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VENDOR'S OBLIGATION AS TO FITNESS OF LAND FOR A PARTICULAR PURPOSE*

ALLISON DUNHAM**

IN MARCH of this year the real estate section of the New York Sunday Times had in adjacent columns two stories about land contracts and the fitness of the housing purchased: one was a report of testimony before a subcommittee of the House Committee on Banking and Currency on the quality of new housing constructed on Long Island under Veterans Administration (VA) and Federal Housing Administration (FHA) plans;¹ the other was a report that the National Association of Home Builders (NAHB) was proposing to its members that buyers of new housing be given a written warranty of workmanship and quality of materials.² During this same period the New York legislature had before it a bill to require builders to post a bond to guaranty the workmanship and materials in new housing. During the past year the English legal journals have been concerned with the question whether, under the Town

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1. N. Y. Times, Mar. 2, 1952, Sec. 8 p. 1, Col. 4. For the official report of the hearings see, *Hearings Before Subcommittee on Housing of the Committee on Banking and Currency on H. R. 436*, 82 Cong., 2d Sess. (1952).

2. N. Y. Times, Mar. 2, 1952, Sec. 8 p. 1, Col. 5. The proposed warranty reads as follows:

This home meets the requirements of the applicable building code. It has been inspected and approved by local building authorities.

The home upon delivery to the original purchaser was structurally sound and free from defects in material and workmanship not common to the grade and type of materials used in it.

For the original purchaser, we will replace or repair, free of cost, any such defects which occur under ordinary use and care before or before resale by the original purchaser, whichever date is earlier. Such defects must be brought to our attention in writing within that time. We do not, of course, assume responsibility for 1) damage due to natural wear and tear, 2) defects which are the result of characteristics common to the materials used, 3) loss or injury caused in any way by the elements, 4) conditions resulting from condensation on, or expansion or contraction of, materials.

This warranty is limited to the date stated in the preceding paragraph. It is the only warranty made or authorized by us with respect to the above home, and is in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, whether with respect to material or workmanship in the home, damage to the purchaser or others, or to his or their effects, or otherwise. We make no warranty beyond the time above stated, even though the claimed defect does not become apparent within such time.

This warranty is solely for the protection of the original purchaser whose signature appears below.

and Country Planning Act and the standard land contract, a vendor warranted the use or fitness of property sold.³ The House subcommittee later reported that the quality of Federal Housing Administration (FHA) and the Veterans Administration (VA) housing was not as bad as complaints had alleged; and the NAHB decided to have a paper called a "policy" and not a "warranty";⁴ and the New York legislature did not pass the bills imposing a mandatory warranty of quality; and the English Law Society decided that permitted use under the Town and Country Planning Act was not a matter of vendor's obligation under a standard contract. Nevertheless this activity of a legal and non-legal nature concerning the relation of vendor and purchaser suggested to me that we conveyancers ought to take a short recess from our preoccupation with marketable title and laws designed to make title more certain and take a look at a relatively neglected area of land law—a vendor's obligations as to the quality and fitness of the land which he has contracted to sell. We should do this because public concern of the type evidence by the articles referred to usually foreshadows

3. Potter, *Caveat Emptor or Conveyancing Under the Planning Acts*, 13 (N.S.) Conv. & Prop. Lawyer 36 (1948); Cobby, *Is the Permitted Use a Matter of Title?*, 13 (N.S.) Conv. & Prop. Lawyer 329 (1948). See also, Potter, *Conveyancing Under the Planning Act*, (1950) J. Planning Law 247, 330.

4. The proposed "policy" reads:

HOME OWNER'S SERVICE POLICY

(1). We hope you will be happy in your NEW HOME. It has been constructed in accordance with accepted home building practices. It has been inspected by our trained personnel and, where required, by the building department of the municipality in which it is situated.

(2). As a matter of policy we will, upon written request to our office at the address appearing on this Service Policy, made within 6 months from the date of delivery to you of title to this Home (subject, however, to Paragraph 4 below) inspect your home as promptly as possible; and, where shown by such inspection to require adjustment by reason of defects in workmanship or material, we will make reasonable and necessary repairs or adjustments without cost to you.

(3). A Manual of Suggestions on the care and maintenance of your New Home is given you with this Service Policy. Please read it carefully! It will help you to understand the minor adjustments to most newly constructed homes necessary in their first few months. It will aid you in the proper care of your Home so that its value may be preserved for a long time. Specific reference is made in the Manual to the extent and duration of such responsibility as manufacturers or others have for the work done or equipment installed by them.

(4). This Home Owner's Service Policy is non-transferable. Any obligation under it terminates if the property is resold or shall cease to be occupied by the Home Owner to whom it is originally issued.

(5). This Home Owner's Service Policy and accompanying Manual conforms with the standard requirements of the National Association of Home Builders and its affiliated local association. As a condition of membership in these Associations, we have pledged ourselves to build good homes and to abide by the Home Builders' Code of Ethics in the conduct of our business.

legal development of statutory or judge-made law.⁵ We should also review the law in this area because the post World War II building boom saw a great increase in the industrialization of the building industry⁶ and mass production of housing, and it was this same movement toward mass production of goods a century ago which produced the growth of the modern law of seller's obligations as to quality in the sale of goods.⁷ The growth in sales law was from caveat emptor toward attaching legal significance to buyer reliance on seller's statements about his product and then to a warranty imposed by reason of common understanding of the bargain. It is the purpose of this paper to look at the legal concepts which now impose a seller's obligation as to quality and fitness and which may grow into rather firmly fixed obligations similar to the sales law of warranties which the seller not the buyer must contract out of.

