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will follow the construction of section 60 adopted in this case. That the decision here was alternatively based on the substitution doctrine weakens this case as a precedent in a situation where the substitution doctrine would be inapplicable. Also, it is noteworthy that amendments to section 60 have been proposed by a committee of the National Bankruptcy Conference, which, if passed, will affect the issues involved here.³⁶

Although *Grain Merchants* seems to place in a safe position those creditors secured under an article 9 security device, a trustee would be well advised to challenge transactions which would, in the absence of the Uniform Commercial Code, surely be voidable preferences under section 60.

David A. Ives

A "New" Tort in Texas — Implied Warranty in the Sale of a New House

Plaintiff bought a completed house from defendant, a builder-vendor. The only warranty contained in the deed was the warranty of title, and the defendant made no other express warranties, either written or oral. The house caught fire and partially burned the first time plaintiff lighted a fire in the fireplace. Plaintiff brought an action for damages alleging that the fire was caused by a defective fireplace and chimney. The trial court granted summary judgment for defendant and the court of civil appeals affirmed.¹ *Held, reversed and remanded*: The builder-vendor of a completed house impliedly warrants that the house is constructed in a good and workmanlike manner and is suitable for human habitation. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

I. THE DEVELOPMENT OF IMPLIED WARRANTY IN THE SALE OF REAL PROPERTY

The doctrine of *caveat emptor* in transactions involving real property is deeply embedded in the common law and the courts have been reluctant to abandon it.² Supporting the doctrine is the proposition that the buyer must examine, judge and test for himself.³ Furthermore, all aspects of the

³⁶ *Id.* at 218. See also Kohn, *Preferential Transfers on the Eve of the Bankruptcy Amendments*, 2 PROSPECTUS 259, 261 (1968). One proposal is that a security agreement entered into within four months of bankruptcy would not be preferential if the transaction is in the ordinary course of the debtor's business. Another would set up a two-point test whereby there would be a preference to the extent that the total receivables subject to the security interest at the time of filing the bankruptcy petition exceeds the total receivables subject to the security interest four months before. Reference would be to these two points only, regardless of fluctuations during the four months.

¹ *Humber v. Morton*, 414 S.W.2d 765 (Tex. Civ. App. 1967).

² See Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953) (a discussion of the state of the law before the recent developments); Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Comment, *Caveat Vendor—A Trend in the Law of Real Property*, 5 DEPAUL L. REV. 263 (1956).

³ The buyer must rely on his own judgment and assume the risk of any defects in what he buys. However, this doctrine has been almost entirely abandoned in the sale of chattels and an implied

sale of realty are deemed to be merged in the deed and unless expressly included are not binding on the parties.⁴ Even though *caveat emptor* is a tenacious doctrine, a trend appears to be developing towards imposition of implied warranties in the sale of a new house by a builder-vendor.⁵

England first applied the implied warranty doctrine to the sale of a house in 1931 in *Miller v. Cannon Hill Estates, Ltd.*⁶ The doctrine was again applied in *Perry v. Sharon Development Co.*⁷ Significantly, in both cases the contracts of sale were made before construction was completed. The courts emphasized that a buyer of an incomplete house must rely on the builder's skill in construction since he cannot inspect as can the buyer of a finished house. Furthermore, because the houses were incomplete, the seller was treated solely as a builder by the courts and thus was not protected by *caveat emptor* as a vendor.

