COMMENTS

Builder-Vendor's Implied Warranty of Good Workmanship and Habitability. *Humber v. Morton,* 426 S.W.2d 554 (Tex. 1968).

Mrs. Humber purchased a new house from Morton, a builder-vendor. The first time she used the fireplace, the house caught fire and partially burned. Mrs. Humber brought suit for damages against Morton; one of her theories for recovery was that the sale gave rise to an implied warranty that the house was fit for human habitation. Morton's defense was that Texas had never recognized an implied warranty in the sale of a new house, because of the common law rule of *caveat emptor* (let the buyer beware). The Supreme Court of Texas reversed the court of appeals judgment for the seller[1] and held that, on remand, Mrs. Humber might base her suit on a theory that the builder-vendor of a new home impliedly warrants to his vendee that the house has been built in a workmanlike manner and is habitable.

I. BACKGROUND OF THE ISSUE

The court's forthright holding aligns Texas with a slender array of states that have made available a new theory of recovery for the home buyer who accepts a deed and then finds that he cannot live in the house.

In the past, a buyer could proceed against his seller on several theories, if his facts and available proof justified the attempt. The easiest route was to show breach of an express warranty—either an oral promise or a promise incorporated in the sales contract or in the deed, a guarantee that the realty sold had certain qualities. An example is the express warranty customarily included in the sale of FHA houses.[2] If the house failed to conform to the terms of the express warranty, the buyer could sue for breach.[3]

Another ground for recovery was fraud. Active, knowing deception by the seller, to induce the purchase, entitled the deceived

1. 414 S.W.2d 765 (Tex. Civ. App.—Amarillo 1967).

2. Seller or builder must warrant that construction substantially conforms with approved plans and specifications; the buyer has 1 year after conveyance or occupancy (whichever comes first) to notify seller of defect. 12 U.S.C. § 1701(j)(1)(a) (1964), *as amended*; (Supp. III, 1965-67).

3. Re v. Magness Constr. Co., 49 Del. 377, 117 A.2d 78 (1955) (in sales contract); Greenfield v. Liberty Constr. Corp., 81 N.Y.S.2d 550 (Sup. Ct. 1948) (oral agreement); New Home Constr. Corp. v. O'Neill, 373 S.W.2d 798 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (by implication); Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113 (dictum).

buyer to relief by way of damages, rescission, cancellation, or partial cancellation and restitution to avoid unjust enrichment.[4] Misrepresentation of a material fact was actionable, even though the one making the statement did not know that his representation was false.[5] The law of fraud developed to the point that the buyer could escape his bad bargain if he could show even tacit misrepresentation by the seller, in situations where the seller knew a fact and knew that the buyer did not know it and could not by the exercise of reasonable diligence know it, and yet the seller remained silent with the intent to defraud.[6] In both explicit and tacit misrepresentation, the buyer had to show that he was actually misled by the misrepresentation, and that he would not have bought but for the misrepresentation.

Mutual mistake as to a material fact afforded another possibility for a purchaser's remedies in an unsatisfactory transaction for the purchase and sale of land;[7] and on occasion failure of consideration has been successfully urged as a basis for a buyer's action against his vendor.[8]

Except for the rare transaction which contained an express warranty, the hope of the disappointed purchaser lay in showing a defect in the formation of the bargain. Otherwise, he had to suffer the consequences of his deal gone sour. Cases arose across the country, involving seemingly deserving buyers who could not prove all of the

4. Lynch v. Fowler, 257 S.W. 948 (Tex. Civ. App.—Texarkana 1923, writ ref'd) (misrepresentation that house was solid brick). Land, not home cases: Sellers v. Webb, 403 S.W.2d 822 (Tex. Civ. App.—Beaumont 1966, no writ); El Paso Dev. Co. v. Ravel, 339 S.W.2d 360 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.); Riley v. Atmar, 213 S.W. 682 (Tex. Civ. App.—Galveston 1919, writ ref'd); Kallison v. Poland, 167 S.W. 1104 (Tex. Civ. App.—San Antonio 1914, writ ref'd); Sargent v. Barnes, 159 S.W. 366 (Tex. Civ. App.—Austin 1913, no writ); Martin v. Ince, 148 S.W. 1178 (Tex. Civ. App.—Fort Worth 1912, writ ref'd); Pruitt v. Jones, 36 S.W. 502 (Tex. Civ. App. 1896).

5. Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954); Polk Terrace, Inc. v. Harper, 386 S.W.2d 588 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.); Passero v. Loew, 259 S.W.2d 909 (Tex. Civ. App.—El Paso 1953, writ ref'd n.r.e.) (dictum). Texas' article 4004, upon which actions for fraud with regard to real estate were previously based, was repealed effective Sept. 1, 1967, TEX. REV. CIV. STAT. ANN. art. 4004 (Supp. 1968). A similar provision, TEX. BUS. & COMMERCE CODE ANN. § 27.01 (1968), takes account of plain fraud (actual damages) and wilful fraud (exemplary damages). Allowing an action for implied warranty reaches the same result as does the fiction of "innocent" or "constructive" fraud, and gets there with at least equal forthrightness.

