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Thomas Sidney Smith

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invoked to determine whether the decedent had completely divested himself of the property at the time of the transfer, as in the *Skinner* case. There were also cases in which agreements were used as a makeweight in finding a tax liability, as in *McNichol,* but no cases squarely holding that no tax would be imposed on continued possession or enjoyment in the absence of an agreement.

The Treasury contends that if the decedent transferred his home to his wife or to his children, the full value of the home should be included in his gross estate in any of the three following situations: (1) if by state law he had a legally enforceable right to live in the home as long as it belonged to his wife, or (2) if he was discharging a legal obligation to support his wife or children, or (3) if he continued to reside in the residence until his death.[20]

In light of the literal wording of section 2036 and the apparent policy behind the statute to prevent tax avoidance, it is submitted that the Treasury's position is sound and should be followed.

WILLIAM S. LOWNDES

Torts—Implied Warranty in Real Estate—Privity Requirement

The principle of caveat emptor[1] in real property sales is beginning to show cracks in what previously was its impregnable structure. In 1936 Professor Williston said, "There are no implied warranties in sales of real estate."[2] Although this is still the rule in a vast majority of the jurisdictions in the United States,[3] the reasoning behind it seems to be weakening.

The first inroad into the principle involved houses to be con-

[20] Speech by Chief Counsel Sept. 19, 1964, as reported in 4 RESEARCH INSTITUTE TAX COORDINATOR 47008C (1965).

[1] The North Carolina view is that caveat emptor will be followed in the sale of real property provided no fraud is involved. Smathers v. Gilmer, 126 N.C. 757, 759, 36 S.E. 153, 154 (1900). For a further discussion of the North Carolina view see 42 N.C.L. REV. 946, 951 (1964). See generally Bearman, *Caveat Emptor in Sales of Realty,* 14 VAND. L. REV. 541 (1961); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose,* 37 MINN. L. REV. 108 (1953); Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931); Comment, 5 DE PAUL L. REV. 263 (1956); Note, 4 W. RES. L. REV. 357 (1953).

[2] 4 WILLISTON, CONTRACTS § 926, at 2602 (rev. ed. 1936).

[3] *E.g.,* Narup v. Higgins, 51 Ill. App. 2d 102, 200 N.E.2d 922 (1964); Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963); Shapiro v. Kornicks, 103 Ohio App. 49, 124 N.E.2d 175 (1955); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959). See 55 AM. JUR. *Vendor and Purchaser* § 368 (1946); Annot., 78 A.L.R.2d 446 (1961).

structed or in the process of construction.[4] In these instances some courts have permitted the immediate vendee to recover for defects in the house on an implied warranty.[5] This rule is receiving increasing support but is not yet unanimous.[6]

A very small minority of United States jurisdictions that have considered the problem have gone so far as to allow an implied warranty to survive the completion of the house.[7] In *Carpenter v. Donohoe*[8] the plaintiffs purchased a house built by the defendant. Four months later the walls began to crack. The suit was based on fraud and breach of implied warranties. The Supreme Court of Colorado held that the implied warranty doctrine would be extended "to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting."[9] The court continued, "Where . . . a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation."[10] In the *Donohoe* case, there was privity of contract between the parties. This would seem essential where the plaintiff is suing on a contractual theory.[11] But where personal injury is involved, privity would not be essential, since the suit would be in tort and not contract.[12]

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[4] This exception to the doctrine of caveat emptor in the sales of real property seems to have originated in England. Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113. In that case the vendee contracted with the builder-vendor of a housing development to buy a house then being constructed. Structural defects appeared in the house and the vendee sued. The court held the vendor liable for breach of an express warranty and for breach of an implied warranty of fitness for habitation.

[5] *E.g.*, Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Gilbert Constr. Co. v. Gross, 212 Md. 402, 129 A.2d 518 (1957); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).

[6] See cases cited note 3 *supra*.

[7] Carpenter v. Donohoe, 154 Colo. —, 388 P.2d 399 (1964); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). Louisiana has adopted the doctrine of redhibition which has established an implied warranty in sales of real estate as well as chattels. LA. CIV. CODE ANN. arts. 2520-48 (1952).

[8] 154 Colo.—, 388 P.2d 399 (1964).

[9] *Id.* at —, 388 P.2d at 402.

[10] *Ibid.*

[11] It is a basic rule of contracts that an essential element of a cause of action on a contract, or based on a contractual theory, is privity of contract. *E.g.*, Fowler v. Athens City Waterworks Co., 83 Ga. 219, 9 S.E. 673 (1889); Sterback v. Robinson, 148 Md. 24, 128 Atl. 894 (1925). See 2 WILLISTON, CONTRACTS § 347, at 794 (3d ed. 1959).

[12] See PROSSER, TORTS § 97, at 681 (3d ed. 1963).