Sales law and the law of land contract started at the same place. The picture in sales and in land deals is, in the beginning, that of a community whose trade is simple and face to face and whose traders are neighbors. The goods and the land were there to be seen during the negotiation and particularly in the case of land, everybody knew everybody's land; if not, trade was an arm's length proposition with wits matched against skill. Of course caveat emptor would be the rule in such a society. But caveat emptor was more than a rule of no liability; it was a philosophy that left each individual to his own devices with a minimum of public imposition of standards of fair practice.⁸ In the beginning the common law did grant relief from fraud and did recognize that if the seller made an express promise as to his product at the time of the sale he remained liable after the sale on this "collateral" promise.⁹ Indeed covenants for title in the deed were such collateral promises which survived the sale.

We all know the development that occurred in sales law.¹⁰ In

5. Since the investigation referred to in note 1 *supra*, the Veterans Administration in the New Jersey District and perhaps others require as a condition of approval of the housing for Veteran's loans that the builder give a guaranty of the roof and basement. See Veterans Administration Newark Regional Office, Loan Guaranty Issue No. 121, February 25, 1952.

6. For a description of this industrialization see Colean, *American Housing*, chs. 3, 4 and 5 (Twentieth Century Fund 1944).

7. See Llewellyn, *Cases on Sales* 204 (1930); Llewellyn, *On Warranty of Quality, and Society*, 36 Col. L. Rev. 699 (1936); Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. J. 1133 (1931); Marrow, *Warranty of Quality: A Comparative Survey*, 14 Tul. L. Rev. 327 (1940).

8. See Marrow, *supra* note 7; Hamilton, *supra* note 7.

9. 1 Williston, *Sales* §§ 195, 196, 197 (Rev. Ed. 1948).

10. 1 Williston, *Sales* §§ 195-203, 223-226, 227-257 (Rev. Ed. 1948).

sales the requirement of a formal "I warrant" became any promissory words and then any affirmation;¹¹ the requirement of words evidencing an intention to warrant became a requirement that the words be taken as a statement of fact and not of opinion. Then almost any statement about goods became a statement of fact and not of opinion; mere description of goods became warranty of quality.¹² Where reliance was still important the natural tendency of the words to induce a sale became proof of reliance. Finally professional sellers were treated as if they had represented their goods to be merchantable and of fair average quality except where the buyer had not relied on the seller for determination of this fact.¹³

In land law the change has not been as rapid or as evident, nor has there been as much need for change. Mass production is just coming in housing. Even today the great bulk of the housing sold is "second-hand" housing there to be seen during the dicker. Formerly new housing was not purchased; rather there was a contract to construct it on the home owner's lot according to his own plans and specifications. And it has always been clear that a construction contract as distinguished from a sales contract carried with it promises to perform in a workman-like manner.¹⁴ Furthermore many restrictions on use which could not be seen were treated as obligations of the seller within his obligation of title and therefore not within the rule of caveat emptor.

The new development in house marketing is the growth of a contract to sell a house and land from a description and sample or "show house." It is in this area that we may expect the first growth or development of the law, and significantly it is this area that has produced the recent cases and public agitation.

Now let us consider the rules of law which are available to determine a vendor's obligation as to quality and fitness for use.

1. *Where quality or fitness is a part of title.* A vendor is obligated, absent agreement otherwise, to furnish the purchaser with a marketable title which includes a title free from encumbrances.¹⁵ Caveat emptor does not apply while the contract is executory. Absent fraud or mutual mistake however this obligation is treated as satisfied or merged in the deed and on acceptance of the deed the purchaser has no right with respect to a defective title except

11. Uniform Sales Act § 12.

12. Uniform Sales Act § 14.

13. Uniform Sales Act § 15.

14. Hudson, *Building Contracts* 186 (7th ed. 1946).

15. Patton, *Titles* § 30 (1938); 3 Am. L. of Prop. § 11.47 (1952).

insofar as he obtained covenant for title in his deed.¹⁶ Restrictions on use of property found in defeasible estates,¹⁷ and in covenants and equitable servitudes¹⁸ and because of the existence of easements¹⁹ are instances where matters of quality and fitness are also matters of title as is also an encroachment of the subject property on the property of others and of other property on the subject property.²⁰ Are all easements and covenants "encumbrances?" What about those which are apparent and known to or discoverable by the purchaser on inspection before contracting? While it is always said that the buyer's knowledge of an encumbrance such as a mortgage is not material to the scope of the seller's obligations,²¹ there is some confusion and conflict as to the effect of buyer's knowledge or inspection upon those encumbrances which relate to or affect the physical conditions upon the realty.²² It has been held, for example, that an easement such as a public utility right of way which obviously and notoriously affects the physical conditions of the land at the time of sale is not an encumbrance²³ but other authorities have vigorously rejected this rule.²⁴

In sales law this same problem is presented where there are obvious defects in the goods and yet the seller makes a warranty in terms broad enough to warrant against the obvious defect. There the problem has been treated as one of construction—whether a warranty in general terms is to be construed to cover obvious defects.²⁵

The conflict about such open and notorious easements suggests that the quality aspects of the matter are more crucial in judicial thinking than the title aspects. For if the matter were treated as one of quality then the emphasis would be on the importance of the defect and its obviousness. In England, it is asserted that such "physical" or quality defects are matters of title if the defect is

16. Williston, *Contracts* § 723 (1936). See Note, 84 A. L. R. 1008, (1933).

17. Patton, *Titles* § 334 (1938).

18. *Id.* at § 350.

