G. A. GRUNINGER ET FILS LTÉE v. CONSTRUCTION EQUIPMENT COMPANY LIMITED[1]

Vente—Camion-remorque—Défauts cachés de la chose vendue—Connaissance—Présomption—Action en dommages-intérêts—Délai raisonnable—C.C., art. 1527, 1530.

Joseph J. Oliver*

An important but nebulous principle of the civil law has been further confused in the Superior Court decision of *G. A. Gruninger et Fils Ltée v. Construction Equipment Company Ltd.*[1] This case deals with the vendor's liability for damages suffered by the purchaser as a result of the latent defect in the thing sold. In particular it is concerned with the existence or non-existence of a presumption of knowledge on the part of the seller, and the quality of this presumption. Another aspect of the case—the obligation to take a redhibitory action within a reasonable time, as provided by article 1530 C.C.—will not be discussed here.

At the outset it should be emphasized that attention will be directed, not to the *ratio decidendi* of the case, but to an *obiter dictum* which in practice might conceivably exert quite a persuasive influence. This comment will be an attempt to trace the juridical development of the subject matter under consideration, to present the law as it existed at the time of the *Gruninger* case, and to examine whether that case has diverged from accepted principles.

The Case—Facts and Ratio Decidendi

The case is based on an action in damages for latent defects totalling $4,743. The plaintiff, Gruninger, had bought from the defendant Construction Equipment Company Ltd. a powerful truck, which was attached to a tank cementer. While the plaintiff was transporting cement from Montreal to Three Rivers, the apparatus which joined the tank to the truck broke. The tank detached and caused loss of cement and damages to the truck; it was for these damages that Gruninger demanded payment. He claimed that the upsetting of the cementer "was entirely due to a defect of construction in the arm and the harness above mentioned, for which defendant is entirely responsible and of which it was aware or should have been aware."

The learned trial judge, Ferland, J., held that since the plaintiff had neither alleged nor proved any fault on the part of defendant, he could not base his action on Art. 1053 C.C. but must rely upon Art. 1527 C.C. Since Gruninger had proved only fault of construction, and as the defendant is a company

[1][1962] C.S. 444.

*Of the Junior Board of Editors, McGill Law Journal; second year law student.

which distributes and sells Mack trucks which it does not build itself, the action must be founded upon legal warranty for hidden defects. Then the learned judge made certain remarks to which, with all due respect, exception must be taken and which will form the basis of this critique:

> Le défaut de construction exposé au paragraphe 4 de la déclaration était un défaut non apparent que les ingénieurs de la demanderesse et de la défenderesse *n'avaient pu déceler*. Il s'agit donc d'une action résultant de vices rédhibitoires. L'article 1527 C.C. contient le fondement de l'action de la demanderesse.[2]

He continues:

> Comme la défenderesse est une commerçante faisant profession publique de vendre et de distribuer des camions-remorques produits par un manufacturier, elle est légalement présumée connaître les vices du camion qu'elle a vendu à la demanderesse au mois de juin 1952, d'après la loi telle qu'interprétée par la jurisprudence. C'est une responsabilité légale décrétée par le Code civil sans la nécessité de prouver une faute du vendeur.[3]

Hence Ferland, J. would make the vendor liable even though knowledge of the latent defect, was for practical purposes, impossible. But he held that because an action for damages resulting from latent defects ought to be taken with reasonable diligence, as provided by Art. 1530 C.C., and because this diligence was not exercised by the plaintiff, his action was tardy and hence must be rejected. It is not proposed to examine this part of the judgment, which in any case seems unobjectionable in law. The first part of the judgment which is *obiter* will be analysed. However, *obiter* or not, such broad principles (as enunciated by the trial judge) of possible influence in a frequently applied section of the Code, cannot be ignored.

The extent of the vendor's liability is covered by Arts. 1524, 1527, and 1528 C.C. He is bound for latent defects even when they were not known to him; thus he may be open to a redhibitory action setting aside the sale regardless of his knowledge or lack of it.

However, Arts. 1527 C.C. and 1528 C.C. read as follows:

> 1527. If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.
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> He is obliged in like manner in all cases in which he is legally presumed to know the defects.
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> 1528. If the seller did not know the defects, or is not legally presumed to have known them, he is obliged only to restore the price and to reimburse to the buyer the expenses caused by the sale.

