

Sale of Defective Houses

CICERO ☉ THE MORAL CHOICE

John V. Orth

“SUPPOSE THAT AN HONEST MAN wants to sell a house because of certain defects of which he alone is aware. The building is supposed to be quite healthy, but is in fact insanitary, and he is aware that it is; or the place is badly built and is falling down, but nobody knows this except the owner. Suppose he does not disclose these facts to purchasers, and sells the house for much more than he expected. Has he behaved unfairly and dishonestly?” – *Marcus Tullius Cicero*

Sound familiar? Questions like this are posed every year in the basic property course. After a discussion more or less Socratic, the usual picture that emerges is of an old rule in favor of sellers increasingly riddled with exceptions favoring buyers. The logical starting point turns out to be a common-law position against implied warranties of quality in the sale

of real estate, so in the absence of express warranties prospective purchasers take the property as-is. The rationale is said to be that since they are able to inspect the premises prior to purchase, “their eyes are their bargain.”¹ The effect of the rule is captured by the Latin phrase: *Caveat emptor!* Let the buyer beware!²

As disclosed in the usual course of discussion, the attack on the common-law position did not begin with a frontal assault. Instead, using a common maneuver, the critics turned the rationale into a means to confine the rule. If their eyes were truly their bargain, then purchasers who were unable to see the property were not bound if it turned out to be unfit. Purchasers operating at a distance were necessarily forced to rely on representations, implied if not express, concerning quality,³ while a purchaser of an unfinished structure had only the

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1 See JOHN E. CRIBBET ET AL., *CASES AND MATERIALS ON PROPERTY* 1230 (5th ed. 1996).

2 See HERBERT BROOM, *A SELECTION OF LEGAL MAXIMS* 768 (8th ed. 1882). See generally Walter H. Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 *YALE L.J.* 1133 (1931).

3 Cf. *Ingalls v. Hobbs*, 31 N.E. 286 (Mass. 1892) (short term lease of furnished house at Swampscott); *Smith v. Marrable*, 11 M. & W. 5, 152 Eng. Rep. 693 (Exch. 1843) (short term lease of furnished house

builder's plans to examine.⁴ Even in cases in which the premises were available for inspection, purchasers were bound to take only what they could see: latent or hidden defects were the vendors' responsibility.⁵

Eventually the attack centered on the rule itself. If manufacturers of consumer products were bound by an implied warranty of fitness, then home-builders should be comparably bound. The purchasers' opportunity to inspect was no longer central; the complexity of the product made brief inspection, particularly by unskilled home-buyers, largely irrelevant.⁶ At last, purchasers of a completed house were allowed to recover against the builder-vendor because of an implied warranty of quality.⁷

Thereafter attention shifted to consolidating the new rule. Remaining questions concerned whether subsequent purchasers could also sue the builder: Was privity required?⁸ Whether purchasers could bargain away the protection provided by the implied warranty: Was waiver possible?⁹ And when did the statute of limitations begin to run: Did the cause of action accrue when construction was complete or when the defect first became apparent?¹⁰

The next stage is to determine what remains of the old rule of *caveat emptor*. It still holds apparently with respect to commercial, as opposed to residential, property.¹¹ The rationale that purchasers could protect themselves

at Brighton). Because the common law regarded leases as conveyances, as explained below, text at note 28, *infra*, cases concerning claims of defective premises, whether leased or sold outright, are cited interchangeably in this article.

