THE REDHIBITORY ACTION AND THE "REASONABLE DILIGENCE" OF ARTICLE 1530 C.C.

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1. Introduction.

In the contract of sale the vendor is obliged to warrant the buyer against the latent defects of the thing sold (article 1506 C.C.). In the absence of a private agreement of warranty, it is the legal warranty set forth in the Civil Code which applies (article 1507 C.C.). The parties are free, however, to provide in their contract for their own terms of warranty (article 1507 C.C.), which is frequently done in such fields as appliances and automobiles.

Where the thing sold suffers from serious defects which were not apparent and of which the purchaser was ignorant (articles 1522, 1523 C.C.), under the legal warranty the buyer may take the redhibitory action to have the sale cancelled, the action *quanti minoris* for a reduction in price (article 1526 C.C.), or a variant of the latter, consisting of a claim for the recovery of the cost of removing a latent defect. The criteria of what constitutes a serious defect are

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given in article 1522 C.C.: those latent defects in the thing sold and its accessories as render it unfit for the use for which it was intended or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

The Civil Code, having given the buyer the right to sue his vendor because of latent defects in the thing sold, then specifies that his action must be taken with "reasonable diligence" (article 1530 C.C.). The purpose of the writer is to ascertain what is meant by this term and how it has been interpreted by our courts.

2. *The reason for the requirement of "reasonable diligence."*

Unless it is otherwise stipulated in the contract, the vendor's warranty extends only to those defects which existed at the time of the sale.[1] A long passage of time would make it difficult, if not impossible, to establish that the defect really was present at the time of the sale. The seller must consequently be protected from facing a claim which it would be exceedingly difficult to disprove owing to the passage of time,[2] especially in the field of animals, where an illness can strike suddenly or may be caused by poor treatment on the part of the buyer, or in the more modern field of appliances and automobiles, where deterioration can be rapid, particularly where the item is sold second-hand.

There is a more fundamental reason, too. The law recognizes that it is not in the public interest that the rights of creditors who are not diligent in protecting them should be allowed to remain enforceable for an indefinite period, to be pressed a long time afterwards upon the unwary defendant or his heirs who may no longer have the evidence with which to make a defence.

The law protects us against old claims by the means of extinctive prescription, the other purposes of which are to reduce the amount of litigation and to increase the stability of society.[3] While the delay of article 1530 C.C. may not be exactly the same as ordinary prescription, the same principle applies.

3. *The distinction between the redhibitory action and the action to annul for error.*

Extinctive prescriptions are of widely varying lengths of time: for example, the general period is thirty years (article 2242 C.C.), for commercial claims it is five years (article 2260 C.C.), and for damages resulting from bodily injuries

[1]Mignault, *Le Droit Civil Canadien*, VII, page 114 (by inference); Faribault, *Traité de Droit Civil du Québec*, XI, page 301; Marler, *The Law of Real Property*, page 251.

[2]Mignault, *op. cit.*, VII, page 120; *Brown v. Wiseman* (1901) 20 S.C. 304, at 307-8 (Archibald, J.); *Fitzpatrick v. Tremblay* (1915) 21 R.L.n.s. 148, at 158 (Court of Review); *Laverdure v. Lahaie* [1945] R.L. 69 (Loranger, J.).

[3]Mignault, *op. cit.*, IX, pages 336-337; Rodys, *Traité de Droit Civil du Québec*, XV, pages 31-32; *Gosselin v. Beaulieu* [1958] S.C. 23 (Marquis, J.).

it is one year (article 2622 C.C.). They are each, however, for a definite period of time. In contrast, the term "reasonable diligence" is by nature elastic.

The redhibitory action is separate and distinct from the action to annul by reason of error as to the substance of the thing.[4] Thus if I pay a substantial sum for a painting believing it to be the work of a famous artist and later discover that it was done by an unknown, I am entitled to demand the resiliation of the sale on the ground of error. A prescription of ten years will apply to this latter action (article 2258 C.C.) instead of the "reasonable diligence" of article 1530 C.C.[5]

4. The length of the "reasonable diligence" delay.

A. Introduction. Although the general principle may be put forth that the delay must be short enough for it to be evident that the defect existed at the time of the sale while at the same time long enough for such defects to have revealed themselves,[6] the length of the delay will also be affected by various factors, some of which we shall now examine.

B. The special case of the animal stricken with tuberculosis. Article 1530 C.C. specifies that as regards an animal stricken with tuberculosis the redhibitory action will be considered as having been taken within a reasonable delay if taken within ninety days of the delivery. The article adds that the vendor will have the burden of proving that the animal was not so stricken at the time of the sale. Presumably the reasons for these provisions are the lengthy nature of this illness and the difficulty of discovering it, together with the desirability of stamping out a disease injurious to human health (in the case of a cow, for example) by putting a heavier onus on the vendor.

The ninety day delay concerning tuberculosis is in sharp contrast to the short delay generally called for in the case of an animal.

C. Factors governing the length of the delay. The speed with which the buyer must act in order not to lose his rights will depend *inter alia* on the following factors:

(i) *The nature of the defect.*

As already seen, we must exclude from this discussion animals stricken with tuberculosis, which are specifically covered by article 1530 C.C.

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[4]For example, see *Côté v. Laroche* (1890) 16 Q.L.R. 15 (Andrews, J.); *Société Coopérative Agricole de la Rivière Malbaie v. Girard* [1955] Q.B. 542, together with the case comment thereon by Gonthier (1956) 34 Can. B. Rev. 316. See also *Manseau v. Collette* [1955] S.C. 2 (Perrier, J.).

[5]Mignault, *op. cit.*, VII, pages 114-115; Faribault, *op. cit.*, XI, pages 300-301; Ripert et Boulanger *Traité de Droit Civil d'après le Traité de Planiol* (1958), III, pages 509-510; Walter Johnson, "The Redhibitory Action" (1952) 12 R. du B. 322, footnote 2; Gérald Aubin, "De la 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at 17; see also *Denis v. Montreal Investment and Realty Company Limited* (1918) 54 S.C. 116 (Panneton, J.); *Canadian Armature Works Inc. v. Beaulieu* [1953] R.L. 129 (Montpetit, J.).

