1924

*Nov. 18.
*Dec. 30.

SAMSON & FILION (DEFENDANTS).....APPELLANTS;

AND

THE DAVIE SHIPBUILDING & REPAIRING CO. (PLAINTIFFS)... } RESPONDENTS.

W. ZIFF (DEFENDANT IN WARRANTY).....APPELLANT;

AND

SAMSON & FILION (PLAINTIFFS IN WARRANTY) ..... } RESPONDENTS.

W. ZIFF (PLAINTIFF IN SUB-WARRANTY).....APPELLANT;

AND

BAKER & BETCHERMAN (DEFENDANTS IN SUB-WARRANTY) ..... } RESPONDENTS.

APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Vendor and Purchaser—Second-hand dealer—Latent defects—Accident—Liability—Presumed knowledge—Rebuttal—Contractual Warranty—Damages—"Foreseen"—Arts. 1053, 1056, 1074, 1075, 1522, 1526, 1527, 1528 C.C.

These actions arise out of the death of an employee of D. caused by an explosion of gun cotton in an iron "second-hand" pipe in the course of its being heated for use for the purpose for which it had been bought by D. from S. The order given was for "used pipes in good working condition." D. Submitted to a judgment in favour of the

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

representatives of its employee under the Workmen's Compensation Act for $2,560. D. sued to recover this sum from S.; in a second action S. claimed the same sum by way of warranty from his vendor Z., and in a third action Z. sought to recover by way of sub-warranty from his vendor B.

Held, that since no care which could reasonably be expected from the vendors would have disclosed the presence of the gun cotton, there was no delictual liability under Art. 1053 C.C.

Held, that a merchant-vendor, not the manufacturer, is legally presumed to know latent defects in the thing sold only where his calling imports a profession of skill or knowledge in regard thereto on which the purchaser might reasonably rely.

Held that a second-hand dealer is therefore not subject to the legal presumption of knowledge contained in par. 2 of Art. 1527 C.C. He is liable only to the extent indicated in Art. 1528 C.C., unless he had actual knowledge of the latent defect from which injury has arisen, or had some reason to suspect its existence, non-disclosure of which might amount to *dol.*

Held that the presumption of knowledge under par. 2 of Art. 1527 C.C. is rebuttable only by proof that the nature of the defect was such that its existence could not have been suspected by the vendor and that he could not have discovered it by any precaution he might reasonably be expected to take.

Held also that the damages claimed by D. from S. are not recoverable as resulting from a conventional or contractual warranty, as these damages could not "have been foreseen" by the vendor within the meaning of Art. 1074 C.C.

Judgment from the Court of King's Bench (Q.R. 37 K.B. 451) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court by which the action by the Davie Shipbuilding Co. was maintained against the appellants Samson & Filion, the action in warranty by Samson & Filion was maintained against the appellant Ziff and the appellant Ziff's action in sub-warranty against the respondents Baker & Betcherman was dismissed.

The material facts of the case are fully stated in the judgment now reported.

Antonio Langlais K.C. for Samson & Filion.

Belleau K.C. for The Davie Shipbuilding & Repairing Co.

Ryan K.C. and *Budyk* for Ziff.

Fripp K.C. and *Mayrand* for Baker & Betcherman.

(1) [1924] Q.R. 37 K.B. 451.

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

The judgment of the majority of the Court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—These actions arise out of the death of an employee of the Davie Shipbuilding Company caused by an explosion of gun-cotton in a 6-inch iron "second hand" pipe in the course of its being heated preparatory to the use of a "T" attached to it for the purpose for which it had been bought by the shipbuilding company. The company submitted to a judgment in favour of the representatives of their employee under the Workmen's Compensation Act for $2,560.

In the first suit they seek to recover this sum from Samson & Filion, from whom they allege they had bought the pipe in question, in Quebec, in April, 1919; in the second action Samson & Filion claim over, by way of warranty, from their alleged vendor, Ziff, on a sale made in Montreal, in March, 1919; in the third action Ziff seeks to recover similarly, by way of sub-warranty, from his alleged vendors, Baker and Betcherman, on a sale made in Ottawa, in February, 1919. The first two actions were maintained in the Superior Court and the third was dismissed. All three judgments were upheld on appeal.

Although it is suggested that the pipe in question was at one time in use in a munitions factory and that the presence of gun-cotton in it is thus accounted for, that fact is not established. It is common ground, however, that the explosive substance was in the pipe during all the time occupied in its passing through the hands of the several parties to these actions. It is also common ground that none of them up to the moment of the explosion had any knowledge of the fact that the pipe contained such a substance; nor does it appear that any of them (unless it be Baker & Betcherman) knew that the pipe had been used in, or had come from, a munitions factory.