19. *Id.* at § 344.

20. *Id.* at § 368.

21. Rawle, *Covenants* 112 (5th ed. 1887).

22. See Note, 64 A. L. R. 1479 (1929); *First Unitarian Society v. Citizens Sav. & Trust Co.*, 162 Ia. 389, 153 N. W. 87 (1913); Patton, *op. cit. supra* note 17, § 367.

23. Patton, *op. cit. supra* note 17, § 367.

24. See the dissent and citations in *First Unitarian Society v. Citizens Sav. & Trust Co.*, 162 Ia. 389, 153 N. W. 87 (1913).

25. 1 Williston, *Sales* § 207 (rev. ed. 1948).

26. Cobby, *Is the Permitted Use a Matter of Title?* 13 (N.S.) *Conv. & Prop. Lawyer* 329 (1949).

both material and latent.²⁸ Since an implied warranty of quality would impose liability only if the defect was material and latent it seems unnecessary to add the additional step in the reasoning by first saying material and latent defects are matters of title and thus within the title rule. English law says a defect is not material if it does not prevent the property from being substantially the same as that which the purchaser thought he was getting according to the description and inspection of the property.²⁷ This reasoning resembles the warranty of merchantability. It seems to say that if the purchaser gets substantially what he would get on the purchase of any property in the neighborhood he is getting the quality bargained for.

Another set of problems illustrating the difficulty of correlating obligations as to title with obligations as to physical conditions of the land is that of building codes and zoning ordinances. While zoning restrictions have almost identical impact on land use as restrictive covenants they are generally held not to be encumbrances on the title.²⁸ It is only when an element of frustration of purpose is present that it may be said a vendor has obligations as to permitted use under a municipal ordinance.²⁹ Thus a lessee under a lease limiting his privileged use to one prohibited by the zoning ordinance may be excused where a zoning ordinance enacted between the time of signing the contract and date of closing effectively prevents the purchaser from getting the use for which he bargained.³⁰

On the other hand even though the ordinance itself is not an encumbrance and even though a building restriction is excepted from the seller's title obligation by an express term in the contract, it seems that a violation of such an ordinance or restriction is a defect in title and entitles the purchaser to treat the seller as in breach.³¹ Title is said to be unmarketable in a way not excepted from the contract because the seller is clearly attempting to force a "law suit" on the buyer. Furthermore many of these building codes

27. *Id.* at 330.

28. *Anderson v. Steinway & Sons*, 178 App. Div. 507, 165 N. Y. Supp. 608, *aff'd*, 221 N. Y. 639, 117 N. E. 575 (1917); *Lincoln Trust Co. v. Williams Building Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920); see Patton, *Titles* 1038 (1938) (and cases cited therein).

29. *Hyland v. Parkside Ins. Co.*, 10 N. J. Misc. 1148, 162 A. 521 (1932).

30. *Anderson v. Steinway & Sons*, 178 App. Div. 507, 165 N. Y. S. 608, *aff'd*, 221 N. Y. 639, 117 N. E. 575 (1917); *cf.* *Beggs v. Steinway & Sons*, 229 N. Y. 320, 128 N. E. 211 (1920).

31. *Lohmeyer v. Bower*, 170 Kan. 442, 227 P. 2d 102 (1951); 66 C. J. 911, 912 § 590; 3 Am. L. of Prop. § 11.49 n. 92 (1952). *But cf.* *Woodenbury v. Spier*, 122 App. Div. 396, 106 N. Y. Supp. 817 (2d Dept. 1907) where a violation of a building code was held not to be an encumbrance.

and zoning ordinances provide that a violation is a "nuisance"³² and it would seem clear that the existence of a nuisance is an encumbrance.³³

The conclusion that a zoning ordinance is not an encumbrance but that a violation of that same ordinance is, presents some analytical difficulties if a "title" analysis is used but none at all on the sales analogy. It is easy to see that a seller could be said to warrant that the present condition of the premises are legal because the ordinance establishes the minimum quality standards for the community and to that extent he warrants that the premises are reasonably "fit" for the present use; on the other hand he makes no warranty as to possible future uses.

Summarizing the cases where matters of the physical condition of the premises are matters of title: the cases by in large put the seller in the position of warranting that the property is substantially the same as that which the plaintiff thought he was getting according to the description coupled with an inspection of the property and that the present use is that generally permitted in the area by the municipal ordinances. Latent defects of quality, if a matter of title, are actionable, however.

