Unreported Judgments

From time to time, judgments of interest to the legal community, which do not, for one reason or another, appear in the regular reports in this province, will be published in the *McGill Law Journal*. In all cases, the words in smaller type are extracted *verbatim* from the judge's notes; words appearing in larger type are those of the editors.

SALE

ERNEST HAEFNER *v.* ARMAND BOISJOLY, C.S.M. 482,050, January 14, 1963, Mr. Justice F. R. Hannen.

Sale — Failure to comply with municipal building by-laws — Latent defect Legal and conventional warranties — Clause de style *— Action* quanti minoris *— Redhibitory action — Reasonable diligence — Costs — C.C. art. 1506, 1522, 1523, 1526, 1530.*

Plaintiff, having purchased a new apartment building from defendant, the builder-owner, was summoned before the Municipal Court of Montreal on a charge of violating Article 5-25 of the City's building by-laws, which required that "interior stairways and the exits constituting the outlets from a building shall be protected against fire over their entire travel by enclosures". Plaintiff pleaded guilty to the charge, paid his fine and spent a reasonable sum of money to have the enclosure repaired so that it might conform to the City's requirements. Plaintiff served this action ten months after he had received his summons from the City.

Both parties had, in the opinion of the Court, acted in good faith; however, the judge stated that, in equity, he would have ruled for the plaintiff. Compelled, nonetheless, to apply the provisions of the Civil Code, he found for defendant.

Mr. Justice Hannen

Beyond any question, this is primarily an action based on alleged latent defects. That being said, I doubt very much whether the alleged defect is *latent* as required by C.C. 1522, for it was only latent because plaintiff, at best, did not see fit to see the plans and to have then raised the issue, or again to have consulted, himself or an expert on his behalf, the City By-laws. Furthermore I am not sure that the so-called latent defect rendered the apartment-house *unfit* for use as such. Of course, if he had known that something allegedly required by law was missing, he *might* have insisted upon paying less, but that is a big assumption. The fact is that we knew he paid $5,000 less than he offered originally and $10,000 less than the defendant was asking; we do not know why but any *enquête* as to causes of variation in price would necessarily be complete; defendant may quite possibly be in the utmost of good faith in arguing that he "a été pris par surprise et n'a pu contester d'une façon adéquate la preuve faite par ce document", seeing that the declaration never refers to the offer to buy.

> In any event the alleged defect is not latent under C.C. 1523, for it was apparent, and even without insisting as our courts have done in several instances that a buyer has sometimes a duty to hire an expert to make an inspection for him. (I agree fully with Batshaw, J., in *Tellier* v. *Proulx*,[1] in this connection and in his holding that the 'clause de style' "de prendre l'immeuble dans l'état où il se trouve actuellement" does not specifically remove the warranty referred to elsewhere in the contract, and created by law).
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> But in any event this action is seriously late under C.C. 1530. The suit was served on August 20th 1959. But defendant received the summons on or about October 23rd 1958; and although he alleges this was his first knowledge of the "latent defect", it is established that he knew when the City gave a 'final notice' on or about June 20th 1958.
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> So if the action is based wholly on alleged latent defect, it must fall.

The Court found no breach of conventional warranty for reasons which do not interest us here but it is interesting to note that the action was dismissed without costs.

> Both parties were in good faith and the attitude of each might be understood, but if defendant had been less taciturn and a little more co-operative when his buyer was faced with this unexpected problem, I am convinced that this litigation might have been avoided, if for no other reason because the defendant would have indicated how the job could be done for $300 rather than $850.
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> *Action dismissed.*

Comment

The question of the purchaser's obligation to appoint an expert to examine a *new* building remains unresolved. Although there are at least four judgments of the Superior Court which either explicitly or implicitly state that the purchaser of a new building has no such obligation,[1a] the Court of Appeal has expressly left the question open for appreciation by itself at a later date.[2] Hannen, J., implies here that there *may* be such an obligation on the purchaser. The arguments for and against the proposition are clearly laid down by Prof. Durnford in his article on latent defects.[3]

As far as the determination of whether a violation of a building by-law may constitute a latent defect or not, this case is informative as far as it goes, but is obviously not decisive on the point, since

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[1] [1954] C.S. 180.

