Property--Implied Warranty of Fitness in the Sale of a New House

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Constitutional Law—Torts—Equal Protection of Illegitimate Children

An action was brought on behalf of minor illegitimate children for the wrongful death of their mother. The trial court dismissed the suit. On appeal the dismissal was affirmed on the grounds that the denial of the cause of action bore substantial relation to the general health, morals and welfare of people and discouraged bringing children into the world out of wedlock; and, that the dismissal was not a denial of equal protection of the laws, in that there was no discrimination based on race, color or creed. The Supreme Court of Louisiana denied certiorari and the case was appealed to the United States Supreme Court. Held, reversed. The denial to illegitimate children of the right to recover for the wrongful death of their mother on whom they were dependent constitutes invidious discrimination against them in violation of the equal protection clause of the fourteenth amendment. Levy v. Louisiana, 88 S. Ct. 1509 (1968). In the companion case, Glona v. American Guarantee and Liability Insurance Co., 88 S. Ct. 1515 (1968), the Supreme Court applied its holding in Levy by reversing lower court decisions denying a mother a cause of action for the wrongful death of her minor illegitimate son.

The Louisiana wrongful death statute specifies the surviving spouse and child or children of the deceased as the primary class of beneficiaries. The surviving father and mother, or either of them, comprise the secondary class of beneficiaries. The courts of Louisiana have construed "child" or "children" as used in the wrongful death statute to mean legitimate children. This interpretation is in accord with that of most jurisdictions. The general rule was well stated in a recent Pennsylvania case:

When the words 'child' or 'children' appear in a statute, in the absence of qualifying expression, such words are to be interpreted ... as referring to a child or children begotten in lawful wedlock ... or begotten out of wedlock but legitimatized ....

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1 LA. CIV. CODE ANN. art. 2315 (1952).
should be re-examined. While the West Virginia court in the Perdue case requires the movant to disclose some basis for his proposed amendment, the federal courts grant such leave freely and only deny a motion to amend when certain conditions exist which would make it unfair to allow the amendment. 20

Joseph Robert Goodwin

Property—Implied Warranty of Fitness in the Sale of a New House

Morton, who was in the business of building and selling new houses, contracted to sell a completed house and lot to Humber. The only warranty contained in the deed was the warranty of title. No other warranties, written or oral, were connected with the sale. Humber alleges that the house was not suitable for human habitation because the fireplace and chimney were not properly constructed. As a result of this defect, the house caught fire and partially burned the first time a fire was lighted in the fireplace. Morton defended on the ground that the doctrine of caveat emptor applied to all sales of real estate. In the Court of Civil Appeals, Morton’s motion for a summary judgment was granted and Humber appealed. Held, reversed and remanded. The caveat emptor rule as applied to new houses is outdated and out of harmony with modern home buying practices. Consequently, the builder-vendor (house-merchant) impliedly warrants that such house was constructed in a good workmanlike manner and was suitable for human habitation. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

The doctrine of caveat emptor flourished during the nineteenth century in an atmosphere of rugged individualism where emphasis was placed on secure business transactions. 1 However, caveat emptor was not used extensively in the sale of homes because the homebuyer often hired an architect for designing and planning and then hired a contractor to build according to the plans. 2 If the home were defective, the home-owner had a cause of action against either the architect or the contractor. 3

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1 Keeton, Rights of Disappointed Purchasers, 32 TEX. L. REV. 1 (1953-4).
3 Id. at 837.
As a result of the boom in house-construction since World War II, homes have been precut and constructed using the principles acquired with the advent of mass production. The doctrine which served as a shield for the skilled artisan of the past has become a sword for the house-merchant of the present. If the purchaser today wants to protect himself against poor construction, it is assumed that he will insist upon covenants in the deed; if he does not, the doctrine of caveat emptor applies and the purchaser is without remedy.

Assaults upon the doctrine of caveat emptor have caused it to lose some of its significant effect. For example, in *Miller v. Cannon Hill Estates, Ltd.*, the court said that when one buys a house that is in the process of construction there is an implied warranty that the dwelling will be fit for human habitation. A number of cases which appeared later followed the groundwork laid in the *Miller* case. The fact that the houses were under construction when the purchase contract was executed has allowed the courts to treat the contracts as construction contracts. In building and construction contracts it is implied that the work will be done in a reasonably good and workmanlike manner and that the completed structure will be reasonably fit for the intended purpose.

The next logical step has been for the courts to apply the doctrine of implied warranty to the purchase of a completed structure. In *Carpenter v. Donohoe*, the Colorado court held that in the sale of a new house by a builder-vendor there was an implied warranty of

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4 Id.


6 2 K.B. 113, 120 (1931). The court based its decision on the defendant's oral assurances that the material was of the best quality and the best workmanship would be applied to them.


9 Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950). The doctrine of caveat emptor has been of no avail to builder-vendors when as a result of defective construction a new owner or invitee is physically injured. Schipper v. Levitt & Sons, Inc., 44 N. J. 70, 207 A.2d 314 (1965); It seems inconsistent to allow a recent purchaser to recover for physical injury resulting from defective construction and yet deny that same purchaser the right to compel the builder-vendor to repair a defect before an injury occurs. For a more detailed discussion, see Bearman, *Caveat Emptor In Sales Of Realty—Recent Assaults Upon The Rule*, 14 Vand. L. Rev. 541, 570 (1960).

10 15 Colo. 78, 388 P.2d 399 (1964). The court succinctly stated, "[t]hat
workmanlike construction and that the house was suitable for habitation.

The underlying theory of the doctrine of implied warranty is reliance. As a particular item becomes more expensive there is an apparent corresponding increase in the buyer's reliance upon the seller. When a vendee purchases a new home from a builder-vendor, he is relying upon the skills of that individual as a builder, even though the agreement involved is a purchasing contract and not a building contract. The fact that the vendee is relying upon the skill of his builder-vendor becomes more obvious if one considers that the vendee normally has no architect of his own, no real competence to perform his own inspection, and has no opportunity for obtaining protection in the deed since there is a ready market for new houses.

Houses are currently being produced in a manner analogous to the assembly-line methods used in the production of personal property. The courts came to the aid of the disgruntled purchaser of personalty. If courts continue to adhere to the doctrine of caveat emptor in the sale of new houses by a builder-vendor, then legislation may be the only answer for the house-buying public.

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a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it." Id. at 83, 388 P.2d at 402.

11 Bearman, supra note 9, at 574.
12 Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). The extension of the doctrine of implied warranty for the sale of a new house is not without criticism from the house-merchant. The arguments most used by builder-vendors for support include: (1) the bargaining positions of the parties are equal; (2) the agreements between the parties merge in the deed; (3) real estate transactions would become chaotic and uncertain. For general discussions concerning the efficacy of the builder-vendor's contentions see 26 C.J.S. Deeds § 91 (1956); 7 S. Williston, Contracts § 926A (3d ed. 1963); Bearman, supra note 9; Roberts, supra note 2 at 857; Note, Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings, 43 Denver L.J. 379 (1966).

14 In 1967, the New York Law Revision Commission recommended to the legislature that the housing merchant should warrant the house is free from construction defects and is fit for habitation; and that disclaimers and the doctrine of merger will no longer eliminate the builder-vendor's responsibility in this regard. Roberts, supra note 2, at 866-67. The National Association of Home Builders recommended to its members that they supply a written warranty guaranteeing to correct any defects for which the builders could be deemed responsible, 6 N.A.H.B. Correlator 2 (1952).