While anybody even cursorily examining the pipes would probably have noticed white markings upon them, and on more careful investigation might have discovered a white powder in some of them, it is not contended that such a discovery would have given any reason to suspect that the white substance was in reality a dangerous explosive such

as gun-cotton. Indeed the presence of the white powder was noticed by the shipbuilding company's employees in small quantities in a number of the pipes which they handled, but was taken by them to be asbestos. The learned trial judge in discussing the facts says that, however vigilant or distrustful, no buyer of used iron pipe would imagine that it might contain a dangerous explosive. Mr. Justice Flynn, who delivered the principal judgment in the Court of King's Bench, while of the opinion that the vendors of the pipes must have noticed the white substance, is convinced that they had no suspicion of its being an explosive. These findings were not attacked, no doubt because they were regarded as unimpeachable. It seems clear that there was nothing to arouse any suspicion and that only a chemical analysis of the substance in the pipes would have revealed its dangerous character.

The learned trial judge dealt with the first two cases on the basis of delictual responsibility. The Court of King's Bench, on the other hand, treated them as falling within Art. 1527 C.C.—as cases in which there was a legal presumption of knowledge on the part of the vendors entailing the consequences of actual knowledge, i.e., responsibility for all the damages sustained by the purchasers. Consequently Samson & Filion were held liable to the Davie Shipbuilding Company and Ziff to Samson & Filion. Ziff's action against Baker & Betcherman failed in both courts for lack of proof that the pipe in question was one of those bought by him from them.

Samson & Filion v. *Davie Shipbuilding Company*

The plaintiffs in this action rest their claim on three distinct bases:—

(*a*) delictual fault (Art. 1053 C.C.),
(*b*) breach of legal warranty against latent defects (Art. 1522 C.C.) coupled with a legal presumption of knowledge of such defects (Art. 1527 C.C.), and
(*c*) breach of conventional warranty.

The finding of the trial judge that the pipe in which the fatal explosion occurred was one of the lot sold by Samson & Filion to the Davie Shipbuilding Co., affirmed by the Court of King's Bench, could not, upon the evidence, be seriously questioned.

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO

Anglin C.J.C.

On the argument it was suggested that the plaintiffs had been subrogated to the rights of the representatives of their employee who was killed. To their right under the Workmen's Compensation Act there could be no effective subrogation. Any claim such representatives might have had under Art. 1056 C.C.

against third parties responsible for the accident

(R.S.Q. Art. 7334) was never preferred and there has been no assessment of damages on that footing; nor was there any discussion of such a claim in this action. The plaintiffs' declaration makes no allusion to it. That ground of claim may, therefore, be dismissed without further consideration.

(*a*) It may also be said at once that, in our opinion, the facts in evidence fall far short of what would suffice to warrant a finding of failure to take such reasonable care as would involve delictual fault entailing liability under Art. 1053 C.C. The learned Chief Justice indeed negatived that basis of liability when he said:

quel acheteur, fut-il le plus vigilant, le plus averti ou le plus méfiant, ira se douter que des tuyaux de fonte puissent contenir un explosif dangereux?

Delictual fault as a basis of liability was properly rejected by the Court of King's Bench.

(*b*) That court, as already stated, held the appellants liable for a breach of the warranty against latent defects imposed by Art. 1522 C.C. and responsible

for all (the) damages suffered by the buyer

as vendors against whom there was a legal presumption, under Art. 1527 (2), of knowledge of a latent defect which caused such damage.

It may be arguable that what is invoked as a conventional warranty given by the appellants, presently to be dealt with, superseded any legal warranty under Art. 1522 and that the claim based on Arts. 1522 and 1527 C.C. would be thereby precluded. But the Court of King's Bench did not take that view, and, as they have rested their judgment on those articles, it will probably be better first to deal with that basis of liability as if there had been no conventional warranty—especially since what is to be said in this case on that assumption will also apply to the case of *Ziff* v. *Samson & Filion,* where there is no suggestion of conventional warranty.

Arts. 1527 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.

He is obliged in like manner in all cases in which he is legally presumed to know the defects.

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.

The corresponding articles of the Code Napoléon, 1645 and 1646, are:—

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 intérets envers l'acheteur.

1646. Si le vendeur ignorait les vices de la chose, il ne sera tenu qu'à la restitution du prix, et à rembourser à l'acquéreur les frais occasionnés par la vente.

Notwithstanding the omission of the second paragraph of Art. 1527 C.C. from Art. 1645 C.N., and the corresponding omission from Art. 1646 C.N. of the words,

or is not legally presumed to have known them,

found in Art. 1528 C.C., the French authorities are agreed that there exists in French law a presumption similar to, if not identical with, that indicated in the second paragraph of Art. 1527 C.C. and that cases within that presumption fall under Art. 1645 and not under Art. 1646 C.N. French text-writers and jurisprudence are, therefore, helpful in determining the scope of, and the limitations upon, the application of paragraph 2 of Art. 1527 C.C., with which we are presently concerned—the more so since the codifiers cite Pothier, *Vente*, 212-3, and *Obligations*, 163, and Domat, Liv. I, tit. II, s. XI, No. 7, as the basis of Art. 1527 C.C., Laurent (v. 24, No. 294) informs us that Arts. 1645-6 C.N. are likewise derived from Pothier.

(1) *Ex facie* it is not every seller who is in fact ignorant of defects in the thing sold by him who comes within the second paragraph of Art. 1527 C.C., but only such vendors as are "legally presumed to know." Since the code does not enumerate or otherwise define the vendors to whom this presumption attaches, we are driven to the common law to ascertain who they are.