Because resulting damages may often far exceed the value of the goods sold, existence of knowledge on the part of the seller may be crucial. Whether this knowledge exists in fact can be determined in each case by the evidence. Whether it exists as a matter of law (*i.e.* is presumed) is a mixed matter of fact and law. This latter issue of law must first be settled; only then can the particular fact pattern be applied.

In this case the learned trial judge imputes liability under Art. 1527 C.C. because the non-apparent defect was one that the engineers of the plaintiff

[2] *Ibid.*, at p. 445. Italics added.

[3] *Ibid.*, at p. 445 and 446.

and of the defendant "n'avaient pu déceler." To reinforce evidence that the defect was latent, he holds that it could not have been discovered; while it may be conceded that this enhances its hidden quality in the physical sense, in law, impossibility of knowledge has a very different effect indeed. On this point, doctrine and jurisprudence are somewhat confusing and require a complete survey. Nevertheless it is proposed to illustrate that certain legal principles have been settled, and that (1) the legal presumption of knowledge referred to in Art. 1527 C.C. applies only to a limited category of sellers; (2) this category is divided into two groups — manufacturers and non-manufacturers; (3) and for the latter group at least, the presumption is rebuttable upon proof that discovery of the defect was impossible. This entails a consideration of the extent of the obligation of warranty against latent defects.

Survey of the Doctrine and Jurisprudence

(A) To whom does article 1527 *C.C. apply?*

The relevant articles of the Code Napoléon, 1645 and 1646, correspond to articles 1527 and 1528 C.C. and read as follows:

> 1645. Si le vendeur connaissait les vices de la chose, il est tenu, outre la restitution du prix qu'il en a reçu, de tous les dommages et intérêts envers l'acheteur.
> 1646. Si le vendeur ignorait les vices de la chose, il ne sera renu qu'à la restitution du prix, et à rembourser à l'acquéreur les frais occasionnés par la vente.

It should be noted that the words "or is not legally presumed to have known them" in Art. 1528 C.C., emanating from the obligation created in the second paragraph of Art. 1527 C.C., are omitted from the Code Napoléon. Nevertheless French doctrine and jurisprudence are useful in analyzing the theoretical framework of the presumption under consideration.[4]

First, one must refer to Pothier who outlines two situations:[5]

(1) If the seller is ignorant of the defect, his warranty is confined to the price of the thing sold. However, if the seller is aware of the flaw and does not inform the buyer, he is further liable for damages which the defect causes; this is fraud and the seller must indemnify the buyer for all wrongs resulting from it. But the case of actual knowledge is not of immediate concern to us.

(2) An artisan who sells the product of his trade, even if absolutely ignorant of any defect, is nevertheless presumed to know the defect and is liable to indemnify the purchaser for all damages that these imperfections may have caused. The rationale is that the artisan renders himself responsible for the quality of his wares, his want of skill being a fault. *Imperitia culpae annu-*

[4]Anglin, C. J., in *Samson & Filion v. The Davie Shipbuilding & Repairing Co.* [1925] S.C.R. 202 at p. 207, relies upon this source: ". . . the French authorities are agreed that there exists in French law a presumption, similar to, if nor identical with, that indicated in the second paragraph of Art. 1527 C.C." The codifiers cite Pothier and Domat; Mignault also uses French doctrine as a source.

[5]Pothier, *Traité de Vente*, ed. Bugnet, 213-216; *Obligations*, 163.

meratur. In effect he warrants the skill of his art when he professes it publicly. Pothier continues:

> Il en est de même du marchand fabricant ou non fabricant. Par la profession publique qu'il fait de son commerce, il se rend responsable de la bonté des marchandises qu'il débite, pour l'usage auquel elles sont destinées. S'il est fabricant, il ne doit exposer en vente que de bonnes marchandises; il doit s'y connaître, et n'en débiter que de bonnes.[6]

Thus, according to Pothier, the non-manufacturing merchant vendor, like the manufacturer, is inescapably bound for damages; there is no way he may rebut the presumption of knowledge, for it is a presumption *juris et de jure*. Even if he could rebut it by proving ignorance, this very ignorance would be a fault. But such a view is extreme and has been modified by subsequent jurists.[7]

A leading case, which presents a lucid enunciation of the principles involved, is the Supreme Court judgment of *Samson & Filion v. The Davie Shipbuilding and Repairing Co.*[8] The action arose out of an explosion of gun-cotton, in a secondhand pipe, killing an employee of the defendant company. It was common ground that none of the parties knew or could have reasonably been expected to know that the pipe contained such explosive material. The material facts in this case are similar to the case under consideration, wherein a non-manufacturing merchant sold a product, the latent defects of which caused damages. Is he presumed to have had knowledge? If so, is this presumption rebuttable? By what means? The notes of Anglin, C. J. are most instructive.

