

## The Rights of the Vendor in Redhibition

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tions which have bifurcated trial procedures, new penalty trials. Such cases should be rare, however, since it is unlikely that judges will sustain challenges for cause on the basis of conscientious scruples now that the United States Supreme Court and the Louisiana legislature<sup>34</sup> have spoken. The factors which make a second trial for a habeas corpus petitioner potentially hazardous for the state are not likely to be present at the second trial of a defendant who has appealed and is retried shortly afterward. It should be noted, however, that although the United States Supreme Court in *Witherspoon* refused to hold that exclusion of prospective jurors conscientiously opposed to the death penalty results in a jury prejudiced on the issue of guilt,<sup>35</sup> the Court has not foreclosed the possibility of such a holding in the future.<sup>36</sup> Courts which grant new trials for violations of the new constitutional rule may, therefore, be following a wise course.

Larry C. Becnel

#### THE RIGHTS OF THE VENDOR IN REDHIBITION

The Louisiana Civil Code, while dealing extensively with the buyer's rights, is practically silent concerning the rights of the seller in a successful redhibitory action. Since each of the parties to a sale would like to be able to predict the legal consequences flowing from their transaction, the extent of liability and the available remedies are of utmost importance to the vendor. If a vendor sells a thing with redhibitory defects, three situations can arise. First, the thing can be defective to the point of total uselessness, in which case the total avoidance of the sale provides a fair remedy for both parties. Being totally defective, neither would the thing be capable of producing fruits nor would it have any use value for the buyer; therefore, the seller would

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34. LA. CODE CRIM. P. art. 798 was amended after the *Witherspoon* decision and it is no longer permissible to challenge prospective jurors for cause simply because they express conscientious or religious scruples against capital punishment. La. Acts 1968, E.S., No. 13, § 1.

35. The Court again rejected the "prosecution-prone" theory in *Bumper v. North Carolina*, 391 U.S. 543, 545 (1968).

36. The Court said: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt . . ." *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968) (emphasis added).

Justice Black, dissenting, said: "For the majority opinion goes out of its way to state that in some future case a defendant might well establish that a jury selected in the way the Illinois statute here provides is 'less than neutral with respect to *guilt*.'" *Id.* at 539 (emphasis in the original.)

only be entitled to the return of the thing.<sup>1</sup> Secondly, the thing may be only partially defective, in which case the court can decree a reduction in price to balance the reduction in utility of the thing. The seller has sold only a partially useful thing; therefore, he is entitled only to a partial price.<sup>2</sup> Finally, the thing can be so defective as to warrant avoidance of the sale when the court decides the buyer would not have purchased the thing if he had known of these defects,<sup>3</sup> and yet, the buyer may have enjoyed an appreciable amount of use from the thing or may have drawn fruits therefrom. By treating this situation as if the thing were totally defective, the courts have allowed the buyer to gain more from the transaction than the Code allows. Although the Code makes it clear that the buyer's right to recover the expenses of the sale may be diminished by the value of the fruits he has drawn from the thing, it is unclear whether he must account for fruits in excess of expenses, and also silent insofar as the seller's right to recover for the buyer's use of the thing.

The line of jurisprudence dealing with a seller's claim for fruits or use value began with *Farmer v. Fisk*,<sup>4</sup> when a buyer sought the resolution of the sale of a habitual runaway slave. The defendant-vendor requested an instruction that it was the jury's duty to deduct from the purchase price the fruits of the thing sold which were produced while the buyer had possession of the slave. Strictly speaking, the seller was not asking for the value of the use of the slave, but for the fruits he produced, which under the then-existing law would have been the children of the slave.<sup>5</sup> The court, in denying his request and without drawing a clear distinction between *usus* and *fructus*, formulated the rule that the seller's use of the price is equivalent to the buyer's use of the thing.<sup>6</sup> The same result was reached three

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1. LA. CIV. CODE art. 2520.

2. *Id.* art. 2543.

3. *Id.* art. 2520.

4. 9 Rob. 351 (La. 1844).