[6]Mignault, *op. cit.*, VII, pages 114 and 120; *Hanakova v. Girard* [1957] S.C. 344 (Brossard, J.); *Simoneau v. St. Jacques* [1958] S.C. 325 (Marquis, J.).

Traditionally, a very short delay was allowed in the case of sick animals because of the difficulty of establishing that the sickness existed at the time of the sale. Eight or nine days was the period generally settled on, unless the circumstances were such that the buyer could not have acted sooner.[7] The source of this eight or nine day delay rule was apparently a usage in Paris under the old French law.[8] Pothier[9] tells us that under the Roman law the delay was six months but that in France the local usages governed and they allowed much shorter periods. He says that in his own district the delay for the redhibitory action in the cases of horses and cows was forty days from the date of delivery, but he cites Mornac to the effect that in that latter author's day the delay had been nine days. Pothier mentions that under the *Coutume du Bourbonnois* the delay was eight days. We find that in Normandy the delay was thirty days.[10] While article 1648 C.N. is almost identical to the first paragraph of article 1530 C.C., laws subsequent to the Code Napoleon were passed in France which set fixed delays for domestic animals of nine days or thirty days (depending on the types of defects giving rise to the redhibitory action which were specified in the legislation), which delays were applicable to the whole of France, thereby replacing the varying delays of the local customs.[11]

The foregoing French legislation does not apply to Quebec; in fact, the codifiers decided against adopting specific delays in favour of leaving the period ". . . to local usage and the discretion of the Courts."[12] Thus article 1530 C.C. provides that the redhibitory action ". . . must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made."

It is to be noted that the usage to be applied is that ". . . of the place where the sale is made." It is respectfully submitted that this excludes the automatic

[7]Faribault, *op. cit.*, XI, pages 302-303; Mignault, *op. cit.*, VII, page 120; *Darte v. Kennedy* (1871) 15 L.C.J. 280 (Berthelot, J.); *Dame Tétreault v. Duffy* (1899) 16 S.C. 89 (Court of Review); *Brown v. Wiseman* (1901) 20 S.C. 304, at 308 (Archibald, J.); *Guilmette v. Langevin* (1907) 31 S.C. 331 or 13 R.L.n.s. 154 (Court of Review); *Tremblay v. Société d'Agriculture de Charlevoix* (1930) 48 K.B. 171 (cited in *Payeur v. Toussaint* (1939) 67 K.B. 463 at 471); *Remillard v. Beaulieu* [1962] S.C. 657 (Challies, J.). For an example of circumstances preventing the buyer from acting within eight days, see *Picard v. Morin* (1887) 13 Q.L.R. 223 (Angers, J.).

[8]Faribault, *op. cit.*, XI, pages 302-303; Mignault, *op. cit.*, VII, pages 120-121; Argon, *Institution au Droit Français*, 8th edition, (1753), II, pages 245-246.

[9]Pothier, *Traité de Vente*, ed. Bugnet, paragraph 231.

[10]*Payeur v. Toussaint* (1939) 67 K.B. 463, at 469-470.

[11]Duvergier, *Collection complète des Lois, Décrets, Ordonnances, Règlements et Avis du Conseil d'Etat*, (1838), XXXVIII, pages 329ff; Rogron, *Code Civil Expliqué par ses Motifs*, 14th ed. (1850), II, pages 1537ff; Marcadé, *Explication Théorique et Pratique du Code Napoléon*, 5th edition, (1855), VI, pages 283-284; Guillouard, *Traité de la Vente et de l'échange*, 2nd edition, (1890), I, page 483; Dalloz, *Encyclopédie Juridique, Répertoire de Droit Civil* (1955) V, pages 729-730 (paragraphs 135ff); Aubry et Rau, *Le Droit Civil Français*, 6th edition, (1946), V, pages 88ff.

[12]Codifiers' fourth report, page 14.

application of the old Parisian usage of nine days. This period would therefore only apply if this usage had become established in this Province. While it is true that a number of judgments have applied a delay of eight or nine days (cited *supra*), there is an important series of judgments to the effect that this period does not apply, and there being no other usage in the Province,[13] the question as to whether the buyer has shown reasonable diligence will be in the discretion of the court, which will base its decision on the other criterion in article 1530 C.C., namely the nature of the defect (which will depend in part on the nature of the object) along with the circumstances of the case.[14] Let us examine in particular the Court of Appeal decision in *Cayer v. Drolet*[15] and the Superior Court judgment in *Mercier v. Saucier*.[16] While these cases involve the sale of cows rather than of horses, both are domestic animals giving rise to similar problems, and the judgments disclose a generally less rigid outlook on delays and a greater reliance on the ability of medical experts to establish the existence of a disease for a more extended period into the past than was previously possible.

In *Cayer v. Drolet*, plaintiff had bought from the defendant seven cows on November 9, 1948, which were immediately transported to plaintiff's farm. On arrival (on November 9), one of the cows was found to be sick. It was treated by a veterinarian on the following day and lived until November 25 when it died. A second cow died on November 11 and a third on November 16. Two more of the cows purchased died between this latter date and November 25 (we are not here concerned with further cows mentioned in the judgment as already belonging to the purchaser which also took ill or died). The action was taken on December 18, being forty days from the date of the sale and of the appearance of the illness of at least one of the cows. The majority of the Court of Appeal[17] took the following into consideration: the ". . . circonstances particulièrement pénibles dans lesquelles s'est trouvé le demandeur, et de l'inexpérience que démontre sa conduite", the fact that the cow which had been found ill on the day of the sale and delivery (November 9) only died on November 25 and it was not until December 5 that a medical

[13]Gérald Aubin, "De la 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at the bottom of page 16.