(2) Also *ex facie* the presumption is *juris tantum* and not *juris et de jure*. Hence it is rebuttable but by what proof is again a question for careful consideration.

Moreover, although the liability under Art. 1527 C.C., as under Art. 1645 C.N., is stated to be for

all damages suffered by the buyer,

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

the damages recoverable are necessarily subject to some restrictions. The basis of the liability under Art. 1527 C.C. is *dol* actual or presumed. The code provides that even where the inexecution of an obligation is due to fraud of the obligor, only the damages immediately and directly resulting therefrom (Art. 1075 C.C.) can be recovered. It would also seem clear that when an article is sold for a definite purpose and is put to some other use entailing greater loss the damages attributable to a latent defect which may be recovered by the buyer under Art. 1527 C.C. may not exceed those that would have been suffered had it been used as intended. (Pothier, *Vente,* No. 214). That is merely an application of the principle underlying Art. 1074 C.C. Whether when the sale is not for any definite purpose, but is of an article the ordinary use of which is well established, and the buyer puts it to some extraordinary use, he can recover under Art. 1527 C.C. to the extent to which his loss is aggravated by reason of such extraordinary use may perhaps be more doubtful. Pothier's view is against such recovery. (*Vente,* 214). Laurent, (v. 24, No. 295 *in fine*), however, suggests that where knowledge of a defect by the vendor is presumed all the resultant loss to the purchaser may be regarded as within the ordinary rule governing damages, the foreseeable damages (Art. 1074 C.C.) in such a case being much more comprehensive than in the case of an "ordinary vendor."

But we are not presently concerned with the limitations on the amount of damages recoverable and they are alluded to merely to indicate that Art. 1527 C.C., notwithstanding the comprehensiveness of its terms, is subject in its application to some restrictions. The damages suffered by the shipbuilding company were undoubtedly the direct and immediate result of the presence of the gun-cotton in the pipe sold to it by the appellants. That pipe was not put to any extraordinary use or subjected to any unusual treatment and, while the buyers gave a written order for the articles they required, specifying the quantity of each size of pipe (thus indicating that they were acquired for immediate use and for some definite purpose), there is no evidence that that purpose was communicated to the vendors, or, if it was, that the pipes were put to a use not contemplated by them.

(1) Whether the vendors in the present instance, their ignorance in fact of the presence of the gun-cotton in the pipe which they sold having been conceded and knowledge of anything which should have aroused suspicion as to its presence having been negatived, (Pothier, *Vente*, 212; Laurent, v. 24, no. 295), were sellers who should be presumed to have had knowledge of that "defect" may next be considered.

Without so deciding, we shall assume, as was held by the Court of King's Bench, that the presence of the gun-cotton in the pipe in which it exploded, although an extraneous substance, was a defect within Art. 1527 C.C.

The buyers were not seeking either resiliation or compensation for diminished value as provided by Art. 1526 C.C. In pursuing those remedies it would have been unnecessary to establish either knowledge or presumption of knowledge of the defect. But, claiming, as they do, under Art. 1527 C.C., and not averring actual knowledge, it becomes a vital question whether on such a sale as that under consideration—a sale of second-hand pipes by a second-hand dealer—a legal presumption of knowledge by the seller of any latent defect in them arises under the second paragraph of that article.

We naturally turn to Pothier for the principles which must govern this inquiry. He distinctly excludes from the legal presumption of knowledge the vendor who is neither the maker of the goods sold nor a merchant.

> Hors ces cas d'un ouvrier ou d'un marchand, le vendeur qui n'a eu ni la connaissance, ni aucun juste soupçon du vice redhibitoire * * * n'est aucunement tenu du dommage que ce vice a causé à l'acheteur dans ses autres biens. (*Vente*, 215).

Upon this exclusion of the "ordinary vendor" all the text-writers are in accord. Such a vendor is on the same footing as to presumed knowledge and means of knowledge as the buyer. In the absence of conventional warranty the latter will not be justified in relying on the skill or knowledge or means of knowledge of the former. Art. 1527 C.C. cannot be invoked; the only remedies are those provided by Arts. 1526 and 1528 C.C.

Equally distinctly Pothier declares that the manufacturer or artisan who sells his own product is invariably presumed to know of defects in it and to be liable for damages caused by them to purchasers on the same footing

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

as if he had actual knowledge of such defects. (*Vente,* 213; *Oblig,* 163). Here again the commentators are in accord. (Guillouard, Vente, 463; Baudry-Lacantinerie, Vente, 436). Indeed the codifiers of the Quebec Code, in their fourth report, at p. 14, give as an instance of legal presumption of knowledge under para. 2 of Art. 1527 C.C.,

> mechanics, who would be presumed to know defects in the quality of the materials used by them in their trade.

The extent and the force of the presumption in such a case is exemplified in *Ross* v. *Dunstall* (1); see *Wilson* v. *Vanchestein* (2); *compare Société Prométhée* c. *Tonna* (3).

