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SALES

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MANUFACTURER'S LIABILITY FOR REDHIBITORY VICES

The intricacies of the implied warranty for hidden defects were brought before the courts again in *Breaux v. Winnebago Industries, Inc.*¹ Plaintiff bought a mobile home from one of the defendants. After having his endurance tested through considerable frustration and inconvenience, the result of a perversely persistent malfunctioning of the vehicle that the skill of several mechanics was unable to overcome, plaintiff instituted action against the dealer from whom he acquired the vehicle and against the manufacturer, with whom he had no direct contractual relation, seeking rescission and damages for redhibitory defects. The trial court rendered judgment in favor of both defendants. On plaintiff's appeal, the First Circuit Court of Appeal reversed. The manufacturer, Winnebago Industries, Inc., had raised an exception of no cause of action based on the absence of a seller-purchaser relationship with the plaintiff, asserting, further, that such contractual relationship is essential for the purchaser to have an action for rescission or *quanti minoris* based on redhibitory defects.² The court of appeal disposed of the exception in favor of the plaintiff on the authority of the views expressed by the Louisiana supreme court in *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*³ In that case, the supreme court held a national distributor, classified as a manufacturer, solidarily liable with an automobile retailer for the price and other allowable expenses because of the redhibitory vices in a vehicle.

Both the supreme court and the court of appeal deserve praise; the latter for a fair decision, the former for having furnished the grounds in a prior one. Because of the connection between the cases, however, both decisions leave some uncertainty as to the true theory on which they were predicated.⁴

Indeed, in *Media*, the supreme court asserted that a manufacturer impliedly warrants that its product is free from redhibitory vices and defects, and that there is no necessity of privity of contract

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1. 282 So. 2d 763 (La. App. 1st Cir. 1973).

2. *Id.* at 767.

3. 262 La. 80, 262 So. 2d 377 (1972).

4. See Note, 33 LA. L. REV. 724 (1973); Note, 47 TUL. L. REV. 473 (1973). See also Babst, *Redhibition and Tort! Are They Enough?* 22 LA. B. J. 19 (1974); Campbell, *The Remedy of Redhibition: A Cause Gone Wrong*, *Id.* at 27.

for a purchaser to bring an action of rescission against the manufacturer. In the words of the majority: "Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover, whether the suit be strictly in tort or upon implied warranty."⁵ After supporting this view with two of its earlier decisions where the facts differed from the *Media* situation,⁶ the court added: "The pecuniary loss resulting from an unusable vehicle is recoverable when there is an *express* warranty without privity Although there is a split of authority on the question, we find no adequate reason for not applying the same rule and allowing recovery when there is an *implied* warranty without privity."⁷ For that statement, the court found support in decisions rendered in other states.⁸ It seems from the quoted language that the *Media*, and therefore the *Breaux*, decisions have adopted the views currently prevailing at common law in the matter of product liability. Although the theoretical grounds for those views are not yet clear, there is good reason to believe that the main orientation is towards strict tort liability.⁹ A footnote to a paragraph of the majority opinion in *Media*, however, and the approach taken in the concurring opinion in the same case leave room for doubt that strict tort liability theory is what the court intended as grounds for decision.¹⁰ That theory is not the best instrument to obtain the dissolution of a contract of sale attended by return of the defective thing, recovery of the price, and damages incidental to a vendor's breach of his obligation to deliver a suitable thing.¹¹

5. 262 La. 80, 90, 262 So. 2d 377, 381 (1972).

6. See *Marine Ins. Co. v. Strecker*, 234 La. 522, 100 So. 2d 493 (1958), where, on the strength of article 2315 of the Louisiana Civil Code, a tenant was granted recovery against a party who contracted with his landlord, for damage to the tenant's property, and *LeBlanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952), the celebrated case where plaintiff recovered against the manufacturer for personal injuries caused by an extraneous substance found in a soft drink bottle, a recovery certainly not grounded by the court on any contractual warranty. See particularly *id.* at 932, 60 So. 2d at 877 (Hawthorne, J., dissenting).

7. 262 La. 80, 91, 262 So. 2d 377, 381 (1972).

8. *Id.*

9. See Note, 47 TUL. L. REV. 473, 479 (1973).

10. *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 89 n.3, 262 So. 2d 377, 381 n.3 (1972): "Under French law, the right to sue the original vendor for breach of warranty of quality is transmitted with the object of the sale." (Citations omitted.); *Id.* at 92, 262 So. 2d at 382 (Dixon, J., concurring).