[14]*Lanthier v. Champagne* (1874) 23 L.C.J. 253 (Court of Appeal); *Donihee v. Murphy* (1879) 2 L.N. 94 (Court of Appeal); *Tiernan v. Trudeau* (1887) 15 R.L. 444 (Mathieu, J.); *Houle v. Côté* (1887) 13 Q.L.R. 80 (Court of Appeal), (there was an express guarantee but the judgment does not seem to have turned on this); *La Compagnie du Chemin de Fer Urbain de Montréal v. Lindsay* (1890) 18 R.L. 695 (Court of Appeal); *Cayer v. Drolet* [1950] K.B. 790 at 796; *Mercier v. Saucier* [1960] S.C. 305 (Lacroix, J.); *Baleer v. Provancher* (1903) 24 S.C. 137 (Langelier, J.); I think it would also be fair to cite *Brown v. Wiseman* (1901) 20 S.C. 304, at 306-7 (Archibald, J.) and *Picard v. Morin* (1887) 15 R.L. 317 (Angers, J.)—in this case there existed both an express guarantee and difficult circumstances. See also the remarks of St-Jacques, J., in *Gauthier v. Comité de Réalisation de la Cité-Jardin* [1955] Q.B. 100, at 106.

[15][1950] K.B. 790.

[16][1960] S.C. 305 (Lacroix, J.).

[17]per Gagné, J., at page 796 of the report.

certificate was received establishing the sickness that had attacked the cows, and that the lawyer whom plaintiff then consulted could not be blamed for taking about ten days to prepare his action. One can sense here a certain measure of embarrassment on the part of the Court at having rendered what may have appeared to them to be a decision based on equity rather than strict law. It is true that generally speaking the delay begins to run from the date that the defect appears (see *infra*), which would mean the date the cow showed signs of sickness rather than the date of death. Mr. Justice St. Jacques dissented, simply holding that the delay had been unreasonable.[18] Was this really so? We have already seen that the aims of article 1530 C.C. are to cause the delay to be short enough so that it is evident that the defect existed prior to the sale and to prevent vendors from being plagued by claims when they are no longer able to defend themselves. It is submitted that both these aims have been fulfilled in this case. It was clear that the sickness was in existence at the time of the sale, and forty days can hardly be considered as prejudicing the vendor where the medical evidence is plain.

In *Mercier v. Saucier*, plaintiff had bought a farm, including its equipment and cows, on April 23, 1957. In mid-July plaintiff discovered, on being so advised by a government agricultural expert, that the animals had brucellose (a disease in which animals drop their young prematurely), which constituted a hidden defect as it was only discoverable by means of tests. The action was taken on August 22. The Court held that the purchaser had shown reasonable diligence despite the four months' delay since the date of the sale. The judgment seems to have turned on the fact having been clearly established by the medical experts that the sickness had existed prior to the sale, and that the period in which "reasonable diligence" must be shown runs only from the date the defects appear. This resulted in a delay of one month which was held not to be excessive, though there was a mitigating factor in that apparently there had been discussions between the parties before the suit was taken.

Even *Remillard v. Beaulieu*,[19] in which Mr. Justice Challies stated that the eight day rule applies to redhibitory actions relating to sales of animals,[20] can be cited in support of the proposition that longer delays are now more reasonable than formerly because of improved medical knowledge. The horse had been purchased and delivered on July 29, 1958, and was first saddled by the buyer on September 15 when it was discovered that the horse limped. Treatment by plaintiff having failed, an x-ray was taken on about October first. While the judgment does not expressly give the date of the institution of the action, it appears to have been taken on November 7, being over three months after the sale and five weeks after the discovery of the defect. While it is true that the learned judge justified the long lapse of time on the basis

[18]at page 798 of the report.

[19][1960] S.C. 657 (Challies, J.).

[20]at page 658 of the report.

of the principle that an express guarantee has the effect of excluding the requirement of "reasonable diligence", it is siguificant that the evidence of the medical experts to the effect that the arthritis which had been disclosed by the x-ray must have existed at the time of the sale was taken into consideration.

We have seen, then, evidence of what might be the beginning of a new trend as regards the length of delay that the courts will allow in the case of animals. We started out with the enforcement of a short period which seems to have been allowed to be lengthened partly as a result of a more liberal attitude towards legal requirements but much more as a result of the contribution of medical science which in many instances will be able to show that a defect had originated further back than could have been established in an earlier era. This trend would seem reasonable as the seller is not prejudiced where the defect can be clearly established as having originated before the sale, provided that it is not allowed to become extended to the point where the general objective of prescription is not fulfilled, *i.e.* that of protecting persons against claims which in the interests of society should not have been allowed to remain enforceable for so long. The exercise of the discretion given to the judges by the term "reasonable diligence" should certainly prevent this from occurring.

While cows are still vety much part of the modern scene, the horse has to a great extent been supplanted by the ubiquitous automobile, one of the fastest depreciating and hence one of the most expensive items that can be bought. It is a thing which nearly every North American feels he has to own, whether he can afford it or not, either for work or so-called pleasure.

Secondhand cars share with animals the ability to develop defects with great suddenness, with the result that the "reasonable diligence" of article 1530 C.C. has been interpreted as being of a short duration. For example, in *Sirois v. Demers*,[21] the car was acquired by an exchange on October 2, 1943, plaintiff was told of the defects by a mechanic on October 4 or 5, and he sued on October 26. This was held to be too late.

As to new cars, the reasons for there seeming to be little jurisprudence on this are that presumably few of them suffer from defects serious enough to meet the criteria of article 1522 C.C.; a conventional warranty for a definite period is furnished;[22] and, generally speaking, the automobile manufacturers are reluctant, in this hotly competitive field, to allow too many of their customers to remain seriously dissatisfied because of the effect this would have on the volume of future sales. It might be mentioned *en passant* that the Supreme Court, in *Touchette v. Pizzagalli*,[23] discussed the interesting problem that arises where the manufacturer, having stipulated a conventional warranty which excludes the usual legal warranty, fails to fulfil the terms of the former.

[21][1945] K.B. 318.

[22]The effect of a conventional warranty of a definite period is discussed under the heading "The existence of an express guarantee"(*infra*).

[23][1938] S.C.R. 433.