It is important to note, however, the nature of the presumption and the basis on which Pothier rests it (*Oblig.* 163, par. 2). It is not a presumption of fault as some French writers seem to opine (Mourlon, no. 607; Guillouard, *Vente,* no. 463; D. Rep. Vices Redhib. 160). It is a presumption of knowledge which Art. 1527 (2) declares and which such a vendor as *un homme du métier* will not be allowed to deny. (Guillouard, *Vente,* no. 463). Against him there is a *fin de non-recevoir* which precludes his alleging a belief that the article sold was free from defects since that would be to aver as a defence what must be imputed to him as a fault, *imperitia culpae annumeratur,* (Pothier, Louage, 119). In such a case the vendor has opportunities of knowledge not open to the purchaser and it is only natural and to be expected that the purchaser should rely upon him for disclosure of latent defects. Hence the presumption of knowledge and its consequences.

We come now to a more debatable case, that of the merchant selling goods not made by himself. Is every such merchant subject to a presumption of knowledge of defects, or does it arise only where from the nature of his business he may reasonably be said to profess possession of it, and a purchaser from him may fairly act on the assumption that he has it? 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*

(1) [1922] 62 Can. S.C.R. 393. (2) [1897] Q.R. 6 Q.B. 217.
(3) [1914] 1 Dalloz Rec. Heb. 433.

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 defects 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. *Beaver Oil Co.* v. *Véronneau* (1); *Lajoie* v. *Robert* (2); 7 Mignault, p. 213; 3 Langelier, p. 526.

Although many French text-writers broadly assimilate the case of the merchant to that of the manufacturer or workman and use terms quite wide enough to include any sort of merchant-vendor (Guillouard, Vente, no. 463, *in fine*), others, more discriminating, confine the application of the presumption of knowledge, or, as some of them put it, of fault, to merchants of whom it may in a certain sense be said that their business is their profession—"*le commerce dont ils font profession.*" For the wider application of the presumption the concluding paragraph of no. 213 of Pothier's treatise on *Vente* is invoked as authority. That learned writer having dealt in the preceding paragraph with the liability of the workman whose lack of skill or knowledge of things concerning the art he professes to exercise is imputed to him as a fault, opens the concluding paragraph with the general statement *il en est de même d'un marchand fabricant ou non-fabricant.* But he had already in the first paragraph of the same section (no. 213) restricted the application of the presumption to *un marchand qui vend des marchandises du commerce dont il fait profession* and had added *ce marchand est tenu de la reparation de tous les dommages,* etc. As an illustration he had put on the same footing the cooper (*le tonnelier*) and the merchant who deals in casks (*le marchand de tonneaux*), assigning as the reason for the liability of each

son impéritie ou défaut de connaissance dans tout ce qui concerne son art, est une faute qui lui est imputée, personne ne devant professer publiquement un art, s'il n'a toutes les connaissances nécessaires pour le bien exercer: *Imperitia culpae annumeratur.*

In no. 215 he contrasts with these the case of a purchase of casks from a vendor who is neither a cooper nor a dealer

(1) [1923] 29 Rev. Leg. N.S. 106. (2) [1916] Q.R. 50 S.C. 395.

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

in casks, and whose liability is accordingly restricted to the restitution of the price (Art. 1526 C.C.) The restriction of the presumption of knowledge to a vendor who may be regarded as *un homme du métier* is emphasized in the treatise on *Obligations* (no. 163), where Pothier illustrates it by the case of a sale of defective wood by a carpenter entailing full liability, whereas on a like sale by a person not *un homme du métier*, but an "ordinary vendor," the damages recoverable by the purchaser are confined to a reduction in price. See also Pothier, *Louage*, 119. Since the Codifiers indicate the texts of Pothier, *Vente*, 213, and *Obligations*, 163, as the basis of Art. 1527 C.C. it seems reasonable to hold that the vendors who will be "legally presumed to have known" latent defects for the purpose of par. 2 of that article are only those to whom lack of knowledge would be imputable as fault—those 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. Guillouard, (*Vente*, no. 463) puts the basis of responsibility in such cases in these words:

Le vendeur devait, à raison de la profession qu'il exerce, connaître les défauts, même cachés, de la chose qu'il vend;

Pothier (*Vente*, no. 213) as already stated, refers to the "*marchand qui vend les choses du commerce dont il fait profession.*" For a few instances in which the courts have indicated the profession of special skill or knowledge on the part of the merchant-vendor as the basis of his liability under Art. 1645 C.N. (Art. 1527 (2) C.C.), reference may be made to D. 1912, 1. 16 and note; D. 1894,2.573,574 Pand. Fr. Pér. 1892. 2.169; D. 1873,2.55; D. 1863,2.27; *Lajoie* v. *Robert* (1).

