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## Torts -- Recent Extensions in Builder-Vendor's Liability for Defects

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Perhaps this reformation will come with an opinion as significant in the area of poverty law as *Brown v. Board of Education*<sup>41</sup> was in civil rights. *King v. Smith* is far from being that case. What is called for is something on the order of a decision insuring, as a right, a minimum standard of material comfort.<sup>42</sup>

C. FRANK GOLDSMITH, JR.

### Torts—Recent Extensions in Builder-Vendor's Liability for Defects

For the buyer of a home who suffers injury or loss due to defective construction,<sup>1</sup> the traditional obstacle in a suit against the builder-vendor has been the ancient rule of *caveat emptor*,<sup>2</sup> that unless the vendee has a claim of fraud or of breach of expressed warranty, he takes the risk himself of quality and condition.<sup>3</sup> Today that rule is subject to broad and growing exceptions,<sup>4</sup> which threaten to replace it with implied warranty and a general duty of due care.

Some of these expanding areas are touched upon by a recent South Carolina case. In *Rogers v. Scyphers*,<sup>5</sup> the wife of the vendee of a new house sued the subdeveloper<sup>6</sup> for negligent construction and for negligent

<sup>41</sup> 347 U.S. 483 (1954).

<sup>42</sup> Or one implementing Professor Reich's "theory of entitlement" to welfare benefits; Professor Reich would elevate the receipt of public assistance, long regarded as a privilege, to the status of a legal right. Reich, *supra* note 34, at 1252.

<sup>1</sup> Construction is described as "defective" if it is faulty, or lacking something essential to its completeness, or not reasonably safe for its anticipated use. *Galloway v. City of Winchester*, 299 Ky. 87, 92, 184 S.W.2d 890, 893 (1944); *Schipper v. Levitt & Sons*, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); BLACK'S LAW DICTIONARY 506 (4th ed. 1951).

<sup>2</sup> See, e.g., *Smith v. Tucker*, 151 Tenn. 347, 270 S.W. 66 (1925), overruled by *Belote v. Memphis Dev. Co.* 208 Tenn. 434, 346 S.W.2d 441 (1961). See generally 55 AM. JUR. *Vendor and Purchaser* § 57 (1946); 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926A (3d ed. 1963).

<sup>3</sup> See, e.g., *State ex. rel. Jones Store Co. v. Shain*, 352 Mo. 630, 634, 179 S.W.2d 19, 20 (1944), overruled by *Morrow v. Caloric Appl. Corp.*, 372 S.W.2d 41 (Mo. 1963). See Note, *Right of Purchaser in Sale of Defective House*, 4 WEST. RES. L. REV. 357 (1953) for a survey of vendee's limitations fifteen years ago.

<sup>4</sup> See notes 8, 24, 25, 41 & 43 *infra*. See generally Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541 (1961) [hereinafter cited as Bearman].

<sup>5</sup> — S.C. —, 161 S.E.2d 81 (1968).

<sup>6</sup> Mrs. Rogers sued the Industrial Life Insurance Company, which actually built the house, and Scyphers, who was president and principal stockholder in the company and was supervisor of the construction. The company conveyed the house to Scyphers, who sold it to Rogers. The court does not distinguish one defendant from the other. *Id.*

failure to disclose a latent danger. The complaint alleged that a fold-up attic stairway had been attached by merely hanging it in the molding, without any bolts or other secure fastenings. Mrs. Rogers used the stairway and was injured when it collapsed.

In affirming the sufficiency of the complaint, the Supreme Court of South Carolina held:

[T]here was a duty on the defendants as builders to use reasonable care in the construction of the home to avoid unreasonable risk and danger to those who would normally be expected to occupy it, and a duty to disclose to the purchaser any dangerous condition of which they knew or *should have known*, in the exercise of reasonable care.<sup>7</sup>

The leading authority for the decision is a growing body of negligence law<sup>8</sup> reflected by 2 *Restatement (Second) of Torts* § 353 (1965), which subjects to liability a vendor who fails to disclose an unreasonably risky condition of which he knows or has reason to know.<sup>9</sup>

The most significant language of the court's opinion deals with the degree of knowledge of the defect that the vendor must have before liability will attach. The present *Restatement's* phrase that vendor "know or have reason to know"<sup>10</sup> of the defect is a distinct shift<sup>11</sup> from the first

<sup>7</sup> — S.C. at —, 161 S.E.2d at 84 (emphasis added).

