(E), that "the owner" for the purpose of the definition in Act 29 of 1942 refers to the person who is the owner in terms of the law in force at the place at which the motor vehicle is, namely, the law, in this case, as contained in the Road Traffic Ordinance, 19 of 1955 (C). Such owner, he contends, is not co-incident with an owner as understood in common law. He conceded that, if in fact he was wrong in that contention and that "owner" as used in sec. 19 (3) of Act 29 of 1942 was an owner as understood in common law, then the allegations in para. 4 of the declaration and para. 1 of the reply to the request for further particulars would not, save for the last sentence thereof, be open to exception or application to strike out.

The issue in the exception is thus whether the owner as understood in the common law is also the owner "in terms of the law relating to motor vehicles" in the Cape Province. In *Masoka's* case, *supra*, the Court held that a person to whom a second-hand motor vehicle had been transferred by the seller in a way which under the common law would have constituted the person to whom it was transferred the owner of that vehicle, was in fact not the owner thereof within the meaning of sec. 19 of Act 29 of 1942, since a roadworthy certificate had not been obtained in respect of the vehicle sold, and that accordingly the seller, by virtue of the terms of sec. 102 (3) (*b*) of Ord. 19 of 1955, remained the owner thereof. I have studied the terms of this judgment and I find myself in agreement with the conclusions therein arrived at. If Act 29 of 1942 and Ord. 19 of 1955 are read together, it seems that where the owner of a second-hand vehicle disposes of the same he continues to be regarded, for the purposes of sec. 19 (3) of Act 29 of 1942, as the owner of such vehicle until a certificate of roadworthiness has been obtained in respect thereof. Since the obtaining of a roadworthy certificate is a condition precedent to registration in the name of the person to whom the vehicle has been transferred (see sec. 4 (4) of Ord. 19 of 1955), the statement that a vehicle is registered in the latter's name is tantamount to an averment that a roadworthy certificate has been issued in respect of that vehicle.

Referring to the allegations in the declaration and further particulars, it is clear that the scooter was a registered vehicle and that it was delivered to the defendant with the intention of making him the owner thereof. Neither in the declaration nor in the further particulars is it alleged that the defendant was the owner of the vehicle within the meaning of sec. 19 (3) of Act 29 of 1942, nor is it therein alleged that he was the registered owner of the vehicle, nor even that a roadworthy certificate had been obtained in respect thereof. While the averments contained in the declaration and the reply to the request for further particulars would be sufficient to constitute an averment that the defendant had under the common law acquired *dominium* in the motor scooter, they do not, in my view, amount to an allegation that the defendant was or became the owner of the vehicle in question within the meaning of sec. 19 of Act 29 of 1942.

Since defendant is alleged himself to have committed the delict which gave rise to the damage claimed by plaintiff, it would not, as it seems to me, have been necessary for the plaintiff to rely upon the terms of sec. 19 (3) of Act 29 of 1942, which constitute defendant a quasi-

insurer, in order to be able to sue him. Nonetheless plaintiff is entitled, if she so chooses, to seek to hold the defendant liable on that basis. If she wishes to do so, however, she must make the allegations necessary to that end in her pleadings. This she has failed to do.

The present case, however, does not appear to me to be one in which I should allow the exception. Even if all the allegations in para. 4 of the declaration and in para. 1 of the reply to the request for further particulars relating to the claim under sec. 19 (3) of Act 29 of 1942 were to be expunged, the plaintiff would still have alleged sufficient in her declaration to have disclosed a cause of action based under the common law upon the defendant's delict. It seems to me, therefore, that the most the defendant is entitled to is an order striking out the offending portions of para. 4 of the declaration and para. 1 of the reply to the request for further particulars.

The Court's order is accordingly that all the words in para. 4 of the declaration, save the words "the said scooter was not insured in terms of the Motor Vehicle Insurance Act, 29 of 1942", and the whole of para. 1 of the reply to the request for further particulars are struck out. The plaintiff is to pay the defendant's costs.

Excipient's Attorney: *D. P. de Klerk & van Gend.* Respondent's Attorney: *Clarke & Co.*

1964(3)225

KROONSTAD WESTELIKE BOERE-KO-OPERATIEWE VERENIGING BPK. v. BOTHA AND ANOTHER.

(APPELLATE DIVISION.)

1964. *May* 11, 28. BEYERS, J.A., OGILVIE THOMPSON, J.A., RUMPFF, J.A., HOLMES, J.A., and WESSELS, J.A.

Sale.—Latent defect.—Damages.—When merchant seller liable for consequential damage.

Liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold. Whether a seller—merchant or dealer—falls within the category mentioned will be a question of fact and degree, to be decided from all the circumstances of the case. Once it is established that he does fall within that category, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it. The remedy, from its nature, is not redhibitorian.

As a general proposition, section 214 of Pothier on *Sale*, in so far as it deals with liability of a merchant seller, is recognised as part of our law. As to the field of application of the rule, there is insufficient judicial support for the wide view that a merchant, who sells goods in which it is his business to deal, is merely on that account liable for consequential damages caused to the purchaser by a latent defect, of which the seller was unaware, in the thing sold.

The decision in the Orange Free State Provincial Division in *Botha and Another* v. *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk.*, reversed.

Appeal from a decision in the Orange Free State Provincial Division

(POTGIETER, J.). The facts appear from the judgment of HOLMES, J.A.