The following is a selection of delays relating to moveables that have been held to be too long: five months for cement blocks,[24] over six months for cement,[25] eight or nine months for hay,[26] six months for toilet articles such as combs and brushes,[27] over a year for wine,[28] three or four months for tobacco,[29] a year for tobacco,[30] over six months for electric light bulbs,[31] six or seven months for paint,[32] four months for a machine,[33] one year for a machine,[34] over a year for a machine,[35] ten months for an electric refrigerator,[36] nine months for plumbing "nipples",[37] six weeks for a horse,[38] thirty-two days for a horse,[39] in two successive exchanges of a horse, two months after the first exchange and forty days after the first action, for the action in warranty by the transferor in the second exchange against his auteur,[40] over a year for an automobile.[41]

The nature of houses is such that defects in them sometimes take longer to appear and so it would not be fair to the purchaser to apply too short a delay. For example, it may be necessary for a house to undergo at least part of the winter season if defects in the heating system or in the structure are to be discovered. At the same time, it will be easier than with an animal or a car to establish, despite the greater lapse of time, that the defect existed at the time of the sale.[42] Thus in *Bourdon v. Lamontagne*,[43] the defect (the collapse of a floor in a new house) occurred in the latter half of June, being one month after the sale, the repairs took until the end of July, the purchaser received the repair bills in August, on September 1st he sent them to the vendor and he

[24]*Chicoine v. Archambault* [1948] K.B. 409.

[25]*Trudeau v. Lafleur* (1907) 32 S.C. 223 (Court of Review).

[26]*Girard v. Dessert* (1915) 48 S.C. 508 (Bruneau, J.).

[27]*Holt v. J. D. Vallières Ltée* [1948] S.C. 397 (Duranleau, J.).

[28]*Guest v. Douglas* M.L.R. (1888) 4 Q.B. 242.

[29]*Dame de Felice v. O'Brien* (1918) 27 K.B. 192.

[30]*Cantin v. Otis* (1927) 65 S.C. 173 (Belleau, J.).

[31]*Gauthier v. Electrical Equipment Co.* (1922) 28 R.L.n.s. 151 (Court of Review).

[32]*Forest v. Roy* [1948] S.C. 380 (Fortier, J.).

[33]*Southern Can Company of Baltimore City v. Whittal* (1916) 50 S.C. 371 (Court of Review).

[34]*Robert Tremblay Inc. v. Lacasse* [1956] R.L. 229 (Boulanger, J.).

[35]*Vallière v. Patent Development and Manufacturing Co.* (1902) 21 S.C. 526 (Choquette, J.).

[36]*Houle v. Forget* [1953] R.L. 229 (A.I. Smith, J.).

[37]*Cedillot v. Lalonde* [1951] S.C. 379 (A.I. Smith, J.).

[38]*Begin v. Dubois* (1875) 1 Q.L.R. 381 (Tessier, J.).

[39]*Tiernan v. Trudeau* (1887) 15 R.L. 444 (Mathieu, J.).

[40]*Payeur v. Toussaint* (1939) 67 K.B. 463.

[41]*Latour v. Pagé et Fils Limitée* [1956] S.C. 153 (Ouimet, J.); *Industrial Acceptance Corp. v. Landry* (1936) 42 R.L.n.s. 367 (Surveyer, J.).

[42]*Bourdon v. Lamontagne* [1945] S.C. 269, at 271 (Boulanger, J.); *Gauthier v. Comité de Réalisation de la Cité-Jardin* [1955] Q.B. 100, at 111.

[43][1945] S.C. 269 (Boulanger, J.).

sued on September 30. The delay of three and a half months from the date of the defect appearing was held to constitute reasonable diligence, though the Court did take into consideration the fact that most of the events had occurred during the long vacation. In *Tellier v. Proulx*[44] the sale took place in July and the heating system was not used until the fall, at which time it was discovered to be defective. In November, the purchaser notified the vendor of the defects and at the end of December the vendor sent his plumbing contractor who made some unsuccessful repairs. The owner had proper repairs made in January and February and he received the final report of the engineers in March. The action was taken at the end of May. This was ten months after the sale and about seven months after the defect had appeared. It was held, however, that the purchaser had acted with reasonable diligence, though it must be noted that the Court took into account that at least part of the delay had been accounted for by efforts on the part of the vendor to remedy the defects.[45] In *Gosselin v. Beaulieu*,[46] we see an example of the lack of reasonable diligence on the part of a building purchaser. The sale took place on October 19, 1954, the purchaser discovered an excess of dampness in December of the same year, he had the building inspected by an architect in May, 1955, and it was only when he was sued by the seller on the balance of price that he filed a cross demand in May, 1956, asking for a reduction in price. The one and a half years delay from the date of the discovery of the defects was held to be too long. In *David v. Manningham*,[47] the sale of the house was on March 22, the defects (cracks in a wall) appeared in mid-May, the buyer waited three months to have the building inspected and another two months before suing (the action was served on October 6). The purchaser was held to have sued too late. The reader is also referred to *Dame Gagnon v. Dame Houle*[48] in which an action taken seven months after the discovery of the defect was held to be tardy. There are many other reported judgments in which the purchaser of a building has been held to have waited too long before suing.[49] Thus, while a purchaser of a house will have greater leeway as to the delay than the buyer of a moveable, the courts will not hesitate, in the exercise of their discretion under article 1530 C.C., to hold that too long a time has been allowed to elapse.

[44][1954] S.C. 180 (Batshaw, J.).

[45]On the effect of undertakings or efforts by the vendor to remedy the defects, see the discussion under the heading "Settlement negotiations and undertakings or efforts by the vendor to remedy the defects" (*infra*).

[46][1958] S.C. 23 (Marquis, J.).

[47][1958] S.C. 400 (Jean, J.).

[48](1923) 34 K.B. 11.

[49]*Renaud v. Huguet* (1930) 49 K.B. 271; *Jacobson v. Pelletier* (1912) 42 S.C. 35 (Court of Review); *Phelan v. The Montreal Investment and Freehold Co.* (1909) 15 R.L.n.s. 1 (Bruneau, J.); *Dame Houston v. Wilders* (1921) 30 K.B. 321; *Joncas v. Blouin* [1952] R.L. 554 (Marquis, J.); *Gauthier v. Comité de Réalisation de la Cité-Jardin* [1955] Q.B. 100; *Jacob v. Lamothe* [1956] S.C. 410 (Lajoie, J.); *Bélanger v. Langlois* [1955] Q.B. 614. See also Walter S. Johnson, "The Redhibitory Action and Buildings" (1952) 12 R. du B. 322.

From the foregoing we see that the length of the delay specified by article 1530 C.C. will depend on the nature of the defect which itself will often depend on the nature of the object.