[1a] *Lauzon* v. *Lévesque*, (1929), 67 C.S. 470 (P. Demers, J.); *Bourdon* v. *Lamontagne*, [1945] C.S. 269 (Boulanger, J.); *Tellier* v. *Proulx*, [1954] C.S. 180 (Batshaw, J.); and *Rothstein* v. *International Construction Inc.*, [1956] C.S. 109 (Collins, J.).

[2] See the *obiter dictum* of Hyde, J., in *E. and M. Holdings Inc.* v. *Besmor Investment Corporation*, [1961] B.R. 376 at p. 378.

[3] *What is an Apparent Defect in Sale ?*, (1964), 10 McGill L.J. 60 at pp. 76-78.

the judge found that the alleged defect did not, in this case, render the building "unfit for the use for which it was intended".[4] In a situation where a building did satisfy that criterion, one would have thought that a court would have no trouble in finding that such a violation amounted to a latent defect.[5]

The question of the tardiness of the action appears to fall in line with the jurisprudence on the matter, ten months being an excessively long delay from the acquisition of knowledge.[6]

The refusal by Hannen, J., to give effect to the *clause de style* is indicative of the more active role which our courts have pursued in the area of judicial legislation; the tendency to reject burdensome, unilaterally beneficial and socially valueless provisions of this nature is growing in Quebec. See, for example, the recent judgment of *Michaud* v. *Letourneux*.[7]

CONTRACT

BERNADETTE BROOMFIELD *v.* PAUL PAPPAS, C.S.M. 587,026, March 2, 1966, Mr. Justice Arthur I. Smith.

Parking lot — Stolen car — Lease and hire of space — Innominate contract Element of deposit — Standard of care — Burden of proof — Locked car — Responsibility for contents — C.C. 1063, 1064, 1802.

Plaintiff entered defendant's parking lot at 2 p.m., paid the standard parking charge, received a parking ticket (a duplicate of which was placed on the car windshield by one of the defendant's employees), was directed where to place the car, parked it herself and locked it. When she returned three hours later, the car was gone and it was only after searching the lot for twenty minutes that she spotted the parking attendants who were lounging in a parked car instead of being at their posts.

Plaintiff claimed the value of the automobile ($2,150) and its contents, various personal effects ($158).

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[4] Art. 1522 C.C.

[5] In the area of the effect of a municipal by-law violation on an action for cancellation of a lease, see the interesting judgment of *Lemcovitch* v. *Daigneault*, [1957] C.S. 178 (Collins, J.) and Prof. Durnford's discussion of uninhabitability, in *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477 at pp. 511 *et seq.*

[6] See, for example, *David* v. *Manningham*, [1958] C.S. 400 (Jean, J.) and *Gagnon* v. *Houle*, (1923), 34 B.R. 11. See also J.W. Durnford, *The Redhibitory Action and the "Reasonable Diligence" of Article 1530 C.C.*, (1963), 9 McGill L.J. 16.

[7] [1967] C.S. 150 (Mayrand, J.). See also *Tellier* v. *Proulx*, [1954] C.S. 180 (Batshaw, J.).

Mr. Justice Smith

> Although it was argued by counsel for defendant that the contractual relationship between plaintiff and defendant was merely that of lessor and lessee of space in which plaintiff could park, I am satisfied that the relationship, while it constituted an innominate contract, involved the element of deposit and that defendant's role required him to exercise the care of a *bon père de famille* in respect of the safekeeping of plaintiff's car.

The Court also found an implication that such was the case in the following condition appearing on the face of the parking ticket:

> Although we take the best possible care of your car and its contents, we are not responsible for articles lost or stolen from cars or for accidents involving our customers. (No overnight Parking.)
>
> The Court is convinced therefore that, whatever name is given to the contractual relationship which existed between the parties, it was one which required defendant to exercise the care of a *bon père de famille* and the burden of proving that this care was in fact exercised rested upon defendant.[1]

The learned judge had no difficulty in finding that the defendant had not discharged the burden.