G. A. Coetzee, Q.C. (with him *M. S. Lipschitz*), for the appellant: In regard to liability for consequential damages arising out of latent defects, the position in later Roman law was that an innocent seller, who had not given an express warranty, was liable for latent defects in the article sold only to the extent of either recission of the contract and a refund of the purchase price or a reduction of the price. The seller was not, however, liable for consequential damage occasioned by the defects unless he was aware of them or gave an express warranty in regard to the article sold; see *D.*19.1.13, *pr.* and 1; Lee *Elements of Roman Law*, 2nd ed., secs. 463-8; *Evans & Plows* v. *Willis & Co.*, 1923 C.P.D. at p. 504. This rule was taken over in the Roman-Dutch law with the result that a vendor-dealer was in the same position as any other vendor and was not liable for consequential damage unless he had knowledge of the defects or had given an express warranty; see Huber, *Jurisprudence of my Time*, Book III, Chap. 5, sec. 40 (*Gane's* translation, vol. 1, p. 420); *Grotius*, 3.15.7; Schorer's *Notes* (to *Grotius* CCCLXXVI); *Domat*, 1.2.11.7. *Voet*, 21.1.10, however, mentions an additional category of persons liable for consequential damages, and that is the artificer. According to *Voet*, the artificer was liable for consequential loss even if he was ignorant of the defects and gave no warranty, on the basis that, being the manufacturer, he was to be equated with a person having knowledge of the defects; cf. *Voet*, 21.1.9, relating to buyers. The statement in *Voet* that an artificer is liable for consequential damages, cannot be stretched to include a vendor-dealer who sells the manufactured products of others; see *Hackett* v. *G. & G. Radio & Refrigerator Corp.*, 1949 (3) S.A. at pp. 687-8. Accordingly in both Roman-Dutch and South African law, the vendor-dealer can be held liable for consequential damages only (i) if he has knowledge of the defects; (ii) if he has given an express warranty as to quality or fitness, or a warranty to be implied solely from the facts of the case; (iii) if he is the manufacturer of the goods. This has been appreciated and stated correctly in several South African decisions; see *Greenberg & Sons* v. *Burton*, 10 H.C.G. at p. 46; *Button* v. *Bickford Smith & Co.*, 1910 W.L.D. at p. 54; *O'Brien* v. *Palmer*, 2 E.D.C. at p. 350; *Seggie* v. *Philip Bros.*, 1915 C.P.D. at pp. 305-6. In other South African decisions, however, it has been held that, as a matter of law, an innocent vendor-dealer is liable for consequential damages, regardless of ignorance of the defects and the absence of any express warranties; see *Young's Provision Stores (Pty.), Ltd.* v. *van Ryneveld*, 1936 C.P.D. 87; *Vlotman* v. *Buysell*, 1946 N.P.D. 412; *Leckie* v. *Wightman & Co., Ltd.*, 1950 (1) S.A. 361; *Odendaal* v. *Bethlehem Romery Bpk.*, 1954 (3) S.A. 370. These cases have all been based on statements contained in Pothier, *Contract de Vente*, secs. 213, 214, in which the proposition is stated that a vendor-dealer, even if innocent of the defects, is in certain circumstances absolutely liable for consequential damages. These passages have also been cited with approval in several South African decisions in which it has been assumed that they coincide with South African law on the subject; see *Erasmus* v. *Russell's Executors*, 1904 T.S. at pp. 373, 375; *Marais* v. *General Commercial Agencies, Ltd.*, 1922 T.P.D. at p. 444; *Evans' &*

Plow's case, *supra* at p. 505; *Bower* v. *Sparks Young and Farmers Meat Industries, Ltd.*, 1936 N.P.D. at pp. 16-7; *Hackett's* case, *ibid* at pp. 691-2; *Jaffe & Co. (Pty.), Ltd.* v. *Bocchi and Another*, 1961 (4) S.A. 358; cf. *Bodenstein* (art. by in *S.A.L.J.* vol. 31 (1914) p. 31); MacKeurtan *Law of Sale of Goods in South Africa*, 2nd ed., pp. 309-10. It is submitted that *Pothier's* statement does not correspond with the Roman-Dutch law on the subject and merely records the development of the redhibitory action in France. As such *Pothier's* statement does not accord with our law; see *Hackett's* case, *supra* at pp. 686-7, 687-8, 691-2. Therefore, in so far as reliance was placed on any general rule of law imposing a liability on dealers for consequential damages, the cases in which *Pothier's* propositions have been applied were incorrectly decided and they can be justified only on the basis that, in the particular circumstances of the cases in question, a guarantee against latent defects could be implied, as a matter of fact and be equated with an express guarantee. But there is no rule of law rendering all vendor-dealers liable, *ipso facto*, for consequential damages. While respondents' declaration may raise an implied guarantee, the portions of the plea that have been struck out rebut the implication, and therefore were incorrectly struck out. Alternatively, there is no rule in our law imposing liability on all vendor-dealers *ipso facto* and this Court should not introduce such a rule by extending principles applicable to manufacturers and persons with knowledge of defects. Such a rule would have far-reaching implications having regard to the complexities of modern manufacture and commerce and is a matter for detailed legislation as in the English and United States' cases. As to English law, see Halsbury, *Laws of England*, 3rd ed., vol. 34, pp. 45-54; Sale of Goods Act, 1893 (56 and 57 Vict. C.71). As to American law, see Williston, *Sales* (Revised ed., secs. 227-34). Alternatively, if this Court is to extend the liability of manufacturers to innocent vendor-dealers, as such, such extension should be in accordance with modern needs and detailed safeguards should be provided, as in the English and American statute law, to protect vendor-dealers who sell specific articles manufactured by others under trade, or patent, names, and dealers who are not specialists in the commodity in question and do not profess to be such and on whose skill and judgment reliance is not placed by the purchasers; cf. *Hackett's* case, *supra* at pp. 692-3. Alternatively, if there is a rule rendering vendor-dealers liable, as such, for consequential damages, on a proper construction of *Pothier, supra*, and having regard to the realities of modern commerce, the rule is limited to cases in which the vendor-dealer is a specialist in regard to the articles in question or holds himself out as a specialist. Alternatively, the rule has no application to cases in which the vendor-dealer, to the knowledge of the purchaser, has no specialist knowledge of the goods or is in no better position than the purchaser to determine whether the goods are or are not latently defective, e.g. as in the present case, where the goods sold are branded goods produced by persons other than the dealer in sealed containers that are not opened by the dealer. The portions of the plea that have been struck out contain relevant facts to show that any general rule of law rendering vendor-dealers so liable does not apply to the present case. These portions