The learned Chief Justice states that since the Code does not list those vendors who are legally presumed to have knowledge, nor does it in any way describe them, recourse must be had to the common law (presumably the civil law). He goes on:

> Also *ex facie* the presumption is *juris tantum* and not *juris et de jure*. Hence it is rebuttable, but by what proof is again the question for careful consideration.[9]

The basic object of his search is to discover whether a legal presumption of knowledge exists against a secondhand dealer selling secondhand pipes, and the nature of the presumption if it does exist. For this purpose, he divides the application of Art. 1527 C.C. into four relatively distinct groups.

The first group, that of the ordinary vendor who is neither manufacturer nor merchant, is excluded by Pothier from a legal presumption of knowledge. Against him Art. 1527 C.C. has no application. Lack of knowledge is not a fault, for the public has placed no reliance on his skill, which is considered equal to theirs. Secondly, at the other extreme, is the merchant-manufacturer

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[6]*Traité de Vente*, 214.

[7]However, Pothier is supported by Guillouard, *Traités de la vente et de l'échange*, I, no. 463, who places both the manufacturer and the merchant in the same position.

[8][1925] S.C.R. 202, followed in *Cayer v. Drolet* [1950] K.B. 790, and *Dame Azeff & Meilman v. Century Construction* [1958] S.C. 80.

[9][1925] S.C.R. 202, at 207.

who does incur a presumption of knowledge of latent defects in the goods he has produced. On these two categories the authorities are in agreement.[10] The third group, that of the vendor classified as a merchant, but selling goods which he has not manufactured, directly concerns us. The learned Chief Justice states:

> The authorities are in accord that in the case of a merchant-vendor who deals in a definite class of goods in regard to which he may reasonably be supposed to possess skill and special knowledge — *un marchand qui vend des ouvrages . . . du commerce dont il fait profession*, (Pothier, Vente, 213); *un marchand faisant le commerce de choses pareilles*, (Baudry-Lacantinerie, Vente, no. 436); *qui n'est pas en effet un vendeur ordinaire*, (D. 73, 2.56) — knowledge of latent defect will be presumed. Such merchants are classed amongst those who are legally presumed *par profession* to know the latent defects in their wares (5 Aubry et Rau, p. 113), and therefore held to be within Art. 1527 C.C. . . .[11]

Further on he introduces an important concept — he speaks of vendors,

> . . . on whose skill or knowledge, because their calling imports possession of it, a purchaser would be justified in placing, and might be expected to place, reliance. It is not, therefore, surprising to find that in the French cases in which merchant-vendors actually ignorant of defects in articles sold by them have been held liable under Art. 1645 C.N. on the footing of presumed knowledge or of fault, attention is generally directed by the courts to the special skill or knowledge which their public carrying on of a particular line of commerce imports. *Spondet peritiam artis* is the underlying principle of liability.[12]

Thus the element of reliance has been added as a requirement, or at least an indication, of the existence of presumed knowledge; if the public places their trust in a merchant's skill, then his lack of that skill must be deemed a fault. The basis of this trust rests upon the particular talents or knowledge which the specialized merchant possesses and makes known publicly. French doctrine and jurisprudence may be cited as support.[13]

Finally, Anglin, C. J. presents the fourth category, that of the merchant not selling in his professed field, and it is within this group, with the ordinary vendor, that he classes the secondhand dealer, upon whom no special reliance or presumption of knowledge rest.

(B) Quality of the Presumption of Knowledge

Then the learned Chief Justice poses a question central to this case comment. "By what proof is the presumption of knowledge under Art. 1527 C.C. rebuttable?"[14] The answer cannot be absence of knowledge, because the very rationale of the presumption is to impute fault or imprudence to ignorance; to interpret otherwise would be to subvert centuries of judicial opinion and

[10]Guillouard, *op. cit.*, I, no. 463; Baudry-Lacantinerie, *Vente*, no. 436; Pothier, *Vente*, 213; Troplong, *Vente*, 574; Duvergier, *Le droit civil français*, I, no. 412; *Wilson v. Vanchestein* (1897) 6 B.R. 217; Sirey 1873-2-179, *Pernet v. Clément & Monnier* — Sirey 1899, 1re partie, p. 271, Cass. Req. 30 janvier 1895; Fourth Report of the Codifiers, at p. 14.

