she was being placed (an illicit relationship which was not condoned by the court) was nevertheless found to be preferable to a non-family situation.

In our opinion, no such unusual circumstances exist here. The choice is not between denying the father visitation rights or granting them. The question is whether it would be in the best interest of the children to protect them from the influence of the father's illicit relationship to the extent that is possible. We conclude that it would and that this can be done by limiting his visitation rights to situations where the paramour is not present. If at some future time the relationship matures into a marriage as the father indicated it would, then the order can be changed.

We think this is consistent with the *Sorace* case. The effect of the illicit relationship is most present at bedtime. In *Sorace*, there were no overnight visitation rights. On its face we cannot find that the *Sorace* court approved an exposure to extra-marital relationships. We find that such exposure could be damaging to the children and the effects of such an experience could be far reaching.

The court has a heavy responsibility in protecting the interests of the children who are brought before it. It is not too much to ask the father to accept the limitations on his visitation rights as we propose to do. He may be slightly inconvenienced, but the children's interests will be protected, and that is what is required of us.

ORDER OF COURT

NOW, May 26th, 1978, visitation rights are granted to Curtis D. North, father of Christopher and Ryan North, every second week-end beginning Friday, May 26, 1978, at 6:00 p.m. through Sunday, May 28, 1978, at 7:00 p.m. prevailing time in Chambersburg, Pennsylvania. In addition, the father shall have the right to visit with the children every second holiday beginning with Independence Day, July 4, 1978, from 6:00 p.m. on the day preceding the holiday until 7:00 p.m. on the holiday. The other holidays contemplated by this Order include Labor Day, Veterans' Day, Thanksgiving Day and Memorial Day.

In addition, the father shall have the right to visit with the children five days during the Christmas-New Years period. For convenience of calculating the time, the five days shall be at the beginning of the school vacation in the district where the children reside or at the close. In 1978, the father's visitation shall be the last five days and alternately thereafter.

In addition, the father shall have the right to visit with the children for two weeks during the summer at the time of his vacation, from 6:00 p.m. on the Friday preceding the two-week period until 7:00 p.m. on the Sunday concluding the period. In order to exercise these rights, the father shall give the mother at least three weeks prior notice of his intention to do so.

These visitation rights granted to the father shall not be exercised in the presence of any person with whom the father may be living out of wedlock.

Each party shall pay his and her own costs.

Editor's Note: This case appealed to Pa. Superior Court on June 13, 1978.

KING v. EBERLY (NO. 2), C.P. Franklin County Branch, A.D. 1977-346

Exceptions - Warranty of habitability - Builder-Vendor - Defective Home

1. The term "builder-vendor" includes any builder who places a new house on any tract of land and then offers it for sale, as contrasted with the builder who constructs a house on ground owned by the person who intends to occupy it.

2. The test of whether a house is defective for the purpose of the implied warranty of habitability is one of reasonableness in the construction of the house.

George E. Wenger, Jr., Esq., Attorney for Plaintiffs

David S. Dickey, Esq., Attorney for Defendants

OPINION AND ORDER

Heard befor Eppinger, P.J., Keller, J.; Opinion by

EPPINGER, P.J., May 26, 1978:

This action was heard by the Court without a jury. Following the trial, the Court issued Findings of Fact, Conclusions of Law and a verdict finding for Robert D. King and Gail I. King, husband and wife (Kings) plaintiffs and against Ronald E. Eberly and Nancy L. Eberly, husband and wife (Eberlys) defendants in the amount of $5,523.00.

The suit was for damages arising out of a water condition in the basement of the house purchased by the Kings from the Eberlys. The Court found that the Eberlys were builder-vendors and that the water condition that existed was a breach of the implied warranty of habitability recognized in *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972). The case was tried on the theory that the Kings were entitled to damages on the basis of current maket values. All of the expert testimony offered by both the Eberlys and the Kings stated current values and at no time did the Eberlys suggest during the trial that the recovery should be limited by values existing at the time of the sale.

The Eberlys excepted to the present values determined by the Court. It was found that the premises unaffected by the water condition would have a value of $44,700 and affected by the water condition had a value of $39,300. In making these findings the Eberlys contend that the verdict was against the weight of the evidence.

It was also contended that the Court erred in finding that the Eberlys were builder-vendors.

BUILDER-VENDORS

In the Court's opinion filed June 29, 1977, we reviewed the *Elderkin* decision, noting that where the water supply was not potable, the doctrine of caveat emptor did not apply, because as a matter of public policy, it is more reasonable for the builder-vendor to bear the risks of defects in the house. The Supreme Court stated in *Elderkin* that one who purchases a development house relies on the skill of the developer that the house will be a suitable building unit.

Though the issue was not raised during the argument on the Preliminary Objections in the nature of a demurrer, Eberlys now contend that they were not builder-vendors because they had not laid out the development in which the Kings' house was built. We reject this argument. It is our view that the term builder-vendor includes any builder who places a new house on any tract of land and then offers it for sale. This is to be contrasted with the builder who constructs a house on ground owned by the person who intends to occupy it.

The further argument made by the Eberlys was that the *Elderkin* case should be distinguished from the present one because there is a difference in the defects present in each situation. In *Elderkin* the well-water drilled by the builder was not potable. Eberlys contend this was a *constant* problem

which diminished the habitability of the house on a daily basis and caused constant and serious inconvenience to the purchasers. The present case, the Eberlys say involves only an *intermittent* problem, one occurring only in periods of heavy rains.