accordingly were wrongly struck out. Alternatively, even if *prima facie* a vendor-dealer is liable for consequential damages, there is no such liability where it appears that the purchaser did not purchase the goods on the basis of any tacit assurance from the vendor, and where, having regard to the facts of the case, it appears that his being a dealer did not influence the mind of the purchaser in entering into the sale; see *Hackett's* case, *supra* at pp. 692, 693; *Odendaal's* case, *supra* at p. 373; *Jaffe & Co.'s* case, *supra* at p. 367. Accordingly the portions of the plea in question were relevant and should not have been struck out.

G. P. C. Kotzé, S.A. (with him *M. T. Steyn*), for the respondents: *Voet*, 21.1.10, erken die reël dat 'n ambagsman (*artifex*) aanspreeklik is vir gevolgskade deur 'n koper gely ondanks die feit dat hy onbewus is van die bestaan van 'n verborge gebrek. *Pothier*, para. 213-4, van sy verhandeling op die koopkontrak, plaas die handelaar wat in die loop van sy besigheid handel dryf in 'n besondere artikel op dieselfde voet. *Pothier* se stelling word reeds vir meer as 'n halfeeu aanvaar wesenlik in ooreenstemming te wees met die beginsels van die Romeins-Hollandse reg; sien *Erasmus* v. *Russell's Executor*, 1904 T.S. op bl. 373-4; *Greenberg & Sons* v. *Burton*, 10 H.C.G. op bl. 45-6. Sedertdien het die Provinsiale Afdelings van die Hooggeregshof van Suid Afrika pasgemelde reël aanvaar en behou; sien *Marais* v. *Commercial Agency Ltd.*, 1922 T.P.D. op bl. 444; *Evans & Plows* v. *Willis & Co.*, 1923 C.P.D. op bl. 503; *Young's Provision Stores (Pty.), Ltd.* v. *van Ryneveld*, 1936 C.P.D. 87; *Vlotman* v. *Buysell*, 1946 N.P.D. 412; *Odendaal* v. *Bethlehem Romery Bpk.*, 1954 (3) S.A. op bl. 376-7; *Jaffe & Co. (Pty.), Ltd.* v. *Bocchi*, 1961 (4) S.A. op bl. 363-4; kyk ook *Alexander* v. *Armstrong*, 1879 Buch. op bl. 238; *Bower* v. *Sparks, Young & Farmers' Meat Industries, Ltd.*, 1936 N.P.D. op bl. 16-17. Ook word die reël deur skrywers van aanvaarde Suid-Afrikaanse handboeke aanvaar; sien Lee & Honoré, *South African Law of Obligations*, para. 344 (iii); Mackeurtan, *Law of Sale of Goods in South Africa*, 3de. uit. bls. 309-10; Wessels *Law of Contract in South Africa* para. 4770; de Wet & Yeats, *Kontraktereg en Handelsreg*, 3de. uitg. bls. 234-5; Hahlo & Kahn, *Union of South Africa*, bls. 681-2. Die rede wat die reël ten grondslag lê is die verantwoordelikheid wat die handelaar se openbare handeldryf meebring. Die reg eis van hom dat hy kennis behoort te dra van die ware wat hy openlik aanbied en verkoop aangesien die koper geregtig is om aan te neem dat die handelaar kennis dra van die samestelling van sy produk en van die bestaan van 'n gebrek indien daar een is; sien *Marais* se saak, *ibid*; *Young's Provision Stores* saak, *ibid* op bl. 92-3; kyk ook *Lockie* v. *Wightman & Co., Ltd.*, 1950 (1) S.A. op bl. 367-8. Die aanspreeklikheid van die handelaar berus geensins op die feit dat hy kennis dra van die gebrek nie, dog sy aanspreeklikheid vloei voort uit 'n plig wat die reg hom oplê vanweë die aard van die ooreenkoms wat hy sluit en die hoedanigheid waarin hy optree. Hierdie reël soos reeds ingewortel in die Suid-Afrikaanse regstelsel, voldoen aan die vereistes van die hedendaagse samelewing; sien *Hackett* v. *G. & G. Radio & Refrigerator Corp.*, 1949 (3) S.A. op bl. 692. Eisers se stelling is dat indien die lang tydperk waartydens *Pothier* se reël met goedkeuring nagevolg is in ag geneem word, die Hof nie daarvan sal afwyk nie; sien *Voet*, 1.3.19; *Union Government* v. *Rosenberg (Pty.), Ltd.*, 1946 A.D. op bl. 130; *Odendaal* se saak, *supra* op bl. 377. Die reg reken outomaties aanspreeklikheid toe aan die handelaar en sodanige aanspreeklikheid kan slegs deur uitdruklike ooreenkoms tussen koper en handelaar uitgesluit word. In die afwesigheid van enige bewering in die verweerskrif dat daar aldus ooreengekom is, opper 'n handelaar geen geldige verweer tot 'n eis om gevolgskade nie. Eisers doen laastens die stelling dat die blote feit dat hul as kopers bewus was dat die verweerder as handelaar onbewus is van die samestelling van Metasystox geensins laasgenoemde se aanspreeklikheid raak nie.