[11][1925] S.C.R. 202, at 210 and 211.

[12]*Ibid.*, p. 212.

[13]D. 1912, 1.16; D. 1894, 2.573,574; Pand. Fr. Pér. 1892. 2.169; D. 1873, 2. 55; D. 1863, 2. 27.

[14][1925] S.C.R. 202, at 213.

decision. But does this mean that there is no manner in which the presumption, and hence the liability may be rebutted? If it was impossible for the vendor to discover the defects, may he not then be exonerated? Upon this important issue rests the validity of the *Gruninger* case, for it is submitted with the utmost respect that if the presumption is in reality irrebuttable, the learned judge's *obiter* is merely confusing; but if it is rebuttable, as this comment will attempt to show, then his remarks tend to be at variance with a preponderance of doctrine and jurisprudence.

To provide theoretical background it is necessary to return to the authors. Pothier has placed the manufacturer and merchant in one group; for both there is no escape from the liability; the presumption against them is *juris et de jure*.

Baudry-Lacantinerie agrees with Pothier about the manufacturer, but expresses doubts regarding a merchant selling similar articles (*i.e.* a specialized merchant). He believes that the merchant also is obliged by his profession to know what he is selling, and that the buyer is not required to prove this knowledge:

> Mais ce n'est qu'une présomption qui comporte la preuve contraire, et si le marchand démontre que la nature des vices cachés était telle qu'il lui a été impossible de les découvrir, il sera traité selon l'article 1646 et non selon l'article 1645. La controverse porte donc simplement sur le point de savoir si l'acheteur devra prouver que le vendeur connaissait le vice, ou si le marchand sera tenu de prouver qu'il ne le connaissait pas.[15]

Faribault takes opposition to Pothier, whom he labels as dated:

> Cette règle est plutôt sévère, mais on se rappellera qu'elle a été formulée à une époque où marchands, ouvriers et artisans connaissaient si bien leurs professions ou métiers qu'il leur était naturel de garantir la qualité de leurs produits ou de leur ouvrage . . .
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> Bien que cette règle reçoive encore son application aujourd'hui, on considère que la présomption à laquelle elle réfère a plutôt les caractères d'une présomption *juris tantum*. Il sera cependant toujours assez difficile à un fabricant ou à un marchand spécialisé d'échapper à une condamnation en prouvant qu'il ne pouvait pas raisonnablement soupçonner que la chose qu'il vendait était affectée du vice qu'on lui reproche.[16]

This means that the manufacturer in addition to the specialized merchant may rebut the presumption against him, a view unshared by most contemporary jurists.[17]

As seen above, Quebec jurisprudence also has placed the non-manufacturing merchant in a separate category. Mignault takes exception to Pothier's strict view, and indicates that:

> . . . le marchand, contre qui il existe une présomption de faute, pourra néanmoins échapper à la responsabilité des dommages-intérêts en démontrant que la nature des vices cachés était telle qu'il lui a été impossible de les connaître . . . Je refuserais de libérer le marchand qui ne ferait que prouver son ignorance du vice, car précisément cette ignorance est une faute. Mais si le marchand (je ne parle pas ici du fabricant) démontrait qu'il lui a été absolument impossible de connaître ce vice, malgré les précautions minutieuses qu'il avait adoptées, il me semble que ce serait raisonner trop rigoureusement des termes de notre article . . .[18]

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[15]Baudry-Lacantinerie, *op. cit.*, XIX, no. 435.

[16]*Traité de droit civil du Québec*, XI, p. 395.

[17]However he is compelled to admit the irrebuttable presumption against the builder in virtue of Art. 1688 C.C.

[18]*Le droit civil canadien*, VII, p. 113.