- 4 Miller v. Cannon Hill Estates, Ltd., 2 K.B. 113 (Eng. 1931) (purchase of unfinished structure); Vanderschrier v. Aaron, 140 N.E.2d 819 (Ohio App. 1957) (purchase of unfinished structure) (on completion and occupancy, inadequate sewer system rendered house insanitary and unhealthy).
- 5 Barnes v. MacBrown @ Co., 342 N.E.2d 619 (Ind. 1976) (latent defect in pre-owned house).
- 6 In a sense, this was a development of the rule concerning latent defects: even under a strict rule of *caveat emptor*, the purchaser was not held to have accepted defects that could not reasonably have been discovered by inspection. Of course, the purchaser could have been charged with the knowledge of what a skilled inspector would have discovered, just as the purchaser is charged with the knowledge concerning title that a professional title-searcher would have discovered. See text at note 12, *infra*.
- 7 Petersen v. Hubschman Constr. Co., Inc., 389 N.E.2d 1154 (Ill. 1979); Hartley v. Ballou, 209 S.E.2d 776 (N.C. 1974); Cochran v. Keeton, 252 So.2d 313 (Ala. 1971).
- 8 Barnes v. MacBrown @ Co., 342 N.E.2d 619 (Ind. 1976) (privity not required); Keyes v. Guy Bailey Homes, Inc., 439 So.2d 670 (Miss. 1983) (same); Terlinde v. Neely, 271 S.E.2d 768 (S.C. 1980) (same); Real Estate Marketing, Inc. v. Frantz, 885 S.W.2d 921 (Ky. 1994) (same). See D. Brent Marshall, Note, *Relief to Subsequent Home Purchasers in Kentucky: The Past, Present, Future, and Frantz*, 85 Ky. L.J. 483 (1996-97). See generally Sean M. O'Brien, *Caveat Venditor: A Case for Granting Subsequent Purchasers a Cause of Action Against Builder-Vendors for Latent Defects in the Home*, 1995 J. CORP. LAW 525.
- 9 Petersen v. Hubschman Constr. Co., Inc., 389 N.E.2d 1154, 1159 (Ill. 1979) ("a knowing disclaimer of the implied warranty" is not contrary to public policy); Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1977) (more than a "boilerplate" disclaimer is required). See generally Powell, *Disclaimers of Implied Warranties in the Sale of New Homes*, 34 VILL. L. REV. 1123 (1989).
- 10 Statutes of repose have in some instances determined the question by limiting actions to some gross period beginning with the completion of construction. See, e.g., N.C. Gen. Stat. § 1-50(a)(5)(a) (limiting cause of action to recover damages for defective improvement to real property to six years after "substantial completion of the improvement"); Nolan v. Paramount Homes, Inc., 518 S.E.2d 789 (N.C. App. 1999) (construing the statute).
- 11 C.F.R. Foods, Inc. v. Randolph Development, 421 S.E.2d 386, 389 (N.C. App. 1992) (sale of land for

through prior inspection still seemingly makes sense when businesspeople are involved on both sides of the transaction, special needs might be involved, and the public interest in housing is lacking. The old rule certainly remains with respect to titles, as opposed to physical defects. Concerning the state of the title, there still are no implied covenants, so express warranties of title continue to appear in almost every deed. Here "their eyes are their bargain" remains valid since the registry of deeds opened the chain of title to inspection.¹² The only remaining question concerns whether covenants contained in a prior contract of sale survived delivery of the deed or were terminated by merger.¹³

Near the end of the usual classroom

discussion come questions like those posed at the beginning of this article. The peculiar feature in these cases is that they involve the seller of "used" housing, not the original builder. The specific technical issue may now be fraudulent concealment of relevant facts rather than an implied covenant of fitness as such, but the general problem remains the same. Since the physical defects are known only to the seller, the buyer may not have assumed the risk. The question may be harder with respect to some "insanitary" conditions, perhaps best exemplified today by a stigmatizing feature such as a death on the premises by homicide, suicide, or AIDS.¹⁴ These may in fact not be objective reasons to find fault with the property, but prospective

development as shopping center) (citations omitted):

Where "the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie." Here, plaintiff had a full opportunity to make pertinent inquiries and failed to do so through no inducement of the seller. By the exercise of reasonable diligence prior to its purchase, plaintiff could have discovered the problem and protected its interests accordingly.

12 Actually, as every title-searcher knows, examination of the record cannot disclose all possible defects of title. Forged or undelivered deeds, undisclosed spouses, and mistakes in indexing are only the most obvious sources of problems. Since buyers risk the loss of their investment, a special branch of the insurance industry has developed to offer policies of title insurance.

13 The doctrine of merger has been described as "an old but misleading concept." JOHN E. CRIBBET ET AL., *CASES AND MATERIALS ON PROPERTY* 1240 (5th ed. 1996):

Briefly stated, it means that any covenants in the contract merge into the deed on the execution of the deed and are no longer enforceable. Actually, the contract covenants are terminated rather than merged and the parties must then look to the deed for any cause of action. It is basically a titles doctrine designed to prevent the grantee from going behind the deed to earlier promises. There are many exceptions to the doctrine when title is not directly involved and when the covenant is collateral to the promise to convey land.

