

Sales - Redhibitory Action - Action for Breach of Contract - Difference in Prescriptive Periods

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the opposing party.¹⁰ In the instant case, the peculiar sequence of pooling arrangements was sufficient to convince the court that plaintiffs were not aware of the facts. Consequently, it seems clear that the legal principles applied by the court are well grounded in the Louisiana jurisprudence. Although this case was compromised pending decision on the application for rehearing, it is an expression of judicial thought on the lease clause involved and can serve as a guide for future action to all parties interested in mineral operations.

William D. Brown III

SALES—REDHIBITORY ACTION—ACTION FOR BREACH OF CONTRACT—
DIFFERENCE IN PRESCRIPTIVE PERIODS

Plaintiff purchased paint from defendant which defendant had advertised as "guaranteed 100% Mold and Mildew-Resistant All-Purpose White Paint." Plaintiff used the paint on his own house and on another. Within less than a year after application of the paint mildew appeared on both houses. Suit was brought to recover the cost of the paint and the expenses incurred in its application and removal. The trial court held that the action was one in redhibition and, since the suit had been instituted more than two years after the date of the sale and more than one year after the discovery of the defects and deficiencies in the paint, the defendant's plea of prescription was sustained. On appeal, plaintiff urged that the controversy was not controlled by the one-year rule of prescription applicable to the action of redhibition, but instead by that of ten years since the action was to recover damages for breach of contract. The Orleans Court of Appeal stated that "the Supreme Court must still be of the view that . . . this is a redhibitory action," and *held*, affirmed. "[I]n such a case as this, the party who sustains loss is entitled to 'damages' but . . . those damages are such as are contemplated by Article 2545 of the Civil Code [C]onsequently the claim is barred by the prescription period of one year in accordance with Article 2534, if the seller did not know of the defect, or Article 2546 if the

10. *Harvey v. Richard*, 200 La. 97, 7 So.2d 674 (1942); *Hayward v. Carolina Ins. Co.*, 51 So.2d 405 (La. App. 1951). Ratification, while not entirely equitable in nature, must include an intent to confirm, and therefore requires knowledge of all facts surrounding the questioned transaction. *Art. 2272, LA. CIVIL CODE of 1870*; *Otis v. Texas Co.*, 153 La. 384, 96 So. 1 (1923); *Lacaze v. Kelsoe*, 185 So. 676 (La. App. 1939).

seller had such knowledge."¹ *Walton v. Katz & Besthoff, Inc.*, 77 So.2d 563 (La. App. 1955).

Under the Civil Code the redhibitory action lies when the object sold has some vice or defect.² It is also made applicable by the Code to a false declaration of quality.³ The action entitles the buyer either to reject the thing sold and obtain restitution of the price paid and the expenses of the sale⁴ or to keep the thing and obtain a reduction of the price.⁵ He may claim damages only when the seller has knowingly failed to disclose vices or defects in the thing⁶ or has intentionally misrepresented its qualities.⁷ On the other hand when a breach of contract occurs, the buyer may obtain damages.⁸ The good or bad faith of the seller affects only the amount of the recovery.⁹ A buyer's right to recover damages against a good faith seller therefore will depend upon whether the action is treated as one in redhibition or as one for breach of contract. The distinction between these two actions is also important because of the different prescriptive periods applicable to each action.¹⁰ Under the Civil Code of 1808 no distinction was made between good faith and bad faith declarations of quality.¹¹ The seller could be forced to respond in damages, "according to circumstances," whether his declarations were made in good or bad faith.¹² Thus, as to declarations of quality,

1. 77 So.2d 563, 566 (La. App. 1955). It is submitted that the cited language may be misleading. Damages can be recovered only when the seller has knowledge of the defect.

2. Arts. 2520, 2521, 2522, LA. CIVIL CODE of 1870. The action cannot be instituted for vices or defects perceivable on simple inspection or which were revealed to the seller before or at the time of the sale. Further, they must be such as to render the object absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it if he had known of the vice. For a general discussion, see Comment, *The Nature of the Redhibitory Action*, 4 TUL. L. REV. 433 (1930).

3. Arts. 2529, 2547, LA. CIVIL CODE of 1870. Although a declaration of quality is not a vice, it is made subject to the redhibitory action if the reliance of the buyer thereon was the principal motive for making the purchase.