(ii) *The date from which the delay begins to run.*

This is an interesting question which has been the object of much discussion.[50] There are various possibilities: the date of the sale, the date of delivery, the date on which the buyer has his first opportunity to inspect the thing, the date on which he first uses it, and the date on which the defects appear. If there is a usage relating to this question, it will govern.[51] Various suggestions have been made as to the starting date in the absence of a usage, but the majority opinion seems to be to the effect that it is the date of the discovery of the defect by the purchaser that governs.[52] The same view seems to have been taken by our jurisprudence. Thus we find the following statement by Duff, C. J.:[53] ". . . the action must, by the terms of article 1530 C.C., be brought with reasonable diligence and, in practice, the point of departure is recognized by the tribunals as the date of the discovery of the defect by the purchaser . . ." This particular statement by Duff, C. J., seems admittedly to be an *obiter dictum* in the case he was deciding, but the principle has been applied in a number of judgments.[54] Moreover, the progressive manifestation of defects will be a factor in extending the delay — this was so held by the Supreme Court in *Lemire v. Pelchat*,[55] where because of various circumstances a redhibitory

[50]For example, see: Gérald Aubin, "De la 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at 18; Guillouard, *Traité de la Vente et de l'Échange*, 2nd edition (1890), I, pages 485ff; Laurent, *Principes du Droit Civil Français*, 4th edition (1887) XXIV, pages 296-297; Aubry et Rau, *Droit Civil Français*, 6th edition (1946), V, page 87; De Lorimier, *Bibliothèque du Code Civil de la Province de Québec*, XII, pages 231-233; Planiol et Ripert, *Traité Pratique du Droit Civil Français*, 2nd edition (1956), X, page 156; Ripert et Boulanger (1958) *op. cit.*, III, page 509; *Dame Gagnon v. Dame Houle* (1923) 34 K.B. 11 at 20; *Jacobson v. Pelletier* (1912) 42 S.C. 35, at 40-43 (Court of Review).

[51]Guillouard, *op. cit.*, 2nd edition (1890), I, page 485; Laurent, *op. cit.*, 4th edition (1887), XXIV, page 296; Mignault, *op. cit.*, VII, page 114; Domat, *Oeuvres*, I, page 414; Ripert et Boulanger (1958), *op. cit.*, III, page 509; Faribault, *op. cit.*, XI, page 301; *Hanakova v. Girard* [1957] S.C. 344, at 346-347 (Brossard, J.).

[52]Faribault, *op. cit.*, XI, page 302; Mignault, *op. cit.*, VII, page 119; Domat, *Oeuvres*, I, page 414; Laurent, 4th edition (1887), XXIV, pages 296-297. *Contra*: Ripert et Boulanger (1958), *op. cit.*, III, page 509 (the point of departure is the date of delivery or of the actual putting in possession); Guillouard, *op. cit.*, 2nd edition (1890), I, page 488 (the point of departure is in the discretion of the court); a somewhat similar view is taken by Planiol et Ripert, *op. cit.*, 2nd edition (1956), X, pages 155-156.

[53]*Touchette v. Pizzagalli* [1938] S.C.R. 433, at 442-443.

[54]*Hanakova v. Girard* [1957] S.C. 344 (Brossard, J.); *Mercier v. Saucier* [1960] S.C. 305 (Lacroix, J.); *Plotnick v. Bartos* [1961] S.C. 87 (Perrier, J.); *Piersanti v. Dame Laporte* [1956] Q.B. 210, at 214-215; *Gauthier v. Comité de Réalisation de la Cité-Jardin* [1955] Q.B. 100 at 106; *Doake v. Paige* (1898) 4 R. de J. 457 (White, J.); there is also *Manseau v. Collette* [1955] S.C. 2 (Perrier, J.).

[55][1957] S.C.R. 823.

action, based on latent defects in a tractor, taken nine months after the sale and delivery, was held not to have been instituted too late.

To consider the delay as only beginning to run from the date that the purchaser discovers the defect is no doubt in keeping with the principle that the delay must be long enough, in the interests of the purchaser, for the defects to have manifested themselves. However, are we not in danger of offending the other principles that the delay must be short enough for the vendor to be still in a position to defend himself and in particular in relation to the question whether the defect existed at the time of the sale, and that it is the law's policy, in the interests of society, that it is undesirable that claims be allowed to remain outstanding for too long a time? For example, Laurent[56] cites with approval the upholding of a redhibitory claim relating to a house where the defect had only become known twenty-six years after the sale.[57] On the basis of at least some of the statements in the Quebec judgments cited above, a similar decision might be rendered here.

While the facts in the Quebec judgments in question in no way suggest that too long a time was allowed to pass, it would seem appropriate to sound a note of caution concerning the validity or desirability of having the principle that the delay begins to run only from the date when the buyer discovers the defect apply to every case. The solution proposed by Guillouard[58] would seem much more reasonable. He suggests that as the length of the delay is in the court's discretion, the departure date is also in its discretion, as the fixing of a delay must include the determination of the date when it begins. In other words, it would be up to the courts, where faced with the problem, to protect the purchaser where the nature of the object is such that the defect will be slow to appear while at the same time safeguarding the vendor from having to defend himself too long a time after the sale. That this view of the matter is not repugnant to our law appears from the judgment in *Dame Lebel v. Forest*,[59] where it was held that the departure date will depend on the nature of the object. Thus it was stated that in the case of moveables, especially of perishables or of an animal, the delay should perhaps run from the date of the sale. On the other hand, in an immoveable, particularly a new house, the defects may be of a nature as to manifest themselves only gradually, so that the delay should start when knowledge is acquired. In other words, it is in the discretion of the court to determine the reasonableness of the delay in the light of its length and of its departure point, taking into consideration the nature of the defect (and of the object), along with the circumstances.

[56]4th edition, (1887), XXIV, pages 296-297.

[57]Article 1648 C.N., being the equivalent to article 1530 C.C., reads as follows:

> L'action résultant des vices rédhibitoires doit être intentée par l'acquéreur, dans un bref délai, suivant la nature des vices rédhibitoires, et l'usage du lieu où la vente a été faite.

[58]2nd edition, (1890), I, page 488.