2. *Vendor's obligation as to physical condition of the premises where quality and fitness are not a matter of title.* Non-title questions as to a vendor's obligation as to fitness of the premises between time of contracting and time of closing arise: (a) by reason of express warranties of vendor including warranties arising by reason of description or of sale from a sample or model; and (b) by reason of warranties or obligations implied by rule of law.

(a). *Vendor's liability for deterioration of premises between time of contracting and time of closing.* Whether or not the vendor has any obligation as to the condition of the premises at the time of contracting, the contract time fixes a condition of the premises to which the purchaser is entitled at closing except as a worsened condition results normally from the vendor's right of possession until closing. Hence the vendor is clearly obligated to the purchaser for deterioration in the condition resulting from voluntary waste by the vendor. While there has been little litigation on permissive

32. N. Y. Multiple Dwelling Law § 4 (30); Building Code of Chicago (1951) §§ 39-7; 90-4.

33. In *Pharm v. Letuchy*, 283 N. Y. 130, 27 N. E. 2d 811 (1940) a vendor was held liable for personal injuries sustained by a tenant of the premises after the conveyance on the theory that the statute made violations of the building code a nuisance and liability for nuisance survives the conveyance. See also *Prosser, Torts* 645 (1941).

waste by a vendor in this country, the English cases and the theory of what few U. S. cases there are support the conclusion that the vendor also is liable for permissive waste.³⁴ While the obligation is deducible from the theory of equitable conversion, the same result is obtainable by an interpretation of the contract—the contract 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 possibly loss from casualty³⁵ excepted.

(b). *Express warranties*. It is, of course, axiomatic that if the vendor makes express promises or affirmations as to the condition of the premises sold, the vendor has obligations as to the fitness of the premises. However inquiry must be directed to (1) the words or circumstances sufficient to create the express representation or warranty; (2) the scope of the obligation assumed; and (3) the purchaser's remedy.

What words and facts are sufficient to create a warranty? In the 17th century sales law answered "none" except the words "warrant" or "guarantee." But the courts have been receding from the rigid formalism of *Chandelor v. Lopus*³⁶ so that today, in sales law at least, no formal words of warranty are required. If it is the hope of the National Association of Home Builders to avoid the existence of a warranty by changing the name of the paper given to the purchaser from "warranty" to "policy" then they have more faith in the formalism of land law than I have.³⁷ Is there any order of time with reference to the time of contracting when the words of warranty must be expressed? This is important because it is my understanding that the National Association of Home Builders paper frequently is signed and given to the purchaser at closing and not at the signing of the contract. If one of the essential features in warranty is reliance on the seller's statements there should be no difficulty with statements made before the bargain. For statement made after the bargain it is obvious that there is going to be technical difficulty in establishing consideration or detrimental

34. *Royal Bristol Permanent Bldg. Society v. Bomash*, 35 Ch. Div. 390 (1885). *Contra: Hellriegel v. Manning*, 97 N. Y. 56 (1884). See Note, *The Vendor's Liability for Permissive Waste*, 48 Harv. L. Rev. 821 (1935).

35. As to risk of loss from casualty see Note, 5 U. of Chi. L. Rev. 260 (1938); N. Y. L. Rev. Comm. Leg. Doc. No. 65M (1936); Vanneman, *Risk of Loss in Equity Between the Date of Contract to Sell Real Estate and Transfer of Title*, 8 Minn. L. Rev. 127 (1923); Uniform Vendor and Purchaser Risk Act.

36. Cro. Jac. 4, 79 Eng. Repr. 3 (1603).

37. See notes 2 and 5 *supra* for wording of the "warranty" and "policy."

reliance.³⁸ If the buyer was entitled to reject the performance tendered at the closing or if he claimed the right in good faith, consideration for the later express warranty could be spelled out of an inducement to him to forbear exercise of the right to terminate. In states which allow written modification of contracts without consideration³⁹ there should be no difficulty in spelling a modification out of the later written statements. It has been held in sales that a warranty given at any time before title has passed is effective and while there may be some technical difficulty with these cases they do indicate that the important question is whether the language is part of the bargain.⁴⁰

Must the seller have a specific intention to warrant? It may be that the use of "policy" instead of "warrant" in the latest National Association of Home Builders form is to negate an intention to warrant. The English sales cases do hold that "intention" to warranty is essential⁴¹ and some of the earlier American sales cases reached the same result.⁴² The better sales cases and the Uniform Sales Act now reject this requirement and concentrate attention on the question whether the statement is merely a matter of opinion or an affirmation of fact.⁴³ Thus a statement by a lessor that an apartment was "in first class shape" was held to be a matter of opinion or trade puffing.⁴⁴

Modern sales law treats the description of goods as an express warranty that the goods conform to the description.⁴⁵ Land law seems to have a similar rule where the description fixes what was bargained for. Thus a statement of quantity in the description is a representation that the legally described parcel contains that

38. This difficulty would not arise even if the warranty is not given until closing if representations concerning it were made in advertisements and sales promotions.

39. See N. Y. Real Prop. Law § 279.

40. 1 Williston, Sales § 211 (Rev. Ed. 1948).