Coetzee, Q.C., in reply.

Cur. adv. vult.

Postea (May 28th).

HOLMES, J.A.: This appeal involves the enquiry whether a merchant, who sells goods in which it is his business to deal, is merely on that account liable for consequential damages caused to the purchaser by a latent defect in the thing sold, of which the seller was unaware.

The appeal comes direct to this Court, by consent, from a decision of a single Judge of the Orange Free State Provincial Division, granting an application for the striking out of certain averments from a plea.

The respondents' summons claimed damages in the sum of R48,150. The declaration averred that the respondents jointly carried on operations as kaffircorn farmers; that in March, 1962, the appellant, a co-operative society registered under Act 29 of 1939, sold to them a toxic pesticide, known as Metasystox, with which to spray kaffircorn for the destruction of lice; that it was an implied term of the contract that the pesticide was fit for the purpose for which it was bought and free from latent defects rendering it unfit for such purpose and injurious to the crops; that, in breach of the said warranty, the pesticide suffered from a latent defect rendering it injurious and unsuitable for the purpose for which it was bought; and that it grievously damaged the respondents' kaffircorn crops after having been sprayed thereon.

In replying to a request for further particulars to the declaration, the respondents averred that the implied term aforesaid was based on the following facts:

(i) the appellant is a dealer in toxic substances with which to spray plants;
(ii) as such, the appellant gives out that it has knowledge of the products sold by it; and
(iii) the toxic substance was sold with knowledge that the respondents had to spray it on their kaffircorn for protection against lice.

The appellant's plea denied the existence of the aforesaid implied warranty; averred that the appellant was aware that farmers generally, including the respondents, bought and used Metasystox for spraying their kaffircorn to protect it from lice, and that the respondents specifically asked for Metasystox by name on the occasion in question;

denied that there was a latent defect; and made the following further averments, *inter alia*:

(*a*) that the appellant was neither an artificer nor a manufacturer of the pesticide; that it did not have specialised knowledge of it; and that it did not hold itself out as a specialist;

(*b*) that Metasystox was the registered trademark of a German manufacturing company and was widely known as the name of a toxic chemical preparation described by the manufacturers as a systemic insect-killer and recommended by them as suitable for spraying on kaffircorn to combat lice; that the manufacture required an intricate chemical process of which the appellant had no knowledge; and that the appellant also had no knowledge of the effect of Metasystox on kaffircorn or lice;

(*c*) that Metasystox was sealed by the manufacturers in containers, on which were pasted directions for use and a description of the chemical composition and the toxic effects; that the sealed containers were delivered to the appellant who did not open them or test the contents and remained unaware of the composition or quality thereof, and sold them in the condition in which they were received;

(*d*) that the Metasystox sold to the respondents was as described in (*b*) & (*c*), *supra*, and to their knowledge was sold in the circumstances set out in (*a*) to (*c*);

(*e*) that by reason of the foregoing facts (*a*) to (*d*), if there was a latent defect the appellant was not liable for consequential damages.

The respondents successfully applied for the striking out from the plea, as being irrelevant, of all the foregoing averments (*a*) to (*e*).

I wish to make it clear that, notwithstanding the form and contents of the pleadings, the case was argued on both sides, in this Court and in the Court *a quo*, upon the footing that the respondents' cause of action was that, under the so-called *Pothier* rule, the appellant was liable for consequential damages caused by latent defect, as a merchant whose business it was to deal in toxic pesticides; and that the plea was that *Pothier's* rule was not part of our law or, if it was, that it applied only where the merchant had expert knowledge of the subject matter of the sale, and that the appellant did not have such expert knowledge. The appeal therefore falls to be dealt with on that basis.

In this Court Mr. *Coetzee*, for the appellant referred to the relevant Roman and Roman-Dutch principles.