5. LA. CIV. CODE arts. 491, 492, 539 (1825).

6. *Cf.* *Farmer v. Fisk*, 9 Rob. 351, 352 (La. 1844): "As to the *fruits* of the thing sold, the sale was a cash one. If the purchaser, on the one hand, received the *services* of the slave, the vendor on the other, enjoyed the *interest* of the purchase money. The one may well be considered as an equivalent for the other. 2 Troplong, *Vente Nos.* 571, 572" (emphasis added). As for the correctness of this rule and the authority cited by the court, see note 42 *infra*. Laurent suggests that if the thing sold produces no fruits during the time between the sale and the resolution it is practical to equate the use of the price to the use of the thing. 24 LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS* n° 554 (1877). Very little calculation is needed to demonstrate that the interest on \$4,000 in one year is much less than the fair rental value of a partially defective \$4,000 car for one year. It is neither practical nor equitable to equate the two sums.

years later in *Harvey v. Kendall*<sup>7</sup> in which the vendor specifically asked for compensation for the services of the slave. The court cited no authority for its conclusion.

The next important case on the subject was in the automobile age.<sup>8</sup> The plaintiff, in *Rousseau & Co. v. Dolese*,<sup>9</sup> formerly the defendant in a successful redhibitory action concerning the sale of a car, claimed that he was entitled to the rental value of the car for the ten months that the buyer had possession of it. The court distinguished between resolution and rescission,<sup>10</sup> citing *George v. Lewis*,<sup>11</sup> and suggested that the plaintiff was confusing a contract voided for redhibitory defects in the thing sold with one which has been dissolved under the dissolving condition.<sup>12</sup> The court felt the former theory was the only possible one in redhibition. In denying plaintiff's claim of unjust enrichment, the court relied on the rule of equivalents and characterized plaintiff's request as "inconceivable."<sup>13</sup>

In a subsequent case the plaintiff was successful in "rescinding"<sup>14</sup> the sale of a defective car, but the district court ordered the vendor to return the purchase price less \$500. It con-

7. 2 La. Ann. 748, 749 (1847): "The defendant contends that he should be allowed compensation for the services of the slave while in the plaintiff's possession. The sale was for cash. The use of the money paid as the price stands as an offset against the services of the slave."

8. There was one decision directly to the contrary in the interval between 1847 and 1928, but it is very rarely reported and completely ignored in the jurisprudence. See *Hill, Fontaine & Co. v. Cherry, Gunby's Dec. 45* (2d Cir. 1885). Apparently the buyer had the sale of some horses resolved for defects. The syllabus reads: "Where the sale is annulled, the buyer owes rent for the stock during the time he has used them." *Id.*

9. 8 La. App. 785 (1st Cir. 1928).

10. *Id.* at 787: "In seeking the avoidance of such a contract it cannot possibly be said that its execution or enforcement is sought or asked. It is the very opposite of a demand for the dissolution of a commutative contract under the resolutive condition, as in such a suit, as hereinabove explained, the contract is not attacked, but its execution is demanded to carry out the obligations of the parties thereunder." *But see* note 26 *infra*.

11. 11 La. Ann. 654 (1856). This decision correctly makes the distinction between resolution and rescission, but it is not authority for the proposition that a redhibitory action is one of rescission.

12. For a further discussion as to who was confused, see note 40 *infra*.

13. *Rousseau & Co. v. Dolese*, 8 La. App. 785, 787 (1st Cir. 1928): "Defendant was to be the owner of the thing sold and plaintiff [the owner] of the money which defendant paid him for it. The possession of defendant was as owner, and the use of the auto was as such. His possession as owner makes it evident that his use was to be free of charge to the plaintiff. It is inconceivable that defendant could have thought for a moment that he would be charged rent for the use of an auto he had paid for in good faith and that he was using as proprietor." The court also cited *Farmer v. Fisk*, 9 Rob. 351 (La. 1844); 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE nos 571-572, 575 (5th ed. 1856). Troplong is not authority for the proposition stated in this case. See note 42 *infra*.