6. Loghry v. Capel, 257 Iowa 285, 132 N.W.2d 417 (1965) (since natural consequence of failure to disclose is that buyer will be deceived, seller's intent to deceive is presumed); Westwood Dev. Co. v. Esponge, 342 S.W.2d 623 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

7. Mason v. Peterson, 250 S.W. 142 (Tex. Comm'n App. 1923, jdgmt adopted).

8. Hauck v. Jordan, 235 Ky. 388, 31 S.W.2d 624, 625 (1930) (a contract to build and convey).

elements necessary for recovery under any of the available remedies.[9] Recognizing the need for protecting the buyer's sizable investment in his home, a few states have hammered out the doctrine of implied warranty in the sale of new housing. First were Colorado, Idaho, and South Dakota.[10] Then Texas joined the small circle. Even more recently Kentucky has adopted the new doctrine.[11]

To arrive at this new stage in defining the legal relationships between vendor and purchaser of real estate, the Texas court had to slice through three distinct impediments: (1) the common law doctrine of *caveat emptor*; (2) the doctrine of merger; and (3) the state's statutory restriction in article 1297[12] as to the covenants that may be implied in the sale of land.

A. Caveat Emptor

The common law doctrine of *caveat emptor* was based on the premise that the buyer and seller dealt at arm's length, and that the purchaser had means and opportunity to gain information concerning the subject matter of the sale which were equal to those of the vendor. The Latin phrase was a convenient, shorthand method of expressing a commonsense notion that the buyer must look out for himself; if he did not ascertain that the thing he was about to buy was what he hoped it would be, and if he did not protect himself by demanding an express warranty from the seller, the law would not rescue him from the consequences of his folly. The civil law countries, by contrast, formulated a notion that is the antipode of *caveat emptor;* under civil law, it is the seller who must beware, for a sound price implies a sound commodity.[13] Whatever the explanation for the variance in philosophy between the common and the civil law, *caveat emptor* suited the needs

9. Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961) (water emptying under house from bathroom facilities); Fegeas v. Sherrill, 218 Md. 472, 147 A.2d 223 (1958) (termite infestation in home where seller had lived).

10. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (buyer had to shore up cracking cellar walls 4 months after purchase, to avoid cave-in); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) (foul odor and bug infestation resulted from water seeping into garage built over irrigation conduit); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803 (S.D. 1967) (water seeped into basement, creating condition dangerous to health and safety).

11. Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969) (water in basement; no coating on concrete blocks and no drain tile). The Kentucky court held that the builder-seller impliedly warrants that a new dwelling in its major structural features was constructed in a workmanlike manner and using suitable materials. No mention is made of habitability.

12. TEX. REV. CIV. STAT. ANN. art. 1297 (1962).

13. The contrast was noted by Coke: "Note that by the Civil Law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse Warranty, but the

of England as she built an empire and of the United States as she pushed back her frontiers.[14] A laissez faire economy and a sporting view of business transactions were natural and perhaps necessary.[15] It was entirely reasonable to require a buyer to stick to his bargain for the purchase of land. Land lay open to his inspection; he could readily evaluate the quality of the soil and the structures on the land;[16] or he could get an express assurance from the owner, who often had himself been occupying the land before the sale. Nor was it unreasonable to expect a purchaser of personal property to buy at his own risk; he was ordinarily as capable as the seller of determining the worth of a bolt of cloth, a saddle, or a silver platter.

Legal scholars attest that with regard to real estate sales most common law states follow *caveat emptor* strictly.[17] Courts denying relief to disappointed or injured property buyers have invoked the hoary rule with all the solemnity and respect thought due a phrase

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Common Law bindeth him not, unlesse therebe a warranty, either in Deed or in Law for Caveat emptor . . . ." COKE, FIRST INSTITUTE 102 (3d ed. 1633).

The reader will notice that no treatment of Louisiana cases is attempted because of that state's use of the civil law.

14. Perhaps related to *caveat emptor* were the freedom-of-the-will concept in philosophy, the democratic experiment in government, and the subjective theory of contracts emphasizing freedom to contract. A man's freedom to make his own choice has been highly regarded, even if he makes his choice unwisely.

15. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967). Other articles of interest and importance include: Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 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); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Ramunno, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings*, 43 DENVER L.J. 379 (1966); Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439 (1960). Some student notes and comments are: *Implied Warranties—Sale of a Completed House*, 1 CAL. WESTERN L. REV. 110 (1965); *Caveat Emptor: A Pierced Shield*, 15 DEPAUL L. REV. 440 (1966); *An Implied Warranty of Fitness and Suitability for Human Habitation as Applied to the Sales of New Homes in Texas*, 6 HOUSTON L. REV. 176 (1968); *Torts—Recent Extensions in Builder-Vendor's Liability for Defects*, 47 N.C.L. REV. 236 (1968); *Torts—Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236 (1965); *Caveat Venditor—New Doctrine in Real Estate Sales*, 14 S.D.L. REV. 162 (1969); *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862 (1965); *Implied Warranty—Property—Vendor and Purchaser*, 18 W. RES. L. REV. 706 (1967); *Right of Purchaser in Sale of Defective House*, 4 W. RES. L. REV. 357 (1953).

16. The very ceremonies of livery of seizin—handing over the twig or the clod of dirt, then boxing a lad's ears to insure his remembering the occasion—took place *on the land;* hence the assumption was that the buyer necessarily knew whether he was getting what he had bargained for.