But it sometimes happens that, although the appellation merchant may not improperly be given to the vendor, he

(1) Q.R. 50 S.C. 395, at p. 400.

does not deal in the goods sold by him in such a way that they can fairly be said to be *des ouvrages du commerce dont il fait profession*. The business he carries on does not import public profession of any special skill or knowledge in regard to his wares on which a customer might be expected to rely. To such a merchant-vendor the presumption of knowledge does not attach. *Cessante ratione legis cessat et ipsa lex.*

Is there any tenable ground for imputing a profession of skill or knowledge in regard to the wares he sells to the second-hand dealer in scrap pipes or similar material? Can a purchaser reasonably claim that he relied on such a vendor's possession of such special skill or knowledge? In our opinion, assuredly not. In his case, therefore, the basis of responsibility—professed skill or knowledge, on which the imputation of actual knowledge rests—is lacking. The second-hand dealer must, for the purposes of Art. 1527 C.C., be regarded as an "ordinary vendor," not subject to the legal presumption of knowledge under par. 2 of Art. 1527 C.C. and therefore liable only to the extent indicated in Arts. 1526 and 1528 C.C., unless indeed he had actual knowledge of the latent defect from which injury has arisen or had some reason to suspect its existence, non-disclosure of which might amount to *dol.* D. 1873. 2. 55.

A fortiori is this so where, as in the case of the sale by Ziff to Samson & Filion, both vendor and purchaser are second-hand dealers. They stand on an equal footing as to the possession of skill and have equal opportunities of ascertaining any latent defects. Writing recently in 22 La Revue Trimestrielle, at p. 648, M. Réné Demogue says:

> Lorsqu'un professionel passe un contrat, ses obligations sont plus ou moins étroites selon qu'il traite avec une personne de profession voisine, ayant des connaissances spéciales égales aux siennes, ou non.

(II) By what proof is the presumption of knowledge under Art. 1527 (2) C.C. rebuttable? Certainly not, as some writers seem to suggest, (Baudry-Lacantinerie, *Vente,* no. 436 *in fine;* Dalloz, Nouveau Code Civ. Art. 1645, no. 28), merely by proof, however cogent, that the vendor was in fact ignorant of the defect. The hypothesis of the second paragraph of Art. 1527 C.C. is that very ignorance. But there are many cases in which, if the presumption would otherwise have arisen, the circumstances show that know-

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

ledge by the vendor was impossible and common sense demands that he should be held free from liability. An instance that at once occurs to the mind is that of a sale by a retail grocer of goods put up by the manufacturer in sealed packages. If such goods should contain some foreign deleterious substance, while the manufacturer might have difficulty in escaping responsibility, it would be absurd to hold the retail vendor liable under Art. 1527 (2) C.C. The circumstances peremptorily rebut any presumption of knowledge by him.

The presumption made in the French law is regarded as rebuttable by proof that the defect was of such a nature that the vendor could not have discovered it; Baudry-Lacantinerie, *Vente,* no. 436; Guillouard, *Vente,* no. 463 *in fine;* Dalloz, Jur. Gén. Vices Redhib. 160; Pand. Fr. Rep. Vices Redhib. no. 344. In the work of Mr. Justice Mignault, (vol. 7, p. 113) the opinion expressed is that proof that discovery of the vice was impossible, notwithstanding *les précautions minutieuses*, will suffice. Vid. D. 59. 2. 153,155. We are inclined to the view that the presumption of knowledge, for such it is, created by par. 2 of Art. 1527 C.C. is rebuttable by proof that the nature of the defect was such that its existence could not have been suspected by the vendor and that he could not, by any precaution which he might reasonably be expected to take, have discovered it, and that, having regard to the findings of fact made by the learned trial judge and by Mr. Justice Flynn, above noted, liability in the present case under Art. 1527 C.C. should on that ground be held not to have been established. Both because they are not vendors against whom a legal presumption of knowledge of latent defects would arise and also because, on the evidence, no care which could reasonably be exacted from them would have disclosed the fact that the pipes they sold contained a dangerous explosive, we are, with deference, of the opinion that in respect of any purely legal warranty, liability under Art. 1527 (2) C.C. does not attach to the appellants Samson & Filion.

(*c*) There remains for consideration what the plaintiffs (respondents) prefer as a conventional warranty. The order given by them to the appellants for the pipes in question was for " used pipes in good working condition." The plaintiffs aver that by accepting and filling an order drawn

in those terms the appellants warranted that the pipes they supplied were in condition for immediate use by the purchasers in an ordinary way, and that any condition, such as the presence of an explosive substance in them, that would render them unfit for such use would amount to breach of conventional warranty and would entail liability for all damages directly resulting.

Whatever obligation the vendors incurred arose out of their acceptance of the order in the terms in which it was couched. They certainly undertook to furnish pipes answering the description given and are subject to whatever liability inexecution of their contractual obligation entails. That liability is subject to the limitation imposed by Art. 1074 C.C., which reads as follows:

1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen (qu'on a pu prévoir) at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

Were the damages suffered by the respondents as a result of the explosion foreseen or foreseeable within the meaning of this article? That they were not actually foreseen is clear. Whether they should be regarded as damages which " might have been foreseen " depends on the purview of that phrase as used in the article, which is in *ipsissimis verbis* as Art. 1150 C.N. The codifiers references under Art. 1074 are to Pothier, *Vente,* 72-3; *Obligations,* 165; Domat, Liv. I, tit. I, s. II, 17-18; and 6 Toullier, 284 *et seq.* In their report (p. 18) they state that the group of articles which comprises Art. 1074 embodies the rules contained in the French code and declares the existing law. The text of Domat throws no light on the question presently before us. Toullier says that, however immediately or directly the damages flow from the inexecution of the obligation, they will not be recoverable if they could not be foreseen. He adds that if the cause of the occurrence which entails loss to the buyer was known to the seller (no doubt meaning was known or ought to be held to have been known), he will be liable for all the damages sustained since he is deemed to have been willing to make them good.