14. Quotations added.

sidered the \$500 to be the fair value which inured to plaintiff during the year he used the car. In its oral reasons for judgment the court cited no authority,<sup>15</sup> but apparently based the decision on common sense and fairness. The First Circuit Court of Appeal in *Bergeron v. Mid-City Motors, Inc.*,<sup>16</sup> adopted the trial court's reasoning and affirmed the judgment. A similar situation arose one year later in the Fourth Circuit. The defendant-vendor, in *Williams v. Daste*,<sup>17</sup> was granted the excess in rents collected by the buyer while he was in possession of a defective house over and above the expenses occasioned by the sale. While granting the vendor's request for the fruits-revenues, or excess in rents,<sup>18</sup> the court made it very clear that if the vendor had sought rent for the buyer's occupancy, his claim would have been denied on the basis of the older authorities.<sup>19</sup> This circuit apparently reversed its position three years later in *Kiefer v. Bernie Dumas Buick Co.*,<sup>20</sup> by ordering the vendor of a defective car to return the purchase price to the plaintiff-buyer less a \$1,000 credit to cover the use by the buyer of the car. The reasoning of the trial court was adopted without discussion, despite the allegation by the plaintiff-buyer that it was error to allow such a credit. The trial court reasoned that since the car was not completely useless it had a fair use value of slightly less than \$100 per month, for twenty months, minus the buyer's troubles and aggravation, for a total of \$1,000. The Fourth Circuit Court of Appeal relied on the *Bergeron* case in affirming the judgment despite the court's finding that the vendor fraudulently concealed the defects in the car and represented it as undamaged. In the most recent case on the subject, *Gauche v. Ford Motor Co.*,<sup>21</sup> the Fourth Circuit Court of Appeal spoke approvingly of the *Bergeron* case and allowed the seller a \$500 credit for the buyer's use of the car.<sup>22</sup> The trend of these recent cases

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15. The trial judge's oral analysis is reproduced in *Bergeron v. Mid-City Motors, Inc.*, 162 So.2d 835 (La. App. 1st Cir. 1964).

16. *Id.*

17. 181 So.2d 247 (La. App. 4th Cir. 1965), *cert. denied*, 248 La. 916, 182 So.2d 664 (1966).

18. See LA. CIV. CODE art. 2531; Comment, 4 TUL. L. REV. 627, 629 (1930).

19. See *Williams v. Daste*, 181 So.2d 247, 249 (La. App. 4th Cir. 1965), and the authorities cited by the court. See also *Farmer v. Fisk*, 9 Rob. 351 (La. 1844); *Rousseau & Co. v. Dolese*, 8 La. App. 785 (1st Cir. 1928); Comment, 4 TUL. L. REV. 627, 628 (1930).

20. 210 So.2d 569 (La. App. 4th Cir. 1968).

21. 226 So.2d 198 (La. App. 4th Cir. 1969).

22. Actually, there was no need to allow a credit in this case because the buyer resold the defective car before bringing suit. No restitution of the car was made to the seller, so the buyer owed nothing for its use. The court merely granted a reduction in price; therefore, there was no occasion to

in the First and Fourth Circuits is to allow the seller to recover for the buyer's use of the thing. This trend began without citing any legal authority and in the face of older decisions to the contrary.

The Louisiana courts seem to agree that in the case of a true resolution of a sale the vendor is entitled to the return of the fruits in the form of the rental value of the thing sold,<sup>23</sup> but the jurisprudence, until the time of *Bergeron*, indicated that the redhibitory action was one of rescission, and the vendor had no claim for use value.

What effect does this distinction between resolution and rescission have on the vendor's remedy?<sup>24</sup> Apparently the courts feel that no restitution is possible when rescission takes place,

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consider the loss of use of the car to the seller—the partial price was the equivalent of the partial utility of the car. However, the court did voice approval of *Bergeron*.

23. There is no specific Code provision allowing the seller to recover for the buyer's use, unless every time a contract is resolved the parties must resort to the principles of unjust enrichment contained in article 1965 to bring about a restitution. The courts clear this obstacle by relying on the principles of restitution in Roman law and article 2045 of the Civil Code to allow the seller to collect fruits measured by the rental value that the thing sold was capable of producing. This method achieves the same result as allowing the seller to collect for the buyer's use of the thing sold. *See Derepas v. Shallus*, 15 La. Ann. 351, 373 (1840): "The effect of the dissolution of a sale, is to replace the parties in the situation in which they stood before the contract . . . . The rents of a house are the fruits which that kind of property is susceptible of producing . . . . The plaintiff [is] entitled to the rents of the house, as damages or fruits to be paid by defendant . . . ." *See also Cappel v. Meeker Sugar Refining Co.*, 169 La. 1170, 126 So. 695 (1930); *Cappel v. Hundley*, 168 La. 15, 20, 121 So. 176, 178 (1929); *Vincent v. Phillips*, 47 La. Ann. 1238, 17 So. 786 (1895); *Ware v. Berlin*, 43 La. 534, 9 So. 490 (1891); *McKenzie v. Bacon*, 41 La. 6, 5 So. 640 (1889); *Edwards v. White*, 34 La. 989 (1882); *School Directors v. Anderson*, 23 La. Ann. 739 (1876). *Cf. F. MACKELDEY, HANDBOOK OF THE ROMAN LAW* § 220 (Dropsie transl. 1883): "The Roman *restitutio in integrum*, or restoration to the previous condition, was effected by the praetor for equitable causes, on the prayer of an injured party, by annulling a transaction *valid* by the strict law . . . and restoring the parties to their previous legal relations." *See also id.* at § 220 n. 6: "[H]ence it is also termed restoration of the loss because of the civil law or restoration (*redintegratio causae jure civili amissae, or instauratio negotii*)" (emphasis added).