17. *E.g.*, M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY 21, 22 (2d ed. 1963); 8a G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4470, at 393 (J. Grimes ed. 1963); 7 WILLISTON ON CONTRACTS § 926, at 800-01 (3d ed. Jaeger 1963); Keeton, *Rights of Disappointed Purchasers*, 32 TEXAS L. REV. 1, 23 (1953).

succinctly expressing the wisdom of the ages.[18] Sellers have defended with the cry, by rote, "*Caveat emptor!* There is no implied warranty of quality or condition in the sale of realty." Under this aegis vendors have with impunity conveyed land of inferior quality[19] and homes with latent defects.[20]

However, the common law has never really required that *caveat emptor* be applied with absolute rigidity or inflexibility, without a consideration of surrounding circumstances.[21] Some of the early American cases cited as demanding that the rule be followed turn out to be cases of purchase at auction or execution sales, where a buyer would of course be expected to be wary.[22] The scholars and courts qualify their statement of the rule by adding that there are times even in real estate transactions when *caveat emptor* is not appropriate.[23] The

18. As to being bound by precedent in the common law, "[t]here 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 . . . ." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921).

19. Pollard v. Lyman, 1 Day 156, 2 Am. Dec. 63 (Conn. 1803) (land in inaccessible, mountainous area, incapable of settlement, rather than situated conveniently to river traffic as represented); Parker v. Moulton, 14 Mass. 99, 19 Am. Rep. 315 (1873); Kerr v. Parsons, 83 Ohio App. 204, 82 N.E.2d 303 (1948) (dictum on point of no implied warranty; scrub quality fruit trees on land bought for orchard); Dennison v. Harden, 29 Wash. 2d 243, 186 P.2d 908 (1947) (buyer misled as to quality of fruit trees).

20. Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959) (necessary to replace defective heating and refrigeration systems); Allen v. Reichert, 73 Ariz. 91, 237 P.2d 818 (1951) (leaking roofs); Tison v. Eskew, 114 Ga. App. 550, 151 S.E.2d 901 (1966) (action sounding in fraud failed, because defect not latent; all the buyer would have had to do to discover defect was to crawl under the house!); Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963) (flapping carport roof not properly attached to house); Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), *aff'd*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964) (fires starting in utility room where gas-fired boiler was installed); Narup v. Higgins, 51 Ill. App. 2d 102, 200 N.E.2d 922 (1964) (inadequate air conditioner, poor roof); Tudor v. Heugel, 132 Ind. App. 579, 178 N.E.2d 442 (1961) (smoking fireplace, peeling paint, defective guttering); Berger v. Burkoff, 200 Md. 561, 92 A.2d 376 (1952) (leaking basement); Harmon Nat. Real Estate Corp. v. Egan, 137 Misc. 297, 241 N.Y.S. 708 (Sup. Ct. 1930) (uninhabitable); Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966) (inadequate measures against surface water problem; builder-vendor not an insurer; remanded for possible development of negligence or deceit theory); Shapiro v. Kornicks, 103 Ohio App. 49, 124 N.E.2d 175 (1955) (leaking basement; buyer failed on verbal warranty theory; dictum as to no implied warranty); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959) (uneven settling caused by construction on filled land).

21. Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439, 446 (1960), cites, as do other writers, Sherwood v. Salmon, 2 Day 128 (Conn. 1805), as a case of *caveat emptor*, but the fact is that the buyer ultimately prevailed, in equity, 5 Day 439, 5 Am. Dec. 167 (Conn. 1813).

22. *E.g.*, Eckman v. Beihl, 116 N.J.L. 308, 184 A. 430 (1936) (sheriff's sale under execution).

23. Examples from the authors cited in note 17 *supra:* "[T]he doctrine only applies where the parties have equal means of knowledge." THOMPSON at 394. Jaeger's edition of WILLISTON

Nebraska Supreme Court in 1908 wrote: "The doctrine should be invoked that one may not be deprived of his rights, nor [*sic*] to assist one in getting or keeping what he is not entitled to."[24] In other words, a court had to decide first what the parties' rights were, under the circumstances; then *caveat emptor* might or might not be useful in articulating the decision.

During her early history, Texas was of course within the area administered under the laws of Spain and Mexico—civil law countries. In 1840, after Texas won independence from Mexico, the common law of England was adopted as the rule of decision in Texas, so far as not inconsistent with the constitution and laws of the state.[25] Part of the adopted body of law was the notion that the buyer should beware.[26] In Texas as elsewhere the doctrine had a little play in its joints. For example, an 1853 decision in a slave-sale case recognized that the doctrine was not to be applied if a warranty of soundness might be implied from the circumstances or the nature of the thing sold, or if the article were not open equally to both parties for inspection, or if the buyer had relied on the seller's representations.[27] *Caveat emptor* was applied as to the quality of land, but not as to quantity,[28] and was held to apply only so far as it affected a land purchaser with notice of everything he might have ascertained by use of ordinary diligence.[29]

As time passed, *caveat emptor* diminished in importance. What seemed right in an earlier day of rugged individualism, when a person could be expected to look out for himself, began not to seem so right in a paternalistic society. A simple economy of individual craftsmen and small guilds selling to local buyers has been supplanted by a

adds at 813 that courts are giving relief to new-home buyers, and at 818 expresses approval of "this enlightened approach." Keeton's article at 23 predicts a development in the common law toward imposing an obligation of quality on sellers of new housing.

24. Tarnow v. Carmichael, 82 Neb. 1, 116 N.W. 1031, 1034 (1908).

25. Tex. Laws 1840, An Act To Adopt the Common Law of England § 1, at 3, 2 GAMMEL, LAWS OF TEXAS 177 (1898), now TEX. REV. CIV. STAT. ANN. art. 1 (1969). The article has been held to make effective only those provisions of the common law that are not inconsistent with the circumstances of the people of Texas. Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913).