Several American courts have followed the English cases by imposing an implied warranty on the builder-vendor.⁸ The American decisions also turned on the fact that the house was unfinished at the time of the sale. Generally, the courts rendering these decisions have reasoned that the contract of sale raises an implied warranty to finish the house in a workmanlike manner so that it will be suitable for habitation. Thus, the contracts of sale have been treated as construction contracts in which the implied warranty survives the passage of title from the builder-vendor to the purchaser. Significantly, in all of these cases, the cause of action has been based on contract rather than tort; thus, the damages have been limited to contract damages.⁹ However, the application of the implied warranty doctrine to the builder-vendor in the same manner in which it is applied to a manufacturer of chattels has gained recognition in the courts.¹⁰

warranty has been imposed on the seller. This abandonment has evolved through first allowing recovery on contract, then on the basis of negligence, and finally an imposition of strict liability on the manufacturer or seller in some areas. See W. PROSSER, *THE LAW OF TORTS* §§ 96, 97 (3d ed. 1964). The concept of "implied warranty" arose as liability was being extended beyond food and drink to products for intimate bodily use and, today, to almost all chattels. See Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). Texas has adopted this implied warranty concept in tort as a duty imposed by operation of law. *Decker & Sons v. Capps*, 139 Tex. 606, 164 S.W.2d 828 (1942). The implied warranty has also been extended in Texas to cover all defective chattels which cause personal injuries or property damage to the ultimate consumer or user. *Franklin Serum Co. v. Hoover & Son*, 418 S.W.2d 482 (Tex. 1967); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

⁴ 26 C.J.S. *Deeds* § 91 (1956).

⁵ See generally Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); Comment, *Implied Warranties—Sales of a Completed House*, 1 CAL. W.L. REV. 110 (1965); Comment, *Torts—Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236 (1965); Note, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings*, 43 DENVER L.J. 379 (1966); Note, *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862 (1965).

⁶ [1931] 1 All E.R. 93 (K.B.).

⁷ [1937] 4 All E.R. 390 (C.A.).

⁸ *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Weck v. A.M. Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *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 Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

⁹ Contract damages are controlled by the value of the property as evidenced by the contract. Also, only the purchaser, who is in privity with the builder-vendor, can sue the builder-vendor for breach of the implied warranty raised by the contract.

¹⁰ See also *Caporaletti v. A-F Corp.*, 137 F. Supp. 14 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957); *Levy v. Young Constr. Co.*, 46 N.J. Super. 293, 134 A.2d 717

Two recent Texas cases have dealt with the implied warranty in the sale of a house. In each instance the house was purchased before completion and the courts reasoned that there was an implied warranty arising from the construction contract to build the house in a workmanlike manner. In *Moore v. Werner*¹¹ the buyer of a house sued the builder-vendor for defects in construction of the patio and driveway. In allowing recovery the Houston court of civil appeals reasoned that there should be no distinction between the sale of a new house and the sale of personalty; it is the builder-vendor's duty to perform the work in a good and workmanlike manner and failing to do so, the rule of implied warranty of fitness applies.¹² In *Certain-Teed Products Corp. v. Bell*¹³ the Amarillo court of civil appeals used similar reasoning to allow a recovery against a builder-vendor for breach of the implied warranty.

II. IMPLIED WARRANTY IN THE SALE OF A COMPLETED HOUSE

Although generally the courts have allowed recovery only in the sale of an unfinished house, there have been judicial indications that this doctrine would be extended to cover the sale of a completed house. In the first apparent application of the doctrine to the sale of a completed house a New York court, in *Inman v. Binghamton Housing Authority*,¹⁴ asserted that there was no longer any cogent reason for continuing the distinction between chattels and *finished* structures upon real property that cause personal injury. Although the decision was reversed on other grounds, the rationale of the court was approved.

The first successful extension of the implied warranty doctrine to the sale of a completed house came with the decision of the Supreme Court of Colorado in *Carpenter v. Donohoe*.¹⁵ The *Carpenter* court reasoned that it is incongruous that a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a completed house. 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.¹⁶ However, the court also held that since an action for breach of warranty involves relations between the parties arising out of a contract, such action sounds in contract, and damages are based on the value of the property as evidenced by the contract.¹⁷

Judicial inclinations in Texas were revealed to the builder-vendor in

(Super. Ct. App. Div. 1957) (Waesche, J., dissent), *aff'd*, 26 N.J. 330, 139 A.2d 738 (1958); *Leigh v. Wadsworth*, 361 P.2d 849 (Okla. 1961).