11. Whether product liability is governed by tort or contract is certainly not a matter of mere academic importance. Very serious problems involving jurisdiction, prescription, conflict of laws and other matters depend on a final choice of theory. See Percy, *Products Liability—Tort or Contract or What?* 40 TUL. L. REV. 715, 726 (1966); Note, 47 TUL. L. REV. 473, 479 (1973). Regardless of these reasons, it cannot be denied that the weight of the circumstances involved in factual situations has a force of its

The same results as in *Media* and *Breaux* can be attained through remedies provided in the Louisiana Civil Code. This suggestion leads to the certainly not novel question of whether a purchaser, disappointed by a defective thing, may sue his vendor's vendor, or any other party in the chain of transferors of the thing ending with the original manufacturer.¹² The advantages of such an action for the purchaser are well known. If his vendor has fallen into insolvency, which is precisely what happened in *Media*, the purchaser can still sue another solvent party. Moreover, if his vendor was in good faith, that is, if he was ignorant of the vices of the thing he sold, and he failed to repair it, the purchaser may recover from him only the price and the expenses of the sale, while the manufacturer, because of *spondet peritiam artis*, is presumed to have known the defects of the thing of his own making. This casts him in the position of a vendor in bad faith and he is therefore liable also for damages.¹³

The question put must be answered in the affirmative. Support for this conclusion can be found in the doctrine surrounding the warranty against eviction, sister of the warranty against redhibitory vices.¹⁴ In the matter of eviction, article 2503 of the Louisiana Civil Code provides: "But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty

own. A case involving a soft drink bottle or a can of peas, purchased for a few coins, and extensive personal injuries caused to the purchaser by such things, may sound in tort, while a case involving an expensive automobile where the purchaser is primarily concerned with recovering the price he paid for a defective thing sounds in contract. For a discussion of the choice of theory in modern French law, see Mazeaud, *La responsabilité civile du vendeur-fabricant*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 611 (1955) [hereinafter cited as *Mazeaud*].

12. See Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327 & 529 (1940) [hereinafter cited as *Morrow*]. See also Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 273 (1950).

13. For *spondet peritiam artis*, the Roman principle which expresses the presumption that a manufacturer knows the defects of the things he makes, see 3 OEUVRES DE POTHIER 88 (Bugnet ed. 1861). See also *Mazeaud* at 615; *Morrow* at 539; *Radalec, Inc. v. Automatic Firing Corp.*, 228 La. 116, 81 So. 2d 830 (1955); *Tuminello v. Mawby*, 220 La. 733, 57 So. 2d 666 (1952); *George v. Shreveport Cotton Oil Co.*, 114 La. 498, 38 So. 432 (1905). LA. CIV. CODE art. 2531, as amended by La. Acts 1974, No. 673 provides: "The seller who knew not the vices of the thing is only bound to repair, remedy or correct the vices . . . or if he be unable or fails to repair, remedy or correct the vice, then he must restore the purchase price, and reimburse the reasonable expenses occasioned by the sale, as well as those incurred for the preservations of the thing, subject to credit for the value of any fruits or use which the purchaser has drawn from it." *Id.* art. 2545 provides: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages." See also FRENCH CIV. CODE art. 1645.

14. See LA. CIV. CODE art. 2476; FRENCH CIV. CODE art. 1625.

against all others." In case of eviction, then, there can be no doubt that the purchaser has an action against his vendor's ancestor in title through the notion of subrogation, as the article has it. The quoted sentence of article 2503, however, was introduced by an amendment in 1924.¹⁵ Until then, and since the Digest of 1808, the article read as did its French ancestor, article 1627 of the Code Napoleon, that is, with no reference to the purchaser's action against his vendor's vendor.¹⁶ Despite the lack of an express code provision, however, neither the French doctrine and jurisprudence nor the Louisiana jurisprudence prior to 1924 has ever doubted that such an action existed.¹⁷

That certainty is warranted by a well established principle that a traditional authority expresses in the following words: "Successive contracts of sale, in transferring ownership of the thing also transfer, from hand to hand and as accessories, all actions in warranty arising from each sale which are finally reunited in the hands of the last purchaser."¹⁸ The principle, undoubtedly known to the Louisiana redactors, is predicated of all actions in warranty and cannot therefore be limited to eviction alone. Indeed, under articles 2476 of the Louisiana Civil Code and 1625 of the French, the vendor's obligation of warranty is twofold: "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices." Thus, the evicted purchaser would have an action against his vendor's vendor even without the 1924 amendment to article 2503. By the same token, the purchaser has an action for redhibition against his vendor's ancestors in the chain of transfers, even in the absence of express code language to that effect.¹⁹

It might be said that in French law the principle according to

15. See La. Acts 1924, No. 116. Research into the corresponding House and Senate journals has failed to reveal the legislative motive for the amendment. *But see* Van-norgh t v. Foreman, 1 Mart. (N.S.) 352 (La. 1823); Carpenter v. Herndon, 173 La. 239, 136 So. 577 (1931).