41. *Heibutt v. Buckleton*, [1913] A.C. 30; 1 Williston, Sales § 198 (Rev. Ed. 1948). *DeLaSalle v. Guildford* [1901] 2 K.B. 215 which Williston said represented the contrary view until the House of Lords spoke in the *Heibutt* case is a land case and is still cited as good authority in land cases. See *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.

42. See, e.g., *McFarland v. Newman*, 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839). This case was cited with approval in Illinois as late as 1921, *Van Horn v. Stautz*, 297 Ill. 530, 131 N. E. 153 (1921).

43. 1 Williston, Sales §§ 199-201 (Rev. Ed. 1948).

44. *Stovall v. Newell*, 158 Ore. 206, 75 P. 2d 346 (1938).

45. 1 Williston, Sales § 223 (Rev. Ed. 1948). Although it is said to be more customary to describe the warranty as an "implied warranty," the early cases and the proposed Uniform Commercial Code (§ 2-313) call the warranty an express warranty.

quantity;⁴⁶ a contract selling "40 acres, 20 of which are arable," or "40 acres of timber land" is a representation that the land conforms to the description.⁴⁷ Likewise a contract to sell a "lot and house" should be a representation that a house exists on the lot.

Another sales law example of an express warranty is the warranty arising from a sample or model, that the goods shall conform to the sample or model. The applicability of this doctrine to land law is of particular importance today because of the current merchandising practice of the developer opening a "show house" for inspection and selling the other houses from this model and plans and pictures. Of course this transaction could be treated as a contract to sell a lot plus a contract to build a house and it would be obvious that there is in the latter contract a promise that the work should be done in a workmanlike manner and with proper and suitable materials. It also seems clear that even if treated as a sale and not a construction contract there is a warranty that the house will conform to the sample and will be free from any defects rendering the house uninhabitable which would not be apparent on reasonable examination of the sample.⁴⁸

Some of the cases have put this obligation on the seller as an implied obligation and as an exception to the rule of caveat emptor (discussed in next section) because of the absence of a chance of inspection. It seems better to treat this as an obligation of the contract however because in some of the cases liability has been imposed for defects which it was easier to discover because the house was not complete and such liability has been imposed even where the buyer examined the uncompleted house.⁴⁹ This obligation of the seller is also better treated as an express warranty because the cases make clear that the obligation cannot be modified or eliminated (as can an implied warranty) by general words disclaiming it.⁵⁰

46. 2 Warvelle, *Vendor and Purchaser* 839 (1890).

47. *Cf.*, *Woodward v. Western Canada Colonization Co.*, 34 Minn. 8, 158 N. W. 706 (1916).

48. *Stevens v. Milestone*, 190 Md. 61, 57 A. 2d 292 (1948); *Laurel Realty Co. v. Himelfarb*, 191 Md. 462, 62 A. 2d 263 (1948), 72 A. 2d 23 (1950); *Greenfield v. Liberty Construction Corp.*, 81 N. Y. S. 2d 550 (Sup. Ct. 1948); *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113. Note, *New Houses and Warranties*, 85 L. J. 219 (1938) (and cases cited). There is a similar obligation on the lessor when he leases uncompleted accommodations. *Young Corp. v. McClintic*, 26 S. W. 2d 460 (Tex. Civ. App. 1930).

49. See *Laurel Realty Co. v. Himelfarb*, 191 Md. 462, 62 A. 2d 263 (1948), 72 A. 2d 23 (1950).

50. See, *e.g.*, *Cordua v. Guggenheim*, 274 N. Y. 51, 59, 8 N. E. 2d 274 (1937).

(c). *Implied obligations as to condition of the premises.* It is usually said that except for a few exceptions to be discussed presently there are no implied warranties in the sale or lease of land.⁵¹ In sales law on the other hand there are two implied warranties: (a) a warranty of fitness for a particular purpose where the buyer makes this special purpose known to the seller and it appears that the buyer is relying on the seller's skill or judgment that the goods will be reasonably fit for such purpose;⁵² and (b) a warranty of merchantability including a warranty of fitness for ordinary purpose where goods are bought from a seller who deals in goods of that type.⁵³ Neither warranty is available to the buyer if he has examined the goods and if the defect is of the type which such examination ought to have revealed to him.⁵⁴

In a contract to sell unascertained goods or unspecified goods it may not be necessary to "imply" a warranty because a fair interpretation of the contract to sell goods of a certain description may include the obligation as to the quality of the goods. In a contract to sell specific goods sales law also started where land law is alleged to be today—no implied warranties. Today with or without the sales act most jurisdictions conclude that the circumstances of the normal bargain with a merchant justify the buyer in believing that the seller represents the goods to be merchantable and also justify the buyer in relying on this representation.⁵⁵

While land law is said to have the rule of caveat emptor in its broadest application, it should be noted that in many land law situations the rule of no liability on the seller would have obtained even if the sales law rule of implied warranties were followed. In the sale of second hand goods there are many less warranties than in the sale of new goods and if usage of trade imposes none there are none. The bulk of the land sold includes used buildings rather than new buildings, and furthermore in the sale of second hand housing the seller is often so clearly not a merchant or specially skilled seller that the buyer is not entitled to rely on the seller's

51. The leading case is *Hart v. Windsor*, 12 M. & W. 68, 152 Eng. Repr. 1114 (Ex. 1843). See also *Combaw v. Kansas City Ground Investment Co.*, 358 Mo. 934, 218 S. W. 2d 539, 8 A. L. R. 2d 213 (1949). 2 *Williams, Vendor and Purchaser* 680 (1906); *Williston, Contracts* § 926 (rev. ed. 1936).

