 399 (1964).

6 Walsh, Law of Real Property, 508 (1947).

7 Casner & Leach, Cases and Text on Property, 253 (1947, with 1964 supp.).

the courts were very reluctant to invalidate the transaction. The doctrine of *caveat emptor* prevailed. It was felt that where two parties had dealt in an arms-length transaction, and the buyer had ample opportunity to examine the land prior to the sale, he was bound by the bargain he had made.

Of course, where there was fraud or misrepresentation perpetrated on the buyer, the bargain was subject to recision.[8]

This doctrine of *caveat emptor* has its application to the sale of chattels as well as realty. During the course of negotiations for the sale of goods, the buyer secured whatever warranties as to the quality of the goods the seller was willing to give. Once the agreement was completed, the parties were bound to the contract. Should either party commit a breach, the injured party had recourse through the court for his damages. Where, however, one not in privy to the contract was injured and sought recovery, the court dismissed the action based on a lack of contractual privity.[9] The court refused to hear an action brought by one who was not an original party to the contract of sale.

The Industrial Revolution changed all of this. The seller no longer dealt with the buyer; goods were manufactured in large quantities and the buyer was often the last link in a long chain from the manufacturer. Finally in 1916, *MacPherson v. Buick* [10] was decided. This case involved injuries to the plaintiff as a result of a defective wheel on a car manufactured by the defendant. The court held that where an object, if negligently constructed, is certain to place one in danger, the manufacturer is strictly liable to all who might reasonably be expected to use the product even though the injured party is not in privity to the sale.

Thus we see the beginning of liability of a manufacturer for goods he produces.[11] Though this doctrine has been applied to manufacturers of chattels with increasing frequency, there has been great reluctance to apply the same view to building contractors.[12] The courts felt that where a vendor has given up the title and possession to the vendee, since he no longer has any duty to repair the property and is not in control of the premises, he should not be liable for injuries sustained by the vendee, or a third party, due to defects which existed at the time of the sale.[13]

This was the general rule as applied in the United States[14] and England.[15] However, certain exceptions to this rule developed. In a

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[8] Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L. J., 1138 (1931).

[9] Winterbottom v. Wright, 10 M. & W. 109 (1842).

[10] MacPherson v. Buick, 217 N.Y. 382, 111 N.E. 1050 (1916).

[11] 1 Frumer & Friedman, Products Liability, § 5.03 (1) (1967).

[12] Prosser, Torts, § 99, at 693 (3d ed. 1964).

[13] Palmore v. Morris, Tasker & Co., 182 Penna. 82, 37 A. 995 (1897).

[14] Annot., 41 A.L.R. 842 (1926).

[15] Bottomley v. Bannister, 1 K.B. 458 (1932).

1931 English case,[16] the court took a different view. Here the plaintiff had entered into a contract to purchase a house from the defendant. At the time of the signing of the contract the house was still under construction. Oral statements made by the defendant at the time of the sale were to the effect that he would use the best material and perform the work in the best workmanlike manner. Nothing to this effect was put into the agreement. Sometime after plaintiff took possession of the house, it was found that due to defects in construction, excess dampness penetrated the house making it unfit for the plaintiff to live in. The plaintiff brought an action for damages for breach of contract. The defendant answered by stating he did not breach any duty to the plaintiff, as the contract of sale did not contain any warranties, either express or implied. The court in deciding for plaintiff, held that where a purchaser buys a dwelling, which is still under construction, there is an implied warranty, that upon completion the dwelling will be fit for the purpose intended and habitable.

In deciding the case, the court was very careful to make the distinction that its ruling applied only to a dwelling which was unfinished at the time of purchase. The rule regarding dwellings which were sold after completion was not changed.[17]

American Decisions: Caveat Emptor v. Implied Warranty

The position of the American courts regarding the matter of the liability of a builder-vendor for his work is best answered by examining cases from some of the various jurisdictions to see how the problem has been handled.