> It appears from the evidence that it was not the practice for defendant, or his representatives, to require the surrender of the parking ticket before allowing the removal of a car from the parking lot and there is no evidence that anyone was on duty at the exit during the time that plaintiff's car was on the premises. In fact the manager, Murphy, who was not there until after the theft had been reported, and defendant's employee, Ostiguy, both testified that the ticket given to the car owner (a duplicate being placed on the windshield), was given solely for the purpose of ensuring that the parking fee had been paid and not for the purpose of establishing that the person removing the car from the lot was the person entitled to do so. This is an extraordinary admission and leaves unexplained why, if such was the case, it was considered by defendant to be necessary to issue a parking ticket in duplicate. Surely the obvious reason for doing so is that, by requiring the person removing the car from the lot to produce his duplicate ticket, defendant would be able to assure himself that the car was not being removed by an unauthorized person.[2]

The judge then replied to the interesting argument that the degree of care required in the instant case, where the car was locked, was less than where an automobile might be left unlocked, in the following way.

> It however is the court's view that plaintiff's automobile whether locked or not was entrusted to defendant's care and that the most that can be said on behalf of defendant's view is that the degree of care required of the parking lot owner might be less in the case of the car left locked than it would be in the case of the car left unlocked, but in either case it would

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[1] Art. 1063, 1064, 1802 C.C.; *Palmer* v. *Gaucher*, (1941), 71 B.R. 449, *Bell* v. *Ruby Foo's*, [1962] C.S. 559 (Ferland, J.).

[2] *Garage Touchette Ltée* v. *Metropole Parking Inc.*, [1963] C.S. 231 at p. 236.

be defendant's obligation to exercise the care of a *bon père de famille,* having regard to the circumstances. In the present instance the court is obliged to conclude that the burden of proving that such care was taken by defendant has not been discharged.

Finally, the Court dealt with the question of responsibility for the contents of the car.

The value of plaintiff's car was admitted at the sum of $2,150.

In addition to that amount plaintiff claims the sum of $158, the alleged value of personal effects which were in the automobile.

Since the court is convinced that defendant had the obligation of exercising reasonable diligence to safeguard plaintiff's property, it is of the opinion that defendant, having failed to discharge this obligation, is liable to plaintiff for the loss of the personal effects contained in the vehicle.

Counsel for defendant, in arguing to the contrary, cited *Atlas Parking Limited* v. *Laferrière.*[3]

That case however is clearly distinguishable from the present one in various respects and, in particular, in that the plaintiff's claim in that case included a claim for the loss of furs valued at thousands of dollars. The holding of the court in the *Atlas Parking Limited* case that the parties could not in the circumstances be considered to have contemplated that the defendant would be responsible for the safekeeping of such valuable articles is understandable. On the other hand, the said judgment is not, in the opinion of this court, authority for the proposition that the present defendant is not liable for the loss of plaintiff's automobile and its contents comprising only such clothing and personal effects as one might expect to find in such a vehicle.

The proof, however, as to the value of these effects was meager and does not justify the award of the sum of $158 claimed. Although any estimate of the value of these effects must to some extent be arbitrary, the court considers it just and reasonable to fix this value at the sum of $75.

Action maintained ($2,225).

DELICT

ANTONIO DI BIASIO *v.* SEVEN-UP MONTREAL LTD. and COTT BEVERAGES (CANADA) LTD., C.S.M. 670,214, April 7, 1966, Associate Chief Justice George S. Challies.

Collapse of advertising sign — Good sign erecting practice — Fault — Strong wind — Force majeure — Res ipsa loquitur *— Damages for loss of eye.*

Plaintiff claims damages for the loss of an eye arising from an accident which occurred when a sign, the property of Seven-Up Ltd., erected on the outside front wall of the building in which the barber shop where he was employed was located, came loose and fell from the wall through the window of the barber shop, striking him in the face.

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[3] [1962] B.R. 422, and particularly the remarks of Tremblay, C.J., at p. 427.

The Seven-Up sign was erected in two parts, divided vertically in the center, and consisted of a wooden frame in two parts on which was nailed a metal sheet, also in two parts, on which the sign was painted. The sign had been erected in 1957 by Mayman's Signs acting on behalf of Seven-Up and the sign was thereafter the property of that defendant. The sign was repainted in 1960 but it was not thereafter inspected or touched in any way.

After the Seven-Up sign had been installed, a large metal sign was erected in 1962 extending away from the building at right angles and suspended on a metal frame attached to the wall of the building supported by guy wires which were attached to the southern portion of the Seven-Up sign. The second sign was the property of Cott Beverages, the other defendant, and it was alleged that the continuous movement of the Cott sign served to weaken the installation of the Seven-Up sign.