[59](1934) 72 S.C. 290 (Louis Cousineau, J.).

One protection that the vendor has is that the purchaser must, on pain of losing his recourse, examine the thing immediately.[60] This means that where the defect is discoverable by examination when the thing is received, the delay will run from that date, and not from the date that the negligent buyer happens to come across it. An exception to this is where, to the vendor's knowledge, the thing is to be used by the buyer only at a definite subsequent time, in which event the delay will only start to run when the buyer has discovered the defect through the use of the thing.[61]

(iii) *Fraudulent representations as to the condition of the thing sold.*

A vendor may be entitled to exaggerate the qualities of the thing he is selling, but if these representations amount to fraud, the purchaser may sue for the annulment of the contract. The Supreme Court has held that an action to set aside the contract on this ground is not subject to as short a delay as that called for by article 1530 C.C.[62] Much seems to depend on the circumstances, however. Thus, in the case in question, there were additional factors that also would have extended the 1530 delay: the defects appeared only gradually[63] and there was a formal warranty.

(iv) *Settlement negotiations and undertakings or efforts by the vendor to remedy the defects.*

Where the vendor tells the purchaser to be patient as the matter will probably be settled on an amicable basis, the delay of article 1530 C.C. is extended.[64] The same rule applies where the vendor undertakes or attempts to remedy the defects.[65]

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[60]Mignault, *op. cit.*, VII, page 119; Faribault, *op. cit.*, XI, page 302; *Ross v. Baker* (1891) 20 R.L. 203 (Court of Review); *Guest v. Douglas* M.L.R. (1886) 4 Q.B. 242; *Fraser v. Magor* (1892) 1 S.C. 543 (Pagnuelo, J.); *Vipond v. Findlay* (1891) 14 L.N. 298 (Tait, J.); *Cushing v. Strongman* (1892) 1 S.C. 46 (Court of Review); *Marchand v. Dame Gibeau* (1892) 1 S.C. 266 (Court of Review).

[61]Mignault, *op. cit.*, VII, pages 119-120; *Lefebvre v. The A.P. Penchen Co. (Limited)*, (1895) 7 S.C. 420 (De Lorimier, J.); *Roy v. Lafontaine* [1959] Q.B. 223, at 224 and 225.

[62]*Lortie v. Bouchard* [1952] 1 S.C.R. 508; this judgment was applied in *Bouchard v. Vaillancourt* [1961] S.C. 171 (Montpetit, J.); see also *Bernier v. Grenier Motor Co. Ltd.* (1926) 41 K.B. 488 (confirmed by [1928] S.C.R. 86); *Gallant v. Bélanger* (1909) 36 S.C. 5 (Carroll, J.); *Manseau v. Collette* [1955] S.C. 2 (Perrier, J.).

[63]In this connection, see *Lemire v. Pelchat* [1957] S.C.R. 823.

[64]Mignault, *op. cit.*, VII, page 120; Faribault, *op. cit.*, XI, page 302; Langelier, *Cours de Droit Civil de la Province de Québec*, V, pages 80-81; Gérald Aubin, "De la 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at 18-19; *Tellier v. Moody* (1902) 8 R. de J. 168 (Choquette, J., confirmed by the Court of Review); *Manseau v. Collette* [1955] S.C. 2 (Perrier, J.).

[65]Mignault, *op. cit.*, VII, page 120, Faribault, *op. cit.*, XI, page 302; Gérald Aubin, "De La 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at 18-19; *Roy v. Lafontaine* [1959] Q.B. 223; *Rothpan v. Drouin* [1959] Q.B. 626; *Tellier v. Proulx* [1954] S.C. 180, at 184 (Batshaw, J.); *Gauthier and Marcoux Limitée v. Bédard* [1952] S.C. 121 (Bienvenue, J.)—this case actually seems to have been applying the terms of a conventional warranty; *Touchette v. Pizzagalli* [1938] S.C.R. 433, at 451-452; *Bernier v. Grenier Motor Co. Ltd.* (1926) 41 K.B. 488, at 496; *Robert Tremblay Inc. v. Ernest Lacasse* [1956] R.L. 229 (Boulanger, J.); *The Omega Machinery Limited v. Louiseize* (1925) 38 K.B. 38, at 39-41.

The reasons for the foregoing rules are not far to seek: the vendor is waiving the delay which was constituted in his favour; he is also lulling the purchaser into a false sense of security.

(v) *The existence of an express guarantee.*

There is a large body of jurisprudence to the effect that the delay of article 1530 C.C. does not apply where there is an express guarantee.[66] This is logical and understandable where the conventional warranty covers a specific period subsequent to the sale, *e.g.* one year — the vendor will then be liable for defects appearing at any time during that period.[67] But in a good number of the judgments holding that the delay of article 1530 C.C. does not apply where there is an express guarantee, the latter is not for any specific period — the goods may be simply guaranteed to be free of defects. What are the effects of an express guarantee that is not for a definite period? One effect may be to extend the warranty so as to cover apparent defects as well as latent defects,[68] the vendor not otherwise being liable for the former (article 1523 C.C.). Is another effect of such a guarantee to extend the delay of article 1530 C.C.? Many of the judgments hold article 1530 C.C. to apply only in the case of legal warranty and that it is excluded by an express guarantee. It is submitted that this is an incorrect proposition. Article 1507 C.C. gives the parties the right, amongst other things, to *add* to the obligations of legal warranty (the parties are also authorized to *exclude* it altogether). Where the vendor has given an express guarantee but not for a specified period, *he has not excluded the legal warranty*; he has *added* to it, and what he has added to it is a warranty against apparent defects for which he would not otherwise be liable (article 1523 C.C.). He has not made himself liable for defects that may arise after