The Oregon Supreme Court, in 1959, reviewed the case of *Steiber v. Palumbo* [18] wherein the plaintiff brought an action for breach of an implied warranty of quality. The plaintiff, some six years prior, had purchased a newly completed house from the defendant-builder. The dwelling had been built over fill dirt and subsequently settled into the ground unevenly. In upholding the lower court verdict in favor of the builder, the court stated that there are no implied warranties in a contract for the sale of real property and the doctrine of *caveat emptor* prevails. The purchaser who fails to secure for himself express warranties in the sale agreement is precluded from any action on the basis of implied warranty, when a defective condition is discovered.

In the same year that the Oregon case was decided, the Arizona Supreme Court decided a similar case.[19] Here the plaintiff took a somewhat different approach: The dwelling which he purchased from defend-

[16] Miller v. Cannon Hill Estate Ltd., 2 K.B. 113 (1931).

[17] Perry v. Sharon Development Co. Ltd., 4 All. E.R. 390 (1937).

[18] 219 Ore. 479, 347 P. 2d 978 (1959).

[19] Voight v. Ott, 86 Ariz. 128, 341 P. 2d 923 (1959).

ant-builder had been used as a model house, prior to the sale. Shortly after moving in, plaintiff found that the central air conditioning system was defective. He brought suit for breach of an implied warranty of quality. However, realizing that Arizona had the same view as that of Oregon, plaintiff took the position that the air conditioning system was not part of the real property, but was personal property to which the implied warranty would apply. This contention was rejected and it was held that the air conditioning system was a permanent fixture and a part of the realty. Since there are no implied warranties as to quality or condition in the sale of real property in Arizona, plaintiff's action failed.

The purchaser of a new house in Georgia thought he had a good case against his builder-vendor [20] when damage to his house resulted from the builder's failure to comply with a local city ordinance regarding construction of the dwelling. The court, however, said the true issue to be decided was whether the law implies a warranty as to condition or quality of a house which is completed at the time of sale. It was held that the doctrine of *caveat emptor* is in effect in Georgia, and therefore, there are no implied warranties in the sale of real property.

In a 1952 case,[21] Maryland had affirmed the doctrine of *caveat emptor* as applying to its jurisdiction. This position was challenged by litigation in a later case,[22] in which a builder-vendor, in constructing tract type dwellings, placed heating units in the houses which failed to properly heat the house. It was held that the defendant did not warrant that the heating units would properly heat the house, but that he was only required to install heating units in a good and workmanlike manner. If they did not properly heat the houses, defendant was not liable. The most recent Maryland decision, *Allen v. Wilkenson* [23] though acknowledging a new trend toward implied warranties, refused to stray from the established rule that no such warranties exist, holding that it is for the legislature, and not the courts to abrogate the doctrine of *caveat emptor.*

In *Tudor v. Mobley,*[24] the Indiana Appellate Court stated that *Steiber v. Palumbo*[25] was on the same issue and favored the ruling in that case. The court went on to state that where a purchaser deals in an arms-length transaction and has ample opportunity to inspect the premises before purchase, no warranties will be implied in the sale of a new house.

Alabama placed its name among the states holding there are no implied warranties in the sale of newly completed houses, in a 1961 deci-

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[20] Walton v. Petty, 107 Ga. App. 753, 131 S.E. 2d 655 (C.A., 1963).

[21] Berger v. Burkoff, 200 Md. 561, 92 A. 2d 376 (C.A., 1952) (water leaked into basement, due to faulty construction).

[22] Gilbert Construction Co. Inc. v. Gross, 212 Md. 402, 129 A. 2d 518 (C.A., 1957).

[23] 250 Md. 395, 243 A. 2d 515 (1968).

[24] 132 Ind. App. 579, 178 N.E. 2d 442 (1961).

[25] Steiber v. Palumbo, *supra* note 18.

sion.[26] The same court, however, in 1967,[27] allowed recovery to a vendee against the builder-vendor. The vendee and builder had entered into a contract, whereby the builder was to construct a house on a lot in the builder's subdivision. During the course of the negotiations vendee was shown the plans and specifications for his house. Defects discovered after the vendee moved in were found to have resulted from the builder's failure to comply with the plans and specifications. The court distinguished this case from the above, by stating that the builder's action in showing the plans and specifications to vendee amounted to an express warranty that the house would be built accordingly. The agreement between the parties was one for personal services and not for the sale of realty. Therefore, the doctrine of *caveat emptor* had no application.