16. See 3 LOUISIANA LEGAL ARCHIVES 1377-78 (1942).

17. See 5 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS n° 89 (5th ed. 1907) [hereinafter cited as AUBRY & RAU]; 24 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 230 (1877); 10 PLAINOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 102-03 (1932) [hereinafter cited as PLAINOL ET RIPERT]. See also Clark v. Warner, 6 La. Ann. 408 (1851).

18. 9 TOULLIER, LE DROIT CIVIL FRANÇAIS 121 (Duvergier ed. 1838) [hereinafter cited as TOULLIER].

19. See AUBRY & RAU 114; 17 BAUDRY-LACANTINERIE ET SAIGNAT, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL — DE LA VENTE ET DE L'ÉCHANGE 368-69 (2d ed. 1900); 10 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL 209 (1897); PLAINOL ET RIPERT 145-46. See also Cass., Nov. 12, 1884, D. 85.1.357; Paris Feb. 24, 1882, D. 83.2.78; Bordeaux, Jan. 11, 1888, D. 89.2.11.

which a vendor transfers all actions as accessories to the thing is consistent with article 1166 of the Code Napoleon: "The creditors, however, may exercise all the rights and actions of their debtor, with exception of those which are exclusively attached to the person." In Louisiana, the absence of such an article might seem to raise an obstacle to the application of the principle, but such an objection would not rest on firm grounds. The French article was reproduced in the Louisiana Digest in 1808.²⁰ Though it was eliminated in the revision of 1825, a comment by the redactors in the Project sufficiently explains that their intention was to suppress a rule that they considered obvious, without doing away with the underlying principle they regarded in the comment as undoubtedly valid.²¹

At any rate, this line of reasoning merely corroborates the Louisiana redactors' awareness of the existence of a certain rule. It should not be taken to mean that the purchaser's right to address himself to his vendor's vendor is based on that rule. Under article 1166 of the Code Napoleon, the creditor's action against his debtor's debtor is oblique, that is, the creditor is allowed to exercise an action that, in actuality, belongs to his debtor. The action of the purchaser against the party who transferred to his vendor is instead direct, that is, it is an action he obtained from his vendor by means of a cession or assignment implied in the sale.²²

That the purchaser is subrogated to the seller's rights to bring

20. See La. Digest of 1808, ch. III, sec. VI, art. 66.

21. See 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825 at 263 (1937): "Suppress all the articles of section 6 and the title. This section consists only of three articles, the first of which is already inserted in substance in the third section of the preceding chapter. The two other contain provisions which are stated as exceptions to the rule contained in the first, but which, when examined, are found not to be such. The rule is, that contracts neither avail nor injure any but the parties. The exceptions stated, are, *that creditors may enforce, for their own benefit, contracts made by their debtors*, and that they may also invalidate such contracts when they have been made to defraud them. But when the creditor sues to recover a debt due to his debtor, he does not do it as a party to the contract, still less is it in that quality that he acts in endeavoring to set aside an agreement made to his prejudice." (Emphasis added.) Compare with LA. CIV. CODE arts. 1990-92. See also A. YIANNPOULOS, PROPERTY in 2 LOUISIANA CIVIL LAW TREATISE 229 n.117 (1967); Belcher & Creswell v. Johnson, 114 La. 640, 38 So. 481 (1905); Landry v. Hawkins, 156 So. 795 (La. App. 1st Cir. 1934). Article 1166 of the Code Napoleon, however, is mentioned in the text above only for its consistency with the principle that the vendor transfers the thing to the vendee *cum omnis causa* (with all actions) but not as a suggestion that the purchaser's action against the ancestor in title of his vendor is necessarily founded in that article. For further discussion of the matter see 10 PLANIOL ET RIPERT 102-03 TOULLIER 121.