The early Roman Law did not cast on the seller any general duty of warranting the absence of latent defects, and if the buyer wished to protect himself he had to do so by stipulation, which came to be the usual course. Later, the aedilitian protection was introduced, and by Justinian's time it applied to every kind of sale; but the relief claimable under the relevant *actiones* was limited to a reduction of the price or to rescission against restoration of the price. Hence the relief did not extend to consequential damages. See Lee *Elements of Roman Law*, 3rd ed. pp. 308-9, and *Evans & Plows.* v. *Willis & Co.*, 1923 C.P.D. 496, in which WATERMEYER, J., said at p. 504:

"The remedies which they introduced were not an action for damages for breach of warranty, but two specific actions, the *quanti minoris* and the *redhibitoria*. In the case of a latent defect therefore the seller was only liable to these two actions, and was not liable in addition to an action for damages *ex empto*, unless some other cause of action such as fraud or breach of express warranty or breach of contract brought this remedy into play."

Similarly, as regards the Roman-Dutch Law in Holland, it is not disputed that, according to the writers of that country, a seller was not liable for consequential damages caused by latent defect of which he was unaware, save for an exception made by *Voet*, 21.1.10, in regard to artificers. See *Grotius*, 3.15.7, and the authorities mentioned by the learned CHIEF JUSTICE in *Hackett* v. *G. & G. Radio & Refrigerator Corporation*, 1949 (3) S.A. 664 (A.D.) at pp. 682-3, including *van der Keessel*, who was born some 40 years after the French writer *Pothier*.

However, *Pothier*, in sec. 214 of his treatise on *Sale*, states a rule in regard to liability for consequential damages upon which Mr. *Kotzé* for the respondents, relied. Mr. *Coetzee* on the other hand contended that *Pothier's* rule was French law and not part of our law; alternatively that the rule rendered a dealer liable only where he had expert knowledge of the kind of thing sold.

In this country there have been many decisions in which sec. 214 of Pothier on *Sale* has been recognised or referred to with apparent approval in so far as it refers to a merchant seller. The cases are not entirely harmonious as to the precise field of application, but there is no decision rejecting what is conveniently called the *Pothier* rule. I proceed to examine the decisions. So far as counsel are aware the first reference in the reports to the provision in question is to be found in the case of *Erasmus* v. *Russell's Executor*, 1904 T.S. 365. To indicate how the Court came to refer to *Pothier* I shall deal with the decision in some detail. The executor of an estate sold by public auction to a farmer ten apparently healthy cows which, unknown to the parties, were latently suffering from tick fever. A few days later they exhibited symptoms of the disease and nine of them died. Other cattle, with which they were running on the farm, were also infected and sixteen of these died. The farmer sued for cancellation of the sale in respect of the nine cows which had died, and the return of the price, and also for the value of the sixteen other cows. Only the latter claim for consequential damages was contested. The plaintiff founded on an alleged express warranty at the time of the sale that the cows were sound and free from disease and infection. The Court [SOLOMON and CURLEWIS, JJ.] held that even if there was an "express representation" made at the time of the sale, as the claim was brought under the *actio redhibitoria*, consequential damages were not recoverable. With regard to the argument that the "express representation" made all the difference, the Court, relying on *Grotius* 3.15.7., *Voet* 21.1.10, and Pothier on *Sale*, held that consequential damages are not recoverable where the seller was unaware of the defect. At p. 374 the Court referred, *obiter*, to *Voet's* exception of the artificer, and to *Pothier's* exception of the merchant who sells work of his own manufacture or "articles of which he professes to have special knowledge"; and indicated that in these exceptional cases the seller is taken to have had knowledge of the defect. I express no opinion as to the correctness of the Court's judg-

ment on the plaintiff's claim; but I stress that there was an *obiter* recognition of the so-called *Pothier* rule in relation to merchant sellers.

This recognition was again accorded in the following year, 1905. In *Greenberg & Sons* v. *Burton*, 10 H.C.G. 39 at p. 46, LANGE, A.J.P., said, in relation to *Pothier's* reference to the liability of merchant sellers in sec. 214:

"I take it that reference is there made to dealers in certain articles manufactured by others, in a trade in which the dealer was himself trained and of which he is known and presumed to have some special knowledge."

In *Button* v. *Bickford, Smith & Co.*, 1910 W.L.D. 52, SMITH, J., dismissed an exception against a declaration which alleged that the defendants manufactured fuses, that the fuse which they sold to the plaintiff was latently defective, and that the plaintiff was thereby injured. It would appear that the learned Judge was relying on the reference to an artificer in *Voet* 21.1.10 (although *Pothier*, secs. 212 *et seq* were also cited in argument). But what is interesting, for the purposes of the present case, is the learned Judge's *obiter dictum* at p. 54:

"The ordinary vendor who retails goods frequently does not know, and is not in a position to know, of latent defects. It is not just therefore—when he is not in a position to know—that he should be liable for consequential damages."

The reasoning would appear to be that the merchant seller is so liable if he has expert knowledge in the kind of thing sold—which is consistent with the view taken of *Pothier's* rule in *Erasmus's* case, and *Greenberg's* case, *supra*.

Similarly, in *Seggie* v. *Philip Bros.*, 1915 C.P.D. 292, GARDINER, J., was dealing, *inter alia*, with a claim for consequential damages caused by a latent defect and at p. 306 the learned Judge said:

"A merchant, however, who sells goods of his own manufacture or articles of which he professes to have a special knowledge is presumed to know of any defect in the goods."