In *Sklarsky v. Wayne Lawrence Construction Corp.*,[28] the New York court refused to allow the purchaser to recover damages due to latent defects in the construction of his new house. Here the parties had stipulated in their agreement that delivery of the deed by the builder-vendor to the purchaser was evidence of full compliance with the terms of the contract. It was felt that since the agreement had included this provision, there was no implied warranty of good workmanship, and the builder was not liable for latent defects.

Four years later, in 1965,[29] this same court refused to follow the above ruling when presented with a similar case. Here the purchase agreement stated that the house would be built in a good and workmanlike manner. This was interpreted by the court to be an express warranty. Defendant had argued that the purchaser could not maintain his action because the purchase agreement was merged with the deed, and the agreement had stated that conveyance of the deed constituted full compliance by the vendor. Therefore no action for breach was available. In holding that an action for breach of express warranty was available the decision went on to state that the trend in the law today is that there are implied warranties where a house is sold prior to completion, and that the house must be built in a good and workmanlike manner. However, since the facts indicate an express warranty was made, it was not necessary to determine if any implied warranties existed in this case.

Both Washington[30] and Oklahoma[31] hold that there are no implied

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[26] Druid Homes Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961).

[27] Carter v. West et ex., 280 Ala. 630, 196 So. 2d 718 (1967).

[28] 28 Misc. 2d 391, 219 N.Y.S. 2d 733 (S. Ct., Nassau Cty., 1961).

[29] Staff v. Lido Dune, Inc., 47 Misc. 2d 322, 262 N.Y.S. 2d 544 (S. Ct., Nassau Cty., 1965) (Court distinguishes between latent defects and defects discoverable at the time title passes).

[30] Hoye v. Century Bldgs., 52 Wash. 2d 830, 329 P. 2d 474 (1958) (defective sewer system resulting in discharge of raw sewage into premises).

[31] Jones v. Gatewood, *supra* note 3 (water leaking into house).

warranties of quality or condition in a house which is complete at the time of sale. But where the purchase agreement is entered into when the house is still under construction, the builder-vendor impliedly warrants that upon completion the dwelling will be reasonably fit for habitation and built in a good and workmanlike manner.

The Idaho Supreme Court, in reversing a lower court, went one step further in holding for the purchaser of a new house.[32] The plaintiff had purchased the house while it was under construction. The builder-vendor had built the house over an open irrigation ditch which had been filled with dirt. After plaintiff moved in, he found water seeping into the basement from the ditch, making the house uninhabitable. Not only did the court hold that there was an implied warranty that the house would be free from major defects and habitable, but it also stated that the builders knowledge of the ditch, his efforts to fill it, and his failure to inform the plaintiff of the presence of the ditch amounted to constructive fraud on his part and allowed the plaintiff to rescind the agreement. The builder-vendor had based his argument in the lower court on the ruling in *Steiber v. Palumbo*.[33]

This decision indicates that where the parties to a contract are in an unequal position, and the purchaser relies on the skill and knowledge of the builder who holds himself out to be an expert in his field, the builder does impliedly warrant that the house he builds is fit for the purpose intended.

South Dakota also holds that an implied warranty arises in the sale of a new house by a builder-vendor, and that such warranty survives the delivery of the deed. The warranty implied, however, is not one of fitness for purpose intended, but rather of reasonable workmanship and habitability. Thus in *Wagoner v. Midwstern Development*,[34] the South Dakota Supreme Court said:

> The builder is not required to construct a perfect house, and in determining whether a house is defective, the test is reasonableness and not perfection.[35]

The position of Colorado is best stated by examining three cases decided in its jurisdiction. In 1960, the court allowed a purchaser[36] to rescind a purchase agreement where the house was built on fill dirt and sank into the ground. The court in this case discussed the theory of warranty of fitness for habitation, but did not hold that such a warranty existed. Instead, the court held that the vendor's failure to inform the

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[32] Bethlahmy v. Bechtel, 91 Ida. 55, 415 P. 2d 698 (1966).