26. The civil law influence remained in Texas' community property system, and the Spanish land measures are still used in areas once covered by Spanish land grants. On the whole, however, the common law came naturally to Texas jurisprudence. Many of Texas' early settlers and leaders came westward from the middle Atlantic seaboard, through Kentucky and Tennessee. Sam Houston, for instance, the first President of the Republic of Texas, was a Tennessee lawyer. It is doubtful that the Spanish-American legal system ever had a significant effect on the Anglo-American frontiersmen or their Blackstone-trained lawyers.

27. McKinney v. Fort, 10 Tex. 220, 230-31 (1853) (slave died soon after he was purchased).

28. Edmondson v. Hart, 9 Tex. 554 (1853) (dictum).

29. McCord v. Bailey, 200 S.W.2d 885 (Tex. Civ. App.—Eastland 1947, no writ).

commercialized society in which goods are mass-produced and sold to remote strangers after passing through the hands of a succession of distributors, wholesalers, and retailers. *Caveat emptor* had to be discarded as the standard for transactions in *personal property.* A buyer is no longer able to look at the thing he purchases and determine whether it will serve his purpose. An automobile, a washing machine, or a bottle of hair bleach cannot be competently judged by a consumer before he uses it, if then. So there has developed a present body of law providing for products liability, without fault, in the field of torts, and for an implied warranty of fitness in the Uniform Commercial Code[30] and in the "common law" of contracts and sale of goods.[31]

There was no parallel, contemporaneous rejection of *caveat emptor* in *real estate* transactions. The very nature of realty destroys the practicability of setting fixed standards for measuring value. Whereas the liability of makers and sellers of goods was incurred by those in the business of manufacturing and selling, the real estate vendor was ordinarily an individual selling his own land; the usual situation did not involve a business of selling land. The concept of products liability could be justified, because the entrepreneur could spread the risk by raising prices. In a land transaction, it made sense to let a loss lie where it fell, as between two parties "equally free of fault."

Adverting to the tort concept of "fault" suggests a comparison between the case-law development concerning personal injuries and property damage resulting from products defectively manufactured, on the one hand, and from buildings defectively constructed, on the other hand. *Winterbottom v. Wright*[32] was the early case basing denial of recovery for personal injuries upon the absence of privity of contract between the supplier of a faulty vehicle and the one ultimately injured by it. This personal property case had its counterparts in the real property field;[33] those suffering personal injuries after title to realty had passed went without remedy because of the concept that there was no relationship to support a duty of care.[34]

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30. TEX. BUS. & COMMERCE CODE ANN. § 2.314 (1968).

31. Downing v. Dearborn, 77 Me. 457, 1 A. 407 (1885); Ford Motor Co. v. Grimes, 408 S.W.2d 313 (Tex. Civ. App.—Eastland 1966, writ dism'd); Price v. Advance-Rumley Thresher Co., 264 S.W. 113 (Tex. Civ. App.—Amarillo 1924, no writ).

32. 152 Eng. Rep. 402 (Ex. 1842).

33. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 693-96 (3d ed. 1964) terms such cases the "misbegotten progeny" of *Winterbottom v. Wright.*

34. Combow v. Kansas City Ground Inv. Co., 358 Mo. 934, 218 S.W.2d 539 (1949) (no warranty of safety, no relation at time of construction work); Smith v. Tucker, 151 Tenn. 347,

Then in products liability *MacPherson v. Buick Motor Company*[35] discarded the necessity for privity of contract and found a duty running from the manufacturer to those who will come in contact with an automobile, which if negligently manufactured is a thing of danger, reasonably certain to place life and limb in peril. The *MacPherson* notion of negligence—duty, breach, injury, proximate cause—was extended, a generation later, to the real estate field, to cover personal injuries, regardless of privity, if the builder had built negligently and defectively, and if the dangerous defect were not readily discoverable; "fault" was found in creating a danger which the builder knew or had reason to know.[36] The negligence theory, however, has had less success when only damage to the property itself occurred than when there has been a personal injury.[37]

Products liability law, having leveled out for a time on the *MacPherson* plateau, then moved on to liability without fault. The warranty of good workmanship and of habitability implied in *Humber v. Morton* imposes a similar liability without fault upon a builder-vendor of a new house.

The negligent-construction cases began the process of equating a

270 S.W. 66 (1925) (negligently constructed mantel fell on child); Otto v. Bolton & Norris, [1936] 2 K.B. 46, 52 (buyer can take a house or leave it, but if he takes it he takes it as he finds it).

35. 217 N.Y. 382, 111 N.E. 1050 (1916).

36. Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956) (iron step-railing inadequately repaired by defendant-contractor engaged by defendant-landlord); Pastorelli v. Associated Engineers, Inc., 176 F. Supp. 159 (D.R.I. 1959) (heating unit insecurely attached fell on employee of defendant-builder's vendee); Caporalletti v. A-F Corp., 137 F. Supp. 14, 19 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957) ("builder must be charged with knowledge of his negligence"); Dow v. Holly Mfg. Co., 49 Cal. 2d 720, 321 P.2d 736 (1958) (equates general contractor to assembler of automobile); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1, 3 (1948) ("imminence" of danger not necessary); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965) (child of vendee's tenant scalded by hot water from faucet without mixing device); Inman v. Binghampton Housing Authority, 1 App. Div. 2d 559, 152 N.Y.S.2d 79 (1956), *rev'd*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (but rationale of lower court explicitly approved as to point of interest here); Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961) (porch roof fell on tenant of remote grantee). Belote v. Memphis Dev. Co., 208 Tenn. 434, 346 S.W.2d 441, 444 (1961), based possible liability "not upon any relationship whatsoever, whether vendor and vendee, landlord and tenant or what not, but on the rights and duties of man to man" and cited RESTATEMENT (SECOND) OF TORTS § 353 (1965); the general rule is that a vendor is not liable for physical harm resulting from a condition which existed at time of transfer; § 353 covers the exception: the vendor shall be liable if he knows or has reason to know of condition, while vendee does not. Also citing RESTATEMENT § 353 is Rogers v. Scyphers, 161 S.E.2d 81 (S.C. 1968), a personal injury suit against a builder-vendor, on a negligence theory, in which the court takes for granted that a builder-vendor has "reason to know" of an unreasonably dangerous condition.

37. Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964); Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963).

house to a manufactured product. Something else happened after the Second World War that made doubtful the wisdom of applying *caveat emptor* to every real estate sale. The housing merchant made his appearance.

Before World War II the usual practice of one desiring a home of his own was to hire an architect and a building contractor, who would then owe him a contractual duty to construct a satisfactory dwelling. An alternative was to purchase a secondhand house, the buyer often having firsthand awareness of the qualities of the house. Within the last 20 years, however, a great change has occurred in the housing industry. On large scale and small, individuals and corporations are making a business of buying tracts of land, developing them for residential purposes, constructing homes and then selling them. Even a comparatively smalltime builder often speculates by building one or a group of houses at a time, for sale after completion. A generation or a century ago, one proposing to buy a piece of land along with its messuage was in fact able to make an inspection and form his own opinion of the value of the land and the improvements. He was on equal footing with the seller. Not so with today's prospective home purchaser. He does not set out to buy land; he is looking for a house. Like the buyer of some manufactured articles, he is often unable to make a meaningful inspection, partly because of his incompetence to judge construction and partly because of the expense or impracticability of hiring a professional appraiser. The hallmark of progress in this country has been increased specialization of knowledge; its corollary is greater interdependence. As a result, the law in many branches is emphasizing "appearance" and lack of "reason to know." Because of the housing merchant's specialized knowledge, a home purchaser (perhaps specially skilled in his own, wholly-different field) depends on appearances and absence of reason to know of a defect.

The house has come to seem less a fixture on land, and more a manufactured product, but application of the products liability concept to housing has been frustrated by the persistence of the law of fixtures, as illustrated by the venerable maxim, *quicquid plantatur solo, solo cedit*—whatever is planted in, attached to, the soil belongs to the soil. To give up *caveat emptor* for houses would be to give it up for real estate, because the house is attached to the soil. The question is whether "quicquid" may be "unplanted" for the purpose of products liability, without disturbing the attachment that is convenient for purposes of title and taxation. Taking the step away from *caveat emptor* with regard to realty proved harder than taking the step with regard to

personalty, for two reasons—the doctrine of merger, and in Texas and some other states the limitation by statute upon the covenants that can be implied in a deed.

B. Doctrine of Merger

The doctrine of merger in real property law focuses on the deed as the critical point in a conveyance. An agreement for purchase and sale of land merges into the deed.[38] Execution and delivery of the deed eliminate elements not carried forward into the deed, unless there has been fraud or mistake, and unless collateral matters are involved.[39] Under the doctrine, delivery and acceptance of the deed have been the cutoff point; the deed is regarded as the final expression of the agreement and the repository of agreed terms.[40] The relationship between vendor and purchaser of land has developed as a temporary one, ending at the passing of title, as distinguished from the continuing relationship between landlord and tenant, lessor and lessee, owner and contractor. An express contractual promise does not ordinarily survive as an express warranty in the sale of land, therefore, unless it is preserved in the conveyance. The prevalent view that there can be no *implied* warranties in the sale of real estate rests partially on the idea that no warranties are possible except those *expressed* in the deed.

The *Humber* opinion realistically acknowledges that an implied warranty is a creature of the law, a useful fiction, imposed on the vendor for policy reasons without regard to his actual intentions or to an agreement consciously arrived at. A contract does not read, "Seller impliedly warrants . . . ." Nor does a deed read, "Grantor does hereby bind himself . . . to impliedly warrant . . . ." The very term "implied" negates appearance of a warranty in inky form on the face of the deed. If the court can recognize an implied warranty in the sale agreement, it can also carry it forward into the deed.

C. Article 1297.

The following article from the Texas statutes played an important role in three decisions that furnish the immediate setting for *Humber v. Morton:*

> Art. 1297. Implied covenants
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> From the use of the word "grant" or "convey," in any conveyance by which an estate of inheritance or fee simple is to be

38. Commercial Bank, Uninc. v. Satterwhite, 413 S.W.2d 905 (Tex. 1967).

39. Palos Verdes Corp. v. Housing Authority, 202 Cal. App. 2d 827, 21 Cal. Rptr. 225, 231 (1962).

40. Union Producing Co. v. Sanborn, 194 F. Supp. 121, 126 (E.D. Tex. 1961).

> passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs or assigns, are implied, unless restrained by express terms contained in such conveyance:
>
> 1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.
>
> 2. That such estate is at the time of the execution of such conveyance free from incumbrances.
>
> Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.[41]