See *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975) (merger not applied); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982) (same).

14 The depressing effect on the rental market of bad news connected with the premises is concisely illustrated in a short story by O. Henry, "The Furnished Room," quoting an Irish-American landlady in New York: "There be many people will rayjict the rentin' of a room if they be tould a suicide has been after dyin' in the bed of it."

See *Reed v. King*, 193 Cal. Rptr. 130 (Cal. App. 1983) (failure to disclose that premises were the site ten years earlier of a multiple murder); *Van Camp v. Bradford*, 623 N.E.2d 731 (Ohio Com. Pl. 1993) (failure to disclose recent rape on premises). See generally Sharlene A. McEvoy, *Stigmatized Property: What a Buyer Should Know*, 48 J. Mo. BAR 57 (1992).

Legislation in many states regulates the disclosure of stigmatizing features. See, e.g., CAL. CIV. CODE § 1710.2(a) (no cause of action for failure to disclose AIDS-related death on premises more than three years previously); N.C. GEN. STAT. § 39-50 (death or illness of previous occupant not a material fact, but seller may not knowingly make a false statement regarding such past occupant).

buyers may, for reasons of their own, consider them relevant.

The course of legal development, the “progress of the law,” as revealed by this discussion appears to be almost entirely driven by logic. The rule against implied warranties of quality in the sale of real property is posited, its rationale deduced; hypothetical cases are posed, designed to test whether the rule really furthers the reason in specific instances. The old regime of *caveat emptor* swiftly crumbles; the only real question is whether any fragments of it survive. Considered as a matter of logic, the solution can be arrived at quickly, in no more than one or two class hours. After such a discussion no student is particularly surprised to learn that in only a few years the common-law position against implied warranties has been replaced by the routine implication of warranties of habitability in a majority of states.¹⁵

Before exploring further the reason for this sudden shift in legal rules, it may be helpful to return to the questions posed at the beginning of this article and to see them as they were originally phrased more than two thousand years ago:

Vendat aedes vir bonus propter aliqua vitia,

quae ipse norit, ceteri ignorent, pestilentes sint et habeantur salubres, ignoretur in omnibus cubiculis apparere serpentes, male materiatae sint, ruinosae, sed hoc praeter dominum nemo sciat; quaero, si haec emptoribus venditor non dixerit aedesque vendiderit pluris multo, quam si venditurum putarit, num id iniuste aut improbe fecerit.¹⁶

The questioner was Marcus Tullius Cicero (106-43 B.C.), Roman statesman and lawyer. The discussion, set out in Cicero’s *De Officiis* (*On Duties*) in 44 B.C., is remarkably like classroom dialogues today. Indeed, in strict accordance with Socratic precedent, Cicero records a dialogue between two Greek-named interlocutors. Antipater¹⁷ argues that it is unfair and dishonest for a seller intentionally to mislead a buyer, drawing an analogy to the case of a person who refuses to help someone who is lost.¹⁸ Diogenes¹⁹ in reply denies that the seller is duty-bound to disclose defects: people expect a seller to overpraise the product. Restating the maxim “their eyes are their bargain,” Diogenes asks: “[W]hen the purchaser can exercise his own judgement, what fraud can there be on the part of the seller?”²⁰ Cicero himself views the problem as one of moral choice and in the end sides with the proponent of full disclosure, concluding “the man who was

15 Sean M. O’Brien, *Caveat Venditor: A Case for Granting Subsequent Purchasers a Cause of Action Against Builder-Vendors for Latent Defects in the Home*, 1995 J. CORP. LAW 525, 530 (“Although the theory of implied warranty of habitability, in a span of thirty years, became the rule in a majority of states, courts limited its application to the original purchaser of a new home from a builder-vendor.”).

16 CICERO, *DE OFFICIIS* 3:13:54 (Loeb ed. 1913). The translation used at the beginning of this article is by Michael Grant. CICERO, *SELECTED WORKS* 179 (trans. Michael Grant 1960).

17 Antipater of Tarsus (2nd century B.C.), a Stoic philosopher, was the pupil of Diogenes of Babylonia, with whom the supposed dialogue is conducted.

18 The analogy is unpersuasive in the common law tradition in which there is in general no legal duty to render assistance to others.