Pothier (Oblig. no. 160) says:

Lorsqu'on ne peut reprocher au débiteur aucun dol, et que ce n'est que par une simple faute qu'il n'a pas exécuté son obligation; soit parce qu'il s'est engagé témérairement à ce qu'il ne pouvait accomplir, soit parce

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

qu'il s'est mis depuis, par sa faute, hors d'état d'accomplir son engagement; dans ce cas, le débiteur n'est tenu que des dommages et intérêts qu'on a pu prévoir, lors du contrat, que le créancier pourrait souffrir de l'inexécution de l'obligation; car le débiteur est censé ne s'être soumis qu'à ceux-ci.

After pointing out that, ordinarily, foreseeable damages are restricted to those which are intrinsic—*par rapport à la chose même*—and do not extend to extrinsic loss, i.e. to that sustained by the obligee *dans ses autres biens* (Oblig. no. 161; *Vente* 72), Pothier adds that sometimes extrinsic damages are recoverable (no. 162), giving as one example a case where an express provision of the contract anticipated the very occurrence which occasioned the loss; and as another a case where the object of the purchase was made known to the vendor and its frustration entailed loss of business by the purchaser. (See also *Vente,* no. 73). In the former the cause of the damage, in the latter the kind of damage suffered was foreseen. In no. 163 (*Oblig.*) he deals with a case in which knowledge of the cause of the damage imputed to *un homme du métier* affords a ground for holding him liable for extrinsic loss—limited, however, to the risk which the circumstances showed he contemplated undertaking. *Vide* Delvincourt, Notes, no. 2, p. 532. Marcadé (v. 4, no. 523) seems to regard the distinction between intrinsic and extrinsic loss as futile, the sole question, he says, being whether the prejudice suffered should have been foreseen.

With the exception of Aubry et Rau (v. 4, p. 308, note 41), the authorities seem to be in accord that the effect of Art. 1150 C.N. is to exclude the recovery of extrinsic damages of which the cause could not have been foreseen at the time of making the contract. (Dal. Rep. Prat. Obligations, nos. 461-2; Gaz. du Palais, 1902, pp. 6-9; 5 Mignault, pp. 419-420; 3 Langelier, pp. 524-6; 5 Labori, Rep. du Dr. Dommages-Intérêts, no. 50; 16 Laurent, 289-293; Demolombe, *Contrats,* 578 *et seq;* 10 Duranton, 470 *et seq;* 7 Huc. pp. 211-12; 5 Demante, 66, *bis* III.) Aubry et Rau (loc. cit.) would further restrict the recovery under Art. 1150 C.N. to compensation in respect of such injury and loss as might themselves have been foreseen.

In the present case, as already indicated, neither the occurrence from which the respondents' loss resulted, nor the cause of that occurrence, nor the nature and extent of

the damages it entailed could have been foreseen by the appellants. If, therefore, the case should be regarded as merely one of inexecution of the vendors' contractual obligation which arose from their acceptance of the order to furnish the goods answering the description "in good working condition," the damages which the plaintiffs claim are not recoverable.

If, however, the words "in good working condition" in the respondents' order should be regarded as something more than descriptive of the quality of the pipes to be supplied, and the acceptance of such an order should be deemed to import some warranty that the pipes furnished pursuant to it were in a condition suitable for immediate use, (*Lamer* v. *Beaudoin* (1)), any obligation in damages arising out of a breach of that warranty would, in our opinion, be subject to the limitations either of Art. 1074 C.C. or of Art. 1528 C.C. Those limitations in such a case as this do not materially differ. Under Art. 1074 C.C. recovery is restricted to damages foreseeable, because only for them is liability impliedly assumed by the obligor. Under Art. 1528 C.C., if it be applicable, recovery is confined to such compensation as is allowable where all fraud or *dol,* actual or imputable, is excluded.

No doubt, by an instrument clearly expressing, or necessarily implying, such an intention, liability may be assumed for all damages consequential upon a breach of contractual obligation, though they be unforeseeable and should arise from a cause of which there is no knowledge either actual or presumable. *Modus et conventio vincunt legem.* But, in view of the fundamental distinction in regard to the measure of the damages recoverable established by the civil law between cases of *dol* or fraud, on the one hand, and those of innocent breaches of contractual obligations, on the other, the intention, in a case falling within the latter class, to assume the wider responsibility imposed by law in cases of *dol* or fraud will not be lightly imputed.

In the present case fraud is not suggested, and, as already stated, there is no basis for any imputation of *dol* arising from presumed knowledge. The occurrence which occasioned the damages and its cause were alike unforeseen and unforseeable.

(1) [1923] Can. S.C.R. 459.

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Anglin C.J.C.