In *Ross v. Dunstall*,[19] Mignault, J. elaborates upon this analysis. Here the learned jurist repeats his view that while a manufacturer is inescapably bound by Art. 1527 C.C., the ordinary merchant has a way out.[20] Several subsequent decisions lend support to the rebuttable quality of the presumption imposed upon specialized merchants.[21] The Supreme Court case of *Touchette v. Pizzagalli*[22] contains an interesting *obiter* by the then Chief Justice Duff:

> It is now settled that the seller is responsible in respect of all damages sustained by the purchaser by reason of latent defects where the seller is either a manufacturer or a person who deals in, as merchant, articles of the same kind as that which was the subject of the sale. Unless he can establish that the defect was such that it could not have been discovered by the most competent and diligent person in his position, his ignorance is no excuse, because it is conclusively presumed (in the absence of such proof) to be the result of negligence or of incompetence in the calling which he publicly practises and in respect of which he thereby professes himself to be competent.[23]

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[19](1921) 62 S.C.R. 393.

[20]Most doctrine and jurisprudence imply that an irrebuttable presumption of knowledge is imposed upon the merchant-manufacturer by virtue of Art. 1527 C.C. However it is submitted that not only is such a contention redundant in practice, it is also unsound in theory because it neglects the very basis of legal liability for latent defects in the goods sold.

For the seller-manufacturer, ignorance of latent defects is a fault. If he did not discover the defects, this indicates a lack of skill; and, since the public relies upon his skill, he must be responsible for resulting damages. If, however, he did in fact discover the defects, or was presumed to have discovered them, he is responsible under Art. 1527 C.C. Hence against him the existence of knowledge, actual or presumed, makes no practical difference, since liability is also based upon lack of knowledge. Moreover, the quality of the presumption is of no practical consequence—if he knew, was presumed to know, or did not know of the defect, he is nevertheless bound to reimburse for resulting damages.

In the words of Mignault, J.:

"Consequently it is not material in these cases to discuss the nature of the presumption, either *juris tantum* or *juris et de jure* mentioned by article 1527. If ignorance of a latent defect is in itself a fault, in the case of the manufacturer who sells a thing manufactured by him, it becomes unnecessary to determine whether the presumption of knowledge of this defect can be rebutted by him, for, even if he could rebut it and establish his ignorance, he would nevertheless be in fault . . ." *Ibid.*, at p. 420.

Thus it is contended that the notion of irrebuttably presumed knowledge is redundant, for the same juridical end is achieved regardless, *i.e.* he is inescapably bound whether or not we assume a rebuttable or irrebuttable presumption of knowledge.

It may be argued that this analysis is purely an academic refinement, effecting no practical difference. However it does avoid a theoretical confusion concerning the very rationale of the liability. To discuss a presumption *juris et de jure* is deceiving since it imputes fault only to the presence of knowledge in the seller-manufacturer, when in reality the very basis of his fault derives from the lack of knowledge. For the reason a manufacturer-merchant is inescapably bound is not merely that he should have taken care to discover any defects, and hence is presumed to have known them, but also that no defects should have occurred in the first place. If they did occur it was due to his lack of skill. This is precisely why the non-manufacturing merchant is not liable for lack of knowledge — he did not cause the defects because he did not manufacture the product. However, since he did handle the product in some way, he should have been prudent enough to have discovered them — hence the rebuttable presumption of knowledge.

[21]In *Bouvier v. Thrift Stores Ltd.* (1936) 74 S.C. 93, at p. 95, Greenshields, C. J. follows *Blair v. Pure Food Stores Ltd.* (not reported) and quotes from Anglin, C. J.'s judgment in *Samson & Filion* (as noted above).

[22][1938] S.C.R. 433.

[23]*Ibid.*, at p. 439.

Hall, J. in *Legare Auto and Supply Co. and another v. Choquette*[24] held that the presumption may be rebutted upon proof that the defect was such that its existence could not have been suspected or discovered with reasonable care. He introduces a novel concept pertinent to this analysis:

> There is therefore, a distinction to be made between the position of a merchant who deals in a general class of goods, and one who deals in the particular product of a particular manufacturer. The former is held to a general warranty against any latent defects, but the latter should be held only to warrant that the goods are indeed the actual product of the particular manufacturer . . . he thereby tacitly accepts the warranty of the general reputation of the manufacturer . . .
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> It is impossible for me to accept the general proposition that a dealer is always bound in all respects to the full warranty of the manufacturer. Such an interpretation of the law would make a general business almost impossible. It is perfectly obvious that a dealer in motor cars has no qualification to criticize the design adopted by the manufacturer, or to test the sufficiency of all the parts entering into the manufacture. He must be held, therefore, to come within the provisions of the general rule laid down by the Supreme Court that "No care which could reasonably be exacted from them would disclose" the alleged latent defects.[25]

