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Private Law: Particular Contracts

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sufficient bases to warrant such an interpretation and such a finding by the court. The trouble here seems to have been that, in the opinion of the majority, there was no room for any other interpretation of the testator's intention.

PARTICULAR CONTRACTS

*J. Denson Smith**

Although where a sale is made pursuant to an option previously granted the value of the property in an action of lesion beyond moiety is to be determined as of the date of the option,¹ the four-year prescriptive period begins to run from the date of the sale.² These provisions were applied in *Fletcher v. Smith*.³ The court also held that in determining the value of the property it is proper to consider its highest and best use as is done in cases involving expropriation. It reached this conclusion after reviewing the opinion of the Supreme Court in *Armwood v. Kennedy*,⁴ which stated that the "highest and best use" rule is not applicable to the problem of lesion. The question posed is being considered for discussion in a later issue of this *Review*.

An effort by an automobile dealer to claim protection against the sale of a defective car by virtue of a so-called manufacturer's warranty plus a signed "check list" which purported to contain an acceptance of the car as in satisfactory condition and an acknowledgment that future adjustments would be made only under the terms of the warranty was rejected by the court in *Stumpf v. Metairie Motor Sales, Inc.*⁵ Earlier cases involving this kind of problem are generally in accord and constitute a recognition that such limitations of liability are not the result of actual bargaining and should not be given literal effect. The evidence that the car was so defective that the buyer would not have bought it if its true condition had been known to him was clear and convincing.

In *Faust v. Pelican Plumbing Supply, Inc.*,⁶ the plaintiff brought an action in redhibition claiming a return of the purchase price plus expenses against (1) his own vendor, (2) the

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1. LA. CIV. CODE art. 2590.

2. *Id.* art. 2595.

3. 216 So.2d 663 (La. App. 3d Cir. 1968).

4. 231 La. 102, 90 So.2d 793 (1956).

5. 212 So.2d 705 (La. App. 4th Cir. 1968).

6. 215 So.2d 373 (La. App. 4th Cir. 1968).

latter's vendor, who was a local distributor, and (3) the manufacturer of a steam bath unit. His actions against the seller and the distributor were dismissed by the trial court and he was given judgment against the manufacturer. He appealed inasmuch as the judgment dismissed his action against the seller and the distributor. It was held on appeal that plaintiff's suit against the seller should not have been dismissed. The dismissal in favor of the distributor was upheld on the ground of lack of privity. Not considered was the propriety of the judgment against the manufacturer since this defendant had made no appearance at any time in the suit. Inasmuch as the seller had bought the unit from the distributor it would appear that the plaintiff acquired by way of tacit assignment the seller's right against the distributor,⁷ but this contention was apparently not presented to the court. From this point of view, privity is not the issue although a question does arise concerning whether the buyer may sue both his vendor and his vendor's vendor.⁸

TORTS

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The Louisiana Supreme Court in *Grant v. Touro Infirmary*¹ correctly held a surgeon negligent for his failure to remove a sponge from an incision before closing it. The general rule according to *Corpus Juris Secundum*,² classifying the failure as negligence per se, was cited with approval.

The court also held that the surgeon and the hospital had a division of control over the nurses attending the operation and assisting with it; hence, the borrowed servant rule did not apply. The conduct of the nurses was material because a nurse's failure to count sponges correctly during the operation was clearly negligent.

The precise nature of the nurse's function was also important on the overpowering issue of whether Touro's liability insurance carrier had correctly denied coverage and refused to defend in reliance on the clauses in the policy excluding coverage for the

7. See *McEachern v. Plauche Lumber & Const. Co.*, 220 La. 696, 57 So.2d 405 (1952); *POTHIER, CONTRAT DE VENTE* nos 215-16 (Bugnet ed. 1861).

8. *Id.*

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1. 254 La. 204, 223 So.2d 148 (1969).

2. 70 C.J.S. *Physicians and Surgeons* § 48, at 969 (1951).