Viewed as in the nature of a warranty arising out of their acceptance of the order for pipes "in good working condition," the obligation of the vendors would no doubt be conventional in its origin. It would accordingly not be confined to latent defects properly so called. The presence of a foreign substance in the pipes rendering them unfit for use would be a breach. Failure by the purchasers to make such inspection before using the pipes as, having regard to their description as "used pipes," ordinary prudence would, in the absence of such a warranty, have dictated, would not avail the vendors as a defence, even had the defect which caused the damage been readily discernible. But the warranty would, nevertheless, be implied by law rather than expressed and the obligation would attach to the appellants in their character as sellers. Arising, as it does, out of a stipulation incident to a contract of sale, whether express or implied, that obligation would, therefore, seem to be subject, as to the extent of the responsibility in damages which it entailed, to Arts. 1527-8 C.C. *Lamer v. Beaudoin* (1). We find nothing in the terms of the order indicative of an intention on the part of the contracting parties that the vendors should renounce the restriction on the measure of damages afforded by Art. 1528 C.C. and assume the wider responsibility attached by the law only to cases of fraud or *dol.* (Pand. Fr. 1892. 2. 169). The right to recover the damages claimed in this action on the ground of conventional warranty, therefore, in our opinion cannot be maintained.

For these reasons the appeal of Samson & Filion against the judgment condemning them must be allowed.

Ziff v. *Samson & Filion*

The dismissal of the action against Samson & Filion necessarily destroys the basis of their claim in warranty against their vendor Ziff.

Moreover, there certainly was nothing in the nature of a conventional warranty on Ziff's sale to Samson & Filion. On the contrary, in shipping the pipes he sold Ziff was careful to describe them in the Bills of Lading merely as "car pipes scrap" and in the invoice as "78,700 pounds pipe."

(1) [1923] Can. S.C.R. 459.

Neither was the use to be made of the pipes known when he effected the sale.

That the pipe which exploded was one of the pipes sold by Ziff to Samson & Filion is clearly established by the evidence. If the principal action had been maintained we would thus have been confronted in the action against Ziff with a sale of second-hand pipes, without either express warranty or express exclusion of warranty, by one dealer in that class of goods to another. Responsibility for the damages claimed was in the Ziff case rested by the plaintiffs either on delictual fault or on a breach of implied warranty entailing liability under Art. 1527 C.C. For the reasons stated in the Samson & Filion case, liability on neither ground was incurred by Ziff. Indeed, so far as responsibility under Art. 1527 C.C. is concerned, as already stated, he would appear to be in even a better position with regard to Samson & Filion than they were in regard to their purchasers, the Davie Shipbuilding Company, since both Ziff and Samson & Filion were dealers in second-hand pipes and therefore each had, or ought to have had, equal skill and equal opportunities for ascertaining any latent defects in them.

The appeal of Ziff against the judgment condemning him must also be allowed.

Ziff v. *Baker & Betcherman*

The evidence in this action would not justify a reversal of the concurrent findings of the Superior Court and of the Court of King's Bench on the question of identification which is purely one of fact. Moreover, as we think the action against Ziff not maintainable, the basis of his claim in warranty disappears. It is unnecessary, therefore, to consider the contention of counsel for Baker & Betcherman that their liability would depend upon and be excluded by Ontario law. *Jones* v. *Just* (1).

The appeal in Ziff v. Baker & Betcherman fails.

IDINGTON J. (dissenting).—

Samson & Filion v. *Davie Shipbuilding Co.*

The respondent having bought from appellant certain pipes the former needed in its business, which is that which

(1) [1868] L.R. 3 Q.B. 197.

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Idington J.

its name implies, proceeded to make use of them and, in course thereof, an explosion ensued which resulted in the death of one of its employees. As a result thereof the legal representatives of said deceased, were awarded, under the Workmen's Compensation Act of Quebec, damages to the amount of $2,560 against respondent herein.

The respondent paid such damages and costs, and then sued the appellants, who had, in selling said pipes to the respondent, represented them as in good working order, when in fact they were not, but liable, by reason of some material inside same, to produce such an explosion as took place, as already stated. On the trial of said action the learned trial judge found appellants liable and gave judgment for said damages with costs.

From that judgment appellants appealed to the Court of King's Bench, and that appeal was dismissed with costs.

This is an appeal therefrom taken, I infer from the appellants' factum, as a precautionary measure awaiting the result of an action they had brought against one Ziff, from whom they had bought said pipes.

I see no ground for the appeal and think same should be dismissed with costs.

The foregoing was written by me several weeks ago and now I have given me a copy of the judgment of the learned Chief Justice of our court, allowing the appeal with costs, and which I have read with care.

I am, however, unable to change my views expressed in the foregoing; especially seeing that the learned trial judge was the Honourable Chief Justice, Sir F. X. Lemieux, of the Superior Court for the District of Quebec, who entered judgment for the now respondent for the amount claimed, and was upheld by the unanimous judgment of the Court of King's Bench at Montreal, consisting of Chief Justice Lafontaine and four others, said court, however, resting upon article 1527 of the Civil Code, instead of a *quasi delict* —as they seem to think the learned judge had done.

Moreover, the factum of counsel for the appellants for the appeal here does not attempt seriously to argue that said courts erred.