The learned Judge was clearly relying on sec. 214 of Pothier on *Sale*, which had been cited in argument; furthermore he had just referred to *Erasmus's* case, *supra*.

In *Marais* v. *Commercial General Agency Ltd.*, 1922 T.P.D. 440, according to the head-note a seed merchant, who inadvertently supplied a farmer with seeds of a character different from that purchased, was held liable for the resultant loss of the value of the crop. The decision turned on breach of contract. However, at page 444, the Court [MASON and CURLEWIS, JJ.] said, *obiter*, that even if it could be thought that this was a case of latent defect, *Pothier's* rule would render the sellers liable, because they were seed merchants who advertised in effect that they specially dealt in seed, "with twenty awards of merit for produce and seed", and thus they professed a special knowledge in the thing sold.

In *Evans & Plows* v. *Willis & Co.*, *supra*, the seller had given an express warranty as to the good quality of the cement sold. He was held liable to the purchaser for consequential damages caused by the cement's inferior quality. The case is therefore not in point, but in the course of his judgment WATERMEYER, J., at p. 505 referred in some detail to secs. 213-6 of Pothier on *Sale*.

In *Bower* v. *Sparks, Young and Farmers' Meat Industries Ltd.*, 1936 N.P.D. 1, the seller was held liable, on breach of contract, for

consequential damages which were within the contemplation of the parties. FEETHAM, J.P., referred at p. 17 to the admitted fact that the seller was a person in the position of a manufacturer of the thing sold; and at p. 25 said that the award of damages could also be supported on the basis that the seller was liable as an artificer to pay extrinsic damages for supplying defective articles. The case is not directly in point, but what is of interest is that, at pp. 12 and 16-17 of the judgment, *Pothier* was cited as an authority, as also were *Erasmus's* case at p. 374, *supra*, and *Marais's* case at p. 444, *supra*.

The first judicial suggestion of a somewhat wider field of application of *Pothier's* rule in relation to a dealer vendor appeared in *Young's Provision Stores (Pty.) Ltd.* v. *van Ryneveld*, 1936 C.P.D. 87.

JONES, J. (with whom CENTLIVRES, J., agreed) translated sec. 214 of Pothier on *Sale* (pp. 91-2) as follows:

"There is one case, in which the seller, even if he is absolutely ignorant of the defect in the thing sold, is nevertheless liable to a reparation of the wrong which the defect caused the buyer in his other goods; this is the case where the seller is an artificer, or a merchant who sells articles of his own make, *or articles of commerce which it is his business to supply*. The artificer or tradesman is liable to a reparation of all the damage which the buyer suffers by a defect in the thing sold in making a use of the thing for which it was destined, even if such artificer or tradesman were ignorant of the defect. For example, if a cooper or a dealer in casks sells me some casks, and in consequence of defects in any of the casks the wine which I put in them is lost, he will be liable to me for the price of the wine which I have lost. Similarly if the wood of the cask, by its bad quality, communicates a bad odour to the wine, the custom is in such a case that the seller is condemned to take the damaged wine for his own account and to pay me for it according to the price of that which remains undamaged. The reason is that the artificer by the profession of his art *spondet peritiam artis*. He renders himself in favour of those who contract with him responsible for the goodness of his wares for the use to which they are naturally destined. His want of skill or want of knowledge in everything that concerns his art is imported to him as a fault, since no person ought to publicly profess an art if he does not possess all the knowledge necessary for the proper exercise: want of skill is attributed to him as a fault (*Dig.* 50.17.132). It is the same in regard to the merchant whether he makes or does not make the article which he sells. By the public profession which he makes of his trade he renders himself responsible for the goodness of the merchandise which he has to deliver for the use to which it is destined. If he is the manufacturer, he ought to employ for the manufacture none but good workmen for whom he is responsible. If he is not the manufacturer he ought to expose for sale none but good articles; he ought to have knowledge of his wares and ought to sell none but good."

The words which I have italicised must be contrasted with the rendering of "articles of which he professes to have special knowledge", as used in decisions already referred to. At p. 93, in the penultimate paragraph, JONES, J., said that

"*Pothier* does not limit the liability of the merchant to cases when he holds himself out as a specialist . . ."

However, the actual *ratio* would seem to rest somewhat upon the latter narrower basis, for in summarising the judgment the learned Judge said:

"The conclusion at which I have arrived is that when a merchant who deals exclusively and extensively in the sale of foodstuffs sells tinned food for human consumption he is liable to make good any damage which the purchaser has suffered as a result of eating the food, . . ."

In *Vlotman* v. *Buysell*, 1946 N.P.D. 412, SELKE, J., without dealing with any distinction between a merchant selling goods in which it is his business to deal, and a merchant selling the kind of goods in which he has expert knowledge, held that the former was liable for damages

under the common law, on the footing *spondet peritiam artis*. The learned Judge referred, *inter alia*, to Pothier on *Sale*, sec. 214. The *ratio* suggests that the law imputes expert knowledge to a merchant selling goods in which it is his business to deal.