4. Art. 2531, LA. CIVIL CODE of 1870.

5. Art. 2541, LA. CIVIL CODE of 1870. But note especially article 2543, which makes the action for reduction of the price a bar to a further suit in redhibition. That article also provides that the judge has discretionary powers to order a reduction in the price in the redhibitory action. Article 2544 provides that the rules of redhibition will govern the action for a reduction of the price.

6. Art. 2545, LA. CIVIL CODE of 1870. The prescriptive period in this case will not begin to run until discovery of the vice. Art. 2546, LA. CIVIL CODE of 1870.

7. Art. 2547, LA. CIVIL CODE of 1870.

8. Arts. 1926, 1927, 1928, LA. CIVIL CODE of 1870.

9. Art. 1934(1), (2), LA. CIVIL CODE of 1870.

10. Arts. 2534, 2546, 3544, LA. CIVIL CODE of 1870.

11. LA. CIVIL CODE of 1808, 3.6.81, p.-360.

12. *Ibid.*

it was not important to distinguish between the redhibitory action and the action for breach of contract, aside from the difference in the prescriptive periods. It was only through the revision of the articles on redhibition by the redactors of the Civil Code of 1825 that it became important in considering a claim for damages whether or not declarations of quality were made in good or bad faith.¹³ The revised articles remain unchanged in our present Civil Code. In deciding which action should apply, little difficulty is encountered in determining what constitutes a vice or defect giving rise to the redhibitory action. Great difficulty does arise, however, in determining what constitutes a declaration of quality, giving rise to the redhibitory action, as distinguished from a descriptive statement identifying the object to be delivered under the terms of the contract and resulting in a primary obligation. No rules are provided in the Civil Code to help in making this distinction. At common law similar problems are discussed in terms of condition and warranty.¹⁴ If the declaration constitutes a promise which must be fulfilled in order to render enforceable the promise of performance given in return, the declaration is called a condition precedent.¹⁵ A warranty, on the other hand, is defined as "an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract."¹⁶ The seller's failure to comply with a condition precedent entitles the buyer

13. *Projet of the Civil Code of 1825*, 1 LA. LEGAL ARCHIVES 308, 311 (1937); see *Compiled Edition of the Civil Codes of Louisiana*, 3 LA. LEGAL ARCHIVES 1399 (1942). The redactors of the Code said of the change: "This section is remoulded entirely, and although the principles contained in it remain the same, and there are few additional provisions, yet we think that the matter is here presented with more order and clearness." *Projet of the Civil Code of 1825, supra*, at 308.

14. BENJAMIN, SALE 553 *et seq.* (8th ed. 1950); CORBIN, CONTRACTS §§ 14, 622 *et seq.*, 639 *et seq.*, 1101 (1951); 1 WILLISTON, SALES § 178 *et seq.* (rev. ed. 1948); Brown, *The Laws of Sales in the United States*, 8 COLUM. L. REV. 82 (1908); Burdick, *Conditions and Warranties in the Sale of Goods*, 1 COLUM. L. REV. 71 (1901); Costigan, *Conditions in Contracts*, 7 COLUM. L. REV. 151 (1907); Hill, *Conditions and Warranties*, 1 RES JUDICATAE 146 (1935-38); Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327 (1940); Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 273 (1950); Stoljar, *The Contractual Concept of Condition*, 69 L.Q. REV. 485 (1953); Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods—I*, 15 MODERN L. REV. 425 (1952); Williston, *Rescission for Breach of Warranty*, 16 HARV. L. REV. 465 (1903); Williston, *What Constitutes an Express Warranty in the Law of Sales*, 21 HARV. L. REV. 555 (1908); Note, 21 MICH. L. REV. 478 (1923); Recent Cases, 71 SO. AFR. L.J. 333 (1955).

15. BENJAMIN, SALE 553, 554, 555 (8th ed. 1950); 3 CORBIN, CONTRACTS §§ 626 *et seq.*, 639 *et seq.* (1951); 1 WILLISTON, SALES §§ 178, 179, 180 (rev. ed. 1948).