In this situation, sales of real property should be on the same footing as sales of chattels.[13] The Supreme Court of New Jersey in *Schipper v. Levitt & Sons, Inc.*[14] recognized this difference. In that case the defendant corporation was a mass builder-vendor of houses. Its vendee lived in one of the houses for two years and then leased the house to one of the plaintiffs. When the house was built, the defendant equipped it with a hot water system that was directly connected with the heating system of the house. Since the water that came from the hot water tap was almost boiling, one first had to turn on the cold water to reduce the temperature. The infant plaintiff was severely burned when he turned on the hot water without first turning on the cold water. The Supreme Court of New Jersey held the defendant liable on the theories of negligence[15] and breach of implied warranty of habitability.[16] In abrogating the privity requirement, the court drew an analogy to sales of chattels, saying that there is no meaningful distinction between a mass producer of automobiles and a mass builder of homes.[17]

Various reasons have been advanced for not requiring privity where a person injured by a chattel sues the manufacturer:

(1) Since only the manufacturer can comprehend the intricacies of his product, he should be responsible for the defects which cause injuries to those who could foreseeably be expected to use the product.[18]

(2) The consumer has no control over the precautions the manufacturer takes in making the product. Thus, the manufacturer should have the responsibility of making the product reasonably safe.[19]

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[13] See generally PROSSER, TORTS § 97 (3d ed. 1963); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 1 (1965).

[14] 44 N.J. 70, 207 A.2d 314 (1965).

[15] Id. at —, 207 A.2d at 328. Although this was the first time the Supreme Court of New Jersey had held a building contractor liable for negligence without requiring privity, other jurisdictions in the United States had done so before. Dow v. Holly Mfg. Co., 49 Cal. 2d 720, 321 P.2d 736 (1958); Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928); Annot., 13 A.L.R.2d 191 (1950).

[16] 44 N.J. at —, 207 A.2d at 328.

[17] *Id.* at —, 207 A.2d at 325.

[18] Comment, 16 BAYLOR L. REV. 263, 266 (1964).

[19] Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138 (5th Cir. 1959). See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

(3) Placing liability on the manufacturer would best insure the life and health of the consumer.[20]

(4) The manufacturer is better able to distribute the risk of loss to the general public through insurance and slightly increased prices.[21]

These policy reasons would seem to apply equally well to the situation presented in the *Schipper* case where defendant is a mass builder of houses.

In time it is likely that more courts in the United States will follow the New Jersey decision. The process of change will be slow, however, for precedent must be overcome. The basic obstacle facing the courts is the rule of law that all the provisions of the antecedent contract in the sale of real estate are merged in the deed, which becomes prima facie the total obligation of the parties.[22] Once the court has permitted an implied warranty to survive acceptance of the deed, another problem arises. Warranty is associated with contract, and if there is no privity between the plaintiff and defendant, there can be no warranty, and, hence, no breach of warranty.[23]

Originally breach of warranty sounded in tort since it was an action on the case. Thus there was no privity requirement.[24] When the method of declaring on a warranty became *indebitatus assumpsit,* the tort elements were lost,[25] breach of warranty became a part of contract law, and privity was required.[26] But in a personal injury case, the plaintiff is not suing on the contract. According to the *Restatement of Torts,* "The liability stated is one of tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant. . . . It is strict liability. . . . The basis

[20] Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

[21] PROSSER, TORTS § 84 (2d ed. 1955).

[22] *E.g.,* Ridley v. Moyer, 230 Ala. 517, 161 So. 526 (1935); Duncan v. McAdams, 222 Ark. 143, 257 S.W.2d 568 (1953); Percifield v. Rosa, 122 Colo. 167, 220 P.2d 546 (1950).

[23] *E.g.,* Welshausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271 (1910); Flaccomio v. Eysink, 129 Md. 367, 100 Atl. 510 (1916); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931).

[24] 1 WILLISTON, SALES § 195 (3d ed. 1948); Ames, *History of Assumpsit,* 2 HARV. L. REV. 1, 8 (1888).

[25] Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134, 149 (1937).

[26] See cases cited note 23 *supra.*

of liability is purely one of tort."[27] Damages are measured in tort.[28] The warranty is one imposed by law and does not derive from the mutual consent of the parties.[29] The liability being one of tort,[30] the merger theory and the privity theory have no relevance in the sales of real property where personal injury is involved.

Of course, there must be limitations to the extent of this strict liability.[31] It should not be feared that strict tort liability would be unlimited once the privity requirement is abrogated, for the rules governing the sales of chattels seem to provide logical limits.

In the chattels field "no one has yet recovered for personal injuries, on the basis of strict liability without privity, who could not fairly be called a consumer of the product, or at least a user."[32] Thus, in the sales of chattels, where there is personal injury involved, the courts hold the manufacturer strictly liable only to foreseeable plaintiffs.[33] This would also seem to be the logical limit in the sales of real property. Surely public policy demands that the builder be held strictly liable to those who he could reasonably foresee would be injured by a defect in the house.

There is another problem which must be considered: for what period of time will this strict liability apply to the builder? It would seem that there are two logical solutions. In the *Schipper* case the court said that three years was a reasonable time under the circumstances.[34] What is a reasonable time must be determined on the facts of each case. The statute of limitations might provide another solution to the problem. The North Carolina statute of limitations provides a three-year limitation on an action for injury

[27] RESTATEMENT (SECOND), TORTS § 402A, comments, *l*, *m* (1965).