This has direct application to the material facts of the *Gruninger* case, for the Construction Equipment Company (defendant) was a specialized merchant that distributed and sold Mack trucks it did not manufacture. On this basis it might be argued that the only duty of defendant was to warrant that the object was the actual product of the manufacturer, *i.e.* that is was really a Mack truck. Perhaps that is an extreme position, yet it indicates the important principle that certain distributors ought not to be bound to warrant the full quality of goods of which they may not have complete technical knowledge.[26] The public buys a brand name product, and expects uniform quality regardless of the distributor; surely it is upon the manufacturer that reliance is placed.

Summary

While the law is not settled about all issues regarding the vendor's liability for damages as a result of latent defects in the goods sold, nevertheless those principles which are pertinent to the instant case have been decided authoritatively by many French and Quebec cases, in particular the *Samson & Filion* case. Jurisprudence has delineated four distinct categories. (1) The ordinary vendor, who is neither manufacturer nor merchant, and does not fall within Art. 1527 C.C. and hence is excluded from a legal presumption of knowledge of latent defects. (2) Similarly this article has no application against the

[24](1926) 41 K.B. 69.

[25]*Ibid.*, at p. 77 and 78.

[26]Thus, the *Legare Auto and Supply Co.* case appears to have posed new questions regarding the degree of responsibility imposed upon certain single brand and single product distributors. Does it imply that a distributor, who specializes in the products of only one manufacturer, has the lesser obligation of merely warranting that the goods were the actual product of the particular manufacturer? If this reasoning be extended, is not a greater onus inevitably imposed upon the vendor who specializes in a particular product, and not a particular brand name of that product? These questions, which raise interesting issues of policy, have not yet been resolved. But they are significant and should prove a fruitful object of study.

merchant not selling in his professed field. (3) At the other extreme, the merchant-manufacturer is inescapably liable for latent defects in the goods he sells. (4) The non-manufacturing vendor selling goods "du commerce dont il fait profession"[27] is legally presumed to know of the latent defects in the thing sold. Thus he is liable according to Art. 1527 for all damages suffered by the purchaser, if the latter was not aware of these defects before the sale, and if he used the goods for the purpose for which they were intended. The vendor may rebut this presumption by proving that he was ignorant of the defects and that it was impossible for him to have discovered them, even if he had acted with reasonable care, and had taken "précautions minutieuses."[28] Clearly then, the presumption is *juris tantum.*

It is respectfully submitted that the remarks of Ferland, J. in the *Gruninger et Fils* case leave a very different implication: they clearly imply that the presumption against the specialized vendor is irrebuttable. In an effort to emphasize the hidden nature of the defect, the learned judge has also created the impression that if the seller could not have found the defect he remains liable, when in fact jurisprudence holds that this very impossibility of discovery will rebut the presumption. In effect he has returned to the strict liability position which Pothier held, at least for the manufacturer, a position definitely influenced by the historical context.[29] Now, since most products are mass produced and given in gross to distributors, one could not expect every vendor to employ a permanent expert to test each good sold. Such a contention has rightly been rejected by Mignault and others. However, it is in the public interest to ensure that reasonable care and attention will be taken by distributors, especially those who specialize in particular fields which they publicly profess. Hence, in the event of latent defects, specialized vendors are liable for restitution of the price, as well as damages caused to goods of the buyer. But they are discharged from responsibility if they could prove that it was impossible to discover these defects.

The *Gruninger* case, however, holds the seller liable whether or not he could have discovered the latent defects. Hence this decision, if followed, can have significant commercial consequences. On the other hand, it is hoped that the courts will not seize upon that principle, but will reject it as contrary to the spirit and theory of judicial thought since Pothier. In law the remarks are clearly *obiter*; they are pronouncements of a court in direct opposition to jurisprudence of higher authority; they may at any time be overruled. Yet they do provide an opening, a gap through which the particular fact pattern of one case may equitably pass, to the subsequent inequity of future decisions. For the legal realist this has occurred often in the past; but for the legal theorist it ought not to occur again in the future.

[27]Pothier, *Vente*, 213.

[28]Mignault, *op. cit.*, VII, p. 111-112.

[29]*Supra*, note 16.