16. 1 WILLISTON, SALES § 181 (rev. ed. 1948); see BENJAMIN, SALE 553 *et seq.* (8th ed. 1950),

to reject the goods and sue for damages.¹⁷ Although a breach of warranty entitles the buyer to damages, it does not give him the right to reject the goods.¹⁸ The problem at common law of determining when a particular stipulation is a warranty or a condition, therefore, is similar to the Louisiana problem of determining when the redhibitory action or action for breach of contract lies. Rules developed by common law authorities to aid in making this distinction may be helpful in applying Louisiana law.¹⁹ Professor Williston, in discussing the English law of warranty, mentions three questions which may be asked, two of which will be the basis of this discussion: (1) Was the statement made as to specific goods? (2) Was the statement collateral to the principal undertaking?²⁰ Where the parties are dealing with specific goods, any declaration concerning the quality of the goods is collateral to the principal obligation to deliver the goods in question. Such a declaration therefore is a warranty and not a condition. Even where the parties are not dealing with specific goods, a statement by the seller that the goods possess a certain quality is a warranty and not a condition, unless the absence of the quality makes the thing delivered different in kind from that described in the contract.²¹ Delivery of goods not of the kind described in the contract is a breach of the principal, not a collateral, undertaking. Delivery of goods generally answering the description, on the other hand, but not of the quality contracted for constitutes only a breach of warranty. It would seem that each case must be judged on its own facts. In England and the various American jurisdictions, the distinction between conditions and warranties is no longer important.²² In England, the courts distinguish between conditions and warranties on the basis of the parties' "intentions" and without an exact formula.²³ In the majority of the American jurisdictions the principles of warranty have

17. BENJAMIN, SALE 555 (8th ed. 1950); 5 CORBIN, CONTRACTS § 1114 (1951); 1 WILLISTON, SALES § 181 (rev. ed. 1948).

18. BENJAMIN, SALE 555 (8th ed. 1950); 1 WILLISTON, SALES § 181 (rev. ed. 1948).

19. See particularly BENJAMIN, SALE 555-56 (8th ed. 1950); 1 WILLISTON, SALES §§ 182-85 (rev. ed. 1948).

20. 1 WILLISTON, SALES § 182 (rev. ed. 1948). His third question relates to executory contracts and is not pertinent here. It should be noted that Williston does not approve of this approach, but favors abolition of the distinction. *But see* discussion in BENJAMIN, SALE 609 *et seq.* (8th ed. 1950).

21. See 1 WILLISTON, SALES § 184 (rev. ed. 1948), citing *Bailhache, J.*, in *Harrison v. Knowles*, [1917] 2 K.B. 606.

22. 1 WILLISTON, SALES § 184 (rev. ed. 1948); see references in note 24 *infra*.

23. 1 WILLISTON, SALES § 183 (rev. ed. 1948); see Brown, *The Law of Sales in the United States*, 8 COLUM. L. REV. 82, 86 (1908); Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 340 (1940).

been altered so that now, even for breach of warranty, a buyer may reject the goods and obtain damages.²⁴ Furthermore, the Uniform Sales Act²⁵ and the Uniform Commercial Code²⁶ provide that the seller "expressly warrants" that the goods sold by description will comply with the description given. As to declarations of quality, the same result appears to have been possible under the Louisiana Civil Code of 1808. The change in the Civil Code of 1825,²⁷ however, created a problem for the Louisiana courts which has been avoided in most jurisdictions. The French *Code Civil* contains no provision relating to declarations of quality about the object sold. Only in dealing with warranty in case of eviction does it mention that the "parties may by particular agreement add to the obligation of warranty . . . or diminish its effect."²⁸ The French commentators do not elaborate on this provision.²⁹ They merely mention that the "absence of quality does not give rise to the redhibitory action,"³⁰ without going into the question what its legal consequences are. The Spanish *Código Civil* of 1889 follows the French *Code Civil* and there is the same lack of discussion concerning declarations of quality in the Spanish treatises.³¹ The answer to the silence of the French

24. 1 WILLISTON, SALES § 184 (rev. ed. 1948); see Brown, *The Law of Sales in the United States*, 8 COLUM. L. REV. 82, 85 (1908); Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 338 *et seq.* (1940); Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 273, 284 *et seq.* (1950).

25. UNIFORM SALES ACT § 14; see references in note 24 *supra*.

26. UNIFORM COMMERCIAL CODE § 2-313(1)(b).

27. See note 13 *supra*.

28. CODE CIVIL art. 1627, which is identical with Art. 2503, LA. CIVIL CODE of 1870.

29. 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 121 (1932), *e.g.*, is of the opinion that such guarantees, although they are very common in sales contracts, are at times formulated so vaguely as not to add or subtract from the warranty of the Code. It seems that the French jurisprudence deals with the non-compliance with declarations of quality under the aspect of fraud and error. *Cf., e.g.*, 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL n° 126 (1932); Note, 10 TUL. L. REV. 147, 149 (1935).