24. Comment, 4 TUL. L. REV. 433, 627 (1930) explains that in the case of a resolution of a sale, as for non-payment of the purchase price, the vendor can recover for the buyer's use of the thing sold. This is enforcing a part of the contract, the resolutive condition, and since the contract is valid until resolved the buyer must pay for his use. "Whereas, in the case of rescission, the vice taints the sale *ab initio*, and hence there is no enforcement of an obligation, but as a matter of fact it is annulling the contract. Therefore, the vendor cannot collect for the use of the thing—there being no obligation." *Id.* at 627-28.

Probably the writer means that in resolution, since the contract exists until it is resolved, there is a just cause on which to base a claim for restitution. No restitution is granted when the contract is void or voidable under the civil law. *See F. MACKELDEY, HANDBOOK OF THE ROMAN LAW* § 221 (Dropsie transl. 1883).

but since the redhibitory action is actually one of resolution, restitution should be available, and the vendor should have a claim for the buyer's use of the thing sold.

The difference between rescission and resolution, and the impropriety of classifying the redhibitory action as one of rescission can be seen by analogizing the action in warranty against eviction and the redhibitory action. Both of these actions are the result of the seller's obligation to warrant the thing he sells.<sup>25</sup> It follows that the redhibitory action is not one in rescission basically because it has nothing to do with vitiating the buyer's consent. Instead, it is the failure of the seller to carry out his obligation to deliver a thing free from defects which gives the buyer the right to seek a resolution of the sale.<sup>26</sup> When one of the parties to a commutative contract does not comply with his obligations, the other has a right to invoke the implied resolutive condition.<sup>27</sup> The vendor should then be entitled to a *restitutio in integrum*<sup>28</sup> wherein he is returned the thing plus the revenues it was susceptible of producing during the time of the buyer's possession measured by the fair rental value standard.<sup>29</sup>

#### The reasoning and analysis of the cases before *Williams v.*

25. LA. CIV. CODE arts. 2475, 2476.

26. See 24 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS nos 277, 286 (1877): "no 277 The buyer demands the resolution of the contract, or the restitution of a part of the price; this supposes that the vendor has not at all fulfilled his obligation; and in effect, he has not fulfilled it when he delivers to the buyer a defective thing within the meaning of article 1641. In this sense, there is an analogy between eviction and redhibitory vices; in the two cases, the right of the buyer is founded upon the tacit resolutive condition that the law implies in synallagmatic contracts . . . ."

"no 286 [T]he guarantee is founded on the inexecution of the obligations contracted by the vendor; but, when he sells a thing free from defects, he satisfies his obligation; it follows that the buyer does not have any action against him" (transl. by author).

"no 277 *L'acheteur demande la résolution du contrat, ou la restitution d'une partie du prix; cela suppose que le vendeur n'a point rempli son obligation; et, en effet, il ne la remplit pas quand il livre à l'acheteur une chose viciée dans le sens de l'article 1641. Sous ce rapport, il y a analogie entre l'éviction et les vices rédhibitoires; dans les deux cas, le droit de l'acheteur est fondé sur la condition résolutoire tacite que la loi sous-entend dans les contrats synallagmatiques . . . .*"

"no 286 [L]a garantie est fondée sur l'inexécution des obligations contractées par le vendeur; or, quand il vend une chose non viciée, il satisfait à ses obligations; par suite, l'acheteur ne peut avoir aucune action contra lui."

27. See LA. CIV. CODE art. 2046.

28. Cf. *Rousseau & Co. v. Dolese*, 8 La. App. 785, 786 (1st Cir. 1928).

29. See note 23 *supra*. Comment, 4 TUL. L. REV. 627, 628 (1930) cites what on first glance is a contrary view, TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE no 575 (1836): "*Le contrat est résolu . . . le vendeur reprend la chose en l'état où elle se trouve, et l'acheteur recouvre son argent sans dommages et intérêts.*" (Emphasis added.) It is most interesting to notice that the authority for this detail is here speaking of resolution, not rescission. This statement is authority only for the view that the buyer has

*Daste* is summarized in a Comment on the nature of the redhibitory action<sup>30</sup> which distinguishes between resolution and rescission: "The rescission implies the total *avoidance* of the convention of the parties for some inherent *defect* therein."<sup>31</sup> These distinctions are correct, but they do not clearly establish that the Louisiana Civil Code defines the redhibitory action as one of rescission.<sup>32</sup> It is true that the courts invariably use the term "rescission"<sup>33</sup> when speaking of redhibition, but this does not make the usage correct. The courts have used the term "rescission" from the early days of our jurisprudence,<sup>34</sup> but this is probably the result of the unfortunate use of the words "void sale" in an early opinion dealing with redhibition<sup>35</sup> and a progressive mistranslation in the Louisiana Civil Code.

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no claim for damages if the seller is in good faith. Most of the French authorities agree that the vendor is entitled to the fruits. *See* 5 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 355 *bis* (6th ed. 1946); 19 BAUDRY-LACANTINERIE ET SAIGNAT, TRAITÉ THÉORIQUE ET PRACTIQUE DE DROIT CIVIL n° 435 (3d ed. 1908); 1 GUILLOUARD, TRAITÉS DE LA VENTE ET L'ÉCHANGE n° 461 (2d ed. 1890); 3 OEUVRES DE POTHIER, TRAITÉ DE CONTRAT DE VENTE n° 217 (2d ed. 1861); 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE n°s 572-573 (5th ed. 1856).

30. Comment, 4 TUL. L. REV. 433, 627 (1930).

31. *Id.* at 434 (emphasis added). The author's authority for this distinction is 4 TOULLIER-DUVERGIER, DROIT CIVIL FRANÇAIS n° 551 (6th ed. 1846): "Resolution is a general term which includes all manners of resolving contracts; rescission is particular to those which contain an intrinsic *vice*, which is opposed to their perfection.

"Rescission supposes on the contrary that there had existed only the appearance of a contract; but that it has never had an actual existence, because the *vices* which had accompanied it have opposed themselves to its *perfection*."

"One rescinds, therefore, contracts void for an intrinsic cause which goes back to their birth, as contracts infected with fraud, error, violence, etc.; one resolves contracts intrinsically valid in their origin but which *posterior causes destroy*." (Transl. from Comment, 4 Tul. L. Rev. 433, 434 (1930); emphasis by author of this Note.)

The above emphasized words seem to have suggested redhibitory vices to the author and the courts. In fact, vices which prevent the perfection of contracts are vices of consent, such as fraud, violence, error, etc., as Toullier suggests. *See* LA. CIV. CODE arts. 1779, 1819; FRENCH CIV. CODE arts. 1108, 1109. In a redhibitory action the posterior cause of destruction mentioned above is the seller's failure to deliver a thing free from defects as warranted. *See* note 26 *infra*.

32. *Cf.* Comment, 4 TUL. L. REV. 433, 435 (1930); LA. CIV. CODE art. 2520; "*Redhibition* is the *avoidance* of the sale on account of some *vice* or defect in the thing sold . . ." (emphasis added). The emphasized words do seem to suggest rescission for a vice of consent.

33. *See* Comment, 4 TUL. L. REV. 433, 435 n.7 (1930).

34. *See, e.g.,* Reech v. Coco, 223 La. 346, 65 So.2d 790 (1953); Savoie v. Snell, 213 La. 823, 35 So.2d 745 (1948); Riggs v. Duperrier, 19 La. 418 (1841); Nelson v. Lillard, 16 La. 336 (1840); Beale's Heirs v. De Gruy, 2 La. 468 (1831); Bloudean v. Gales, 8 Mart.(O.S.) 313 (La. 1820); Dewees v. Morgan, 1 Mart.(O.S.) 1 (La. 1809); Kiefer v. Bernie Dumas Buick Co., 210 So.2d 569 (La. App. 4th Cir. 1968); Williams v. Daste, 181 So.2d 247 (La. App. 4th Cir. 1965); Bergeron v. Mid-City Motors, Inc., 162 So.2d 835 (La. App. 1st Cir. 1964).

35. Dewees v. Morgan, 1 Mart.(O.S.) 1 (La. 1809). "Void" is more cor-

The Digest of 1808 uses the term "*résolution*" in the French version, and the term "cancellation" in the English version.<sup>36</sup> The Code of 1825 uses the term "avoidance" in the English version, but retains that word "*résolution*" in the French version.<sup>37</sup> Finally, the Revised Civil Code of 1870 keeps the term "avoidance."<sup>38</sup> Since "avoidance" and "vice" do seem to suggest nullity and rescission, the error is the logical result of the mistranslation.<sup>39</sup> The French commentators overwhelmingly use the term "*résolution*" when speaking of the redhibitory action.<sup>40</sup>

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rectly associated with "null," "nullity," and "rescission." The use of the term "void" understandably led to the use of "rescission."