<sup>8</sup> *Bray v. Cross*, 98 Ga. App. 612, 106 S.E.2d 315 (1958), *criticized in* *Whiten v. Orr Constr. Co.*, 109 Ga. App. 267, 136 S.E.2d 136 (1964); *Derby v. Public Serv. Co.*, 100 N.H. 53, 119 A.2d 335 (1955); *McCabe v. Cohen*, 268 App. Div. 1064, 52 N.Y.S.2d 903, *aff'd per curiam*, 294 N.Y. 522, 63 N.E.2d 88 (1945); *Waggoner v. Midwestern Dev. Co.*, — S.D. —, 154 N.W.2d 803 (1967); *Fisher v. Simon*, 15 Wis. 2d 207, 112 N.W.2d 705 (1961); *see note 11 infra*. *Cf. Farragher v. City of New York*, 26 App. Div. 2d 494, 275 N.Y.S.2d 542 (1966); 2 *RESTATEMENT (SECOND) OF TORTS* § 353(2) (1965) [hereinafter cited as *RESTATEMENT 2D*]. *See generally* *Annot.*, 8 A.L.R.2d 218 (1949).

<sup>9</sup> *RESTATEMENT 2D* § 353(1), *quoted in full in* *Rogers v. Scyphers*, — S.C. —, —, 161 S.E.2d 81, 83 (1968), *states*:

A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

<sup>10</sup> *RESTATEMENT 2D* § 353(1) (b).

<sup>11</sup> *See Caporaletti v. A-F Corp.*, 137 F. Supp. 14 (D.D.C. 1956), *commented on in* *Bearman* at 568; *Belote v. Memphis Dev. Co.*, 208 Tenn. 434, 346 S.W.2d 441 (1961), *noted in* *Note, Liability of Vendor of Real Property*, 29 *TENN. L. REV.* 588 (1962). These cases, both of which cite 2 *RESTATEMENT OF TORTS* § 353(1) (1934), best demonstrate the change in judicial thinking that resulted in the "know or have reason to know" standard.

*Restatement*, which required actual knowledge.<sup>12</sup> *Rogers* took one further step and held that the vendor must disclose defects of which he "knew or should have known." This is not a meaningless change in words.<sup>13</sup> Although it is not clear whether the court recognized the importance of the phrase, the court clearly adopted a broader standard of negligence. "To have reason to know" means that the vendor possesses certain information that would lead a reasonable man to infer that the defect exists. That the vendor should disclose defects of which he knew or "should have known" implies that he is under a legal duty to use ordinary care to warn of any defect that a reasonable man would have perceived.<sup>14</sup> The threshold problem of vendor's knowledge is avoided, and defendant builder-vendor's conduct will be judged entirely by the reasonable man standard.<sup>15</sup> In practical terms, if the plaintiff's attorney cannot prove the defendant did have actual knowledge, he may rely on the jury's decision whether a reasonable man would have known of (or taken steps to discover) the defective condition.

This problem of the degree of knowledge vendor must have is analogous to the divergence of authority on the comparable point in the law of landlord and tenant.<sup>16</sup> Irrespective of any lease provisions about a duty to repair, the landlord will be responsible for any injury due to a latent

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<sup>12</sup> 2 RESTATEMENT OF TORTS § 353(1) (1934). The early basis for holding a vendor liable for hidden defects was fraud. A vendor owed a duty to reveal facts of which he knew or had notice. See, e.g., *Herzog v. Capital Co.*, 27 Cal. 2d 349, 164 P.2d 8 (1945); *Weikel v. Stearns*, 142 Ky. 513, 134 S.W. 908 (1911); *Mincy v. Crisler*, 132 Miss. 223, 96 So. 162 (1923); *Brooks v. Ervin Constr. Co.*, 253 N.C. 214, 116 S.E.2d 454 (1960).

The only authority for § 353 of the first RESTATEMENT was dicta in *Kilmer v. White*, 254 N.Y. 64, 171 N.E. 908 (1930) and in *Palmore v. Morris, Tasker & Co.*, 182 Pa. 82, 90, 37 A. 995, 999 (1897), according to W. PROSSER & Y. SMITH, *CASES AND MATERIALS ON TORTS* 540 n.3 (4th ed. 1967); however, *Kilmer* was itself based on the tentative draft of § 353, first RESTATEMENT.

