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the presence and influence of blacks and members of other minority groups, is evident. This is a fundamental right granted by the United States Constitution. However, it is also evident that by upholding the liquor license issued to Moose Lodge, the Supreme Court has permitted an admittedly discriminatory club to enjoy the benefits granted by the State of Pennsylvania, under its police power, to engage in the sale or distribution of intoxicating liquors.

STEVEN A. EDELSTEIN

IMPLIED WARRANTIES IN THE SALE OF REAL ESTATE

Plaintiffs were purchasers of new condominiums from the defendant, the builder and developer of a condominium project. Soon after the plaintiffs moved into the premises, the air-conditioning system began malfunctioning. After many unsuccessful attempts to remedy the defective condition, the plaintiffs contracted to have the system repaired at their own expense. They then brought an action to collect the cost of repairs. The builder’s one-year express warranty on the equipment, materials, and workmanship had expired prior to the institution of the suit. The District Court of Appeal, Fourth District, affirmed the trial court’s judgment in favor of plaintiffs. On certiorari to the Supreme Court of Florida, held, affirmed: Implied warranties of fitness and merchantability extend to the sale of newly built houses and condominiums by builders. Gable v. Silver, 264 So.2d 418 (Fla. 1972).

The history of the development of warranties in Florida and elsewhere has been traced in detail by many writers and need not be repeated here. Suffice it to say that Florida has progressed steadily away from caveat emptor and toward increased consumer protection. In the period between the Fourth District’s ruling in Gable and the Supreme Court of Florida’s decision affirming that ruling, three states have joined

2. The supreme court adopted the decision of the district court as its ruling.
the rapidly growing minority extending implied warranties to the sale of real estate.

The instant case, however, represents a more liberal and atypical situation. In other states the common denominator of the plaintiffs' complaints has been a defect which has rendered the house uninhabitable. Complaints have included floodings, cracks in the walls, roofs or foundations, and fires caused by defective fireplaces. Whether or not a defective air-conditioning system renders a home uninhabitable is, however, questionable. It is significant that the Gable court did not address itself to this point. Rather, the court reasoned that if an air-conditioning system could be classified as realty, then it fell within the warranty's purview. In reaching this conclusion, the court resorted to the technical test of "physical mobility." Thus, a builder would be liable on implied warranty grounds if the defective item is immovable and attached to the realty.

The name given to such a warranty has varied. Courts have held that there is a warranty of "habitability," of "workmanlike construction and fitness for habitation," or simply of "fitness." It cannot be too strongly stressed, however, that these varieties of warranties have been generally applied to defects which have rendered a home uninhabitable. One court has restricted the warranty's application to "major

A.2d 771 (1972). By statute, Maryland has recently extended implied warranties to real estate sales. Md. Ann. Code art. 21, § 95B (Supp. 1971). The courts of that state had refused to allow recovery on implied warranty grounds, stating that any change should be made by the legislature. Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968). See also Lindstrom v. Chesnutt, 189 S.E.2d 749 (N.C. App. 1972), which indicated that North Carolina seemed to favor the minority view, stating, however, that it was unnecessary to reach the question because there was sufficient evidence to find an express warranty.


6. See generally Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959), where the Supreme Court of Arizona was faced with the problem of classifying an air-conditioning system as realty or personality. The action was based on implied warranty in the sale of chattels. Reasoning that some type of cooling equipment is almost a necessity in Arizona, the court found the air-conditioner to be realty and denied recovery.

Some purchasers will not purchase homes unless there is a refrigeration system, while others are content with evaporative cooling system but it is almost universal that no new residence property in the Phoenix area can be sold without one or the other of the two general methods of cooling.

Id. at 135, 341 P.2d at 927. At the time this case was decided implied warranties in real estate sales were not widely recognized.

7. Gable v. Silver, 258 So.2d 11 (Fla. 4th Dist. 1972). The court also relied on Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970), involving air-conditioning malfunctioning. In that case, however, water seepage also caused damage to the rugs, draperies, furniture, house paint and other household items.

