Kentucky Law Journal

Volume 58 | Issue 3 Article 17

1970

Real Property--Implied Warranty in Sale of New House by Vendor

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feels that this form of gerrymandering meets one of the criteria for a political question as defined in *Baker v. Carr*: "a lack of judicially discoverable and manageable standards for resolving it."[49]

Since its 1960 decision in *Gomillion v. Lightfoot*,[50] in which gerrymandering for purposes of racial discrimination was held unconstitutional, the Supreme Court has decided only one case pertinent to this discussion.

In *Wright v. Rockefeller*,[51] the use of racial factors in establishing district boundaries in order to assure that a racial minority had representation was declared not violative of the Constitution. Therefore, it seems logical to assume that the Court would not rule unconstitutional a districting plan in which the "one man - one vote" principle was applied, and yet, in *Wright*, the district boundaries were so drawn (gerrymandered) as to further the representation of a minority (either urban or rural).

The *Wallace* case has signalled the arrival of reapportionment in Kentucky. But it has not necessarily signalled the stifling of the rural minority voice in local government. The door is still open for local legislative units to innovate within constitutional limits some method of redistricting which would promote true representation for both rural and urban interests. It is submitted that this innovation could best be carried out by combining the principle of "one man - one vote" with the technique of gerrymandering as described above.

Joseph H. Terry

REAL PROPERTY—IMPLIED WARRANTY IN SALE OF NEW HOUSE BY VENDOR.—A husband and wife purchased a new house from the builder-owner. Several months after moving in, the purchasers discovered that water seeped through the basement walls every time it rained and would not drain out. Suit was brought alleging breach of an implied warranty. The jury found for the plaintiffs. *Held*: Affirmed. In selling a new house, builder was bound by an implied warranty

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[49] Professor Jewell states:
There is no ideal standard against which to measure an allegedly gerrymandered districting plan . . . . The factors that have discouraged judicial attack on partisan gerrymandering in state legislative districts would seem to be equally applicable to cases of gerrymandering that occur in local units of government. *Id.* at 797.

[50] 364 U.S. 339 (1960).

[51] 376 U.S. 52 (1964).

that in its major structural features the house was constructed in a workmanlike manner with suitable materials. *Crawley v. Terhune,* 437 S.W.2d 743 (Ky. 1969).[1]

Absent an express contractural guaranty to the contrary, the general common law rule of *caveat emptor* has, until the present case, continued with respect to sale of real property in Kentucky.[2] It denies recovery for property found defective after purchase, with one major exception: a house specially built according to the buyer's specifications. The following is an excellent summation of the principles involved in this exception:[3]

> It is a general principle of law that any person who holds himself out as specially qualified to perform work of a particular character impliedly warrants that the work which he undertakes shall be of proper workmanship. It is also fundamental in the law of building contracts that one contracting to build a structure for a particular purpose impliedly warrants that the structure when completed shall be reasonably fit for its intended use. These two principles have led to the rule that in the sale of a house to be constructed or in the process of construction there are implied warranties by the vendor that the house shall be built in a reasonably efficient and workmanlike manner and that the house when com-

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[1] The appeal was based on a separate issue involving another party to the original action, a real estate broker, who helped the builder sell the house to the plaintiffs. The Court followed a long line of Kentucky precedents by holding that the Terhunes could not recover from the real estate broker in an action for deceit unless they could prove the broker's statement that the basement was dry was made with knowledge that it was untrue and under circumstances that do not justify belief in its truth. The plaintiffs lost on this issue. The *Crawley* case centered on the question whether there was an implied warranty of fitness for habitation in the sale of a new home absent any fraud or misrepresentation by the seller. The following represent some of the precedents on the issue of deceit: McDonald v. Goodman, 239 S.W.2d 97 (Ky. 1951); Bunch v. Bertram, 219 Ky. 848, 294 S.W. 805 (1927); McGuffin v. Smith, 215 Ky. 606, 286 S.W. 884 (1926); Pickerell & Craig Co. v. Bollinger-Baggage Co., 204 Ky. 314, 264 S.W. 737 (1924).

[2] "Note, that by the civil law, every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty, either in deed or in law; but the common law bindeth him not, for *caveat emptor. . . .*" 2 Coke, Littleton 102(a), c.7, § 145 (1633) as cited in Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541, 542 n. 5 (1961).

"The doctrine of *caveat emptor* so far as the title of personal property is concerned is very nearly abolished, but in the law of real estate it is still in force." 7 S. WILLISTON, CONTRACTS 779 (3d ed. 1963). The development of the doctrine of implied warranty for personal property is discussed at § 975 of this treatise. For a comprehensive article on the subject, see Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQ. L. REV. 1 (1963).

[3] Florida Ry. v. Smith, 88 U.S. (21 Wall.) 255 (1874); Allen v. Reichart, 73 Ariz. 91, 234 P.2d 818 (1951); Jose-Belz Co. v. DeWitt, 93 Ind. App. 672, 176 N.E. 864 (1931); Hall v. MacLeod, 191 Va. 665, 62 S.E.2d 42 (1950); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950); Miller v. Cannon Hill Estates, Ltd. [1931] 2 K.B. 113.