Indeed, as I suggested in my foregoing notes, it seemed to be a matter of practical expediency in view of their claim

over against Ziff, and ended by presenting the following suggestion:—

Appellants had no defence to the action taken by respondent but that negligence of respondent's employee and the fact that they had bought the pipes from Wm. Ziff whom they called in warranty. It is true that defendant in warranty Ziff did not take their place and stead. It is also true that the principal action was one trial and the action in warranty was another, but in those actions in warranty should not the person responsible for the fault be also held responsible for all the costs? The ruling of the Superior Court is to this effect.

Appellants were satisfied with the judgment of the Superior Court. It is only upon defendant in warranty's inscription of his case before the Court of King's Bench that they appealed from the judgment of the Superior Court in the event and only event that the Court of King's Bench would modify the ruling of the trial judge. It is only upon defendant in warranty's inscription before this court that appellants inscribed their case, to see that, somebody having to pay, they shouldering only other people's responsibility, should not be compelled or should have a recourse against someone.

Ziff v. *Samson & Filion*

This appellant (having failed in the action taken by respondent against him in the courts below seeking relief by way of action in warranty, in respect of the pipes sold by respondent to the Davie Shipbuilding & Repairing Company Limited, out of which sale and actual warranty so much litigation has arisen) appeals here.

His appeal here in his action against Baker and Betcherman, I had for my part disposed of by writing my opinion at the same time as I had written in the Samson & Filion appeal; holding that his said appeal should be dismissed.

His liability on the alleged warranty to Samson & Filion, I by no means could hold clear, either on the facts or the law, and I concluded to await the decisions of the Chief Justice and my brother judges.

The learned Chief Justice having sent me a copy of his judgment dealing with all three appeals, I see little hope of anything therein for respondent's recovery against this appellant.

It has always seemed to me very difficult to hold this appellant liable, for he was selling only scrap, whereas Samson & Filion were selling pipes (which by no means was of the scrap order), though picked out of a mass of what had been sold to them as scrap.

If they had only taken due care to clean them thoroughly their express warranty of their being in good working order

1924

SAMSON & FILION v. DAVIE SHIPBUILDING & REPAIRING CO.

Idington J.

would have been, I have no doubt, quite justifiable, and been justified.

The appellant in the result, of course, is entitled to succeed, with costs throughout.

Ziff v. *Baker & Betcherman*

The appellant carried on the business of an iron merchant in Montreal, in 1919.

There was an incorporated company known as the Davie Shipbuilding and Repairing Company, Limited, which, during said year, carried on the business which said name implies, at Quebec.

There was a firm called Samson & Filion, at the same time in Quebec and, amongst other things, they dealt in second-hand goods out of which they sold, in March, 1919, a quantity of iron pipe of three different dimensions, to the said corporate company and when those in charge of its business come to use said piping an explosion took place which resulted in the death of one of its workmen.

The company being held liable under the Quebec Working Men's Compensation Act, to the extent of $2,560 for damages suffered by the legal representatives entitled to recover same under said Act, paid the same, and some costs.

The said incorporated company then brought an action against said firm of Samson & Filion, who in turn brought an action in warranty against appellant, and he in turn brought an action in sub-warranty against the respondents, who carried on business in Ottawa, and, appellant says, were the parties from whom he had bought the goods he had supplied to Samson & Filion.

The courts below seem to have found it impossible to maintain the said lastly mentioned action, by reason of failure, on appellant's part, to identify the goods he claims respondent sold him, as those which came from Samson & Filion to the Davie Shipbuilding & Repairing Company, Limited.

Any goods of the kind sold by respondent to appellant were of the second hand class known as scrap and were of a mixed lot such as enabled the appellant to pick out piping of the size wanted by the shipbuilding company—but whether the same he picked out is exceedingly doubtful.

The law governing the question raised as to any warranty from the respondent, would be that of Ontario, for the bargain between the appellant and the respondent was actually made here in Ottawa, and for the goods to be put free on board the cars here, and then respondent's duty would end.

There is not pretended to have been any express warranty, and certainly, after reading the evidence of the said parties hereto, there was none to be implied, according to the opinion I have formed.

And in light of the evidence adduced as to our law relevant to such a dealing, I am surprised at this final stage of the course of litigation that has arisen, being continued so far.

Not only do I hold that in applying our Ontario law (of which we must take judicial notice) to the relevant facts to be considered herein, the appellant has no ground to rest upon for its appeal here, but I also incline to agree with those in the courts below who doubt the identity of the goods in question herein with those sold by appellant to Samson & Filion.

I would therefore dismiss this appeal here with costs throughout.

Appeal Samson v. *Davie Co. allowed with costs.*
Appeal Ziff v. *Samson allowed with costs.*
Appeal Ziff v. *Baker dismissed with costs.*

Solicitors for Samson & Filion: *Langlais, Langlais, Godbout & Tremblay.*

Solicitors for Davie Shipbuilding & Repairing Co.: *Belleau, Baillargeon, Belleau & Boulanger.*

Solicitor for Ziff: *J. A. Budyk.*

Solicitor for Baker & Betcherman: *Ovide Mayrand.*