[28] Comment, 10 HASTINGS L.J. 418, 424 (1959).

[29] *Ibid.*

[30] Dean Prosser, speaking about chattels, aptly expresses the idea when he says, "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134 (1960).

[31] The Supreme Court of New Jersey recognized that there must be certain limitations to this strict liability when they said, "Issues of notice, time limitation and measure of proof, which have not really been discussed in the briefs, would seem to be indistinguishable from those which have been arising in the products liability field . . . ." 44 N. J. at —, 207 A.2d at 328.

[32] PROSSER, TORTS § 97, at 682 (3d ed. 1963).

[33] Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963). For a case which holds that the plaintiff was not an intended user see Kuschy v. Norris, 25 Conn. Supp. 383, 206 A.2d 275 (Super. Ct. 1964).

[34] 44 N.J. at —, 207 A.2d at 328.

to the person.[35] It is further provided that the statute begins to run when the cause of action accrues[36] and, as interpreted by the North Carolina Supreme Court, this is when the defendant committed the tort and not when the plaintiff first acquired knowledge of the tort.[37] In the cases in which the North Carolina Supreme Court has interpreted the statute, a nominal injury had to occur to begin the running of the statute.[38] Perhaps, the courts could apply this rule as a limit in the case of a builder and have the statute begin to run at the time the house was sold although the plaintiff had not yet suffered any personal injury.[39]

It is important to note that the doctrine of strict liability would not relieve the plaintiff of sustaining his burden of proof.[40] As in sales of chattels, the plaintiff would still have to prove that his injury was caused by a defect in the house[41] and that the defect existed when the house left the hands of the defendant.[42] The time for which the builder's liability would exist would be limited further by the burden of proof since, as time passed, it would be more difficult to prove that the defect existed when the house left the hands of the builder.

The question may arise whether strict liability would apply to the builder of a single house. In this situation, the court has two basic policies to consider. First, the builder of one house could not distribute the risk of loss to the general public any better than could the injured plaintiff. On the other hand, since the injured plaintiff had no real opportunity to inspect the house, the builder should have the responsibility of making the house reasonably safe for all foreseeable users. The outcome of the case may depend upon which policy the court considers more significant.

In the not-too-distant future, it is likely that the strict liability principles applied in *Schipper* will be extended to other fields. Dean

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[35] N.C. GEN. STAT. § 1-52(5) (1953).
[36] N.C. GEN. STAT. § 1-15 (1953).
[37] *E.g.*, Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).
[38] *Ibid.*
[39] In Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962) the court said that it would not decide whether the statute would begin to run if there had been no injury at all. *Id.* at 326, 128 S.E.2d at 416. If the court would not do so, the legislature could enact a statutory exception to the rule.
[40] PROSSER, TORTS § 97, at 683 (3d ed. 1963).
[41] *Ibid.*
[42] *Ibid.*

Prosser states, "As to defendants other than sellers, who supply chattels under contract, there has as yet been no suggestion of any strict liability to third persons."[43] But considering that the law has expanded from liability for negligence where there is no privity[44] to strict liability in real estate[45] notwithstanding the doctrine of caveat emptor, the day may come when strict liability without privity will be applied to defendants other than sellers.[46]

THOMAS SIDNEY SMITH

Torts—Nondelegable Duty—Direct and Vicarious Liability for Negligence

The plaintiff in a recent North Carolina case[1] recovered from the general concessionaire[2] of a county fair for injuries received when she was thrown from a carnival ride owned and operated by an independent contractor. The retaining bar of the ride was found to be difficult to close, and the independent contractor, not a defendant in the suit, was found to be negligent in failing to ascertain whether the retaining bar securing the plaintiff was closed and properly latched. The ride was determined to be "inherently dangerous,"[3] *i.e.*, that it was such a ride as was likely to cause injury to passengers unless due care was exercised in its maintenance and operation. The jury also found the defendant concessionaire negligent in failing to inspect the ride and its operation to see that it was maintained and operated with due care.

It is the general rule that an employer is not ordinarily liable for the negligent acts of his independent contractor; however this rule has numerous exceptions.[4] They are so numerous, in fact, that

[43] *Id.* § 98, at 685.
[44] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
[45] 44 N.J. at —, 207 A.2d at 328.
[46] It must be noted that the Supreme Court of New Jersey held the defendant liable on the alternate grounds of negligence and implied warranty of habitability. The alternate holding of negligence may tend to minimize the import of the court's decision on implied warranty. Whether the court will follow this case as a precedent, where no negligence is alleged, remains to be seen.

[1] Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965).
[2] Hereinafter the terms concessionaire, employer, or owner will be used to designate the person who contracts with the independent contractor.
[3] 264 N.C. at 414, 142 S.E.2d at 35.
[4] 2 HARPER & JAMES, TORTS § 26.11 (1956); MECHEM, AGENCY §§ 480-90 (4th ed. 1952); PROSSER, TORTS § 70 (3d ed. 1964); RESTATEMENT (SECOND), TORTS §§ 409-29 (1965).