> pleted shall be reasonably fit for the intended habitation. Although these are two separate warranties, the courts in allowing recovery have attached no significance to the distinction.[4]

The Kentucky courts have followed this reasoning in cases involving construction contracts[5] by granting appropriate relief to the vendee. The house in *Crawley,* on the other hand, was purchased ready-made, so that the case brought on appeal was one of first impression. Yet, in affirming judgment for the buyers, the Kentucky Court seems to have followed a trend lately apparent in several other jurisdictions: that of protecting the consumer's interests to a greater extent than has been customary heretofore.[6] In *Caporaletti v. A-F Corporation,*[7] a damage suit for injuries resulting from builder's negligence, the vendee was granted relief and the builder's plea of *caveat emptor* was rejected by the court in these words:

> Conditions have radically changed since the origin of the common law rule. Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise he would be at the vendor's mercy.[8]

Such argumnts appear persuasive. But is the relaxation of the strict provisions of *caveat emptor* defensible also on legal grounds?

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[4] Note, *Right of Purchaser in Sale of Defective Home,* 4 W. RES. L. REV. 357, 360 (1953).

[5] Creson v. Carmody, 310 Ky. 861, 222 S.W.2d 935 (1949); Helm v. Speith, 298 Ky. 225, 182 S.W.2d 635 (1944); Cassinelli v. Stacy, 238 Ky. 827, 38 S.W.2d 980 (1931); W. D. Harris & Co. v. Lewis, 235 Ky. 810, 32 S.W.2d 401 (1930); Hauck v. Jordan, 235 Ky. 388, 31 S.W.2d 624 (1930). In *Hauck,* relief was granted for a defect in a specially built house patterned after a model home. The reasoning of the Court was that the latent defect could not be discovered by viewing the model home.

[6] The courts have granted relief to the purchaser of a new house wherein major defects have been afterwards discovered on three principal theories: (1) implied warranty of fitness for habitation; (2) imminently dangerous condition caused by negligence in construction; (3) concealing or failing to disclose the defect. For a thorough discussion of the development and application of these theories, see Annot., 25 A.L.R.3d 383 (1969).

[7] 137 F. Supp. 14 (D.D.C. 1956).

[8] *Id.* at 16. A similar view was expressed by Judge Waesche dissenting in *Levy v. C. Young Constr. Co.,* 46 N.J. Super. 293, 134 A.2d 717 (1957), *aff'd on other grounds,* 26 N.J. 330, 139 A.2d 738 (1958). The *Levy* case involved a malfunction of a sewer line. The case was dismissed on the grounds that there was no evidence to show that the contractor was at fault.

The reasoning usually advanced in favor of retaining *caveat emptor* warns against straying from acknowledged precedent,[9] especially since vendees can always protect themselves by having an express warranty against faulty workmanship written into the deed of sale.[10] Otherwise, the vendor would be burdened, in effect, with unlimited liability, an alternative inviting legal chaos.[11] But excellent counter-arguments, which apparently influenced the Court in *Crawley*,[12] were offered in the Idaho case of *Bethlahmy v. Bechtel*.[13] "A buyer who has no knowledge, notice, or warning of defects, is in no position to exact specific warranties."[14] Holding that there was an implied warranty of fitness where the vendee had bought a house the basement of which was not properly waterproofed, the court dismissed the fear of legal "chaos" by specifically denying that the implied warranty theory subjects the builder-vendor to endless claims and automatic liability for all defects.

> The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution. The builder-vendor's legitimate interests are protected by the rule which casts the burden upon the purchaser to establish the facts which give rise to the implied warranty of fitness and its breach.[15]

The rule of *caveat emptor* has also been criticized on grounds that it encourages fly-by-night operators and hurts the honest builder as a consequence.[16] But perhaps the most crucial argument against the strict application of *caveat emptor*, is that the contract for the sale of

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[9] Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959); Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968).

[10] Levy v. C. Young Constr. Co., 26 N.J. 330, 139 A.2d 738 (1958).

[11] *Id.*

[12] 437 S.W.2d at 745.

[13] 91 Idaho 55, 415 P.2d 698 (1966).

[14] *Id.* at —, 415 P.2d at 707.

[15] *Id.* at —, 415 P.2d at 711. The court in *Waggener v. Midwestern Dev. Inc.*, 154 N.W.2d 803 (S.D. 1967) concurs in the view that the standard for determining whether a house is defective is not perfection but only reasonable workmanship. In *Loma Vista Dev. Co. v. Johnson*, 177 S.W.2d 225 (Tex. Civ. App. 1944), *rev'd on other grounds*, 142 Tex. 686, 180 S.W.2d 92 (1944), the court spelled out what it meant by an implied warranty: "By offering the house for sale as a new and complete structure appellant impliedly warranted that it was properly constructed and of good material and specifically that it had a good foundation. . . ." *Id.* at 227.