¹¹ 418 S.W.2d 918 (Tex. Civ. App. 1967).

¹² *Id.* at 920.

¹³ 411 S.W.2d 596 (Tex. Civ. App. 1967), *aff'd*, 422 S.W.2d 719 (1968) (appealed on statute of limitations grounds).

¹⁴ 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).

¹⁵ 154 Colo. 78, 388 P.2d 399 (1964).

¹⁶ 388 P.2d at 402.

¹⁷ See also *Bethlahamy v. Bechtel*, 415 P.2d 698 (Idaho 1966); *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965) (personal injury case).

Loma Vista Development Co. v. Johnson.¹⁸ In a suit for a defective fireplace and foundation, the San Antonio court of civil appeals said: "By offering the house for sale as a new and completed structure appellant [the builder-vendor] impliedly warranted that it was properly constructed and of good material and specifically that it had a good foundation"¹⁹ Despite this announcement of an implied warranty, the court computed damages on the basis of contract rather than tort. The decision was reversed on other grounds, but it did give a glimpse of things to come.

III. HUMBER V. MORTON

The decision in *Humber v. Morton*²⁰ to impose on the builder-vendor an implied warranty that the house was constructed in a good and workmanlike manner and was suitable for human habitation places Texas in the lead among the few states following this new trend.

In reaching the decision the court relied on the out-of-state cases which have specifically held that the implied warranty arose from the construction contract and that the action, therefore, sounds in contract. However, in Texas an action for breach of implied warranty is not the contracted one, but is one imposed by law as a matter of public policy. Texas courts have found this to be the preferable approach in that it avoids the limitations of the contract theory of implied warranty.²¹ In *Humber* the supreme court is clearly attempting to extend Texas' own position in products liability in tort to cover the sale of a new house by a builder-vendor just as it covers the sale of a chattel. The public policy argument alone, without the contract cases, would seem strong enough to demand such an extension of the implied warranty doctrine.

Three reasons have been advanced²² to justify continuing to apply *caveat emptor* to the sale of real property in spite of the developments in the field of chattels: The buyer should conduct a thorough inspection before he makes his purchase; the buyer should obtain an express warranty if he wishes protection against defects; and recognition of implied warranty would result in a rash of litigation. These contentions are easily met.²³ The first is untenable because implied warranty applies to latent and undiscoverable defects; the second is unrealistic because most buyers are not so sophisticated as to retain a lawyer to handle the purchase and insist on such express warranties; to the third it must be stated that if the claims are just, a judicial remedy should be available.²⁴ The strongest argu-

¹⁸ 177 S.W.2d 225 (Tex. Civ. App.), *rev'd on other grounds*, 142 Tex. 686, 180 S.W.2d 922 (1944).

¹⁹ 177 S.W.2d 225, 227 (Tex. Civ. App. 1944).

²⁰ 426 S.W.2d 554 (Tex. 1968).

²¹ See *Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

²² See *Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 642 (1965).

²³ *Id.*

²⁴ Due to the great increase since 1945 in mass building of new homes which often results in hurried construction and careless work, many problems with defects in new houses have arisen. Considering the present state of the law of products liability, it is quite anomalous that the purchaser or user of a toy (*Gittelsohn v. Gotham Pressed Steel Corp.*, 266 App. Div. 866, 42 N.Y.S.2d 341 (1943)) is protected from defects in the item while someone who makes what is probably the big-

ment for imposing an implied warranty on the builder-vendor is the necessity of the purchaser's reliance on the superior skill and knowledge of the builder-vendor. Another strong argument, also of great weight in the products liability area, is that a builder-vendor, like a manufacturer, is in a position to spread the cost of damages from such defects over the entire buying public.