36. La. Digest of 1808, bk. III, tit. VI, art. 65: "*On appelle rédhition, le résolution de la vente . . .*" The corresponding English version reads: "Redhibition is the cancelling of the sale . . ."

37. La. Civ. Code art. 2496 (1825): "Redhibition is called the avoidance of the sale. . . ." The French version is unchanged.

38. LA. CIV. CODE art. 2520: "Redhibition is the avoidance of a sale. . ."

39. Comment, 4 TUL. L. REV. 433, 627 (1930) does not mention articles 2529 and 2547 of the Louisiana Civil Code, but these two articles are greatly responsible for the association of redhibition with the concept of error and rescission. These articles concern the situations (good faith and bad faith) in which the seller declares the thing sold to have a specific quality. The articles speak of fraud, principal motive, and damages: all concepts concerning vices of consent and rescission in Book III, Chapter 2 of the Code. An error as to a substantial quality is treated in article 1844 as a cause for rescinding the contract, and it comes under the heading of fraud when the seller is in bad faith. See LA. CIV. CODE art. 1847(4).

Articles 2529 and 2547 have no equivalent in the French Code Napoleon. The French make it quite clear that the lack of a declared quality is not a redhibitory vice, but error which makes the contract subject to the action for rescission with a ten-year prescriptive period. See 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 126 (1932); 5 AUBRY ET RAU, DROIT CIVIL FRANÇAIS, n° 355 bis (6th ed. 1946); 10 T. HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DE CODE CIVIL n° 142 (1897); 24 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS n° 281 (1877).

It is still somewhat of a mystery why the draftsmen chose to include these two articles in the section of the Code dealing with redhibition. Perhaps they were originally inserted to refer the reader back to Book III, Chapter 2, for the rules covering error as to a substantial quality. There is a rather fine practical distinction between a redhibitory vice and such an error, and these articles could have been intended to clarify the distinction. However, in the transition from the Digest of 1808 to the Revised Civil Code of 1870, the words "the buyer shall be well founded to claim . . . the cancelling of the sale" evolved into "gives rise to redhibition." Confusion, instead of clarification, is the result.

There is no great objection to adopting the French view and restricting the meaning of articles 2529 and 2547. An example will demonstrate that the lack of a substantial quality is error: If B asks A to sell him a car, A warrants that the car is free from redhibitory defects: malfunctioning brakes, corroded electrical system, or a misfiring motor. But if B tells A that he is a race driver and wants a fast car, and A declares that "this car will go 200 m.p.h.," and it develops that the car will not go 200 m.p.h., there is error as to a substantial quality. The car is not defective in any manner; it simply does not have the declared quality.

40. See 24 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS nos 277-278, 286, 292-293 (1877):

"n° 293 The effects of the redhibitory action are those of every action in resolution" (author's transl.).

Another obstacle to the vendor's recovery in the earlier cases was the equivalents rule which equates the buyer's use of the thing to the interest received by the seller on the purchase price.<sup>41</sup> The rule is somewhat unfair and without support among most of the French commentators and courts.<sup>42</sup> The rule could only work adequately in the case of a cash sale wherein the seller has the use of the full price. The provisions of the Civil Code are applicable to both cash and credit sales, and they strongly imply a solution contrary to the jurisprudentially created rule of equivalents. The vendor in redhibition is entitled to these fruits after deducting from them the expenses occasioned by the sale.<sup>43</sup>

Why the courts initially denied relief to vendors in redhibitory actions was probably the result of mistranslation, confusion of proper terminology, and, possibly, certain concepts of fault. On first impression it seems that a seller is at fault for selling a thing which is defective, but a good faith vendor actually sells things which contain latent defects that are noticeable only upon inspection, and sometimes, use. The French commentators feel that the vendor in this situation is less at fault than the seller

"n° 293 *Les effets de l'action rédhibitoire sont ceux de toute action en résolution.*"

See also 9 BEUDANT, COURS DE DROIT CIVIL FRANÇAIS n° 260 (2d ed. 1934).

"n° 260 [T]he redhibitory action is an action in resolution like the recourse in warranty for eviction . . ." (Author's transl.)