19 Diogenes of Babylonia, also known as Diogenes of Seleucia, a Stoic philosopher, was the pupil of Chrysippus and the teacher of Antipater of Tarsus. He was part of a delegation of philosophers who visited Rome in 156 B.C. as ambassadors of Athens, seeking remission of a fine. While on their diplomatic mission, the philosophers gave public lectures, which were so well attended by young Romans that Cato the Elder persuaded the Senate to expel all philosophers from the city for fear they were diverting the young men from their military exercises. See PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 428 (John Dryden © Arthur Hugh Clough trans. 1864) (Modern Lib. ed.) (life of Marcus Cato).

20 CICERO, *SELECTED WORKS* 179 (trans. Michael Grant 1960).

selling the house should not have withheld its defects from the purchaser.”²¹

The point of rehearsing this ancient history is to demonstrate that the concerns still actively discussed today are as old as the hills of Rome. Indeed, they are older: Cicero relied on Greek sources. Which means that these arguments, at least standing alone, cannot possibly be what caused modern American law concerning the sale of defective houses to begin changing fairly suddenly only a few decades ago. Logic did not cause the change; the logical arguments have been well understood not just for centuries but for millennia.²²

But if logic did not drive the change, what did? Aside from the logical arguments, the cases and commentators routinely allude to changes in the real estate market to explain the shifting legal rules. As one court put it in 1979:

Because of the vast change that has taken place in the method of constructing and marketing new houses, we feel that it is appropriate to hold that in the sale of a new house by a

builder-vendor, there is an implied warranty of habitability which will support an action against the builder-vendor by the vendee for latent defects and which will avoid the unjust results of *caveat emptor* and the doctrine of merger.²³

Typical is the assertion that before 1945 the mass production of houses was unknown.²⁴ Statistics certainly show a post-World War II building boom, as productive capacity was redirected from the war effort to the task of making up for lost time and housing the newly demobilized military forces.²⁵ Something similar had, however, occurred before. Indeed, the birth of the suburbs is usually dated a generation earlier, in the period after World War I:

In the 1920s the American population as a whole increased by 16%. Those living in the centers of cities increased by 22%. But those living in the satellite areas – the suburbs – increased by 44%. ... What does all this add up to? The United States took to wheels. This was quite truly the age of the mass automobile. With the automobile the United States began

21 *Id.* 180. Cicero did not limit his conclusion to cases of the sale of defective houses but extended it to sales of personal property as well, including sales of slaves. “[I]f a man knows that a slave he is selling is unhealthy, or a runaway, or a thief, he must (unless the slave is one he has inherited) report accordingly.” *Id.* 185-86. Similar problems must have arisen in some American states prior to the adoption of the Thirteenth Amendment.

22 Cicero’s *De Officiis* was “used as their prime textbook by generations of university students in England and France and Germany.” MOSES HADAS, *A HISTORY OF LATIN LITERATURE* 135 (1952). Studying Cicero was once also a prominent part of the education of American elites, particularly lawyers. See Stephen Botein, *Cicero as Role Model for Early American Lawyers: A Case Study in Classical “Influence,”* 73 *CLASSICAL J.* 313 (1978).

23 *Petersen v. Hubschman Constr. Co., Inc.*, 389 N.E.2d 1154, 1157-58 (Ill. 1979). Introduction of the phrase “latent defects” in the holding raises a question about how new the rule really is: purchasers even under a strict regime of *caveat emptor* may not have been held to accept defective property when the defect was latent and not discoverable by inspection. See text at note 5, *supra*.

24 Leo Bearman, Jr., *Caveat Emptor in Sales of Realty – Recent Assaults Upon the Rule*, 14 *VAND. L. REV.* 541, 542 (1961) (“A changing law for sales of personalty, stimulated perhaps by early mass production and accompanying mass buying and consequent mass expectation of quality, had little effect upon the rules governing sales of realty, since before 1945 no similar mass production methods had so totally invaded the building industry.”).