[33] Steiber v. Palumbo, *supra* note 18.

[34] 154 N.W. 2d 803 (1967).

[35] *Id.* at 809.

[36] Cohen v. Vivian, 141 Colo. 443, 349 P. 2d 366 (1960).

purchaser of the fact that the house was constructed on fill dirt amounted to concealment of a latent defect, of which the vendor had knowledge. Plaintiff was permitted to rescind on the basis of the vendor's fraud.

Three years later, a decision was rendered holding that where a house is sold while under construction, there was an implied warranty by the builder that the house, when completed, would be fit for habitation.[37]

Finally in 1964, the court stated in *Carpenter v. Donahoe*,[38] that the determination of the existence of implied warranties in the sale of a new house should not be based on whether the dwelling was finished or unfinished at the time of sale, as such a distinction was inconsistent. It was therefore held that a builder-vendor does impliedly warrant that the house he builds will be suitable for habitation and constructed in a quality manner, and this implied warranty exists whether the house was complete or not at the time of sale.

This same view was expressed most recently by the Texas Supreme Court[39] when it indicated that the doctrine of *caveat emptor* had no application to a situation involving a builder-vendor and the purchaser of a new house.

In Illinois, the existence of implied warranties in the sale of a new house is determined by the district court in which the buyer brings his action. The Appellate Court in the First District has held that where the house was not complete at the time of sale, there is an implied warranty that upon completion the dwelling will be fit for habitation.[40] The Appellate Court in the Third District, one year later, although acknowledging the above decision, held that there are no implied warranties as to quality, condition, or fitness for habitation in the sale of a new house. This is true whether the house is finished or not at the time of sale.[41]

In a few jurisdictions the new trend toward builder's liability based on implied warranty has been followed, although the courts have not yet had occasion to decide a case dealing directly with private residential dwellings.

In Minnesota, for example, an implied warranty of fitness for the purpose intended was found to exist in the construction of a commercial structure.[42] In Iowa similar warranties were found in the construction of an onion warehouse.[43]

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[37] Glisan v. Smolenski, 153 Colo. 274, 387 P. 2d 260 (1963).

[38] 154 Colo. 78, 388 P. 2d 399 (1964) (cracked walls and sagging walks).

[39] Humber v. Morton, 426 S.W. 2d 554 (Tex. 1968).

[40] Weck v. AM Sunrise Construction Co., 36 Ill. App. 2d 383, 184 N.E. 2d 728 (1962).

[41] Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E. 2d 780 (1963).

[42] Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co., 274 Minn. 17, 143 N.W. 2d 626 (1966).

[43] Markman v. Hoefer, 252 Iowa 118, 106 N.W. 2d 59 (1960).

It seems likely that should a purchaser of a residential dwelling seek to hold his builder-vendor liable upon the theory of implied warranty, in these jurisdictions, he will be successful.

Tort Theory

The cases presented thus far have attempted to resolve the issue of the liability of a builder-vendor by the application of contract law. However, this is not the sole remedy available to the purchaser. Many courts have allowed recovery based on an action in tort for negligence. Much has been written [44] as to whether a purchaser's action should be on the contract or in tort.

The following are some cases where the issues were resolved based on an action in tort, or through the application of a combination of contract and tort law.

One of the earliest cases in this country concerning the issue of defective construction in a new house occurred in 1925 in Tennessee.[45] Here the defendant-vendor had sold a newly completed house to the purchaser. Defendant was not the builder, but had hired a contractor to build this house along with three other houses on the same street. Sometime after moving in, the purchaser noticed that the heavy stone mantel over the fireplace was separated from the wall. He advised defendant of this condition. Defendant examined the mantel and told the purchaser that it was sound. Shortly thereafter, the mantel collapsed on purchaser's minor son, causing his death. Purchaser brought an action against defendant, for negligence in construction, and failure of defendant to advise purchaser of the defective condition of the mantel. The mantel was found to be constructed improperly and negligently. In holding for the defendant, the court stated that he had no actual knowledge of the dangerous condition at the time of the sale, and applied the doctrine of *caveat emptor,* holding that once title passed to the purchaser, defendant was no longer liable for any injuries which resulted due to defects in the premises. The Tennessee court had an opportunity to change this view when it reviewed a case in 1966.[46] Here the builder had sold a newly completed house to plaintiff and her husband. After moving in, plaintiff was injured when steps to the basement, which were not adequately braced, collapsed. Although the court affirmed the ruling in the prior case and held that *caveat emptor* still prevailed, a decision was rendered for the plaintiff. The court said where a dwelling is constructed by