In the three cases, new-home purchasers sought recovery from their builder-vendors on a theory of breach of implied warranty. In one, where the purchaser recovered the cost of remedying a defect caused by poor workmanship and materials, the defendant had failed to object to the plaintiff's theory of implied warranty at trial level; the appellate court found it unnecessary, therefore, to rule on the question of whether implied warranty was a permissible theory for recovery in light of article 1297.[42] In the other two cases, recovery on a theory of implied warranty was denied because article 1297 was interpreted as eliminating any possibility of an implied warranty of the condition of land.[43]

The *Humber* opinion points out that the article in question deals with conveyance, that the implied warranty of habitability arises from the transaction between the parties, not just from the conveyance. Implicit in the court's statement is the distinction being drawn between warranties and covenants. An implied warranty is imposed by law, without regard to intention of the parties.[44] A covenant, on the other

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41. TEX. REV. CIV. STAT. ANN. art. 1297 (1962). California has an almost identical statute, CAL. CIV. CODE § 1113, which has been held to close the door on implied warranties as to the condition of real estate. Gustafson v. Dunham, Inc., 204 Cal. App. 2d 10, 22 Cal. Rptr. 161 (1962); Liberty Bldg. Co. v. Royal Indem. Co., 177 Cal. App. 2d 583, 2 Cal. Rptr. 329 (1960).

The severity of California's statutory interpretation contrasts with a recent liberal holding that a savings and loan association was liable to home buyers for its negligence in financing a tract development; an expansive soil condition caused the houses to crack. The California court wrote of public policy reasons for protecting low-income purchasers by imposing a duty of care at the point of effective financial control. Connor v. Great W. Sav. & Loan Ass'n, 69 A.C. 887, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

42. Pleasant Grove Builders v. Phillips, 355 S.W.2d 818 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

43. Polk Terrace, Inc. v. Curtis, 422 S.W.2d 603 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.); Westwood Dev. Co. v. Esponge, 342 S.W.2d 623 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) (dictum as to article 1297; plaintiff's fraud theory was workable).

44. *See* 34 WASH. L. REV. 171, 172 (1959).

hand, is not implied unless it is clearly shown that the element must necessarily have been within the contemplation of the parties when they entered into an agreement—that the transaction would not have been workable unless the covenant to be implied were part of it.[45] A warranty is implied in law; a covenant is implied in fact.

The shift from the real property terminology of "covenant" to the contract-and-sales terminology of "warranty" in sales of houses has its background in the considerable body of case law involving contracts to build—cases bridging the gap between the old days when delivery of a deed terminated practically all duty of the seller and the new day of implied warranty of habitability of a new home. During the transition period probably the most frequently used method of getting a new house was to contract to have it built. Sometimes the contractor would build from the beginning according to the owner's plans and specifications; sometimes a builder would begin a house, contract to sell it, and complete construction after the sales contract. Often sales of uncompleted houses were made by showing model homes.[46] The contract to build or to finish established a relationship which made it natural to talk in terms of "implied warranty of good workmanship and materials," because of the familiar concept that performance of a contract must be within the framework of the parties' reasonable expectations. Clearly, a building contractor knew that the owner intended the house to be lived in.[47] Consequently, courts began to use the idea of an implied warranty of reasonable fitness for occupancy as a place of abode; and buyers who purchased homes before construction was completed were able to recover money damages for the cost of abating a fault and for restoring damaged premises.[48] Occasionally the builder's duty amounted even to susceptibility to liability without fault.[49] Within this line of contract-to-build cases, there came a gradual

45. Freeport Sulphur v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039 (1928); Foster v. Wagner, 343 S.W.2d 914 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.).

46. Compare the sale through showing a model home to the sale of goods by sample. TEX. BUS. & COMMERCE CODE ANN. § 2.313 (1968).

47. Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113, 121.

48. Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963) (cracking walls and tilting doors and windows caused by soil characteristics known to buyer as well as to builder-developer); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962) (leaking plumbing, basement and roof; provisions of agreement to complete construction were collateral to conveyance of title; therefore, execution of deed did not fully execute contract); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957) (basement flooded with sewage because of defective sewer line); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963) (floor coverings damaged by water seeping through concrete slab floor); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958) (raw sewage discharged on premises).

49. F. & S. Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963). The house was, as expressly warranted, in compliance with VA-approved plans and specifications; a soil engineering

drift away from emphasis on contractual concepts of breach of promise, lack of substantial performance, and failure of consideration, toward an emphasis on the mercantile language of sales—implied warranty of fitness for the ordinary purposes.[50] The large-scale builder-vendor came to be regarded as a merchant as well as an artisan.[51]

In Texas, contract-to-build cases paved the way to *Humber*.[52] The law had accustomed itself to the idea that a building contractor impliedly warrants fitness for intended purpose and quality of workmanship in a structure completed after contract. With *caveat emptor* already eliminated from the contract-to-build area, the question inevitably arose whether article 1297 necessitated drawing a line between a contract to build or finish a house and a contract to convey a house just finished. The practical considerations justifying responsibility in the contract-to-build situation are equally applicable to the contract to convey.[53]

One case in Texas' movement toward implied warranty in new housing requires special attention. *Loma Vista Development Company v. Johnson*, a fraud case, contained the following language: "By offering the house for sale as a new and complete structure [Loma Vista] impliedly warranted that it was properly constructed and of

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consultant gave his opinion before construction began; no fraud, negligence, or defective workmanship was found; yet the clay soil heaved, the walls cracked, and the buyer collected.