The instant decision has labeled the warranty one of "fitness and merchantability." It is significant that the term "merchantability" has never before been used in this context. However, the court did not attempt to define the meaning of the term, the reason for its choice of labels, or the limits of the warranty's protection. The use of the term "merchantability," coupled with the fact that the warranty was applied to a defective air-conditioning system, would indicate that this decision has a wider scope of protection than its counterparts in other jurisdictions, whose limits have generally been defined by defects rendering a house uninhabitable.

The Gable court also held that the builder's express warranty did not preclude liability on implied warranty grounds. In reaching this conclusion, the court relied on the Florida common law of warranties and disclaimers in the area of sales of chattels. The court adopted a two-step reasoning: (1) If in Florida disclaimers have been held invalid in the sale of goods area, then (2) an express warranty with no disclaimer provisions will not preclude liability from arising.

The Gable decision, however, does not indicate to what extent builders will be able to limit their responsibilities by the use of express disclaimer clauses. In cases involving automobile sales, disclaimers have been held invalid on the ground that they are inimical to the policy of the law, since they often take place in a setting where equality of bargaining power is lacking. It is significant that this same line of reasoning has led courts to impose warranty responsibilities upon "mass"

10. Gable v. Silver, 258 So.2d 11 (Fla. 4th Dist. 1972). It is noteworthy that the court in Gable selected the terminology used by the Uniform Commercial Code.

IMPLIED WARRANTY: MERCHANTABILITY: USAGE OF TRADE
(1) A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

UNIFORM COMMERCIAL CODE § 2-314; FLA. STAT. § 672.314 (1971).

IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE
Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose.

UNIFORM COMMERCIAL CODE § 2-315; FLA. STAT. § 672.315 (1971).

11. Analysis of the Uniform Commercial Code's interpretation of the term may suggest that merchantability has a wider scope of protection:
(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and . . .
(b) are fit for the ordinary purposes for which such goods are used . . .

UNIFORM COMMERCIAL CODE § 2-314; FLA. STAT. § 672.314 (1971). Comment 6 adds:
Subsection (2) does not purport to exhaust the meaning of "merchantable" . . . . The language used is "must be at least such as . . .", and the intention is to leave open other possible attributes of merchantability.

UNIFORM COMMERCIAL CODE § 2-314, Comment 6; FLA. STAT. ANN. § 672.2-314, Comment 6 (1966).


builders. With these views in mind, it is questionable that a builder will be able to limit his liability unreasonably.

In the area of implied warranties in realty, at least two cases have dealt with the question of exclusion of warranties. In Smith v. Old Watson Development Company, the Supreme Court of Missouri held that a clause, "Property to be accepted in its present condition unless otherwise stated in contract," did not exclude an implied warranty. Similarly, in Wawak v. Stewart, the Supreme Court of Arkansas declined to give effect to a provision that the purchaser was not relying on any warranties as to age or physical condition of the premises.

In Gable there was privity of contract between the plaintiffs and the defendant: the plaintiffs were the immediate purchasers from the defendant builder. Without settling the question, the court nonetheless alluded to the possibility of a future extension of the warranty's protection to more remote purchasers. By way of dictum, the court seemed inclined to relax privity requirements: "We recognize that liability must have an end but question the creation of any artificial limits of . . . remoteness to the original purchaser."

Lack-of-privity cases dealing with a builder-vendor's implied warranty to third parties have been few in number. At least one personal injury case has effectively dispensed with privity. Recently a Washington appellate court held that privity was not required in a property damage situation involving a third purchaser who was the first occupant of the house.

14. See Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). As a caveat, it should be noted that there are distinctions between the automobile and the building industries. "The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position." Henningens v. Bloomfield Motors, Inc., 32 N.J. 358, 364, 161 A.2d 69, 74 (1960). However, in the building industry "... for every Levitt & Sons, there are probably hundreds of small builders." Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 Fordham L. Rev. 447, 459 (1971) [hereinafter cited as Murray].

15. See generally Uniform Commercial Code § 2-316; Fla. Stat. § 672.316 (1971), dealing with exclusion of warranties. But see Murray, supra note 14, where it is stated that by carefully drafting express warranties and disclaimers as delineated by the U.C.C., builders are attempting to escape liability. It is also suggested that the larger builder might be able to effectively avoid liability by forming one "modestly endowed thin corporation" for every development he builds. "By the time the dust has settled, the disgruntled homeowner will discover that he has a worthless judgment." Murray, supra note 14, at 458.