About one month after the accident, the wall was examined by one Reiter who found the brick wall, and particularly the mortar, in poor condition. He found a four and a half inch hook (Exhibit P-4) which was still in one of the holes surrounded by some fragments of wooden wedges which had rotted because of moisture getting into the wood.

When the accident occurred, the entire north portion of the Seven-Up sign fell and went through the window of the barber shop although the Seven-Up sign was over the window of an adjacent pastry shop and not over the window of the barber shop. This fact caused the court to conclude that "it must have swung on one of the wires connected to the Cott sign and then swung through the window, probably impelled by the wind".

Although a record wind velocity was recorded at Dorval about 15 minutes before the accident occurred and it was undisputed that the wind was strong in the locality of the barber shop, there were six or seven other signs in the immediate neighbourhood on both sides of the street, some of which were flat against the wall and some of which were suspended over the sidewalk, none of which fell at the time the Seven-Up sign fell.

Associate Chief Justice Challies

> On the facts as above set forth the Court has no doubt as to the responsibility of both defendants both under 1054 and 1053. The two signs were each things the property of and under the care and control of the respective defendants and it was the autonomous act of the signs put into motion by the wind which caused the signs to fall and to cause the damage to plaintiff. Accordingly both defendants are responsible unless they can show that they could not by reasonable means have prevented the accident. In

view of the fact that there was not the slightest inspection of the signs at any time, the Court is unable to come to the conclusion that the defendants could not by reasonable means have prevented the accident.

An attempt was made to prove the defence of irresistible force or fortuitous event. It may well be that a wind with gusts to 100 miles an hour would constitute a fortuiteus event, as the highest wind previously recorded in the Montreal area was 86 miles an hour. However, there is no evidence at all that gusts of anything like this magnitude were found at the scene of the accident, and it must be borne in mind that Dorval is an undetermined but considerable number of miles away from the scene. The maximum velocity wind of 50 miles an hour recorded at St. Hubert Airport is by no means a wind of unusual velocity in Montreal. Accordingly the defence of irresistible force or fortuitous event fails.

The fact that the Seven-Up sign fell brings into play the principle of *res ipsa loquitur* and the Court is of the opinion that, failing the strongest evidence to the contrary, this indicates in itself that the sign was defectively installed. However, there is ample evidence that the mortar and the bricks were in poor condition and that all the holes into which the pins supporting the sigu had been driven were in to the mortar. The weight of the evidence shows that at least one of the pins used was the four and a half inch pin found a month after the accident and produced as Exhibit P-4. It must also be borne in mind that half of the sign did not fall and one wonders how it was that half of the sign was sufficiently well attached and that the other half was not, and also how it was that none of the other signs in the immediate neighbourhood blew down.

Defendant Seven-Up argued that the two guy wires from the Cott sign put an unexpected strain on the Seven-Up sign resulting in it being loosened and then falling from the wall. There is no precise evidence as to the extent of this strain and the proof on this point by Mr. Jenkinson, civil engineer, is largely hypothetical and not based on any definite information. In any event the defendant Seven-Up should have inspected the sign periodically and had it done so it would have immediately discovered the existence of the guy wires and had them removed.

Insofar as the defendant Cott is concerned, it was its thing, the guy wires attached to its sign, which put in motion the chain of events which caused the sign of Seven-Up to fall through the window. Here again Article 1054 applies and there is no proof that defendant Cott was unable by reasonable means to have prevented what occurred. Also defendant Cott is at fault in that it never inspected its sign during a period of almost two years and in that it permitted its sign to remain guyed not to the wall of the building in accordance with good sign erecting practice but guyed to the bottom of another sign which is contrary to acceptable practice.

Accordingly the two defendants or their representatives committed all the faults alleged in paragraphs 18 and 21 of the declaration and these faults led directly to the accident which caused the loss of the vision in plaintiff's eye.

Turning now to damages, the three doctors who gave very clear testimony all agreed that the vision of the right eye was for all practical purposes irretrievably lost. Dr. Little gave a percentage of actual bodily incapacity of 16% but conceded that some authorities would go as high

as 25%. Dr. John Nicholls felt that he would give a percentage of 12½% to 15% but also conceded that the doctors in the United States allowed 30% incapacity for the loss of an eye and the United States Army allows 40%. Dr. Kushner inclined to a considerably higher percentage of incapacity. There was total temporary incapacity of three months.