50. TEX. BUS. & COMMERCE CODE ANN. § 2.314 (1968).

The Washington court's initial use of the phrase "implied warranty that [the house] would be fit for human habitation," in Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474, 475 (1958), was noted at 34 WASH. L. REV. 171 (1959). Similar wording appears in the other contract-to-build cases cited in note 48 *supra*. Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260, 262 (1963): "an implied warranty that the house, when completed, would be fit for habitation"; Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728, 734 (1962): "the provisions of the collateral agreement [to build] entitled [the purchasers] to a habitable dwelling"; Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819, 821 (1957): "reasonably fit for its intended use"; and Jones v. Gatewood, 381 P.2d 158 (Okla. 1963), syllabus by the court: "reasonably fit for occupancy as a place of abode."

Changing emphasis from workmanlike construction to fitness for intended purpose may have been influenced by the increasing importance of UNIFORM COMMERCIAL CODE concepts coupled with an unspoken recognition that a house is as similar to goods as it is to land.

51. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967).

52. Certain-Teed Prods. Corp. v. Bell, 422 S.W.2d 719 (Tex. 1968); Moore v. Werner, 418 S.W.2d 918 (Tex. Civ. App.—Houston 1967, no writ); New Home Constr. Corp. v. O'Neill, 373 S.W.2d 798 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Metropolitan Cas. Co. v. Medina Rural High School Dist. No. 5, 53 S.W.2d 1026 (Tex. Civ. App.—San Antonio 1932, writ dism'd).

53. It is actually easier for a buyer to protect himself by making his own inspection during construction than after completion; a brand new house is just as sure to be for the specific purpose of habitation as a house in the process of being built; a builder-vendor is in as good a position

good material and specifically that it had a good foundation."[54] The excerpt has been very widely quoted and cited as authority for possibly making Texas the first common law state to espouse a doctrine of *caveat venditor* (let the seller beware). It is doubtful that the sentence deserves the attention it has received; the buyer ultimately lost his case on appeal because he failed on a fraud theory. It appears that if the Supreme Court of Texas had been ready to find an implied warranty the plaintiff would have prevailed without regard to fraud. Perhaps the court of civil appeals dictum meant to say that the vendor's salesman who made the false representations had implied authority to warrant, rather than that the vendor impliedly warranted. It is possible, however, that the quotation expressed a new idea that was frozen back because it budded 20 years too soon.[55] Either way, article 1297 continued as a barrier to implied warranty in housing until *Humber* cleared the way, by statutory interpretation, making it clear that the article deals with covenants in a conveyance, not with warranties in a realty sale.

II. ASSESSMENT OF THE CASE

The opinion in *Humber v. Morton* leaves many questions unanswered. Some of those questions are:

1. How long does the builder-vendor's liability last?
2. Will his liability extend to anyone other than his immediate vendee? If so, by what criteria can potential plaintiffs be identified?
3. Will he be liable for all flaws, or will he have to answer only for substantial defects, dangerous defects, or defects that make the house unfit to live in?[56]
4. How can he make plans for adequate insurance protection, faced with the prospect of uncertainty in a

to know what materials and methods he used as is a contractor-vendor; the buyer's reliance is equal in the two situations.

54. 177 S.W.2d 225, 227 (Tex. Civ. App.—San Antonio 1943), *rev'd*, 142 Tex. 686, 180 S.W.2d 922 (1944).

55. Judge Norvell, who sided with the two-to-one majority in the San Antonio Court of Civil Appeals in the *Loma Vista* case, wrote the opinion in *Humber v. Morton* and uses the quotation but characterizes it as dicta.

56. Reasonableness, not perfection, is suggested as test for seriousness of defect, and reasonableness for determining duration of seller's potential liability. Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803 (S.D. 1967).

heretofore settled field, unable to predict liabilities arising after title and control have passed?[57]

5. How is habitability to be defined? Must the buyer find the house really unbearable, or will there evolve an idea similar to "constructive eviction" in the law of leases?[58]

6. Did the Supreme Court of Texas impose the implied warranty of strict tort liability, on the one hand, or the implied warranty of the mercantile world as provided in the Uniform Commerical Code, on the other hand?[59]

7. Will qualities of the soil itself become the subject of implied warranties in non-residential sales?[60]

The recent case of *Polk Terrace, Incorporated v. Curtis*[61] must be considered along with *Humber* if one is to make a rational evaluation of *Humber* as precedent for future reference. The *Polk Terrace* case assumes significance by virtue of the fact that the Supreme Court of Texas found no reversible error in it 2 weeks after the *Humber* decision. The court's refusing writ of error in *Polk Terrace* is a puzzling result in light of the court of civil appeals having held in *Polk Terrace* that there is no implied warranty of material and workmanship, relying for authority on article 1297 as applied by another court of civil appeals.[62]

57. *See* 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).

58. Mulhern v. Hederich, 430 P.2d 469 (Colo. 1967), a construction contract case, considered the difficulty of defining habitability and concluded that an implied warranty of fitness for habitation had been breached in a situation where the doors would not close; remedying the defect would cost about 15 percent of original price of home.