In our earlier opinion we noted that the same theory of implied warranty of habitability was applied by the Indiana Court in *Theis v. Heuer*, 280 N.E.2d 300 (1972) where water came into the house during heavy rains, in *Hanavan v. Dye*, 4 Ill. App. 3rd 576, 281 N.E.2d 398 (App. Ct. 3rd Dist., 1972), where water covered the first floor of plaintiffs' home to ankle depth about 25 times. In *Elmore v. Blume*, 31 Ind. App. 3rd 643, 344 N.E.2d 431 (1975) the plaintiff was awarded damages for the costs to repair defects caused by water entering the house. In our case, it was stated the situation could not be remedied.

The test of whether a house is defective for the purpose of the implied warranty of habitability is one of reasonableness in the construction of the house. *Waggoner v. Midwestern Development, Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967). In *Waggoner* the lower court dismissed a claim for damages on the theory of breach of implied warranty of habitability, but it was reinstated on appeal, where there was a seepage of water into the house after several heavy rains. In our earlier opinion we said:

> **It is not unreasonable to say that contemporary standards require that a house be built so that the basement does not flood to about four feet rendering the water system inoperable. On these occasions, at least, the house would not be habitable.** [1]

PRESENT VALUES OF THE PROPERTY

In this case, it was not seriously contested that the house suffered from water seepage during rainy periods. The Kings testified to depths up to four feet. Some suggestions were made for partially correcting the defect, but the Court was of the view that actually correcting it would be impossible. It was the suggestion of the real estate experts that the basement be filled and that the house become a house without a basement.

As might be expected the real estate experts called to testify to the value of the property unaffected by the water condition and as affected by the condition varied substantially

[1] Editor's Note = Reported at 1 Franklin 33

as between those testifying for the Eberlys and the one testifying for the Kings. The finder of facts may believe all or none or part of the testimony of any witness. *Commonwealth v. Neil*, 447 Pa. 452, 290 A.2d 922 (1972).

The Court may consider all of the testimony in reaching its conclusions, believing some and rejecting other even from the same witness. In this case, the house and the conditions were sufficiently described so that absent testimony of valuation experts, the Court could reach his own conclusions.

Since this is true, it is meritless to discuss the relative qualifications of the experts or the certainties or defects of their positions.

ORDER OF COURT

NOW, May 26, 1978, the defendants Ronald E. Eberly and Nancy L. Eberly having filed exceptions to the Court's adjudication in this matter filed March 16, 1978, after argument on the exceptions before the court en banc, the exceptions are overruled.

Editor's Note: See earlier opinion, same case, 1 Franklin 31.

COMMONWEALTH v. HOGAN, et al., C.P. Cr. D., Franklin County Branch, No. 128 of 1977

Criminal Law - Summary Offense - Burden of Proof - Proof of elements of Offense Under Sect. 36 (5) of Weights and Measures Act of 1965 (76 P. S. Sect. 100-36(5)) - Unconstitutional Presumption of Guilt - Demurrer to Evidence

1. In any criminal prosecution, the Commonwealth has an unshifting burden to prove beyond a reasonable doubt all elements of the crime.

2. A necessary element of the offense under Section 36 (5) of the Weights and Measures Act of 1965 charged against this nonpossessor of the commodity was that the defendant packaged the commodity.

3. Evidence that the defendant was the manufacturer of the nails in question is insufficient to establish proof of such element, but at best gives rise to an inference that the defendant could have been responsible for their packaging.

4. An inference does not shift the burden of persuasion or relieve the Commonwealth of the burden of proving every essential element of the alleged offense beyond a reasonable doubt.

5. Another necessary element in this case was that the packages of nails tested by the prosecutor must have contained the same quantity of nails as they did when they left the possession and control of the defendant.

6. Since the packages were purchased by the store from a third party, shipped to it from an undisclosed location, were not sealed, were placed on counters in the store open to the public and susceptible to shoplifting, there are too many unanswered imponderables to satisfy the requirements of proof beyond a reasonable doubt, even though it is not the burden of the Commonwealth to disprove all other non-criminal possibilities.

7. It is the continuing presumption of innocence which is the basis for the requirement that the state has the never shifting burden to prove guilt beyond a reasonable doubt.

8. A procedure by which when the weighing scale indicator falls exactly between an odd and even number on the scale, the Commonwealth always rounds the weight off to the even number, constitutes, in effect the taking of a presumption in favor of the Commonwealth part of the time, and this is constitutionally impermissible under the general rule that whenever conflicting presumptions are raised, the presumption of innocence must prevail.

9. A demurrer to the evidence in a criminal case must be sustained when the Commonwealth, in its case in chief, fails to prove the defendant guilty beyond a reasonable doubt.

John C. Childe, Esquire, Deputy Attorney General, Attorney for the Commonwealth

Kenneth F. Lee, Esquire, Attorney for the Defendant

OPINION

KELLER, J., June 29, 1978:

On August 17, 1976, a criminal complaint was filed by Charles C. Goodhart of the Pennsylvania Department of Agriculture, Bureau of Standard Weights and Measures, charging R. P. Hogan, Vice-President, Commercial Operating and Wheeling Corrugating Company, Division of Wheeling-Pittsburgh Steel Corporation with violation at Moore's #23 on August 22, 1976 of the Act of December 1, 1965, P.L. 988, "In that the defendant and his servants or agents did then and there on the above stated date and place aforesaid mentioned offer for sale at retail 36-16 oz. packages of size 8 flooring nails which were unreasonably short weight." Justice of the Peace Gotwals found the defendants guilty and an appeal was taken from the summary conviction to this