<sup>13</sup> Cf., e.g., *State ex. rel. Bohlen v. Feldstein*, 207 Md. 20, 113 A.2d 100 (1955). The court sustained with leave to amend a demurrer to a complaint that alleged the lessor knew or should have known of the defect. The court said the complaint must allege that he knew or should have had reason to know.

<sup>14</sup> RESTATEMENT 2d § 12 & comment a. See also *id.* § 353, comment c.

<sup>15</sup> It is not clear whether a vendor would be under a duty to inspect his premises. A jury could decide that a reasonable man using ordinary care would not inspect under the circumstances. In a similar field of law, a landowner is under a general duty to use reasonable care to protect his invitees. Many courts have held that this means he must inspect in order to discover dangerous conditions. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.12 at 1487 (1956); W. PROSSER, *THE LAW OF TORTS* § 61, at 402-05 (3d ed. 1964).

<sup>16</sup> Some courts have criticized the analogy of the vendor's duty to the lessor's duty, arguing that the lessor and lessee have a continuing relationship, but the relationship between the vendor and the vendee terminates upon completion of the sale. See *Sarnicandro v. Lake Dev., Inc.*, 55 N.J. Super. 475, 480, 151 A.2d 48, 51 (App. Div. 1959); Annot., 8 A.L.R.2d 218, 220 (1949).

defect in the premises at the time of letting, if the landlord in fact knew of the danger, and if the tenant did not.<sup>17</sup> Many courts will go farther, and impose liability if the landlord had some reason to believe or information to infer that the defect existed.<sup>18</sup> To complete the disarray, other jurisdictions, comparable to South Carolina in *Rogers*, ask only whether the landlord should have known of the defect.<sup>19</sup> Since this inconsistency in the older field of landlord's liability has not yet been resolved, it may persist in vendor-vendee law for some time.

The *Rogers* court did not extend its new standard to all of vendor-vendee law. Although the court broadened the scope of liability,<sup>20</sup> it limited that liability to builder-vendors. Because the non-building vendor is likely to be an ordinary citizen re-selling a used house, courts may be reluctant to abandon the "reason to know" standard of the *Restatement*.

In subjecting the builder-vendor to a duty of due care, the South Carolina court cited another group of cases that hold a building contractor responsible for his negligence.<sup>21</sup> *MacPherson v. Buick Motor Co.*<sup>22</sup> held that a chattel manufacturer may be liable to a third person for injury caused by the negligent manufacture of his product. Subsequently, courts applied the same rule to a contractor, that is, that he would be liable if his negligent work caused harm to a third person with whom he was not in privity, even after the contractee had accepted the work as satisfactory,<sup>23</sup> or had purchased the structure from the contractor.<sup>24</sup>

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<sup>17</sup> *Hendricks v. Socony Mobil Oil Co.*, 45 Ill. App. 2d 44, 195 N.E.2d 1 (1963); *Taylor v. Geroff*, 347 Ill. App. 55, 106 N.E.2d 210 (1952); *Janis v. Jost*, 412 S.W.2d 498 (Mo. 1967); *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (App. Div. 1953); *Corcione v. Ruggieri*, 87 R.I. 182, 139 A.2d 388 (1958). Cf. *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1953).

<sup>18</sup> *Brandt v. Yeager*, — Del. —, 199 A.2d 768 (Super. Ct. 1964); *State ex rel. Bohan v. Feldstein*, 207 Md. 20, 113 A.2d 100 (1955); *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960); *Meade v. Montrose*, 173 Mo. App. 722, 160 S.W. 11 (1913); *RESTATEMENT 2d* § 358.

<sup>19</sup> *Downs v. Powell*, 215 Ga. 62, 108 S.E.2d 715 (1959); *Harrill v. Sinclair Ref. Co.*, 225 N.C. 421, 35 S.E.2d 240 (1945) (dictum).

<sup>20</sup> Cf. *Waggoner v. Midwestern Dev. Co.*, — S.D. —, —, 154 N.W.2d 803, 806 (1967) (dictum), which suggests that the standard be liability for defects of which a reasonable man (builder-vendor) would have known.

<sup>21</sup> — S. C. at —, 161 S.E.2d at 83.

<sup>22</sup> 217 N.Y. 382, 111 N.E. 1050 (1916). See *RESTATEMENT 2d* § 395.