25 *Id.* 542 n.6:

Statistics reveal that the value of annual new construction of private residential buildings rose from less than \$2,000,000,000 annually in 1945 to about \$15,000,000,000 annually in 1950 and about \$18,000,000,000 annually by September 1959. At the same time, the number of one-family non-farm dwelling units begun in each year rose from about 100,000 units begun in 1945 to about 1,150,000 units begun in 1950.

a vast inner migration into newly constructed, single-family houses in the suburbs; and these new houses were filled increasingly with radios, refrigerators, and the other household gadgetry of a society whose social mobility and productivity had all but wiped out personal service. Within these houses Americans shifted their food consumption to higher-grade foods, increasingly purchased in cans – or, later, frozen.²⁶

Development of a new suburban housing pattern, no matter when exactly it emerged, seems hardly adequate as a complete explanation of the appearance of the modern implied covenant of fitness in the sale of residential real estate because the new legal rule concerning houses was closely linked with a simultaneous development in urban real estate law. In the law of landlord and tenant, predominantly a

concern of city-dwellers, an implied covenant of habitability in residential leases was recognized.²⁷ Leases had traditionally been viewed as a form of conveyance²⁸ with, perhaps, a few promises known as “covenants” attached. As a conveyance, the lease fell under the common-law rule against implied warranties, so unless an express covenant of fitness was included in the lease, none was implied.²⁹ Then, again fairly suddenly, an implied covenant or warranty of habitability was recognized in residential leases.³⁰

In the law both of leasing and selling residential real property the shift toward implied covenants was associated with a renewed emphasis on the contractual aspect of the transaction.³¹ So long as leasing and selling real estate were viewed primarily as conveyancing,

26 WALT ROSTOW, *THE STAGES OF ECONOMIC GROWTH* 77 (2d ed. 1971).

27 See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076 (D.C. Cir.) (finding an implied covenant of habitability in residential leases and noting that “courts have begun to hold sellers and developers of real property responsible for the quality of their product”), cert. denied, 400 U.S. 925 (1970); *Petersen v. Hubschman Constr. Co., Inc.*, 389 N.E.2d 1154 (Ill. 1979) (finding an implied warranty of fitness in a contract for the sale of a house and noting that same court had already recognized an implied warranty of habitability in a residential lease).

28 The principal forms of conveyance at common law were: feoffment, lease, grant, and mortgage. 3 *AMERICAN LAW OF PROPERTY* 215 (A. James Casner ed. 1952).

29 As of 1952, the standard treatise on American property law stated the then universal rule:

There is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adapted to the purpose for which leased. The tenant, then, cannot use such unfitness either as a defense to an action for rent or as a basis for recovery in tort for damages to person or property. The reason assigned for this rule is that the tenant is a purchaser of an estate in land, subject to the doctrine of *caveat emptor*. He may inspect the premises and determine for himself their suitability or he may secure an express warranty.

1 *AMERICAN LAW OF PROPERTY* 267 (A. James Casner ed. 1952).

30 The law of landlord and tenant is today increasingly divided into residential and commercial components. This, in turn, has placed a hitherto unknown emphasis on the definition of “residential tenant.” See, e.g., *Brigdon v. Lamb*, 929 P.2d 1274 (Alaska 1997) (distinguishing “possession prior to sale” from tenancy). See also John V. Orth, *Who Is a Tenant? The Correct Definition of the Status in North Carolina*, 21 N.C. CENT. L.J. 79, 81 (1995); John V. Orth, *Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act*, 78 N.C. L. REV. 783 (2000).

31 See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.) (“leases of urban dwelling units should be interpreted and construed like any other contract”), cert. denied, 400 U.S. 925 (1970); *Brown v. Southall Realty Co.*, 237 A.2d 834, 837 (D.C. Cir.) (finding no reason “to treat a lease agreement differently from any other contract”), cert. denied, 393 U.S. 1018 (1969); *Wright v. Baumann*, 398 P.2d 119 (Or. 1965) (construing lease as essentially a contract rather than a conveyance). See generally John V. Orth, “Contract and the Common Law,” in *THE STATE AND FREEDOM OF CONTRACT* 44-65 (ed. Harry N. Scheiber, 1999) (describing the substitution of contract for property as the organizing principle of the common law).

that is, transferring an interest in real property, the legal emphasis remained on the effectiveness of the transfer as such, rather than on the characteristics of the property transferred. The common law presumed that title was of paramount concern to the transferee and restricted the legal inquiry to whether and when title passed and to the quality of title involved. Once the transactions were reconceptualized in terms of contract, the seller's performance could be seen as essentially the performance of a set of promises, rather than as simply the delivery of title. The property itself, as opposed to the title to it, emerged as a focus of legal interest.