[66]*Remillard v. Beaulieu* [1960] S.C. 657 (Challies, J.); *Lortie v. Bouchard* [1952] 1 S.C.R. 508; *Touchette v. Pizzagalli* [1938] S.C.R. 433, at 451-452; *Bernier v. Grenier Motor Co. Ltd.* (1926) 41 K.B. 488 (and confirmed by the Supreme Court, [1928] S.C.R. 86); *Gagné v. Macrae Co. Ltd.* [1949] K.B. 239; *Simoneau v. St. Jacques* [1958] S.C. 325 (Marquis, J.); *Laurion v. Godin* (1929) 67 S.C. 44, at 47 (Boyer, J.); *Gallant v. Bélanger* (1909) 36 S.C. 5 (Carroll, J.); *Bessette v. Raymond* (1920) 58 S.C. 59 (Court of Review); *Menier v. Gauthier* (1921) 31 K.B. 564; *Silver v. Drennan* (1922) 60 S.C. 120 (De Lorimier, J.); *Lefebvre v. Montpetit* (1922) 60 S.C. 202 (Mercier, J.); *Dodier v. Paradis* (1920) 57 S.C. 198 (Court of Review); *Bilodeau v. Lahaise* [1952] R.L. 321 (Edge, J.); *Acme Restaurant Equipment Company v. Coziol* [1962] Q.B. 1; *Carter v. Limoges* (1917) 23 R.L.n.s. 52 (Court of Review); *Fitzpatrick v. Tremblay* (1915) 21 R.L.n.s. 148 (Court of Review); *The Lachute Shuttle Company v. Frothingham and Workman, Limited* (1913) 22 K.B. 1; *The Canada Producer and Gas Engine Company Limited v. The Hatley Dairy Light and Power Company, Limited* (1913) 22 K.B. 12; *The Omega Machinery Limited v. Louiseize* (1925) 38 K.B. 38; *Lapierre v. Drouin* (1912) 41 S.C. 133 (Lemieux, A.C.J.); *Benard v. Roquebrune* (1926) 64 S.C. 486 (Surveyer, J.). See also Faribault, *op. cit.*, XI, page 305; Langelier, *Cours de Droit Civil*, V, page 81; Aubry et Rau, 6th edition (1946), V, page 88; Gérald Aubin, "De la 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at 17-18.

[67]See, for example, *Acme Restaurant Equipment Company v. Coziol* [1962] Q.B. 1; *Simoneau v. St. Jacques* [1958] S.C. 325 (Marquis, J.).

[68]*Dallaire v. Villeneuve* [1956] Q.B. 6, at 11; *Arpin v. Francoeur* (1930) 48 K.B. 231, at 233-234; *Carter v. Limoges* (1917) 23 R.L.n.s. 52 (Court of Review); *Fitzpatrick v. Tremblay* (1915) 21 R.L.n.s. 148 (Court of Review).

the sale — he is still only liable for those existing at the time of the sale. Therefore the balance of the legal warranty provisions continue to apply, including the "reasonable diligence" delay of article 1530 C.C.[69] There is only one way in which this delay may be extended as a result of an express guarantee that does not cover defects arising after the sale, and that is by relieving the buyer of the obligation to examine the things immediately on their receipt, so that the delay will only start to run from the date that the defects manifest themselves through use.[70] Once the delay begins to run, however, it should be the "reasonable diligence" delay of article 1530 C.C.

Where there is an express guarantee for a specified period after the sale, the defects giving rise to a claim must have manifested themselves during that period. However, it is not necessary for the action also to be commenced during the same period,[71] unless the terms of the guarantee require it. Presumably it would have to be taken with reasonable diligence after the appearance of the defect.

5. *What the buyer must do.*

He must examine the thing promptly on receipt,[72] he must notify the vendor immediately on the discovery of the defects, and if the vendor fails to agree to a cancellation of the sale or a reduction in the price, the purchaser must tender back the object[73] and *sue* with reasonable diligence. It is *not* enough merely to protest or to wait until the seller sues for the price[74] (unless, of course, the seller sues so quickly that the buyer is prevented from taking action first).[75] Moreover, the buyer must be careful that his behaviour does

[69]The following cases give some support to my submission: *Houle v. Paquette* [1961] S.C. 197 (Brossard, J.)—this case actually involved a guarantee for a specified period after the sale; *Eglinton v. Ashmead* (1896) 9 S.C. 427 (Andrews, J.); *Dubé v. Cousineau* (1940) 46 R. de J. 470 (Forest, J.); and perhaps also *Odell v. Lavigueur* (1907) 32 S.C. 99, at 110-111, where McCorkill, J., after holding that article 1530 C.C. is excluded by an express warranty, still seemed to apply the criterion of "reasonable diligence".

[70]See the discussion under the heading "The date from which the delay begins to run" (*supra*).

[71]*Acme Resturant Equipment Company v. Coziol* [1962] Q.B. 1. In *Gauthier and Marcoux Limitée v. Bédard* [1952] S.C. 121 (Bienvenue, J.), it was held that each time the automobile, which was covered by a three months express guarantee, was repaired by the vendor, the delay began to run afresh.

[72]See the discussion under the heading "The date from which the delay begins to run" (*supra*).

[73]*Ménard v. Desloges* [1949] R.L. 123 (Salvas, J.).

[74]Gérald Aubin, "De la 'Diligence Raisonnable' dans l'action rédhibitoire" (1955) 2 Les Cahiers de Droit 16, at 18; Planiol et Ripert, *op. cit.*, 2nd edition (1956), X, page 155; Guillouard, *op. cit.*, 2nd edition (1890), I, page 484-485; *Holt v. J. D. Vallières Ltée* [1948] S.C. 397 (Duranleau, J.); *Payeur v. Toussaint* (1939) 67 K.B. 463; *Robert Tremblay Inc. v. Lacasse* [1956] R.L. 229 (Boulanger, J.); *Guilmette v. Langevin* (1907) 13 R.L.n.s. 154 (Court of Review); *Girard v. Dessert* (1915) 48 S.C. 508 (Bruneau, J.); *Joncas v. Blouin* [1952] R.L. 554, at 565 (Marquis, J.); *Dubé v. Cousineau* (1940) 46 R. de J. 470 (Forest, J.); *David v. Manningham* [1958] S.C. 400, at 402 (Jean, J.); *Tremblay v. Fleury* [1953] S.C. 423 (Dion, J.).