<sup>23</sup> *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir.), cert. denied, 351 U.S. 989 (1956); *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958); *Inman v. Binghamton Housing Auth.*, 1 App. Div. 2d 559, 152 N.Y.S.2d 79 (1956), rev'd on other grounds, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962); *RESTATEMENT 2d* § 385. Cf. *Stewart v. Cox*, 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961). *Contra*, *Clyde v. Sumerel*, 233 S.C. 228, 104 S.E.2d 392 (1958).

<sup>24</sup> *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1 (1948); *Leigh v. Wadsworth*, 361 P.2d 849 (Okla. 1961).

If caveat emptor would be no defense in an action by an injured third party against a builder-vendor, then neither should it be an obstacle to the contractee-vendee. Like other cases before it,<sup>25</sup> *Rogers* held that the builder-vendor<sup>26</sup> owed the same duty to his vendee that he would owe to a foreseeable third party. The court thus places liability upon the sub-developer in his role both as a vendor and as a builder.

One serious limitation to recovery, which is reiterated in *Rogers*,<sup>27</sup> is that liability will arise only for those defects that are latent or concealed. The rule that a producer is under no duty to safeguard against an obvious danger is widely applied in the field of negligent manufacture of chattel,<sup>28</sup> and has been carried over into cases of lessor's<sup>29</sup> or vendor's<sup>30</sup> failure to disclose defects.

Problems appear with the latent defect rule when a court fails to distinguish between an obvious defective physical condition and the risks inherent in that condition.<sup>31</sup> The lack of a safety cab atop an earthmover is certainly obvious, but how obvious is the risk that the uplifted shovel will fall backwards and crush the operator?<sup>32</sup> Trial courts limit the jury

<sup>25</sup> *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); *Fisher v. Simon*, 15 Wis. 2d 207, 112 N.W.2d 705 (1961). See also *Brown, Building Contractor's Liability After Completion and Acceptance*, 16 CLEV.-MAR. L. REV. 193 (1967).

<sup>26</sup> Cf. *Connor v. Conejo Valley Dev. Co.*, 253 Cal. App. 2d —, 61 Cal. Rptr. 333 (Dist. Ct. App. 1967), which held that the financier (a savings and loan association) of the subdeveloper owed a duty of due care to the ultimate home purchaser. He could be found to have breached that duty by negligently backing an inexperienced subdeveloper.

<sup>27</sup> — S. C. at —, 161 S.E.2d at 85.

<sup>28</sup> *Messina v. Clark Equip. Co.*, 263 F.2d 291 (2d Cir. 1959); *Standard Conveyor Co. v. Scott*, 221 F.2d 460 (8th Cir. 1955); *Dempsey v. Virginia Dare Stores*, 239 Mo. App. 355, 186 S.W.2d 217 (1945); *Douglas v. W.C. Mallison & Son*, 265 N.C. 362, 144 S.E.2d 138 (1965); *Tyson v. Long Mfg. Co.*, 249 N.C. 557, 107 S.E.2d 170 (1959); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); *Parker v. Heasler Plumb. & Heat. Co.*, 388 P.2d 516 (Wyo. 1964).

<sup>29</sup> *Kearns v. Smith*, 55 Cal. App. 2d 535, 131 P.2d 36 (Dist. Ct. App. 1942); *Brandt v. Yeager*, — Del. —, 199 A.2d 768, (Super. Ct. 1964); *Downs v. Powell*, 215 Ga. 62, 108 S.E.2d 715 (1959); *Janis v. Jost*, 412 S.W.2d 498 (Mo. 1967); *Harrill v. Sinclair Ref. Co.*, 225 N.C. 421, 35 S.E.2d 240 (1945). Cf. *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1953).

<sup>30</sup> *Fisher v. Simon*, 15 Wis. 2d 207, 213, 112 N.W.2d 705, 709 (1961) (dictum); cf. *Inman v. Binghamton Housing Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (building contractor).

<sup>31</sup> See, e.g., *Meade v. Montrose*, 173 Mo. App. 722, 160 S.W. 11 (1913) (roof poles too weak to support the roof were an obvious defect); *Harrill v. Sinclair Ref. Co.*, 225 N.C. 421, 35 S.E.2d 240 (1945) (The difficulty in raising an overhead door was obvious, even if the faulty construction, which would cause the door to fall, was not.).