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[44] Roberts, The Unwary Home Buyer, 52 Corn. L. Q. 835 (1967); Prosser, Assault Upon the Citadel, 69 Yale L. J. 1099 (1960).

[45] Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925).

[46] Gillenwater v. Gasteiger, 417 S.W. 2d 568 (Tenn. C.A., cert. denied, 1966); see also, Belote v. Memphis Development Co., 208 Tenn. 434, 346 S.W. 2d 441 (S. Ct., 1961) (Plaintiff fell through opening in attic).

a vendor's workman, the vendor is presumed to have actual knowledge of dangerous conditions, and his failure to warn the purchaser of such conditions will make him liable for injuries.

Some jurisdictions have experienced great difficulty in overcoming the doctrine of *caveat emptor*. New Jersey is one such state. In *Levy v. C. Young Construction Co., Inc.*,[47] the purchaser of a newly completed house sued the builder-vendor when he experienced trouble with the sewer system. The Appeals court applied the doctrine of *caveat emptor* and held the builder not liable for latent defects. There was a dissent in the case, which took the view that where a builder holds himself to be experienced and knowledgeable in his field, he impliedly warrants his product and should be held liable for defects. The purchaser appealed to the New Jersey Supreme Court [48] which affirmed the lower court ruling, on the ground that the purchaser had failed to prove that his sewer problems were caused by improper installation by the builder. The decision went on to say that the rule of *caveat emptor* was harsh and unjust, and its application in the modern commercial world was highly questionable. However, since the case could be resolved without deciding the validity of this doctrine, such a decision would be put off to another day.

That day came sooner than expected: The very next year *Sarnicande v. Lake Developers Inc.*[49] came before the court. Here the plaintiff was the mother of the purchaser, and leased a part of the house from the purchaser. Shortly after moving in, purchaser discovered a defective step and asked the builder to make repairs. The repairs were never made. Plaintiff was injured two years after purchaser had taken possession of the house. The court again was able to resolve the case without evaluating the *caveat emptor* rule. It held that inasmuch as purchaser had taken possession with full knowledge of the defective step, it became his duty to keep the premises reasonably safe and free from defects and the purchaser was therefore negligent for allowing this condition to exist for over two years without doing something about it.

Opportunity knocked again in the form of an action by the purchaser against the builder-vendor for faulty construction of purchaser's new house.[50] Once again the court did some fancy footwork to avoid ruling on the doctrine of *caveat emptor,* and here found that the purchaser had been given an oral warranty that the house would be habitable and fit for the purpose intended.

The day of decision finally arrived with *Schipper v. Lewitt and Sons, Inc.*[51] In this case the plaintiff was the minor son of lessee. Lessor had purchased the house new from defendant, who was a mass producer of

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[47] 46 N.J. Supp. 293, 134 A. 2d 717 (1957).

[48] 26 N.J. 330, 139 A. 2d 738 (1958).

[49] 55 N.J. Supp. 475, 151 A. 2d 48 (C.A., 1959).

[50] Caparrelli v. Rolling Greens Inc., 39 N.J. 585, 190 A. 2d 369 (S. Ct., 1963).