16. 479 S.W.2d 795 (Mo. 1972).


18. Gable v. Silver, 256 So.2d 11 (Fla. 4th Dist. 1972).

19. Id. at 18.

20. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). In Schipper the minor son of the lessee from the original purchase was scalded by hot water drawn from a faucet. The builder had failed to equip the faucet with a mixing valve. The court failed to see any distinction between the mass production of houses and the mass production of other products where implied warranties are found. But see Wright v. Creative Corporation, 498 P.2d 1179 (Colo. App. 1972), where the court refused to afford the implied warranty protection to the injured minor son of the second purchaser, stating that a builder's implied warranty extends only to his immediate buyer.

By limiting its holding to the sale of new homes and condominiums, the court may be implying that used property will be excluded from the operation of the warranty. This limitation relates directly to two other problems that eventually will have to be resolved: (1) what is the nature of the promise that the builder impliedly enunciates, and (2) which statute of limitations will govern suits resulting from a breach of the implied promise?

The nature of the implied promise that the premises will be fit and merchantable logically must fall into one of two categories. Either the builder impliedly promises that the premises will be fit and merchantable at the time the first purchaser begins occupancy, or he impliedly promises that the premises will remain fit and merchantable for some period of time. If the warranty is breached upon delivery for occupancy, problems of when a cause of action accrues are eliminated, and it remains only to choose the applicable statute of limitations. An implied promise that quality will remain constant for some time period weighs favorably toward protection of subsequent purchasers, but such an approach will necessitate a case-by-case approach to determine whether the promise was still in effect when the cause of action accrued to the plaintiff. Courts adopting this second definition of the implied promise have spoken in terms of “a standard of reasonableness” in determining the duration of liability.

Since the field of warranty often involves a merger of tortious concepts and concepts ex contractu, several statutes of limitation become possible candidates. Courts implying a promise couched in terms of a “reasonable” duration period might feel more intellectually consistent in applying a tort statute of limitations that would run from discovery of the defect. The “breach” would then take the nature of a continuing tort. However, the promissory nature of the warranty militates most strongly in favor of utilization of a statute of limitations for breach of contract. This theory fits most comfortably with a promise that is breached upon delivery, and would parallel the structure found in the Uniform Commercial Code. A collateral problem flowing from

25. UNIFORM COMMERCIAL CODE § 2-725; FLA. STAT. § 672.725 (1971) sets a four-year limitation period which generally begins to run upon tender of delivery. See also Murray, supra note 14, noting the dearth of law in this area and adding:

It is ventured that the majority of the courts will adopt the view of the U.C.C. and hold that the statute of limitations begins to run from the tender of possession of the house to the first buyer by the builder-vendor. The question of the length of the statutory period will present a more difficult problem. The courts will have to either adopt the four year period specified in section 2-725, or characterize a
an adoption of a contract theory is whether the implied promise is to
be found between the lines of a written contract that might exist be-
tween the parties (whose breach would then be governed by the statute
of limitations controlling contracts in writing) or is, in actuality, a
separate agreement in and of itself, to be governed by the statute of
limitations for contracts not in writing. The former is by far the most
tenable. The latter flounders on the shoals of a lack of separate con-
sideration.

The Gable decision indicates that this warranty responsibility arises
only when the seller is also the builder of the property. It is also
noteworthy that Gable is the first case to rule that there are implied
warranties in the sale of condominiums. Although there should be no
meaningful distinction between the sale of a house and a condominium,
thus far the decisions have only involved houses.

Gable failed to delineate whether liability will be imposed only
against the "mass" builder or against the smaller contractor as well,
including one who engages in an isolated building and sale transaction.
The vast majority of decisions similarly fail in this respect. An analysis
of their facts shows, however, that in many instances the builder was
a "developer" or a builder "engaged in the business of constructing
houses for sale."