59. The *Humber* opinion at 558 refers to the "present personal property rule of implied warranties or strict liability in tort," seeming to treat the two expressions as synonymous; furthermore, the opinion at 556 states that "generally in Texas, the notion of implied warranty arising from sales is considered to be a tort rather than a contract concept," and cites products liability cases. Yet the opinion makes absolutely nothing of the danger-to-user-or-his-property concept that is part of Texas' products liability law. Rather, the opinion's use of the language of implied warranty of habitability suggests the commercial sales concept of fitness for the usual purpose. The opinion makes a point at 559-60 of the fact that the Colorado case, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964), recognizing an implied warranty of habitability in the sale of a new house by a vendor-builder was cited by a New Jersey strict tort liability, personal injury case, Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314, 326 (1965), but that the Colorado case was on a *different* theory from the New Jersey case.

60. The line once dividing the area of permitted implied warranties in personalty from the area of prohibited implied warranties in realty has been moved over to accommodate houses. Perhaps the line itself will eventually disappear. The struggle to classify mobile homes as either realty or personalty illustrates how hard it is to devise satisfactory or durable categories.

61. 422 S.W.2d 603 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

62. Westwood Dev. Co. v. Esponge, 342 S.W.2d 623 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.). For a discussion of the *Westwood* case, see text accompanying note 43 *supra*.

Knowing which factors in *Polk Terrace* led to an opposite result from *Humber* would facilitate a confident prediction as to the course of the future litigation that will, case by case, fill in the details of the new area outlined by *Humber*. Some possible factual and procedural distinctions follow:

1. The element of danger in *Humber* did not exist in *Polk Terrace*. Mrs. Humber narrowly escaped her burning house in the middle of the night. The *Polk Terrace* house just settled unevenly on a bad foundation; mortar and sheetrock cracked; bricks pulled apart. Danger is significant in the cases fitting into the negligence exception to the rule of nonliability of realty vendors;[63] but the *Humber* opinion does not treat the case as falling in that category, and leaves the clear impression that the plaintiff on retrial could win without showing seller's concealment of a defect or seller's negligence in not knowing of the dangerous condition, if she can prove that there was a latent defect when she bought, that the defect caused the fire, and that she found the house uninhabitable as a result. Danger would make a difference, too, if the court is thinking in terms of imposing upon housing merchants the *MacPherson* kind of liability facing manufacturers of chattels inherently dangerous to life and limb if negligently made. But if the court means to extend liability without fault to builder-vendors, it is hardly likely that it would draw a line between danger of personal injury and of property damage, for products liability law has come to the point in Texas that a consumer can recover for damage to his property [64] as well as to his person.[65]

2. The suddenness of the accidental fire in *Humber*, as opposed to the gradual deterioration over a period of several years in *Polk Terrace*, may have had a significant bearing. In the latter case, the buyer was disappointed over a bad bargain, the kind of economic loss to which strict liability or enterprise liability has not generally been extended even in the field of personalty.[66]

3. A factual distinction between the two cases is that Mrs. Humber received no express warranty of any kind, whereas in *Polk Terrace* the buyer received an express, written 1-year VA warranty. However, the invited conclusion that a buyer is better off without a warranty at all than with an expired express warranty is weakened by

63. Cases cited note 36 *supra*.

64. O.M. Franklin Serum Co. v. C.A. Hoover & Sons, 418 S.W.2d 482 (Tex. 1967).

65. Sales Affiliates, Inc. v. McKisson, 416 S.W.2d 787 (Tex. 1967).

66. Seeley v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). *Contra*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

Passero v. Loew,[67] in which the buyer recovered from the vendor on a fraud theory, though the buyer had been furnished an express guarantee in writing by a third party (contractor-builder), who was insolvent at the time of trial. Furthermore, the federal statute prescribing the VA warranty clearly states that such warranty shall be in addition to, and not in derogation of, all other rights the purchaser may have under any other law.[68]

4. The *Polk Terrace* purchaser lost on his fraud theory because the 2-year statute of limitations had run. That it had run on a fraud action does not necessarily mean, however, that it had also run on an implied warranty theory and that therefore the Supreme Court of Texas considered it useless to consider the appeal. In a very recent case the court has held that a suit for breach of an implied warranty arising from a written contract could be brought within 4 years.[69]

5. Habitability is probably the key. The buyers in *Polk Terrace* did not have to move out; Mrs. Humber did. The cases which placed Colorado, Idaho, South Dakota, and Kentucky outside the majority rule of no-implied-warranties-in-the-sale-of-realty involved, as did *Humber*, conditions that made it necessary either to move out or to do extensive repair work to avoid risk to health and safety. The Supreme Court of Texas was probably ready to recognize an action on the theory of implied warranty of habitability, without having to spell out, at the moment of making a clean break from the majority common law view, just how bad the material and workmanship have to be to amount to a breach of the implied warranty of fitness as a place of abode. A car is made for transportation, a flashlight is made for illumination, a house is made for habitation.

III. CONCLUSION

The answers to the questions raised are not to be found in the *Humber* opinion. The only problem before the court for decision was whether either article 1297 or the doctrine of *caveat emptor* or the doctrine of merger entitles a builder-vendor to summary judgment, in the special situation of an immediate vendee's alleging that a defect built into the house resulted in a damaging fire a few months after title passed. The decision is that the seller is not entitled to summary judgment; a builder-vendor of new housing impliedly warrants that the

67. 259 S.W.2d 909 (Tex. Civ. App.—El Paso 1953, writ ref'd n.r.e.).
68. 38 U.S.C. § 1805(a) (1964).
69. Certain-Teed Prods. Corp. v. Bell, 422 S.W.2d 719 (Tex. 1968).

house was constructed in a good workmanlike manner and is suitable for human habitation. Future cases will give further answers.

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