<sup>32</sup> *Messina v. Clark Equip. Co.*, 263 F.2d 291 (2d Cir. 1959) (held an obvious danger), criticized in *Noel, Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837-39 (1962).

function by citing a lack of evidence of a *latent* defect<sup>33</sup> and then dismissing the case on the ground that the defendant owed the plaintiff no duty.<sup>34</sup>

A new approach to the latent defect rule has been taken in the case of *Totten v. Gruzen*,<sup>35</sup> in which the minor son of a tenant sued the builder of the apartment for negligently exposing a steam pipe. The infant became entangled with the pipe in his own bedroom and was severely burned. The court refused to follow a strict latency rule, holding instead that the obviousness of a defect is only one factor in the jury's determination of the defendant's negligence, and not an insurmountable barrier to recovery. The defendant's creation of a highly visible defect may still create an unreasonable risk.<sup>36</sup> This recent decision assuages the harsher aspects of the latency requirement, and restores to the jury its freedom to judge the defendant's conduct by a reasonable man standard.

Yet if *Totten* signals an abandonment of "latent defect," tort liability will not have advanced far.<sup>37</sup> A vendee injured by an obvious danger will likely be faced with the defenses of contributory negligence or assumption of the risk.<sup>38</sup> If a vendor warns his vendee of an otherwise latent defect, but an unwarned third person is nonetheless injured, the patency created by the warning may not permit the judge to dismiss because of the absence of a duty, but the warning will perhaps cause the jury to find the vendor not to be negligent.<sup>39</sup>

The law of negligence has not been the only field in which the builder-vendor's liability has grown. Recent years have featured widespread imposition of strict liability upon manufacturers for injuries to the ultimate consumer caused by defective products. The courts imply a war-

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<sup>33</sup> See, e.g., *Dempsey v. Virginia Dare Stores*, 239 Mo. App. 355, 186 S.W.2d 217 (1945). In affirming a non-suit, the court held that any reasonable person would have realized the unusually high risk of flammability of a "Fuzzy Wuzzy" lounging robe.

<sup>34</sup> If the case should get to the jury, the defendant would of course have the advantage of the defenses of contributory negligence and assumption of risk. It is suggested that the hesitancy of juries to reach a defendant's verdict based on one of these defenses is a strong influence in the retention of the latency rule. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837 (1962). Some courts compromise the problem by submitting to the jury the issue of whether there was latent defect. See, e.g., *Couch v. Pacific Gas & Elec. Co.*, 80 Cal. App. 2d 857, 183 P.2d 91 (Dist. Ct. App. 1947).

<sup>35</sup> 52 N.J. 202, 245 A.2d 1 (1968).

<sup>36</sup> This holding was suggested in *Schipper v. Levitt & Sons*, 44 N.J. 70, 87, 207 A.2d 314, 323 (1965).

<sup>37</sup> RESTATEMENT 2D does not speak in terms of latent defect, but still manages adequately to define liability. See §§ 351-56, 358, 402A.

<sup>38</sup> See note 34 *supra*.

<sup>39</sup> See generally W. PROSSER, THE LAW OF TORTS § 33, at 179-81 (3d ed. 1964).

ranty that the product is safe for its intended use.<sup>40</sup> *Schipper v. Levitt & Sons*<sup>41</sup> moved the law into the home construction industry.<sup>42</sup> It broke through the traditional distinction between realty and chattel, and asserted that mass production of housing should be treated like mass production of personal products. The buyer of a home may rely on an implied warranty that his house was built in a workmanlike manner and is suitable for habitation.<sup>43</sup> The South Carolina court in *Rogers* recognizes that implied warranty is the modern trend and (as dictum) cites favorably the leading cases.<sup>44</sup>

Implied warranty theory transcends problems of the vendor's knowledge of a defect. Liability is imposed without fault and without regard to a judgment upon the defendant's conduct. It is, nevertheless, the contrast between the inexperience of the typical home buyer and the knowledge and training of the builder-vendor that allows the former to rely on the latter by way of implied warranty.<sup>45</sup> Liability does not pivot on whether the builder-vendor should have known of a defect, but rather upon the vendee's reliance on the builder-vendor's skill to build a house fit for habitation.