[51] 44 N.J. 70, 207 A. 2d 314 (S. Ct., 1965).

houses. Defendant, in an effort to keep production costs down, had not installed a temperature regulator on the hot water tank. As a result, plaintiff was severely scalded by water from the bathroom tap. The court stated that the application of *caveat emptor* was fine where the buyer and the seller had equal bargaining positions and could protect themselves in negotiating the agreement. But today the buyer of a private residential dwelling is not in an equal position to bargain and provide for his protection. This is especially true where the seller is a mass producer of houses. It is not harsh or unjust to hold such a builder to strict liability, as he represents himself to be skilled and experienced in the field and the buyer, relying on this knowledge, has a right to expect that the house he purchases will be fit for habitation.

Such a builder-vendor can protect himself through the purchase of insurance, thereby making the risk of loss a cost of doing business and passing this cost on to all of his purchasers.

It will be observed that this decision went only so far as to hold a tract developer or mass producer of houses to strict liability in tort, where a house is defective at the time of sale. The burden is still on the plaintiff to prove that the condition which resulted in damage or injury to him was the result of faulty construction on the part of the builder-vendor and was unreasonably dangerous.

Although the decision speaks of the buyer and seller, the court held that this protection was also extended to include those persons who might reasonably be expected to use the house, thus allowing for plaintiff's recovery.

Most recently, the rule of *Schipper v. Lewitt,* which had been applied to tract developers only, has been expanded to include all building contractors.[52]

This idea of strict liability of a vendor was examined in a recent California decision.[53] Here the vendor was a land developer who had contracted to have a house built which upon completion, was sold to plaintiff. The house had been built on a slope. The condition of the soil and drainage in the area was such that heavy rains created the possibility of a landslide, thus threatening to move the house. Plaintiff sued for recision of the contract. The court first examined the theory of strict liability in tort as applied to the manufacturer of a product, but refused to apply the same thinking to the builder of a house. The opinion stated that since a real estate transaction takes some time to be completed, the purchaser has ample time to inspect the premises. However, once having made these statements, the opinion states that plaintiff may recover if the vendor was guilty of negligence in construction of the house. Here the court found that the defendant was aware of the fact that the area

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[52] Totten v. Gruzen, 52 N.J. 202, 245 A. 2d 1 (1968).

[53] Conolley v. Bull, 65 Cal. Rptr. 689 (C.A., 1968).

was susceptible to landslides, and that soil tests were advised to determine what drainage and construction was necessary to protect against a landslide. It was also stated that defendant owed plaintiff, or anyone who might be expected to buy the house, a duty to use reasonable care in construction.

The decision refuses to find any implied warranties in the sale of real property, but allows a purchaser to recover, if he can prove that the builder was negligent in construction of the house.

The District of Columbia[54] and South Carolina[55] have taken the California position, in holding that a builder-vendor will be liable for defects to a dwelling, which are the result of his negligence, thus allowing recovery to a purchaser or an invitee who sustains injury or damages.

A discussion of the view taken by Ohio has been saved for last, as there is some confusion as to what the view actually is.

In *Shapiro v. Kornick*,[56] the Court of Appeals for Cuyahoga County held that no implied warranties as to fitness for habitation existed where a new house was completed at the time of sale. The decision stated that the plaintiff should be allowed to recover if he could prove that at the time of sale, the defects of which he complained were known to the vendor. Recovery was based on vendor's fraud for failure to inform the plaintiff of such defective conditions. The question of vendor's knowledge was one of fact to be determined by a jury.

Two years later the same court, in *Vanderschrier v. Aaron*,[57] ruled that where a purchaser entered into a purchase agreement prior to completion of the dwelling, the builder-vendor did impliedly warrant that upon completion the house would be constructed in a good and workmanlike manner and would be reasonably fit for habitation. This decision cited the reasoning in the English case of *Perry v. Sharon Development Co. Ltd.*[58] discussed earlier, as being sound, and applied it in rendering the decision.

This represented one of the earliest cases, decided in any American jurisdiction, which held that implied warranties existed in the sale of a new house. Of course, the application was only to those houses unfinished at the time of sale.

In 1966, the Court of Appeals for Lucas County submitted to the Ohio Supreme Court the case of *Mitchum v. Johnson*[59] as being in con-

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[54] Caporaletti v. A-F Corp., 137 F. Supp. 14, 240 F. 2d 53 (D.D.C. 1956) (collapse of steps due to improper support).