[75]In *The Omega Machinery Limited v. Louiseize* (1925) 38 K.B. 38, the defendant was held to have been justified in waiting until he was sued for the price as article 1530 C.C. had been excluded, due to there being an express guarantee.

not amount to an adoption of the contract and consequently a renunciation of his right to sue in cancellation.[76]

6. *Must the failure to act with reasonable diligence be pleaded?*

The general rule relating to prescription is that the same must be pleaded. The question is whether the rule applies to the "reasonable diligence" requirement of article 1530 C.C. In other words, if the vendor who is a defendant to a redhibitory action wishes to raise this defence, must he allege the tardiness of the purchaser's action in his plea?

The jurisprudence is divided on the issue. The following judgments held that it was necessary for the defendant to allege the lack of reasonable diligence: *The Omega Machinery Limited v. Louiseize*,[77] *Bernier v. Grenier Motor Co. Ltd.*,[78] *Boutin v. Paré*,[79] *Lavallée v. Brûlé*,[80] *Dame Nobert v. Bélanger*,[81] and *Davis v. Taillefer*.[82] The contrary has been held in *Latouche v. Lehouillier*[83] and *Jacob v. Lamothe*.[84] Mignault[85] and Faribault[86] both take the view that an allegation in the plea is necessary, and this seems to be the better opinion as it is only if the necessary facts are alleged and proved that the judge will be in a position to exercise his discretion.[87]

7. *The types of action covered by article 1530 C.C.*

Article 1530 C.C. refers to the necessity of the redhibitory action to be taken with "reasonable diligence." This is the action that is taken by the purchaser who wishes to have the sale cancelled. But does article 1530 C.C. apply to the action *quanti minoris* (being the one in reduction of the price) or to its relation, recognized by the jurisprudence, the action to recover the cost

[76]*Laynachan v. Armour* (1904) 25 S.C. 158 (Davidson, J.); *Southern Can Company of Baltimore City v. Whittal* (1916) 50 S.C. 371 (Court of Review); *Carré v. Noël* [1959] Q.B. 544; *Latour v. Pagé et Fils Limitée* [1956] S.C. 153 (Ouimet, J.); *Dame Coorsh v. Coorsh* [1956] Q.B. 338; *Faucher v. Pilon* [1953] Q.B. 583; *Houle v. Forget* [1953] R.L. 229 (A.I. Smith, J.); *Cedillot v. Lalonde* [1951] S.C. 379 (A.I. Smith, J.); *Ménard v. Desloges* [1949] R.L. 123 (Salvas, J.).

[77](1925) 38 K.B. 38.

[78](1926) 41 K.B. 488.

[79][1959] Q.B. 459.

[80](1920) 57 S.C. 426 (Court of Review).

[81][1953] S.C. 295 (Ferron, J.).

[82](1873) 5 R.L. 404 (Bélanger, J.).

[83][1959] Q.B. 26.

[84][1956] S.C. 410 (Lajoie, J.).

[85]*Op. cit.*, VII, page 120.

[86]*Op. cit.*, XI, page 304.

[87]See also the case comment by Brahm Campbell (1959-60) 6 McGill L.J. 138; see too *Vallière v. Patent Development and Manufacturing Co.* (1902) 21 S.C. 526 (Choquette, J.) as to what disposition may be made in relation to the costs where the issue of reasonable diligence was raised only at the hearing.

of remedying the defect;[88] and again does it apply to the claim for damages under article 1527 C.C.?

Langelier[89] took the view that as the article speaks of the redhibitory action alone, it applies only to that claim. Mignault,[90] along with many other authorities,[91] takes the view that the action *quanti minoris* is also covered; some also include the claim for damages.[92]

8. Conclusion.

Article 1530 C.C. is a striking example of the operation of the civil law system. A general principle is laid down which the courts then apply to individual cases. As a result of an evolution that has taken place through the application of the article to many different circumstances over a long period of time, certain criteria have come to be laid down that assist the judges in the exercise of their discretion. Thus the principle is made adjustable within certain limits that have been reasonably well defined, while at the same time the flexibility of the rule has been retained by reason of the broadness of the terms of the article. The fact that there is so little controversy in the jurisprudence is a tribute to the ability of the courts to apply the article in a logical and satisfactory manner.

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[88]See, for example, *Hanakova v. Girard* [1957] S.C. 344, at 349 (Brossard, J.); *Bourdon v. Lamontagne* [1945] S.C. 269, at 271 and 272 (Boulanger, J.); *Tellier v. Proulx* [1954] S.C. 180, at 184 (Batshaw, J.); *Bourcier v. Donohue* [1956] S.C. 25 (Batshaw, J.).

[89]*Op. cit.*, V, page 80.

[90]*Op. cit.*, VII, page 114, footnote (a).

[91]Faribault, *op. cit.*, XI, page 300; *Girard v. Dessert* (1915) 48 S.C. 508 (Bruneau, J.); *Joncas v. Blouin* [1952] R.L. 554 (Marquis, J.); *Gauthier v. Comité de Réalisation de la Cité-Jardin* [1955] Q.B. 100, at 105-106; *Piersanti v. Dame Laporte* [1956] Q.B. 210, at 214; *Hanakova v. Girard* [1957] S.C. 344 (Brossard, J.); *Gosselin v. Beaulieu* [1958] S.C. 23 (Marquis, J.); *Dame Gagnon v. Dame Houle* (1923) 34 K.B. 11; *Grevier v. La Société d'Agriculture de Berthier* (1881) 4 L.N. 373, at 374 (Torrance, J.); *Lemoine v. Beique* (1887) 15 R.L. 445 (footnote); *Holt v. J. D. Vallières Ltée* [1948] S.C. 397, at 400 (Duranleau, J.); *Doake v. Paige* (1898) 4 R. de J. 457, at 466-467 (White, J.); *Ferro Metal Limited v. St. Germain* [1956] Q.B. 395, at 402.

[92]*G. A. Gruninger et Fils Ltée v. Construction Equipment Company Ltd.* [1962] S.C. 444 (Ferland, J.); *Girard v. Dessert* (1915) 48 S.C. 508 (Bruneau, J.); *Trudeau v. Lafleur* (1907) 32 S.C. 223 (Court of Review); *Forest v. Roy* [1948] S.C. 380 (Fortier, J.); *Dame de Felice v. O'Brien* (1918) 27 K.B. 192. *Contra* (apparently): *De la Durantaye v. Cité de Québec* (1929) 67 S.C. 128 (Belleau, J.).