22. See PLANIOL ET RIPERT 102-03. But see Cass. Com., Feb. 27, 1973, D. 1974.138 & note by Malinvaud criticizing the opposite view. See also TOULLIER 121.

an action for redhibition had been recognized by the Louisiana jurisprudence in *McEachern v. Plauche Lumber & Construction Co.*²³ In that case, however, the court implied that the purchaser has a choice of actions and that once he has elected to sue his vendor he has no right to an "action in solido" against previous vendors.²⁴ The grounds for this contention are not clear. In France, under the same rules, the jurisprudence did not hesitate to allow a purchaser to join in his demand the vendor and a previous vendor, or the manufacturer as the case might be.²⁵ The decision rendered in *Media* departs entirely from *McEachern* and establishes the correct idea of not forcing the purchaser to make a choice. That the defendants in such a suit should be cast *in solido* is consistent with a doctrine developed by the Louisiana jurisprudence, a doctrine according to which parties who owe the same performance, although each for a different cause, are bound by an imperfect solidary bond.²⁶

In the matter of solidarity, however, the decision in *Media* left room for some doubt. Indeed, under the facts in that case, there was no difficulty in holding vendor and distributor liable *in solido*, as plaintiff was seeking only recovery of the price and expenses resulting from the sale. A question remained, however, as to the right solution when the purchaser also seeks damages. In such a case, only the manufacturer, or distributor, or whoever is placed in the position of a vendor in bad faith is liable for such damages, but not the vendor in good faith.²⁷ Such a difference in the position of two defendants would prevent casting them *in solido*. While the *Breaux* decision was not directly addressed to this matter, it aptly dispelled any doubt by correct interpretation and application of the rule established in *Media*. The court held vendor and manufacturer solidarily liable for the price and expenses incurred for the preservation of the thing, and also held the manufacturer singularly liable for damages not recoverable against the vendor.²⁸

23. 220 La. 696, 57 So. 2d 405 (1952).

24. *Id.* at 707, 57 So. 2d at 408.

25. See Cass. Nov. 12, 1884, D. 85.1.357. See also Paris, Feb. 24, 1882, D. 83.2.78; Bordeaux, Jan. 11, 1888, D. 89.2.11.

26. See, e.g., *Gay & Co. v. Blanchard*, 32 La. Ann. 497 (1880); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term — Obligations*, 34 LA. L. REV. 231 (1974). The matter of solidarity greatly depends on whether the purchaser's action against his vendor's vendor is oblique or direct; if oblique, no solidary bond would exist between a vendor and his ancestors in title vis-a-vis the purchaser. See on this 4 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 298 b (6th ed. Bartin) in 1 CIVIL LAW TRANSLATIONS at 24 (La. St. L. Inst. transl. 1965).

27. See LA. CIV. CODE arts. 2531, 2545.

28. *Breaux v. Winnebago Industries, Inc.*, 282 So. 2d 763, 770 (La. App. 1st Cir. 1973).

In *Media*, the court placed a national distributor in the position of a manufacturer insofar as *spondet peritiam artis* is concerned. As asserted in *Media*: "By placing automobiles on the market, the supplier represents to the public that the vehicles are suitable for use."²⁹ Such a view may well be taken as a step in the direction of applying *spondet peritiam artis* not only to manufacturers but also to professional vendors. Traditional and modern doctrine lend sufficient support for an extensive application of the adage.³⁰ If clearly adopted, this manner of handling the presumption of knowledge of defects in the thing sold would allow the same fair results as in *Media*, but without need of straining concepts. Furthermore, the interests that products liability tends to protect would be much better protected by holding professional vendors in the same position as manufacturers.

These reflections on the *Media* and *Breaux* cases are applicable also to *Clark v. McBride Dodge, Inc.*³¹ and *Baughman v. Quality Mobil Homes, Inc.*³²

CERTAIN VERSUS ALEATORY CONTRACTS

An interesting problem related to the matter of classification of contracts is involved in *Cryer v. M & M Manufacturing Co.*³³ Defendant acquired from plaintiff the right to manufacture an outdoor heater for an agreed price of \$12,500 in cash plus a royalty of \$1.35 for each unit manufactured. Defendant further agreed to manufacture a minimum of 5000 units in the first year. No express warranty as to the capacity of the heater or its suitability for orchard-heating purposes was contained in the sale. After producing a small number of units, defendant discovered that the heater failed to generate sufficient heat to protect vegetation. Extensive unsuccessful efforts were made to correct this deficiency and finally, considering the heaters unmarketable, defendant abandoned its plans to manufacture them. At the end of the first year, plaintiff brought suit for royalties and attorneys' fees under the contract. Defendant reconvened for rescission of the sale on grounds of error, failure of cause and redhibitory vice. The reconventional demand was dismissed and plaintiff was granted recovery for royalties on 5000 heaters that were never manufactured.

29. 262 La. 80, 91, 262 So. 2d 377, 381 (1972).

30. See 3 OEUUVRES DE POTHIER 88 (Bugnet ed. 1861) where knowledge of the defects is presumed not only of the artisan who has made the thing but also of the merchant who has made a profession of selling things of that sort. See also *Mazeaud* at 616-17.