In order to recover on strict liability, the plaintiff must still prove a defective condition.<sup>46</sup> The home buyer may feel that his new purchase

<sup>40</sup> *Henningsen v. Bloomfield Mtrs., Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *cf. Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT 2D § 402A. See generally Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

<sup>41</sup> 44 N.J. 70, 207 A.2d 314 (1965), noted in Note, *Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236 (1965).

<sup>42</sup> Implied warranty already had a foothold. Several courts had held there to be an implied warranty of fitness when the purchaser bought his house while the builder-vendor was in the process of erecting it, but not after the house was completed. *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Hoye v. Century Bldrs., Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958); *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 390 (C.A.). But see *Carpenter v. Donohoe*, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964), which refutes this distinction as unreasonable.

<sup>43</sup> *Accord*, *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Waggoner v. Midwestern Dev. Co.*, — S.D. —, 154 N.W.2d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

<sup>44</sup> — S.C. at —, 161 S.E.2d at 83.

<sup>45</sup> *Bethlahmy v. Bechtel*, 91 Idaho 55, 62, 415 P.2d 698, 705 (1966); *Schipper v. Levitt & Sons*, 44 N.J. 70, 91, 207 A.2d 314, 325 (1965); *Waggoner v. Midwestern Dev. Co.*, — S.D. —, 154 N.W.2d 803, 807 (1967). *Cf. Bearman* 574.

<sup>46</sup> *Markwell v. General Tire & Rubber Co.*, 367 F.2d 748 (7th Cir. 1966); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Schipper v. Levitt & Sons*, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); *Levy v. C. Young Constr. Co.*, 26 N.J. 330, 139 A.2d 738 (1958); *Annot.*, 13 A.L.R.3d 1057, 1078-79 (1967). But *cf. Crane v. Sears Roebuck & Co.*, 218 Cal. App. 2d 855, 858, 32 Cal. Rptr. 754, 757 (Dist. Ct. App. 1963).

is generally unsatisfactory,<sup>47</sup> but he may only win damages for harm caused by workmanship unfit for the anticipated use. The defendant will be held to the standard of normal, safe construction, not to the standard of perfection.<sup>48</sup>

Strict liability based upon implied warranty has not yet been extended beyond the builder-vendor. The vendor who resells an old house (and who may be liable under *Restatement* § 353) stands usually on the same level as the vendee himself and cannot be analogized to the manufacturer. Courts may be hesitant also to impose strict liability upon the ordinary building contractor, because he is selling his services but not selling any goods.<sup>49</sup>

Although the law of builder-vendor's liability is now in a fluid state, its broad direction is evident. Special protections for the defendant are being replaced by obligations comparable to those of a supplier of chattel or of a negligent building contractor. For the individual who is injured by defective construction, the field of builder-vendor's liability offers new potential for recovery.

RICHARD F. MITCHELL

### Trade Regulations—Robinson-Patman Act Section 2(d)— Promotional Allowances

The Robinson-Patman Act<sup>1</sup> has been labeled a "masterpiece of obscurity," "prolix and perplexing," and a "hodgepodge of confusion and inconsistency."<sup>2</sup> As predicted,<sup>3</sup> the Federal Trade Commission and the

<sup>47</sup> One wag stated, "Today's buyers do not understand that when you buy a \$10,000 house, you just can't expect gold doorknobs." Bearman 573 n.143.

<sup>48</sup> *Schipper v. Levitt & Sons*, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); *Wagoner v. Midwestern Dev. Co.*, — S.D. —, —, 154 N.W.2d 803, 809 (1967).

<sup>49</sup> RESTATEMENT 2D § 402A & comment f; cf. *Koenig v. Milwaukee Blood Center*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964). *But see Totten v. Gruzen*, 52 N.J. 202, —, 245 A.2d 1, 5 (1968), which refused to deny that strict liability would be applied to building contractors.

<sup>1</sup> 15 U.S.C. §§ 13, 13a-c, 21a (1964).

<sup>2</sup> F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 19, 535 & n.4 (1962, Supp. 1964) [hereinafter cited as ROWE]. "In the end, the political process of pressure, counterpressure and compromise created a cryptic and sloppy legislative enactment, whose ineptitudes and solecisms opened up more legal questions than they closed." *Id.* at 535.

<sup>3</sup> Representative Celler, during debate of the proposed Act in the House of Representatives, predicted: "[T]he courts will have the devil's own job to unravel the tangle. . . . You will have the herculean task to make it yield sense." 80 CONG. REC. 9419 (1936).