A somewhat intermediate position was suggested in the dissenting judgment of SCHREINER, J.A., in *Hackett's* case *supra*, at pp. 692-3. It is not in conflict with that of the majority, for their judgment did not find it necessary to deal with the point. The learned Judge of Appeal expressed the view that the effect of *Pothier's* rule was, broadly speaking, that a seller who deals in articles of the kind sold should *prima facie* be treated as having given the buyer his expert assurance that the goods are free from latent defect, and that this accorded with present day needs; but that the seller should be entitled to show that, in the circumstances, the buyer could not have purchased on the faith of any tacit assurance by the seller. This view found favour with HORWITZ, J., in *Odendaal* v. *Bethlehem Romery Beperk*, 1954 (3) S.A. 370 (O) at pp. 376-7.

The judgment of the Cape Provincial Division in *Hackett's* case, *supra*, was concerned primarily with the question of prescription, but in a comprehensive judgment SEARLE, J., (OGILVIE THOMPSON, A.J., concurring) said with regard to the *Pothier* rule:

> "*Pothier, Molinaeus* and *Domat* attribute it to a conception of law that a vendor who holds himself out as a specialist is bound in law to have knowledge of his wares and accordingly is liable for the consequences if he sells, even though it be in all innocence, a defective article . . . The dealer was regarded as liable for the damages resulting from his having sold, in his capacity as a specialist, a defective article not because he was held to have constructive knowledge of any defect (i.e. *dolus*), nor on the ground of a breach of an implied term of his contract warranting against any latent defects (i.e. breach of contract), but upon the principle that, having held himself out as a specialist, he ought to have knowledge of his wares" . . .

It would seem that there is support for this view in the fact that *Pothier* assimilated the liability of the type of merchant whom he had in mind to the responsibility of an artificer—and it is natural to impute expert knowledge to the latter.

In *Jaffe & Co. (Pty.), Ltd.* v. *Bocchi and Another*, 1961 (4) S.A. 358 (T), the Court recognised the *Pothier* rule in relation to consequential damages, but was primarily concerned with the question of prescription; CLAASEN, J., approved of the first part of the view put forward by SCHREINER, J.A., referred to above. HIEMSTRA, J., at pp. 367 and 368, indicated that under the *Pothier* rule the buyer could claim from the merchant if there was an implied warranty flowing from his position as a dealer.

I must also mention a Rhodesian decision, as a matter of persuasive interest, namely *Lockie* v. *Wightman & Co. Ltd.*, 1950 (1) (S.A.) 361 (S.R.), in which LEWIS, A.C.J., followed a suggestion made in *Young's* case, *supra*, and held that the *Pothier* rule of liability applies to merchants selling goods in which it is their business to deal and that it is not dependent on their having expert knowledge of the kind of goods sold.

The learned textbook writers, almost without exception, have accepted *Pothier's* rule as being part of our law, although they are not entirely harmonious as to its precise scope of application. For example, Mackeurtan on *Sale*, 3rd ed. p. 307 note 115 F, and p. 310, prefers the interpretation "goods in which it is his business to deal", but concedes that there is little to choose between this and the rendering in *Erasmus's* case, *supra*. Morice on *Sale*, writing in 1918, considers on pp. 155-6 that in the complicated production of modern times it is out of the question to hold even manufacturers liable for defects under the *Pothier* rule. Wessels on *Contract*, 2nd ed. vol. II para. 4770, requires the plaintiff to show that the seller is an expert who ought to have known of the defect. Wille & Millin on *Mercantile Law*, 15th ed. p. 160, consider that by a merchant professing special knowledge, is meant simply "one who sells articles of commerce which it is his trade or business to supply". De Wet and Yeats, *Kontraktereg en Handelsreg*, 3rd ed. p. 235, put it thus:

> "Die aanspreeklikheid van die handelaar word hier by ons gegrond op 'n stelling gemaak deur die Franse skrywer *Pothier* waar hy beweer dat die handelaar, wat 'n nering daarvan maak om sekere soort goed te verkoop, aanspreeklik is vir gevolgskade veroorsaak deur gebreke in die goed, ook al was hy onbekend met die gebreke."

Wille's *Principles*, 5th ed. p. 330, held liable a seller who should have known of the defect by reason of his trade, for example a merchant selling goods in which it is his business to deal. Lee and Honorè on *Obligations*, pp. 86-7, hold the merchant liable on two bases, namely when he has sold goods in which it is his business to deal or where he is or purports to be an expert with regard to such goods. Hahlo & Kahn, on *Union of South Africa*, p. 682, refer to "the present fluid state of the law" in regard to the field of application.

Reviewing all the foregoing, it seems to me that it can safely be said that, as a general proposition, sec. 214 of Pothier on *Sale*, in so far as it deals with the liability of a merchant seller, is recognised as being part of our law. As to the field of application of the rule, in my opinion there is insufficient judicial support for the wide view that a merchant, who sells goods in which it is his business to deal, is merely on that account liable for consequential damages caused to the purchaser by a latent defect, of which the seller was unaware, in the thing sold. It follows that the suggestion to that effect in *Young's* case, *supra*, at p. 93, penultimate paragraph referred to earlier, and the conclusion in *Lockie's* case, *supra*, cannot be regarded as reflecting the law of this country. In other words the question posed in the opening paragraph of this judgment must be answered in the negative. Nor do I consider, with respect, that the intermediate view suggested by SCHREINER, J.A., in *Hackett's* case, *supra*, is sufficiently warranted by the decisions. In my opinion the preponderant judicial view, and which this Court should now approve, is that liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold. (It is not intended here to draw any distinction between the words "merchant" and "dealer"). Whether a seller falls within the category mentioned will be a question of fact and degree, to be decided from all the circumstances of the case. Once it is established that he does fall within that category, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implica-

tion contracted out of it. I have only to add that the remedy, from its nature, is not redhibitorian.