30. See, *e.g.*, 11 BEUDANT, COURS DE DROIT CIVIL FRANÇAIS n° 253 (2d ed. 1938), translated in SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON SALES AND LEASES 176 (1954).

31. In the Spanish translation of 2 ENNECCERUS, KIPP & WOLFF, TRATADO DE DERECHO CIVIL 59-60 (2d ed. 1950), annotated by Spanish editors, we find express statements that the Spanish civil law, as distinguished from the German law, "does not provide for the case where the thing lacks the qualities declared by the seller" (author's translation) and the question what the legal consequences in this case should be is merely raised without any indication of how the Spanish law would treat this situation. The new Civil Code of the Philippines, a revision of the Spanish *Código Civil* of 1889, arts. 1545-47, is based on the language of the Uniform Sales Act and has completely eliminated the civil law terminology. 3 GARCIA & ALBA, CIVIL CODE OF THE PHILIPPINES 1767-79 (1952).

The new Italian *Codice Civile* of 1942 contains a special article, 1497, concerning defects in quality which permits "cancellation of the contract in

treatises as to the legal consequences of the absence of declared qualities seems to lie in the fact that according to the constant jurisprudence of the French *cour de cassation* the interpretation of contracts is within the "sovereign" discretion of the trial judge.³²

In the instant case, the plaintiff apparently believed that the statements of the defendant and the advertisements in the local newspapers that the "paint was perfect for the New Orleans climate and would prevent mold and mildew from forming"³³ amounted to a contractual undertaking by the defendant. His contention seems to have been that the delivery of paint that would not prevent mold and mildew was a failure on the part of the defendant to deliver the kind of goods he had contracted to sell. In support of this contention the plaintiff cited *Henderson v. Leona Rice Milling Co.*,³⁴ where the Supreme Court had treated a delivery of mixed rice under a contract calling for "pure Honduras rice" as a breach of contract. He also relied upon *Rapides Grocery Co. v. Clopton*.³⁵ In that case the court applied the one-year prescription for redhibitory actions and rejected the buyer's claim for the profits lost when soy beans sold to him failed to germinate. The court in the instant case concluded that the *Henderson* case had actually been decided on principles of redhibition. Relying on this assumption, the court concluded that since the principles involved in the *Henderson* and *Rapides Gro-*

accordance with the general provisions relative to discharge of a contract by non-performance, provided such defect in quality exceeds the limits for which allowance is made by custom." However, the article expressly subjects the rights arising under it to the prescriptive period of one year for warranty actions. The article was originally designed to cover defects in machinery, instruments, and appliances, but was broadened to cover all declared qualities. See [ROYAL COMMISSION FOR THE REFORM OF THE CODES—SUBCOMMISSION FOR THE CIVIL CODE], CODICE CIVILE: QUARTO LIBRO, OBBLIGAZIONI E CONTRATTI—RELAZIONE AL PROGETTO 48 (1939).

32. 1 RABEL, *DAS RECHT DES WARENKAUFS* 196 (1936), in his discussion of the collateral obligations of the vendor under French law, cites the *jurisprudence constante* of the French *cour de cassation* to this effect and the treatises of Planiol et Ripert and Josserand. The second part of Rabel's treatise which will contain a discussion of warranty for vices has not yet appeared. It is to be published this year.

33. 77 So.2d 563, 564 (La. App. 1955).

34. 160 La. 597, 107 So. 459 (1926).

35. 171 La. 632, 131 So. 734 (1930). The buyer's claim was by way of a reconventional demand filed in an action by the seller to obtain the price of cottonseed previously sold to the defendant. The plaintiff in the instant case contended that the court should recognize that the suit could have been decided on grounds of breach of contract. Since in each case there had been express and implied warranties that the products had such qualities, the plaintiff apparently felt that the failure of the seed to germinate was similar in result to the failure of the paint in his case to prevent mold and mildew.

cery Company cases were substantially the same the latter case was correctly decided.³⁶ It is submitted that the *Henderson* case was properly decided as an action for breach of contract.³⁷

In neither the *Henderson* nor the *Rapides Grocery Company* case does it appear that the contracting parties had dealt with a specific object. In both cases, therefore, the court had to determine whether there was a failure to deliver goods of the kind contracted for or whether there was merely an absence of some declared quality or presence of some vice or defect in the thing sold. In the *Henderson* case the court found that the obligation of the seller was to deliver "pure Honduras rice" and concluded that the delivery of mixed rice was a breach of contract. This conclusion was sound because the goods delivered were of a kind different from those agreed upon. In the *Rapides Grocery Company* case the obligation of the seller was to deliver soy beans. The buyer claimed that there was an express and implied warranty that the beans would germinate.³⁸ Since the principal obligation of the seller was to deliver soy beans, the guarantee that the soy beans would germinate was only collateral and therefore governed by the rules relating to redhibition.³⁹ In the instant