"n° 260 *L'action rédhibitoire est une action en résolution comme le recours en garantie pour éviction . . .*"

*Cf.* 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS n° 580 (9th ed. 1935); 19 BAUDRY-LACANTINERIE ET SAIGNAT, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL n° 435 (3d ed. 1908); 10 T. HUC, COMMENTAIRE THÉORIQUE DE CODE CIVIL n° 151 (1897); 1 GUILLOUARD, TRAITÉS DE LA VENTE ET DE L'ÉCHANGE n° 461 (2d ed. 1890); 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE nos 572-573, 575 (5th ed. 1856).

41. *Farmer v. Fisk*, 9 Rob. 351 (La. 1844). See note 6 *supra*, wherein the court confuses fruits and use and emerges with the equivalents rule.

42. In *Farmer v. Fisk*, 9 Rob. 351, 352 (La. 1844), the court cites Troplong as authority for the equivalents rule. Actually Troplong and most of the French commentators agree that the fruits of the thing are compensated with the interests on the price. They do not say that the two are equivalent. Compensation is the extinguishing of two debts, when they exist simultaneously, to the amount of their respective sums; it is not cancellation on a one debt-to-one debt basis. See LA. CIV. CODE art. 2208. See also 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE n° 571 (5th ed. 1956) "n° 571 [B]ut, in France, the fruits of the thing are always compensated with the interests on the price . . ." (author's transl.)

"n° 571 *Mais, en France, on compense toujours les fruits de la chose avec les intérêts du prix . . .*"

See also 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 134 (1932); OUVRES DE POTHIER, TRAITÉ DE CONTRAT DE VENTE n° 217 (2d ed. 1861); Civ., 17 juillet 1924, Gaz. Pal., 1924, II, 378; Cass., 23 juillet 1834; Sirey, 1934, I, 620.

43. See LA. CIV. CODE art. 2531; Comment, 4 TUL. L. REV. 627, 629 (1930).

who allows his vendee to be evicted,<sup>44</sup> but the action in warranty against eviction is unquestionably an action in resolution.<sup>45</sup> It does not follow then that the courts should classify the redhibitory action as one of rescission on the theory that the seller's fault restricts his remedy.

Aside from the benefit to the seller, there is much to be gained by bringing the redhibitory action back into the family of resolatory actions. The Civil Code takes on a more logical, consistent meaning when this subject is treated as an obligation of the seller, as the Code classifies it.<sup>46</sup> In addition, the courts could reach an appropriate solution in every case of redhibition by following the rules applicable to actions in resolution and the Code articles relating to redhibition. Where the sale is dissolved but the buyer has received some use and/or fruits from the thing, the courts should follow their practice of allowing the seller the return of the thing plus the revenues it was capable of producing in its defective condition.<sup>47</sup> It would be anomalous to allow

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44. See 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE n° 572 (5th ed. 1856).

45. The failure to carry out the obligation to warrant the buyer against eviction is a perfect example of a posterior cause which brings about the resolution of a sale. See also 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA VENTE, n° 572 (5th ed. 1856).

It may seem inconsistent to allow the buyer who is evicted to keep the fruits of the thing sold, but it must be remembered that the Civil Code articles dealing with sales are intended to cover specific situations, not general remedies. The remedies in each situation are based on the exigencies of each situation. The evicted buyer is entitled to the fruits only when he was in good faith on the day of the sale and later came to be in bad faith. Consideration is given to the fact that the eviction is caused by a third person, not by the voluntary act of the buyer who conserved the fruits. Finally, in the case of the evicted buyer, the seller is more at fault than the seller in redhibition. He has failed in his primary obligation to guarantee the buyer the peaceable possession of the thing sold; or in modern terms, he has failed to make the buyer owner of the thing. The seller in redhibition has only failed in the subsidiary obligation to see that the thing sold is free from defects. See PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nos 88, 95, 116 (1932).

46. See LA. CIV. CODE arts. 2475, 2476.

47. It should be remembered that the seller is only entitled to the *fair* rental value: The rental value of the thing in its defective condition. The trial court has discretion in determining this value but there are elements which must be considered. The rental charge should be the value the thing would produce on the market in the *long* run. It would be absurd to use the short run values such as daily car rental rates, motel rates, etc. Other factors which commonly determine market prices should be used: utility, convenience, dependability.