52. Uniform Sales Act § 15(1).

53. Uniform Sales Act, § 15(2).

54. Uniform Sales Act, § 15(3).

55. 1 *Williston, Sales* § 231 (rev. ed. 1948).

56. However the sale is often made through a skilled agent and his skill may be attributed to the seller.

special skill or judgment. The sales law rule of implied warranty would impose no warranties in these situations.⁵⁶ The customary inspection by the buyer in land deals would prevent the imposition of a warranty even under sales law rules because of the usage of the trade.

Finally there is more difficulty in establishing a standard of fitness for ordinary purposes in land cases. Some of the land cases have pointed out that there is no warranty of inhabitability because the purchaser may be purchasing to demolish or remodel the existing structure but these same courts have found an implied warranty of habitability in housing under construction because, it is said, such a contract indicates that both parties know the purpose for which the land is being purchased.⁵⁷ If this is the basis of the house under construction exception to the rule of caveat emptor then there ought to be an implied warranty of habitability in new housing completed shortly before contract⁵⁸ and in old housing where the land use is restricted by private covenant or zoning to residential uses.⁵⁹

There is more difficulty in establishing a standard of fitness for ordinary purposes in land than in goods because of the multitude of uses to which land can be put and because of the multitude of buyer's standards of livability. It is obvious that no one could see in a sale of farm land any warranty of fitness for timber land; yet timber land use is one of the ordinary uses of land. Inspection would probably disclose this defect in any event. But even in housing there are vastly different standards of living conditions sought and the tradition of remodeling imposes obstacles in the way of finding a fair objective standard for the warranty. For example, in the sale of second-hand housing the buyer may buy intending to convert the coal furnace into gas or oil heat and may not care whether the existing coal furnace operates or not. The requirement of reliance could handle most of these situations.

The main exceptions to the rule of caveat emptor in land cases are: (1) with respect to buildings sold or leased during the course of construction;⁶⁰ (2) with respect to latent defects known to the vendor or lessor;⁶¹ (3) with respect to premises used for the pur-

57. *Miller v. Cannon Hill Estates, Ltd.* [1931] 2 K.B. 113.

58. In England on the sale of a completed new house there was held to be no warranty, *Haskins v. Woodham*, [1938] 1 All E. R. 692; *cf.* *Combaw v. Kansas City Ground Investment Co.*, 358 Mo. 934, 218 S. W. 2d 539, 8 A. L. R. 2d 213 (1949) (no warranty in a remodeled house).

59. *Cf. Hyland v. Parkside Ins. Co.*, 10 N. J. Misc. 148, 162 A. 521 (1932).

60. See note 48 *supra*.

61. See Restatement, Torts §§ 353, 358 (1934).

pose of public admission;⁶² and (4) the exception with respect to those parts of the premises remaining under the control of the lessor.⁶³ The first two are said to be applicable both to sales of a fee and sales or leases of a term; the fourth is applicable only to leases; and the third is usually discussed with respect to a lessor's liability.

If the policy of the caveat emptor rule is sound the reason or reasons for these exceptions and their limits are not easy of statement. The first exception with respect to buildings under construction has been justified by reason of the absence of an opportunity for the lessee or purchaser to inspect.⁶⁴ If a vendor is to be liable when the purchaser is unable to protect himself by inspection, then the second exception with its limitation seems too narrow. The purchaser is just as unable to discover the latent defect not known to the vendor as he is one known to the vendor. Actually the authority for the limitation on the exception is extremely meager and it comes almost entirely from landlord-tenant cases and not from vendor-purchaser cases. Early sales law also seemed to have had this limitation that the defect be known to the seller before liability was imposed on him.⁶⁵ In origin it seems clear that the second exception which developed earliest in point of time was developed out of fraud liability. It was thought to be something in the nature of fraud for a vendor or lessor to fail to disclose defects known to him.⁶⁶ With the development of the first exception, however, the reason for the limitation on the second exception becomes less defensible because the first exception is the beginning of an imposition of liability for at least non-discoverable defects in the condition of the premises. Sales law, with the rise of the executory contract (analogous to the contract to sell buildings during construction) soon discarded the fraud basis of liability for concealed defects and made fitness or freedom from concealed defects a part of the bargain or contract whether or not the seller had knowledge of the defects.

Actually in the vendor-purchaser situation the only place this limitation makes any real difference is with respect to new housing already completed at the time of the contract to sell. With respect to buildings under construction, an interpretation of the contract

62. See Prosser, Torts 653 *et seq.* (1941).

63. *Id.* at 656.

64. See note 48 *supra*; 85 L. J. 219 (1938); *Young Corp. v. McClintic*, 26 S. W. 2d 460 (Tex. Civ. App. 1930) (Lessee must be afforded an opportunity to judge suitability).