Although the court stated that the Uniform Commercial Code was
inapplicable to the instant case, for all practical purposes Gable imported
the Code's warranties of fitness and merchantability into the common
law of real estate sales. In the writer's opinion, the weaknesses of this
decision lie: (1) in its failure to define "merchantability" and the
scope of its protection; and (2) in the adoption of the test of "physical
mobility" in extending the warranty to an air-conditioning system. As
to the second point, it should be noted that today's "mass" builder sells
a "package deal" rather than a bare piece of real estate. Included in

breach of warranty case as either a "tort" or a "contract" action and then follow
the applicable tort or contract limitation statute of the jurisdiction.
Murray, supra note 14, at 459.

26. Some courts have expressly qualified their holding by extending it only to a seller
who is also a builder. E.g., Waggoner v. Midwestern Development, Inc., 83 S.D. 57, 154
N.W.2d 803 (1967).

27. The earliest American cases held that implied warranties extended exclusively to the
sale of a house in the process of construction, but not to a completed house. E.g., Vander-
schrier 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). Another basis for the denial of recovery has been the
doctrine of merger, which provides that all prior negotiations in the sale of property are
merged in the deed and thus any warranties are destroyed by the conveyance. Cf. Living-
ston v. Bedford, 284 Ala. 232, 224 So.2d 873 (1960); Amos v. McDonald, 123 Ga. App. 509,
181 S.E.2d 515 (1971). Both views are now generally discredited. See Humber v. Morton,
426 S.W.2d 554 (Texas 1968); cf. Smith v. Old Warson Development Co., 479 S.W.2d 795
(Mo. 1972). The instant case omitted discussion of both views, thereby impliedly dis-
carding them.

28. In the instant case, the defendant was the developer of the condominiums.

29. See, e.g., Smith v. Old Warson Development Co., 479 S.W.2d 795 (Mo. 1972);
Humber v. Morton, 426 S.W.2d 554 (Texas 1968).
the "package deal" might be movable defective items worthy of the warranty's protection. Thus, mobility is at best an artificial test. It is submitted that a builder's liability should not turn on whether a defective item can or cannot be removed. Aside from these points, the Gable decision must be viewed as a major stride away from caveat emptor and toward increased consumer protection.

MARGARITA ESQUIROZ

THE STATUTE OF LIMITATIONS: NO LONGER AN ABSOLUTE BAR

The plaintiff, a widow, was the devisee of a life estate in certain commercial property owned by her husband, the testator. The will provided that their son, who was designated as the remainderman in fee, could occupy the premises as his residence and for business purposes for the duration of the plaintiff's life term, provided he pay $80.00 rental per month to the plaintiff. The plaintiff's son, his wife and, later, a corporation they formed (the defendants), occupied the premises from 1953 (the year the testator died) until 1970, but they never paid any rent to the plaintiff during that time. The plaintiff brought an action in equity for a declaratory decree construing the will, and for the recovery of the 17 years rent that she contended was owed to her. The defendants raised the defenses of the statute of limitations, laches, waiver and estoppel. The trial court held that plaintiff had a valid life estate and was entitled to all the past due rental payments. On appeal to the District Court of Appeal of Florida, Third District, held, affirmed: A court of equity will not rigidly follow the statute of limitations where the equities are unequal; thus, plaintiff's life estate claim for rental was not barred by the passage of time, nor by waiver or estoppel. Tower v. Moskowitz, 262 So.2d 276 (Fla. 3d Dist. 1972).

1. The relevant portions of the will are as follows:
"I. I do hereby give, devise and bequeath my real properties located at 2195 and 2197 N.W. Seventh Avenue, Miami, Florida, and all my real property on N.W. 22nd Street, Miami, Florida, to my beloved wife, ETHEL MOSKOWITZ, for life, but upon her death or remarriage, the said properties shall go to my beloved son, MARTIN TOWER, in fee."
"V. It is my desire and wish and I do hereby direct that my son, MARTIN TOWER, shall have the right to occupy as his home the premises which he now occupies over the store premises at 2195 N.W. Seventh Avenue, Miami, Florida, and also have possession of the store premises at 2195 N.W. Seventh Avenue, Miami, Florida, which he presently occupies, both for the sole consideration of Eighty ($80.00) Dollars per month as rental for the both said premises as long as he shall desire, it being understood, however, that the said MARTIN TOWER shall also be required to pay all real estate taxes that may become due on said premises during the time he occupies the same." Tower v. Moskowitz, 262 So.2d 276, 277 (Fla. 3d Dist. 1972).