36. The court apparently felt that it should reconcile the *Henderson* and *Rapides Grocery Company* cases. By finding that the *Henderson* case was decided under redhibition principles and by pointing to the language in the *Rapides Grocery Company* case that the reconventional demand for damages was barred by the prescription of one year the court apparently felt that it had accomplished its objective. It rationalized its conclusion by stressing that the *Rapides Grocery Company* case was decided only four years after the *Henderson* case and that the author of the opinion in the *Henderson* case had acquiesced in the *Rapides Grocery Company* decision. 77 So.2d 563, 566 (1955).

37. The court was not impressed by the statement in the *Henderson* case that the action could not be one in redhibition since the plaintiff could not return the rice. It stated that even where the object cannot be returned there are instances in which the redhibitory action will lie. Although this conclusion may be correct and the reasoning in the *Henderson* case faulty, the court in the instant case erred in holding that the *Henderson* case was decided under redhibition principles. The decision before us was based on the discussion in the *Henderson* case to the effect that the prescriptive period for redhibition was applicable. 77 So.2d 563, 565 (La. App. 1955). It apparently overlooked the fact that this discussion followed the holding that the action was one for breach of contract and the statement that it was not important on what grounds the action was decided. The Supreme Court in the *Henderson* case felt that it was not important because the action was filed timely under either theory and because the defendant was in bad faith, which permitted the recovery of damages. 160 La. 597, 602, 107 So. 459, 460 (1926). Consequently, although the court in the instant case may have been correct in declaring that the *Rapides Grocery Company* case was properly decided on grounds of redhibition, its reasons for so concluding are of doubtful validity.

38. 171 La. 632, 634, 131 So. 734, 735 (1930).

39. For an excellent comparison of similar cases decided on the same grounds at common law, see Burdick, *Conditions and Warranties in the Sale*

case the contractual undertaking of the seller was to deliver the specific paint in question. The paint was declared to be mold and mildew resistant. As it was proved not to be mold and mildew resistant, the declaration of quality was false. Since a false declaration of quality gives rise to the redhibitory action, the court's application of the one-year prescription rule seems correct.

Charles M. Lanier

SECURITY DEVICES—SURETYSHIP—DEFICIENCY JUDGMENT ACT

The defendant Scheen purchased an automobile from a corporation whose president and principal stockholder was the defendant Mingle dorff. Scheen borrowed the purchase price from the plaintiff bank. As security for this loan Scheen executed a note to the plaintiff. The note was endorsed by Mingle dorff and secured by a chattel mortgage on the automobile. When Scheen defaulted, Mingle dorff persuaded him to sign an instrument requesting the plaintiff to repossess the automobile and sell it at private sale in order to avoid the cost and expense of a public sale. By the terms of this instrument, prepared by Mingle dorff, Scheen as its signer agreed to waive appraisalment and pay the plaintiff bank any deficiency after the sale. After the private auction sale, plaintiff sued for a deficiency judgment *in solido* against Scheen, the maker of the note, and Mingle dorff, its endorser. The trial court held that Scheen was discharged from liability by the terms of the Deficiency Judgment Act,¹ and that Mingle dorff was discharged from liability by the terms of Civil Code article 3061,² because, as surety, he was prevented

of Goods, 1 COLUM. L. REV. 71 (1901). Similar English cases are found in BENJAMIN, *SALE* 616 *et seq.* (8th ed. 1950). See illustrations in 1 WILLISTON, *SALES* 180 and discussion at § 225 *et seq.* (rev. ed. 1948).

1. LA. R.S. 13:4106 (1950): "In any case where any mortgagee or other creditor takes advantage of the waiver of appraisalment of the debtor and provokes a judicial sale, without the benefit of appraisalment, of the encumbered property, whether real or personal, or of both characters, and the proceeds of such sale are insufficient to satisfy the debt for which the property is sold, the debt nevertheless shall stand fully satisfied and discharged, . . . and such mortgagee or other creditor shall not thereafter have the right to proceed against the debtor or any other of his property for such deficiency, in any manner whatsoever."

LA. R.S. 13:4107 (1950): "R.S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor. . . ."

2. The article provides: "The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety."