Private Law: Torts

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had verbally agreed to redeem the property. Since there was nothing of record to show that the right of redemption had been exercised, the protection of the third person was clearly consistent with the leading case of *McDuffie v. Walker*.

A writ of review has been granted by the Supreme Court in the case of *Baton Rouge Wood Products, Inc. v. Ezell*, which involves the question of revival of a mortgage subsequent to the payment of the secured indebtedness.

The case of *Younger v. American Radiator & Standard San. Corp.* is being noted in this *Review*.

**TORTS**

**PRODUCTS LIABILITY**

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Four products liability cases decided by the appellate court in this last term deserve mention. The *Deris* case arose when plaintiff chewed bits of glass in a banana split she was eating. The court predictably applied the Louisiana rules of warranty in holding the defendant liable.

The remaining three cases, *Meche, Larance, and West*, were decided by the application of principles of tort law. Not one of the three cases brought forth any soul-searching on the problem of whether products liability cases properly are founded in tort or in warranty. It is not the purpose of this brief commentary to probe that problem to its depth, but rather here will be noted the current treatment being accorded products liability problems.

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5. 125 La. 152, 51 So. 100 (1910).
7. 193 So.2d 798 (La. App. 3d Cir. 1967), writ refused.

* The Products liability section of *Torts* was written by Dean Crawford. The sections on Sheriff's Liability for Negligent Acts of His Deputy, Noncompensable Mental Pain and Anguish of Parents Resulting From Injuries to Their Child, and Duty to Warn Social Guest were written by Mrs. Guerry.

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cases by the Louisiana courts. Treatment in some depth is already at hand in several writings.³

In West, the defendant was both the manufacturer and the seller of an oil well overshot device allegedly negligently designed and manufactured. While the judgment was in favor of the defendant, it is noteworthy that the court made the following statement of its view as to a manufacturer's duty for such devices:

"... the manufacturer of a dangerous instrumentality is obligated to warn foreseeable users of the limitations of a product when use beyond its limitations may be fraught with potential perils."⁴

The Meche case was brought against the manufacturer of an industrial elevator which had killed the decedent when a stopping device failed to function. The plaintiff alleged that the manufacturer was liable because the stopping device was either faulty in design or the elevator itself was improperly constructed. The court found that the parts were properly made and that the malfunction was due to improper installation which was not the manufacturer's concern, and therefore held in favor of the defendant manufacturer. The court made the following statement of its view of a manufacturer's liability:

"A manufacturer or seller of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design or manufacture of the article, if the injury might have been reasonably anticipated."⁵

The Larance case is more intriguing. A fertilizer was sold to a peach grower who dusted his orchard with it full strength, thinking it was a fungicide and unaware that the material was damaging to the trees and fruit if used undiluted. Plaintiff sued both the seller and the manufacturer, founding his case upon the allegation that the fertilizer container was inadequately labeled. The court cast both the seller and the manufacturer in

judgment, observing that "the action was predicated on the alleged tortious conduct of both the dealer and the manufacturer."

"... we conclude that FMC Corporation and the Tennessee Corporation were both derelict in their duty to sufficiently print or disseminate instructions concerning the proper use of NU-Z, which if applied full strength was calculated to damage property, and are therefore liable with their insurers, in solido, to plaintiff."

The interesting point of this case is that the seller was cast in judgment in solido with the manufacturer. What is the duty of the seller in the distribution of a product of this sort? The opinion does not specify precisely the basis of the seller's liability. The seller's conduct relied upon by the trial judge in his written reasons for judgment are referred to by the appellate court and are apparently the bases for the finding against the seller, viz., its acts of ordering and placing the substance in the warehouse, leading plaintiff to believe it was customarily used as a fungicide, and failing to warn plaintiff that the dust could not be used undiluted. It seems that the conduct of the seller was closely akin to misrepresentation in the eyes of the court.

The Louisiana appellate courts decided these four cases in accordance with the main stream of products liability jurisprudence across the country. In the one food case, it applied warranty, as has been consistently the approach in cases arising from the use of products sold for human consumption or intimate bodily use. In the other three cases the statements of authority follow closely the principles announced generally throughout the country.⁷

**Sheriff's Liability for Negligent Acts of His Deputy**

Sheriffs have historically received a certain protection due to the treatment by our courts of the question of a sheriff's liability for negligent acts of his deputies. The courts in most jurisdictions of the United States have refused to assess liability

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against a sheriff (or his sureties), except when an on-duty deputy wrongfully does an official act.\(^1\) The strict judicial interpretation of this rule is demonstrated when a deputy driving an official car to serve a citation negligently strikes a pedestrian, and his act of driving is held to be an unofficial act.\(^2\) It is questionable whether this viewpoint serves the needs of a modern society. With liability insurance available for a sheriff and his deputies, the public interest might be served better by a less strict interpretation of what is an official act of a deputy for which a sheriff will be held liable.