65. See *Jones v. Just*, L. R. 3 Z. B. (1868).

66. See Prosser, Torts 645 (1941).

will normally impose on the vendor greater liability, indeed almost a warranty of fitness for purpose.⁶⁷ With respect to land in which there are second-hand or used buildings, usage of trade will in most cases compel the conclusion that the sale was on an "as is" basis.⁶⁸ There does not seem to be any justification in limiting the liability of a dealer in new housing to defects known to him at the time of sale, if he is liable for the same defects in housing which he sells before completion.

The third exception is a curious one. It operates to impose on the landlord a duty to see that his premises are in good repair at the time of leasing if the premises are to be used by the lessee as a place for public admission such as a theater or wharf. The duty is clearly owed to the member of the public who is injured and would seem also to run to the lessee at least to the extent of indemnifying him for loss suffered because of his own duty as a possessor to the member of the public. The exception sounds like an implied warranty of fitness for a particular purpose—a representation that premises designed for public admission are safe for such admission. If stated this way then clearly the lessee has an action against the lessor and it would seem that a vendee would have a similar action. In any event the rule imposing liability on a vendor even after sale for harm resulting from a nuisance on the sold land or from the existence of an unreasonably dangerous condition would seem to cover the situation sufficiently to permit the vendee to hold the vendor in practically all situations where the lessor has been held liable to the public.⁶⁹

But for the limitation in the latent defect exception—that the vendor have knowledge of the defect, imposition of liability on a vendor in each of the first three exceptions would be easily understandable as an application of a rule of implied warranty of fitness for ordinary purposes and of the rule of *McPherson v. Buick Motor Co.*⁷⁰

Is the rule of the *McPherson* case applicable to impose liability on suppliers or manufacturers of housing including remodelled housing? This case imposes on suppliers of chattels tort liability for failure to exercise reasonable care to make the chattel safe for the

67. See page 111 of text *supra*.

68. See page 118 of text *supra*.

69. See *Plumer v. Harper*, 3 N. H. 88 (1824); *Pharm v. Letucky*, 283 N. Y. 130, 77 N. E. 2d 811 (1940). But *cf.* Restatement, Torts §§ 374, 375 (1934) where the liability for nuisance is limited to exclude liability for disrepair or failure to keep up.

70. 217 N. Y. 382, 11 N. E. 1050 (1916).

ordinary use for which it was supplied. The main importance of the doctrine is that it extends a seller's liability to persons other than the purchaser. The English courts have rejected extension of the *McPherson* rule (called the "snail-in-the-bottle" principle in England) to realty.⁷¹ In this country, although the application of the doctrine to contractors who remodel buildings seems to be behind the development in the chattel field there seems to be no real indication that it will not be applied. In *Hale v. Depaoli*,⁷² the defendant lessor constructed the building in which the injured plaintiff resided. After the construction the building had been sold by the contractors and was not reacquired by the defendant for some ten years. The Supreme Court of California held the defendant liable for an injury suffered because of a defectively constructed railing on the theory that a building contractor is liable to third persons for negligent construction. It is said that if knowledge of the defect was a requirement, that requirement was met by imputing the carpenters' knowledge that they used nails of improper strength to the contractors. The importance of this case for our purpose is that the defendant was a vendor-contractor apparently in the development business.

The English court in rejecting the extension of the rule to the manufacturer of housing distinguished the chattel cases on the ground that in the case of chattels there was no opportunity for intermediate inspection whereas in the sale of housing the purchaser had an opportunity to inspect. The American cases with respect to inspection of chattels seem to relieve the manufacturer from liability only if the purchaser did inspect and did discover the defect; the opportunity of inspection does not relieve the manufacturer from his liability. With this approach in the chattel cases it does not seem likely that the *McPherson v. Buick* rule will be limited to chattels and manufacturers of buildings will probably be held liable equally with manufacturers of chattels.

Purchaser's Remedies. Assuming some obligation is imposed on the vendor with respect to the condition of the premises, what are the purchaser's remedies?

Here we must distinguish the executory contract from the situation after the purchaser has accepted the deed. When the contract

71. *Bottomley v. Bannister* [1932] 1 K. B. 458 (defective boiler); *M'Alister v. Stevenson* [1932] A. C. 562; *Otto v. Bolton & Norris* [1936] 1 All Eng. 960 (ceiling); Note, 81 L. J. 290 (1936); Note, 82 L. J. 292 (1936).

72. 33 Cal. (2d) 228, 201 P. 2d 1 (1948). See also *Colbert v. Holland Furnace Co.*, 333 Ill. 78, 164 N. E. 162 (1928).

is executory the purchaser's remedies include: (a) rejection of the tendered performance and recovery of any part of the price paid; (b) rejection of the tendered performance and recovery for damages for breach of contract; (c) specific performance to compel full performance; (d) specific performance with compensation for the defective performance.

The materiality of the breach determines whether the purchaser may rescind or whether his only recourse is damages for the defect in quality. It should also be noted that where the defect in quality is also a matter of title, some jurisdictions limit the purchaser to rescission and recovery of the portion of the price paid.

Where the purchaser has accepted the deed and then makes claim with respect to the condition of the premises, new and important problems arise. Does acceptance of title prevent the purchaser from rescinding, from recovering damages, or both?