Although the changes in the law of leasing and selling residential real property advanced in tandem, differences in the legal structure of the two transactions produced different doctrinal emphases. The lease was increasingly assimilated to a contract, while in sales the emphasis shifted from the deed that conveyed title to the preceding contract for the sale of land, that promised to transfer the property. Leases and deeds were now treated as conceptually distinct. In the law of landlord and tenant the covenant of habitability was simply implied in the lease; in the law of conveyancing, on the other hand, it was usually implied in the contract of sale.³² Emphasis on the contract of sale in conveyancing may be attributed to the continuing strength of the rule against implied covenants in deeds,³³ as well as to the greater flexibility of contract

doctrine. Whatever its cause, the new emphasis led in turn to pressure in the law of deeds to relax the old doctrine of merger in order to preserve elements of the contract after the effectiveness of the conveyance.



Marcus Tullius Cicero
(106 B.C. - 43 B.C.)

Again, logical arguments in favor of changing the law of landlord and tenant are routinely supplemented with a recital of facts concerning developments in the rental housing market; this time the emphasis is on the circumstances of urban dwellers rather than suburbanites. In 1970, in *Javins v. First National Realty Corp.*, the landmark case concerning the implied warranty of habitability in leases, Judge J. Skelly Wright wrote on behalf of the United States Court of Appeals for the District of Columbia:

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. ... When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services - a package which includes not merely walls and ceilings, but also adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.³⁴

While this catalogue of wants of modern

32 In some cases finding an implied covenant of habitability in sales of real estate, it is unclear exactly where the covenant is implied, whether in the contract for sale or in the deed.

33 The rule against implied covenants in deeds is related to the use of covenants for title: where express covenants are involved, and presumably bargained for, it is reasonable to exclude implied covenants. See text at note 12, *supra*. It would, of course, also be possible to limit the rule against implied covenants in deeds to implied covenants concerning title, the subject of the express covenants.

34 *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.) (citation omitted), *cert. denied*, 400 U.S. 925 (1970).

urban apartment dwellers may be readily accepted as accurate, it is hardly the case that these wants arose for the first time in the last half of the twentieth century. Apartment-dwelling has been a perennial feature of urban life. Nor is it plausible to attribute the modern revaluation of tenants' rights to the decline of the agrarian tenant or the demise of feudalism – both of which preceded the doctrinal development by years, if not by centuries.³⁵

Emphasis on the contractual aspect of the lease made it fairly easy to draw an analogy to concurrent developments in the general law of contracts. The ubiquitous Uniform Commercial Code (UCC) popularized in the law of sales of personal property a general warranty

of merchantability or fitness for a particular purpose.³⁶ Consumer products such as the automobile and assorted household gadgets now came with implied warranties of quality. Courts inclined to extend the rights of purchasers and lessees of residential real property routinely cited the related concepts of the UCC.³⁷ As one commentator sharply expressed it in 1965, "As far as assurances of quality are concerned, our law offers greater protection to the purchaser of a seventy-nine cent dog leash than it does to the purchaser of a 40,000-dollar house."³⁸ The point became even more telling as the prices of dog leashes but, especially, of houses escalated.³⁹

Seemingly minor terminological problems incident to importing concepts from the law

35 If American property law did indeed maintain a legal rule suitable to feudalism, the question remains why the rule so long outlived its historical context. See John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287, 293 (1991) (suggesting that the provision in the 1960s of federally funded legal services for the poor was a major factor motivating the change).

36 UNIFORM COMMERCIAL CODE § 2-314. Implied Warranty: Merchantability; Usage of Trade:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged and labeled as the agreement may require; and

(f) conform to the promise or affirmation of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

37 See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Petersen v. Hubschman Constr. Co., Inc.*, 389 N.E.2d 1154, 1158 (Ill. 1979). See also Comment, *Washington's New Home Implied Warranty of Habitability – Explanation and Model Statute*, 54 WASH. L. REV. 185 (1978).

38 Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965).