This question was presented to the Louisiana courts this term in an action for wrongful death arising out of a plane crash.\(^3\) The pilot of the plane, which was owned by the sheriff's department, was a special deputy sheriff. He was bonded and a commanding officer of the volunteer group, Sheriff's Air Squadron, although he was never on the payroll of the sheriff's department. The pilot was flying the Mayor of Baton Rouge and an LSU Professor of Government to a municipal officer's meeting in Lansing, Michigan, and the accident apparently resulted from the pilot's negligence in operating the plane under instrument conditions, when he was not trained for instrument flying. The sheriff had consented to the flight, and in fact he had intended to be a passenger himself until a sudden illness changed his plans.

The appellate court, viewing the case within its historical framework, held that the deputy was not on an official act at the time of the accident. In reversing this decision, the Louisiana Supreme Court took a commendable step forward for the jurisprudence of the state in holding "the aircraft was under the absolute control of the pilot for the duration of the entire trip as the agent of the Sheriff."\(^4\) The Supreme Court decision was primarily concerned with the application of the direct action statute to the insurer of the plane, but the merit of the court's position on the official action of the deputy should not be overlooked. By noting the varying duties of the office of a modern-day sheriff, including mutual cooperation and the neces-

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sity of creating good public relations between his office and city and state departments, the court brought into focus the proper understanding of a sheriff's duties today and then correctly placed the responsibility for negligence in performing those duties.

**Noncompensable Mental Pain and Anguish of Parents Resulting from Injuries to Their Child**

In *Voelker v. Liberty Mut. Ins. Co.*, the parents of a small boy who was severely bitten and chewed by a dog sought damages for their mental anguish from viewing the child's injuries, awaiting the results of an emergency operation to repair his wounds, and learning the prognosis that their child would require psychiatric treatment for two or three years. The entire subject of recovery for emotional distress in Louisiana has been discussed in an earlier law review note and need not be further elaborated here. The courts have, almost without exception, denied recovery where one member of a family suffers worry and concern due to the negligent injury to another family member. In so doing, the courts are not necessarily denying the physiological effects of fright and shock, but are rather considering the plea for damages within the framework of whether the negligent defendant who was responsible for the original injury must also answer for the second injury. The *Voelker* case is factually similar to an earlier Louisiana case which denied recovery to a father who suffered a disabling heart attack upon learning that his child was killed through the alleged negligent driving of the defendant. Determinations of liability in this area should be made after careful comparison with the case, *Holland v. St. Paul Mercury Ins. Co.*, wherein a pest exterminator was held liable for worry caused the parents who believed poison had been eaten by their child. The facts of that case, however, allowed the court to base liability upon the breach of a duty owed by the exterminator directly to the parents, due to their contractual relationship.

1. 190 So.2d 136 (La. App. 4th Cir. 1966).
5. 135 So.2d 145 (La. App. 1st Cir. 1961).
DUTY TO WARN SOCIAL GUEST

One Christmas night a Mrs. Foggin and her daughter-in-law were carrying Christmas wrappings and boxes from the latter's house to a trash receptacle. The dark backyard through which they walked was enclosed by a fence with a gate that opened outward. The daughter-in-law held the gate open for Mrs. Foggin to precede her through it, at which point Mrs. Foggin tripped over a plank which was painted a dark color and nailed across the bottom of the gateway, extending six or eight inches above the ground. The suit that arose from Mrs. Foggin's injuries due to this fall1 afforded the Louisiana Supreme Court an opportunity to affirm the rule established by the intermediate courts, unique to Louisiana, that a social guest is considered an "invitee" to whom the landowner owes the duty of exercising reasonable care for his safety.2 The court defined this duty further as one requiring the occupant to warn the guest of a hidden or concealed peril. The daughter-in-law's tacit invitation for the plaintiff to pass through the gate meant that plaintiff could reasonably assume that she could walk through safely, negating any assumption of risk on her part.

SECURITY DEVICES

Joseph Dainow*

Pledge

The necessity of delivery as an essential requirement for a valid pledge1 has been the subject of discussion several times in recent years.2 Generally, the matter is considered as of the time of the making of the purported pledge agreement. There is no reason why the parties could not agree to a later delivery, in which event the pledge is only perfected at the time of such delivery.3 In Steadman v. Action Fin. Corp.,4 the parties signed

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2. In all other American jurisdictions, the social guest is held to be a mere licensee, to whom a lesser standard of care is owed. See Annot., 25 A.L.R.2d 598 (1962); W. Prosser, THE LAW OF TORTS § 60, at 388 (3d ed. 1964).
4. 197 So.2d 424 (La. App. 2d Cir. 1967), writ refused, 198 So.2d 918 (La. 1967).