Bearing in mind the evidence of the three physicians and the type of work done by the plaintiff and the fact that he is affected by the loss of depth perception in the use of the razor and the scissors on his customers, the Court fixes the incapacity at at least 20%.

Action maintained ($22,938.55).

LEASE AND HIRE

PARADIS ST. LEONARD LTEE *v.* CLAUDE ST. JACQUES, C.S.M. 694,465, October 3, 1966, Mr. Justice Albert Mayrand.

Lease and hire of things — Apartment infested with spiders — Unjustified desertion of premises — Cancellation of lease — Damages — C.C. 1612, 1613, 1641.

Plaintiff-lessor seeks $200 for two months of unpaid rent, cancellation of the lease and $300 damages for loss of rental.

Defendant-lessee abandoned the premises in August, 1965, less than four months after taking possession thereof. He had tried to get rid of the spiders himself with an insecticide but finally gave up when it became obvious that the method would be unsuccessful. He complained to the janitor in August and the latter immediately called an exterminator who fumigated the premises while defendant and his family were not at home, on August 21. When they returned, they found the smell unbearable and consequently spent the night at the home of relatives.

On subsequent days the defendant claimed that the spiders re-appeared, although in considerably smaller quantities than previously. The exterminator, on the other hand, was of opinion that there were no more spiders and he stated that, even if there were, he would have fumigated again since his work was guaranteed for several weeks.

Mr. Justice Mayrand

Le défendeur est parti quelques jours après, le 25 août 1965, sans demander que l'on fumige de nouveau, sans payer le loyer d'août qu'on lui avait réclamé, et sans aviser la demanderesse de la date de son départ. La demanderesse déclare n'avoir jamais été avisée de l'intention du défendeur de mettre fin au bail, mais le défendeur soutient qu'il avait prévenu le concierge de l'impossibilité de rester dans ce logement infesté d'araignées.

Il est vrai que la présence de vermine dans un logement peut justifier le locataire de le quitter et de demander la résiliation du bail, qu'il s'agisse

de punaises, de puces, de blattes ou autres insectes nuisibles.[1] En principe, le locataire doit cependant mettre le locateur en demeure de faire disparaître les insectes, surtout lorsque le locataire a habité quelque temps le logement et que l'invasion des insectes est progressive; le locataire ne peut donc pas se faire justice et mettre fin au bail de sa propre autorité en quittant les lieux.[2] A titre exceptionnel, lorsqu'il y a urgence de quitter les lieux, sans quoi sa santé et celle des membres de sa famille seraient en danger, on admet que le locataire puisse quitter les lieux et demander ensuite en justice l'annulation du bail.[3]

Dans le présent cas, la preuve révèle que le locateur a agi avec diligence quand son locataire s'est plaint de la présence d'araignées dans son logement. Il s'est adressé à un entrepreneur en fumigation qui a fait un travail efficace. Quand le locataire a quitté les lieux, sans payer le loyer, si toutefois quelques araignées avaient échappé à l'«extermination», il n'y en avait plus assez pour justifier le défendeur de quitter les lieux. L'odeur de l'insecticide ne pouvait plus l'incommoder sérieusement.

On peut se demander si un bon coup de balai n'aurait pas pu supprimer dès le début la cause du présent litige. De toute façon, la preuve ne révèle pas que le logement quitté subitement par le défendeur était inhabitable; au contraire, la demanderesse a exécuté avec une diligence suffisante ses obligations à l'égard de son locataire.

La demanderesse n'a pu relouer avant le 17 janvier 1966 le logement que le défendeur avait loué d'elle pour une période d'une année et qu'il a abandonné sans droit. Elle a droit de ce fait, en plus de $200.00 pour arriérés de loyer, aux dommages réclamés de $300.00.

Action accueillie ($500).

OBLIGATIONS

DAME ARMANDE DAOUST *v.* DAME MARCELLE DAOUST, C.S.M. 699,579, October 6, 1966, Mr. Justice Albert Mayrand.

Recognition of indebtedness — Natural obligation — Novation — Testamentary disposition — C.C. 1018, 1030.