The court's reliance on contract cases might be interpreted as an attempt to limit the cause of action to the principles of the law of contracts (*i.e.*, as to who may sue the builder-vendor, what damages will be recoverable, etc.). Just as this concept has been abandoned in the field of products liability,²⁵ it seems unlikely that the court will now impose it in this new tort of implied warranty in the sale of real estate. However, the court in *Humber* did not make it clear if it intends to apply the tort principles of recovery. Since there was no direct precedent for the court to cite in this area, the court's reliance on contract cases might be significant only in that it points to the policy behind the warranty generally.

Also unclear from the decision in *Humber* is the extent of the warranty. As the *Restatement of Torts*²⁶ points out, in the products liability area the defective condition must be such that it makes the item unreasonably dangerous to the ultimate consumer or user before recovery will be allowed. Clearly in this case a defective fireplace which caused the house to catch fire is unreasonably dangerous. However, the court made no mention of this fact and gave no indication as to whether the unreasonably dangerous condition is to be required. Some defects might cause extensive damage to the house without making it unreasonably dangerous. The court gave no indication whether or not the purchaser will have a remedy for such defects.

IV. CONCLUSION

Since the old rule of *caveat emptor* does not satisfy the demands of justice in cases involving sales of new houses, Texas has taken a step in the right direction by abandoning this anachronism. The result should be to increase the care in building and thus the quality of new homes in Texas

gest and most important investment in his life, a new home, is not protected from defects which could render his house worthless. Speaking of the implied warranty doctrine, one authority has said: "It would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has been perceptible over the years." 7 S. WILLISTON, CONTRACTS § 926A (3d ed. 1963).

²⁵ See note 3 *supra*.

²⁶ RESTATEMENT (SECOND) OF TORTS § 402A (1965):

(1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(Emphasis added.)

since the buyer of a new house now has an action against the builder-vendor who built and sold it with defects present. Damages recovered can then be passed on to the entire public rather than being borne by the unwary buyer who previously had no hope of recovery. Unfortunately, *Humber* leaves many questions unanswered.

One important question which the courts must answer relates to the persons to whom the warranty extends. Does the warranty extend only to the original purchaser no matter how soon he resells, or will the builder-vendor be held liable even if the house does change hands? Considering the fact that there is no privity requirement in products liability,²⁷ the liability of the builder-vendor should continue for a reasonable length of time even though the house is sold by the original purchaser. Since the action does not sound in contract, it would be contradictory to require privity to impose liability in this new tort. Thus, the courts, in subsequent cases, should not be concerned with whether the owner is the original purchaser.

A second question left unanswered by *Humber* relates to the extent of liability. Will others who do not own the house and are damaged in some way as a result of the defect be allowed to recover on the implied warranty? Certainly a lessee of the owner should be allowed to recover against the builder-vendor for personal injury or property damage resulting from a defect since the owner could have recovered.²⁸ The lessee is a user even though not the owner. What about a non-user (e.g., a neighbor) who suffers damage as a result of the defect? In light of a recent products liability decision,²⁹ even an innocent bystander who is injured or suffers property damage as a result of a defect in the house should be able to recover on the implied warranty theory just as the original purchaser. This seems to be the only just result because the bystander is even more innocent than the purchaser and has no opportunity whatsoever to discover the defect and protect himself against it.

Another important question which the courts must answer relates to parties who will be liable for defective houses. It seems that liability can only be placed on one who is a builder-vendor by profession since one of the primary reasons for allowing recovery is that the loss can be passed on to the entire buying public rather than sustained by one individual, but some argument has been made for extending the liability to anyone who sells a house.³⁰

Other difficult questions arise, such as the statute of limitations problem, but legislative action could answer many of these questions by pro-

²⁷ See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963), noted in 17 Sw. L.J. 699 (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

²⁸ See *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965).

²⁹ *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969) where the Texas supreme court said: "There is no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery against the manufacturer of a defective product. The reason for extending the strict liability doctrine to innocent bystanders is the desire to minimize risks of personal injury and/or property damage." *Id.* at 633.

³⁰ *Haskell*, *supra* note 22, at 651.