The problems arising from the application of this principle to particular cases, for example to everyday purchases such as foodstuffs, could no doubt be worked out judicially over the years. But as a matter of social convenience it may be that this matter is one which could with advantage engage the attention of Parliament. On the one hand, in modern conditions of trade and marketing techniques the position of a dealer may in some respects have in it something of the nature of a mere conduit pipe. On the other hand, there is something to be said in equity for the view that a member of the public who buys an article from a dealer should normally be able to look to him for reparation, instead of being referred to the manufacturer here or overseas. Cf the remarks of SCHREINER, J.A., in *Hackett's* case, *supra* at p. 692, in regard to "the present day needs of the community". Other countries, in an effort to arrive at a balanced solution, have had recourse to legislation. The United States and England are examples.

In the present case it follows from what I have said that the appellant is entitled to adduce such evidence, foreshadowed in its plea, as is directed to showing that it does not fall within the category, referred to above, in regard to the kind of goods sold in this case, i.e., toxic pesticides. This means that the appellant has had substantial success on appeal. If there are a few averments in the plea which travel outside that ambit and might normally have been liable to be struck out, it is not necessary to pursue this aspect of the matter in view of the footing, referred to earlier herein, upon which the case was argued. It is sufficient to say that in general the striking-out order should not have been granted, leaving it to the parties to apply for any amendment to the pleadings in the light of this judgment.

I would add that it was not disputed that the appellant co-operative society can be described as a merchant or dealer, which are words of wide application.

I would also mention that, in reply to a request for further particulars to the declaration, it was averred that one of the respondents is a member of the appellant. Counsel expressly refrained from making any point of this in argument; and it is therefore not necessary to consider it in this judgment.

In the result the appeal is allowed with costs. The order of the Court *a quo* is altered to read "application for striking out dismissed with costs".

BEYERS, J.A., OGILVIE THOMPSON, J.A., RUMPFF, J.A., and WESSELS, J.A., concurred.

Appellant's Attorneys: *M. Liebson*, Johannesburg; *Goodrick & Franklin*, Bloemfontein. Respondents' Attorneys: *de Hart & Cilliers*, Kroonstad; *Van de Wall, Leinberger, Potgieter & Coetsee*, Bloemfontein.

STANDARD FINANCE CORPORATION OF SOUTH AFRICA LTD. (IN LIQUIDATION) v. GREENSTEIN.

(APPELLATE DIVISION.)

1964. *May* 14, 28. STEYN, C.J., OGILVIE THOMPSON, J.A., BOTHA, J.A., HOLMES, J.A. and WESSELS, J.A.

Insolvency.—The insolvent.—Dispositions.—Undue preference under sec. 30 *of Act* 24 *of* 1936.*—Not necessarily a disposition to a creditor.—Disposition to a third party.—When such party need not be joined in proceedings for an order declaring disposition void. —Practice.—Parties.—Joinder.—Action to declare a disposition void under sec.* 30 *of Act* 24 *of* 1936.*—Disposition not to a creditor.—When third party to which disposition made need not be joined.*

The disposition of a debtor's property mentioned in section 30 of Act 24 of 1936 is not a disposition to a creditor and no other.
When the disposition is to a third party, the joinder of that party in an action for an order declaring it to be void as an undue preference in terms of the section, read with section 181 of the Companies Act, 46 of 1926, is not necessary where there is no direct relationship between the plaintiff and the third party, the latter would not be directly concerned in the proceedings, the order sought would not necessarily prejudice its interests and the effectiveness thereof against the debtor (insolvent) would not be dependent upon any co-operation on the part of the third party.
The decision in the Cape Provincial Division in *Standard Finance Corporation of South Africa Ltd. (in Liquidation)* v. *Greenstein*, reversed.

Appeal from a decision in the Cape Provincial Division (DIEMONT, J.). The facts appear from the judgment of STEYN, C.J.

M. H. S. Festenstein, Q.C. (with him *C. J. M. Nathan*), for the appellant: Under sec. 30 of Act 24 of 1936 as amended, the Court is concerned only with the question whether the insolvent intended, by making a disposition, to prefer one of his creditors above another. The section does not require that the disposition should have had this effect. In the present case the effect of the transaction would appear to have been that instead of Greenhill Investments (Private) Ltd. having merely a concurrent claim against the insolvent company for £47,000 and remaining indebted to respondent in the sum of £50,000, Greenhill Investments (Private) Ltd. was released of its liability to respondent as a result of the disposition which the insolvent company made to respondent, and was thus placed in the same position as if it had been paid in full by the insolvent company. But it is not necessary that the transaction should, in fact, have had the effect of preferring Greenhill Investments (Private) Ltd., because the only question arising under the section is, whether the disposition was intended to have the effect of preferring this company. And this was alleged in para. 10 of the declaration. Sec. 30 of the Act does not, either expressly or impliedly, require that the disposition complained of should have been made to a creditor of the insolvent. In those cases in which such a requirement has been postulated, the question that is here in issue was not directly under consideration; cf. *Estate Hunt* v. *de Villiers*, 1940 C.P.D. 79,