39 It could, of course, be argued that the purchaser of the more expensive item should be held to a higher standard of care before purchase.

of sales of personal property reveal the imperfect “join” of modern contract law and traditional real property law. While the UCC speaks in terms of merchantability, the word has not caught on in describing the new implied warranty in the sale and lease of residential real property. The common law has long recognized an implied “warranty of merchantability” in contracts for the sale of land, but it is the state of the title that is impliedly warranted to be merchantable, not the condition of the premises.⁴⁰ Hence the search for a more descriptive term. “Warranty of habitability” is often used, but “habitability” does not adequately describe the scope of the new warranty. As one court has phrased it in a case involving the sale of residential real property, “[t]he mere fact that the house is capable of being inhabited does not satisfy the implied warranty.”⁴¹ Construing the warranty of habitability in leases, another court has read it expansively to include, in addition to the physical condition of the premises, “reasonable safeguards to protect tenants from foreseeable criminal activity.”⁴² An implied warranty of fitness or quality seems, therefore, a more descriptive label.⁴³

Invocation of the UCC and the law of sales of personal property suggests that the principal driving force in changing the law of sales and leases of residential real property has not been either newly discovered flaws in real property

doctrine or recent changes in the real estate market. Such local causes are inadequate to explain a global change. What developments in the law of sales of personal property, residential leases, and conveyancing of residential real estate have in common is, to put it bluntly, a preference for purchasers – whether of chattels, residential leaseholds, or fee interests in residential real estate – over sellers of consumer products, landlords, and builders. The preference for purchasers began with purchasers of consumer goods, particularly automobiles,⁴⁴ but then spread fairly rapidly to tenants and home-buyers. The underlying premise seems to be that purchasers need legal protection against sellers.

Ambient factors that eased the change in policy in these areas of the law include a generalized preference for plaintiffs: buyers are more likely to sue than sellers, and plaintiffs are more likely to win today. Increased social tolerance for litigation may also have played a role: the old rule of *caveat emptor*, rigorously applied, served to reduce the number of lawsuits. Increased judicial activism obviously contributed to the development: unless the pull of precedent was reduced, such wholesale legal change by judicial decision would have been impossible.

Concern for efficiency may also have influenced the change of policy. Assuming purchasers knew and understood the rule of *caveat emptor*, it may have retarded transactions,

40 See *Wallach v. Riverside Bank*, 100 N.E. 50 (N.Y. 1912) (holding that an executory contract for the sale of land includes an implied covenant that vendor must deliver a merchantable title at the closing). See also Uniform Land Transfer Act § 2-304(d) (adopting “the rule of *Wallach*”).

41 *Petersen v. Hubschman Constr. Co., Inc.*, 389 N.E.2d 1154, 1158 (Ill. 1979).

42 *Trentacost v. Brussel*, 412 A.2d 436 (N.J. 1980). See also *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.) (referring to habitable premises as having “secure windows and doors,” which may imply more than apertures that are wind and waterproof), *cert. denied*, 400 U.S. 925 (1970).

43 The implied warranty of fitness does seem to be limited to the lease and sale of residential property and therefore is an implied warranty of fitness for residential use; it has not been extended to leases and sales of real estate generally; that is, it has not become a general warranty of fitness for any known intended use, including commercial uses.

44 See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (eliminating requirement of privity and permitting ultimate consumer to sue manufacturer).

particularly in the consumer product market.⁴⁵ Whether because of concern that the legal message concerning the peril of not inspecting products before purchase did not get through or because of the increased transaction costs imposed by the rule if it did, law makers may have chosen to shift the risk from buyers to sellers. In practical terms, legal allocation of the risk of loss means, in cases involving knowledgeable parties, the assignment of the cost of inspection and the implementation of some method of spreading the cost of failure, such as through pricing or insurance.⁴⁶

Here again, doctrine did not lead the change, but followed it. The role of doctrine was to implement a policy choice not to dictate one.⁴⁷ But the new policy preference in favor of purchasers inspired further doctrinal development. The age-old common law distinction between real and personal property, already weakened, was eroded further as sales and leases of residential real property were assimilated to purchases of personal property.⁴⁸

Leases, once a form of conveyance, became a contract "like any other," and the contract for the sale of land gained a new significance. The implication of a warranty of habitability in leases meant expanded scope for the doctrine of constructive eviction,⁴⁹ and quickly translated into increased tort liability for landlords.⁵⁰ Expanding tort liability for sellers of residential real estate seems likely.