[16] Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

a new house is not made between parties with equal bargaining power.[17]

The unequal bargaining positions of a professional builder and an inexperienced purchaser cannot be remedied easily. In the civil law jurisdiction of Louisiana, there is a legislative solution to this problem known as the Doctrine of Redhibition.[18] In fact, this doctrine is essentially the same as that of implied warranty of fitness. It provides relief in damages when an article or property is sold and subsequently found so defective that it is practically useless. The only exception is when the defect could have been discovered easily upon inspection.[19] But even with that limitation, the Doctrine of Redhibition gives the citizens of Louisiana more protection than is provided by any other state.[20] Thus it is not surprising to find some courts urging legislative action.[21] A recent example was a plea made by the Maryland court in in the view that certain sales of realty ought to be covered by an implied warranty similar to that for the sale of goods and personal property, but declined to issue a holding to that effect. Instead, it urged the legislature to take the initiative.

The Kentucky Court, however, decided not to wait for legislative action. It acted on its own authority and gave the purchasers of a defective house relief. The crucial question is, why, in the absence of

[17] Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966). In fact, as has been noted in *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), the vendee is forced to depend on the skill of the developer since he has no real competency to judge for himself. Professor Bearman, has pointed out that all of a group of Boston architects interviewed agreed that they were hesitant to inspect ready built houses because too many defects can no longer be discovered once the house is completed. They preferred to supervise an entire construction job. The cost for a single trip to inspect a completed house was about $75 to $100; the cost for supervising the entire construction ran between $300 and $1,000. Bearman, *supra* note 2, at 545. This was in 1961. Obviously, then, the purchaser must rely on the skill of the builder.

[18] LA. CIV. CODE ANN. art. 2520 (West 1952).

[19] *Id.* at art. 2521.

[20] The doctrine applies to all types of sales unless expressly excluded [Perkins v. Chatry, 58 So. 2d 349 (La. App. 1952)] including sales of realty [Rodriguez v. Hudson, 79 So. 2d 578 (La. App. 1955)] and sales of ready-made houses [Sterbcow v. Peres, 222 La. 850, 64 So. 2d 195 (1953)].

[21] The federal government also has taken legislative action in an attempt to soften the harsh rule of *caveat emptor* as it applies to purchasers of real property by requiring a one year "Warranty of Completion With Approved Plans and Specifications" for homes insured by the Federal Housing Administration or Veterans Administration. However, the warranty given relates only to plans and specifications and not to defects in construction *per se*. *See* Annot., 25 A.L.R. 3d 383 (1969). In *Helm v. Speith*, 298 Ky. 225, 182 S.W.2d 635 (1944), contractors were required by Federal Housing Administration specifications to produce a dampproof basement. Although the contractors followed a recognized method of dampproofing in a skillful manner, the basement still leaked. The Court held that the contractor could not be held liable for unsatisfactory results. a case[22] with virtually the same facts as *Crawley*. The court saw merit

[22] Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968).

express legislative authorization, did the court choose to set aside *caveat emptor* and apparently suspend its duty to adhere to precedent? The question could perhaps be answered in the light of Justice Cardozo's penetrating reflections on the nature of judicial responsibility:[23]

> But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.[24]

The argument advanced by the Court in *Crawley* seems to have followed this kind of reasoning. It did not disregard existing precedents, but built upon and expanded them by arguing that there was no real difference between a contract by a builder to sell a ready-made house and a contract by a builder to construct a house according to specifications, especially from the buyer's point of view.[25] In either case, the purchaser should be secure in the knowledge that his new house is fit for habitation. Indeed, because of its appeal to precedent, the opinion of the Court cannot be easily criticized or disregarded. It lays a strong foundation for future decisions in Kentucky.

Clearly, the trend in Kentucky and in other jurisdictions is away from strict adherence to the doctrine of *caveat emptor* and toward offering more protection to the purchasers of a house from unscrupulous vendors.[26] Perhaps future decisions in the courts will

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[23] The Court in *Crawley* relies principally on the decision of *Bethlahmy v. Bechtel,* 91 Idaho 55,–, 415 P.2d 698, 708 (1966) which cites Justice Cardozo's view.

[24] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150-51 (1921).

[25] 437 S.W.2d at 745.

[26] But the question of how damages will be computed is still not clear in Kentucky. The amount of damages was set at $6,000, but the opinion doesn't say what the $6,000 was for. The following cases represent some of the existing views on the subject. In *De Armas v. Gray,* 10 La. Rep. 575 (1837), a presumption of bad workmanship was sufficient to entitle the purchaser to the *cost of repairs.* In *Bozeman v. McDonald,* 40 So. 2d 517 (La. App. 1949), the cracking of walls of a house within a year after its completion created a presumption of use of poor material or bad workmanship, entitling buyer to *diminution of the purchase price.* In *Hoye v. Century Builders, Inc.,* 52 Wash. 2d 830, 329 P.2d 474 (1958), the measure of damages was held to be the *difference in value between the house in its uninhabitable condition and its value had it been properly constructed.*

encourage the public to demand, and the building industry to supply, better quality construction.

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