31. 289 So. 2d 841 (La. App. 4th Cir. 1973).

32. 289 So. 2d 376 (La. App. 1st Cir. 1973).

33. 273 So. 2d 818 (La. 1972), *aff'd on rehearing*, 273 So. 2d 828 (La. 1973).

The decision stands on firm grounds regarding the dismissal of the allegations of error, failure of cause and redhibitory vice and the upholding of the sale, with the attendant consequence that plaintiff could keep the price he received in cash. It is different insofar as the royalties were concerned. Indeed, holding the defendant to pay royalties for heaters that were not manufactured amounts to a finding that defendant assumed an unconditional obligation to manufacture such heaters regardless of usefulness or marketability. A closer look at the contract reveals that such a finding is not correct. In purchasing the right to manufacture the heaters, defendant no doubt assumed the risk of the transaction in the sense that producing the heaters might or might not have been possible, useful or profitable. It does not follow that defendant assumed the obligation to pay royalties even if production of the heaters was not possible, useful or profitable.

Regarding the purchase of manufacturing rights for a price in cash, the contract is "certain" according to the terminology of article 1776 of the Louisiana Civil Code, while regarding the obligation to pay royalties, the contract is aleatory, under the same article.³⁴ It is not disputed that a contract may fall under more than one category. It does not have to be aleatory in whole; it may be so only in part.³⁵ French jurisprudence asserts that courts are sovereign in determining the aleatory nature of a contract, and also in determining whether a contract is of a mixed nature, that is, part synallagmatic and part aleatory.³⁶

In this case, the existence of an implied condition, namely, the heater's susceptibility to useful manufacture, makes the contract aleatory. Quite often, the parties clearly intend to make the effects

34. LA. CIV. CODE art. 1776: "A contract is aleatory or hazardous, when the performance of that which is one of its objects, depends on an uncertain event. It is certain, when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated." See 1 S. LITVINOFF, OBLIGATIONS in 6 LOUISIANA CIVIL LAW TREATISE 191-93, 406 (1969). The court recognizes that the contract was speculative in some degree. *Cryer v. M & M Mfg. Co.*, 273 So. 2d 818, 824 (La. 1972). A contract, however, may be speculative and still be "certain." Speculative contracts and aleatory contracts are different things. A contract is speculative when there is a conjecture about the lesser or greater value of the contractual object. From this standpoint there is always some degree of speculation in a business contract. A contract is aleatory when, according to the "alea," one of the two parties may not have to perform, or may be bound to perform in a lesser or greater extent.

35. See KAHN, LA NOTION DE L'ALEA DANS LES CONTRACTS § 74 (1925); 6 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 43 (2d ed. Esmein 1952).

36. See Req., Dec. 28, 1874, D. 76.1.368; July 10, 1899, D. 99.1.592; Civ., April 19, 1882, D. 83.1.77, S. 82.1.368.

of their transaction dependent on a certain fact, but do not make an express condition of it simply because they regard it as something assumed or understood.³⁷ Such a fact cannot be ignored without ignoring the parties' own wishes and interests. It is not too daring, therefore, to consider an implied condition of this sort as the foundation on which the transaction rests, that is, an essential though unexpressed element, the removal or disappearance of which gives rise to the right to have the transaction dissolved.³⁸ Article 2026 of the Louisiana Civil Code lends support to this line of reasoning.³⁹ Additional support is provided by articles 1901 and 1903.⁴⁰

37. See OERTMANN, INTRODUCCIÓN AL DERECHO CIVIL 305 (Spanish transl. 1933).

38. *Id.* For a comparative analysis of the common law doctrine of "constructive conditions" and equivalent civilian notions see 2 PUIG BRUTAU, FUNDAMENTO DE DERECHO CIVIL. DOCTRINA GENERAL DEL CONTRATO 389-90 (1954).

39. LA. CIV. CODE art. 2026: "Conditions are either express or implied. They are express, when they appear in the contract; they are implied, whenever they result from the operation of the law, from the nature of the contract, or from the presumed intent of the parties." (Emphasis added.) See *Cryer v. M & M Mfg. Co.*, 273 So. 2d 818, 826 (La. 1972) (Tate, J., dissenting).

40. LA. CIV. CODE art. 1901: "Agreements legally entered . . . must be performed in good faith." *Id.* 1903: "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect." See 6 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GENERAL 1-30 (1931). This prominent French authority asserts that a party breaches the duty of good faith when he attempts to abuse his right to the detriment of the other party. To force a party to manufacture an unmarketable heater amounts, no doubt, to abuse of right.