The recognition of an implied warranty of habitability in leases and sales of residential real estate raised serious questions about whether an implied warranty of fitness should be recognized in the lease and sale of commercial real estate as well. The appeal of the argument was more logical than practical because of the diversity of commercial uses, and the urge has been resisted despite the fact that the UCC protects merchant as well as non-merchant buyers. In this case the differences between real and personal property seem to remain salient.

It is noteworthy that Cicero, long ago,

45 A rule encouraging inspection prior to purchase is less likely to retard real estate transactions, whether sale or lease, because delay and some sort of inspection are already standard procedure.

46 Despite the demise of *caveat emptor* in sales of residential real estate, purchasers routinely seek professional inspections, as evidenced by the thriving business of private building inspectors. The only question is whether the buyer or the seller should bear the cost of inspection and the risk of mistake.

47 Doctrine's principal purpose in the decision of individual cases is to direct the attention of the judge away from the particularities of the parties and the specifics of the given dispute. Its broader social purpose is to secure the first rule of justice, that like cases be decided alike.

48 The common law routinely distinguished real property (loosely defined as land and everything growing out of it or affixed to it) from personal property (everything else). Many different rules applied to the two species of property, particularly in case of inheritance. In many states and in England succession to land and to personalty have today been completely assimilated. JOHN E. CRIBBET ET AL., *CASES AND MATERIALS ON PROPERTY* 221 (5th ed. 1996). *But see* N.C. GEN. STAT. § 29-14 (distinguishing real from personal property in calculation of the share of a surviving spouse).

49 See ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 3:6, pp.103-04 (1980) ("the interrelationship between the doctrine of constructive eviction and the recently fashioned implied covenant of habitability is clear: where recognized, the implied warranty allows the tenant, in addition to whatever other remedies may flow from recognition of the covenant, to abandon the premises and be absolved of all responsibility for future rental payments").

50 See *Sargent v. Ross*, 308 A.2d 528, 534 (N.H. 1973) (adoption of an implied warranty of habitability destroys "the very legal foundation and justification for the landlord's immunity in tort for injuries to the tenant or third persons"); *Trentacost v. Brussel*, 412 A.2d 436, 443 (N.J. 1980) ("By failing to provide adequate security, the landlord has ... breached his implied warranty of habitability and is liable to the tenant for the injuries attributable to that breach.").

seemed to think that he could discuss the issue of the sale of defective houses without reference to market conditions in the Roman Empire. This was the case, of course, because he viewed the issue as one primarily of moral choice, in the sense of rule-making that reflected and created good mores or customary patterns of behavior. Moral discourse is today discouraged in legal decision-making in favor of utilitarian arguments, but moral choices continue to be made. It may in fact be far more explanatory to begin a discussion of the changing law concerning the sale of defective houses by focusing on the moral choice between favoring consumers, on the one hand, and producers, on the other, without regard to the particular product consumed.

Legal discourse that emphasizes objective, external factors that influence the development of legal rules seems designed to conceal the extent to which legal development is the product of conscious choice. Emphasis on changing market conditions, such as the increasing prevalence of mass produced goods, whether consumer products, urban apartments, or suburban houses, suggests a sort of economic determinism: the implication is that legal rules respond, sometimes belatedly, to market forces. Equally deterministic, if less obviously so, is emphasis on the need for legal rules to conform to patterns of behavior, for example, the supposed fact that consumers do not or cannot protect themselves by inspection

prior to purchase. That legal rules follow public opinion or practice also implies that external factors drive judicial choice.

A more sophisticated version of this sort of non-economic determinism is the argument that the need for consistency with other legal developments constrains legal choice, for example, the argument that the same rule must apply to all consumer purchases, whether of chattels or real estate (except as to the state of the title). That modern American judges should seek to emphasize factors that seem to reduce their policy-making role is perhaps partly to be explained by considerations of separation of powers. Judges, after all, are not explicitly vested with legislative power. Cicero obviously had no experience with modern constitutional democracy, so was unembarrassed about his rule-making.

Emphasis on the moral choice in legal development does not, however, necessarily equate the judicial and legislative roles. While not a denial of practical factors, neither is it a simple abdication to the market or popular practice. It can be, instead, a principled attempt to formulate a workable rule that will shape the market and lead popular practice. Good social customs exist in a reciprocal relation with good legal rules: custom reflects popular understanding, but it also responds to legal rules, at least to known legal rules that embody enlightened moral choices. *§*