[55] Rogers v. Scyphers, 161 S.E. 2d 81 (So. Car. S. Ct., 1968) (collapse of folding stairway to attic).

[56] 103 Ohio App. 49, 124 N.E. 2d 175 (1955).

[57] 103 Ohio App. 340, 140 N.E. 2d 819 (1957) (sewer back up due to faulty construction).

[58] *Supra* note 17.

[59] 7 Ohio St. 2d 66, 218 N.E. 2d 594 (1966); See also, Huber v. Bachman, 12 Ohio Misc. 22, 230 N.E. 2d 461 (1967).

flict with the above case. Here plaintiff had entered into a purchase agreement with the builder. At the time the agreement was made, the house was still unfinished. The builder had agreed to complete construction as part of the contract. After purchaser moved in, he found defects which resulted in water damage to the structure. The opinion distinguished this case from the preceding case by pointing out that *Vanderschrier* involved the sale of an unfinished dwelling, while the present case involved an executed contract for the sale of real property, in which the builder agreed to complete construction. Where such a situation exists, there are no implied warranties that the completed structure will be reasonably fit for habitation. The duty imposed on the builder is to construct the dwelling in a workmanlike manner, and to exercise the care and skill which is reasonably expected of one in his business. Where defects later develop over which he has no control and which are not his fault, he will not be liable if such defects make the dwelling uninhabitable. The builder is not an insurer of the fitness for habitation of the dwelling.

The feeling is that the doctrine of *caveat emptor* is so deeply ingrained in our law of real property that a builder should be held liable only where the facts clearly indicate negligence. A standard of ordinary care and skill should be applied, and a builder-vendor will only be held to impliedly warrant that the work he does will be done in a workmanlike manner and no implied warranty as to fitness for habitation exists.

The Ohio Supreme Court, by this decision, has thus taken the rather clear position as reflected in *Vanderschrier* and created clouds by indicating it is not the facts which will be examined, but rather the court's interpretation of the nature of the purchase agreement. There seems little difference between the facts of these two cases to justify any other observation.

Conclusions

It is obvious that the doctrine of *caveat emptor* is dying very slowly and with much reluctance. The 1936 edition of *Williston on Contracts* [60] contains statements to the effect that no implied warranties existed in the sale of real property. The 1963 edition [61] of the same work indicates that where the seller is a mass producer of dwellings, it is not unjust to hold that he impliedly warrants the houses he builds. He represents himself to be skilled and experienced, and the buyer has a right to rely on this knowledge of the builder. It is not unreasonable for the buyer to expect his finished house to be fit for habitation. Such a view is entirely in keeping with the trend in the law to hold the manufacturer liable for defects

[60] 4 Williston, Law of Contracts, § 926 (rev. ed. 1936).

[61] 7 Williston, Law of Contracts, §§ 926, 926A (3d ed. 1963).

in his product. There seems little difference between one who mass produces cars[62] and one who mass produces houses, and even less reason for applying a different law to judge each. A builder should be held to warrant his product to be free from defects and to be suitable for the use intended. The cases reflect the growing desire to provide the buyer of a new house with this protection. Yet, protection is generally extended only to one who buys a house which is not finished. It seems to make little sense to deny recovery to a buyer simply because he has purchased a finished dwelling. He certainly expects the same quality and workmanship in his house as does the buyer of the unfinished house.

A very recent case, *Connor v. Great Western Savings & Loan Assoc.*,[63] from California, even held a financial institution liable to a home buyer, for faulty construction, when the financier had participated in control over the building development, knowing the building company to be thinly capitalized, and that risk of harm to the buyers was reasonably foreseeable. This is another step in the direction of protection of the consumer in our society.

In the final analysis, it seems we must be satisfied with what has been achieved thus far in overcoming *caveat emptor,* and rely on the general trend in recent decisions to finally put this doctrine to rest.

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[62] Henningson v. Bloomfield Motor Inc., 32 N.J. 358, 161 A. 2d 69 (1960).

[63] 73 Calif. Rptr. 369, 447 P.2d 609 (1969).