When the seller is in bad faith damages must be determined. These are generally losses incurred and the profits of which the buyer has been deprived. The losses of the buyer may include some of the same elements used to determine market value: inconvenience, lack of dependability, etc. Beyond these are the most important damage claims: losses by injury and the accompanying medical expenses, mental distress and aggravation, and pain and suffering. For purposes of clarity, fair rental value and damages should be calculated separately.

the seller to collect these rents only when the buyer chooses to rent the thing out himself so that his return could technically be classified as fruits; and then to deny the seller these rents when the buyer chooses to use the thing himself. In either case the principles of restitution require that the seller be restored what he has lost—the fair rental value of the thing, albeit defective.

Nor should it matter if the sale was for cash, on credit, in good faith, or in bad faith; the solution should be the same. If the sale was for cash, the seller would be bound to restore the price, plus interest, from the day he was paid, and to reimburse the expenses occasioned by the sale. This sum would be offset by the fruits which the thing produced and/or was capable of producing. If the sale was on credit or the price only partially paid, the buyer would have lost no interest or only the interest on the amount paid while the seller would have been out of possession of the whole thing. The seller would still be entitled to the fruits less no interest or interest on the partial price paid. If the seller was in bad faith, it might seem that the buyer's consent has been vitiated and the sale would be rescinded on the basis of fraud.<sup>48</sup> However, the very presence of articles 2545<sup>49</sup> and 2546<sup>50</sup> indicate the drafters' intention of treating the situation in the same manner as if the seller had been in good faith—as an action in resolution.<sup>51</sup> By imposing on the bad faith seller the obligation to pay damages and by extending the prescriptive period, the fraudulent conduct is reprimanded, and an apparent inconsistency of theories is eliminated. If, however, the seller makes a declaration of quality, which quality is the buyer's principal motive in the contract, and it develops that this specific quality is lacking, then the buyer should be able to rescind the sale for error or fraud.<sup>52</sup>

The *Bergeron* case is a good example of how the rule should work; however, the court failed to base its conclusion on solid legal principles. The *Kiefer* case demonstrates how the rule

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48. See LA. CIV. CODE art. 1847.

49. *Id.* art. 2545: "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."

50. *Id.* art. 2546: "In this case, the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice."

51. See PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 126 (1932).

52. See note 39 *supra*.

should work when the seller is in bad faith,<sup>53</sup> but here also the opinion does not show a basis for the holding. Possible hardships caused by the holdings of older cases when applied to automobile sales might have persuaded the courts to alter their positions. The fact that an automobile's value depreciates so quickly focuses attention on the seller's situation in redhibition.<sup>54</sup> The result in these two cases are correct, but the courts in the future should reconsider the nature of the redhibitory action in developing sound legal foundations for their conclusions.

*Michael G. Page*

TORTS OFFSHORE—THE RODRIGUE  
INTERPRETATION OF THE LANDS ACT

An offshore worker fell to his death on the floor of an artificial island more than one marine league off the Louisiana gulf shore. Decedent's widow and two children brought actions in the federal district court for the eastern district of Louisiana based on the Death on the High Seas Act<sup>1</sup> (hereinafter the "Seas Act") and Louisiana's general tort recovery statute<sup>2</sup> allegedly made applicable by the Outer Continental Shelf Lands Act<sup>3</sup> (hereinafter the "Lands Act"). The district court reasoned that since the Seas Act provided a federal remedy inconsistent with the Louisiana statute, the latter could not be urged via the Lands Act.<sup>4</sup> That portion of the actions based on the Louisiana statute was dismissed. The Fifth Circuit Court of Appeals affirmed the district court's dismissal.<sup>5</sup> Certiorari was granted in this and a closely analogous case,<sup>6</sup> and the Supreme Court reversed, holding that petitioners' remedy was under the Lands

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53. The court apparently took into account the buyer's extravagant claims for damages in computing the fair rental value of the car. To avoid theoretical confusion, perhaps it would be advantageous for the court to compute fair use value and damages to be paid the buyer separately. See note 47 *supra*.

54. See *Gauche v. Ford Motor Co.*, 226 So.2d 198, 207 (La. App. 4th Cir. 1969). The court treated depreciation and the buyer's use as interchangeable terms.

1. 46 U.S.C. §§ 761-768 (1920).

2. LA. CIV. CODE art. 2315.

3. 43 U.S.C. §§ 1331-1343 (1953).

4. *Id.* § 1333(a)(2) provides: "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . , the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for . . . the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures thereon. . . ." (emphasis added).

5. 395 F.2d 216 (5th Cir. 1968).

6. *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968).