Where the purchaser accepts a deed after he acquires knowledge of the defect, he clearly loses his right to rescind and this is also the rule in the sale of goods. Where the defect is not discovered until after acceptance of the deed we get a rule that is clearly different in phraseology and probably in effect from modern sales law. As the Restatement of Contracts, Section 413 states the rule, "acceptance of a deed of conveyance of land . . . discharges the contractual duties of the seller to the party so accepting" except such duties as are "collateral" to the main purposes of the contract. Rescission is also precluded except for fraud or mutual mistake. This is clearly different from modern sales law which permits both rescission and an action for damages after acceptance of the goods.⁷³

The test of the difference between the land rule and the sales rule comes in the application of the "collateral" promises exception. For if all of a seller's obligations as to quality are "collateral" obligations then the right to damages survives acceptance of the deed. The test of the Restatement of Contracts is whether the agreement is one which "might naturally be made as a separate agreement by parties situated as were the parties to the written agreement."⁷⁴ It is sometimes said that under a land contract the main obligations of the vendor are: (1) production of documentary evidence sufficient to establish the validity of his title and (2) execution and delivery of the deed. It accordingly is clear that as to all obligations of the

73. Uniform Sales Act, §§ 49, 69(3).

74. Restatement, Contracts § 240 comment (1932).

vendor with respect to title including those matters of title which are also matters of quality, acceptance of the deed by the buyer discharges the vendor from any further obligations under the contract even as to title defects thereafter discovered.⁷⁵ But if we apply this understanding of the main purpose of a land contract to other warranties as to quality, it would seem that such obligations are "collateral" and accordingly do survive acceptance of the deed. Thus promises to make repairs and improvements, warranties as to quality of the soil, promises to build according to specifications, and obligations as to habitability of the premises have been held to survive acceptance of the deed.⁷⁶ Indeed, the history of warranties demonstrates that in origin warranties were always regarded as "collateral contracts" which survived the executed sale.

The development of any concept of warranties as to fitness in a land contract seems destined to carry with it further expansion of the categories of "collateral" contracts which survive acceptance of the deed. In American sales law the buyer may also rescind after acceptance of the goods but in English law this is less frequently the case. Is this doctrine also likely to apply to land contracts? It would seem to me that land law is more likely to develop along the English lines—an action for damages or specific performance may be available to the buyer but not rescission after acceptance of the deed.

In this paper I have not discussed many important questions, including the problems of the measure of damages for breach of warranty of quality; the problem of excluding or modifying warranties by general "no warranty" clauses in the contract; and the problem of modifying the remedies by contract so that the buyer may have only a right that the seller repair the defect. In general these matters are likely to follow sales law rules and do not need special treatment.

To summarize the answer to the problem of the seller's obligations as to the condition and fitness of the premises it may be said that:

75. Cf. *Pybus v. Grasso*, 317 Mass. 716, 59 N. E. 2d 289 (1945) where vendor's duty as to encroachment held discharged.

76. *Shelby v. C. & E. I. R. R.*, 143 Ill. 385 (1892) (repairs to dam); *Disbrow v. Harris*, 122 N. Y. 362, 25 N. E. 356 (1890) (repairs); *South Texas Land Co. v. Sorenson*, 199 Ia. 699, 202 N. W. 552 (1925) (improvements); *Saville v. Chalmers*, 76 Ia. 325, 41 N. W. 30 (1888) (warranty of quality of soil); *Edison Realty Co. v. Bauerschub*, 191 Md. 451, 62 A. 2d 354 (1948) (warranty by description); *Lavin v. Cook*, 186 Md. 535, 47 A. 2d 505 (1946) (warranty of fitness of heating plant). Cases cited in note 48 are also in point. See also Note, 80 Sol. J. 139 (1936); Note, 84 A. L. R. 1008 (1933).

(1) To the extent the obligation is a matter of title a contractual obligation is imposed on the seller but the obligation is discharged if the purchaser accepts the deed without obtaining covenants in the deed such as the covenant against encumbrances.

(2) If no matter of title is involved, the sale of an incomplete building seems to impose on the vendor a duty to make the premises fit for the ordinary purposes for which the building is being constructed and if the sale is from a model there is a duty to make the building sold conform to the model and to be reasonably fit for its ordinary purposes. This duty seems to survive acceptance of the deed.

(3) If the sale is a sale of used housing and of completed new housing, *caveat emptor* clearly applies as to all defects in quality discoverable on inspection. This result would probably be reached even under sales law rules.

(4) On the sale of completed new housing or of second hand housing there seems to be no obligation on the seller as to latent defects in the quality of the land and improvements unless the obligation is one sounding in fraud for concealment of defects known to the seller. This differs substantially from the sale of goods rule where the seller is a manufacturer or dealer because in such a situation the seller is obligated for latent defects in quality whether or not the seller knows of the defects.

(5) It appears that there is likely to be a development in the common law toward imposing an obligation of quality on sellers of new housing. When this occurs the sales and land law rules will come closer together than they are today. There appears to be no need for changing the common law rule as to the vendor's obligation for quality of second-hand housing except perhaps with respect to apartments where a better solution is the imposition of statutory obligations on the lessor as to the fitness of the premises.