Plaintiff claims from defendant, daughter and universal legatee of the deceased, René Daoust, the sum of $2800, invoking the following writing:

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[1] *Thibault* v. *Dumas*, [1947] B.R. 59, *Bousquet* v. *Côté*, (1933), 54 B.R. 436, *Truax* v. *Murphy*, [1965] C.S. 436 (Jean, J.), *Bélanger* v. *Lemieux*, (1940), 46 R.L. n.s. 314 (C.S.) (Vervet, J.), John W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477 at p. 513.

[2] *Lussier* v. *Sklavounos*, [1963] C.S. 225 (Deslauriers, J.).

[3] *Kaunat* v. *Michaud*, [1960] B.R. 1056, *Kirkman* v. *Metro Univ. Development Corp.*, [1965] C.S. 510 (Deslauriers, J.), *Julien* v. *Maplewood Project Inc.*, [1963] C.S. 415 (Montpetit, J.).

Montréal 21 février 1963.

Je, soussigné, René Daoust reconnaît de payer à Madame Armande Chenier la somme de $3800 pour l'argent que mon mari Reese Chenier décédé a investi dans la mine d'Anjou Limitée.

Il est entendu que ce n'est pas une dette, c'est un remboursement honorable, aucune date de remboursement est fixé que si parfois il y a décès avant le remboursement. Je tiens à ce que la Succession René Daoust honore cette dette et la paye en entier sans intérêt.

(Signé) René Daoust.

23/7/64 Je déclare que M. Daoust n'a remboursé la somme de $1,000 sur la somme de $3,800 mentionnée ci-haut.
Témoin:

(Signé) Armande Chenier.

Defendant pleaded in fact that the plaintiff had been paid and in law «que l'écrit servant de base à l'action ne constitue pas une reconnaissance de dette, qu'il est tout au plus une disposition testamentaire révoquée par un testament ultérieur produit comme pièce P-1».

Mr. Justice Mayrand

Reste à savoir si l'écrit du 21 février 1963 est un engagement valable de payer la somme de $3,800.00 à la demanderesse. La défenderesse soutient que ce n'est pas là une reconnaissance de dette, puisque le signataire y déclare «Il est entendu que ce n'est pas une dette». La défenderesse a raison, si l'on définit la reconnaissance de dette «le fait d'une personne qui déclare devoir une dette civile». Par cet écrit, René Daoust déclare en somme qu'il ne doit rien civilement, mais qu'il s'engage à payer la somme de $3,800.00, ce qui constitue désormais une dette civile, l'engageant lui et ses successeurs. Cette interprétation est conforme à l'article 1018 du Code civil: «Toutes les clauses d'un contrat s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier». En écrivant «Il est entendu que ce n'est pas une dette», le signataire déclare que selon son sentiment il ne devait rien civilement à la demanderesse, d'autant moins que la considération de cet écrit est un placement malheureux que le mari de la demanderesse, décédé au moment de la signature de l'écrit, avait fait dans des valeurs minières.

En s'engageant à payer $3,800.00 à la demanderesse (c'est évidemment le sens qu'il faut donner aux mots «je... reconnait de payer»), René Daoust précise qu'il fait «un remboursement honorable»; il transforme en dette civile ce qui n'était qu'une obligation naturelle, l'obligeant «dans le fort de l'honneur et de la conscience» selon l'expression de Pothier.[1]

L'engagement du 21 février 1963 n'est pas une disposition testamentaire ne devant prendre effet qu'au décès de René Daoust. Il liait le signataire immédiatement. Parce qu'aucune date de remboursement n'est fixée, il ne s'ensuit pas que la somme n'était pas exigible du vivant du souscripteur de l'engagement. Même si l'on avait stipulé que la demanderesse ne pouvait exiger le paiement avant son décès, la dette aurait existé immédiatement, seule son exigibilité en aurait été reportée au décès.[2] Le fait d'ajouter que

[1] Pothier, *Oeuvres*, 2e éd., par M. Bugnet, (Paris, 1861), t. 2, no. 192, 193.
[2] *Pesant* v. *Pesant*, [1934] S.C.R. 249.

sa succession devrait honorer cette dette ne fait que confirmer la règle générale posée par l'article 1030 du Code civil: «on est censé avoir stipulé pour soi et pour ses héritiers».

Action accueillie ($2800).

CRIMINAL LAW

LA REINE *v.* CLAUDETTE «CLAUDIA» BRISEBOIS, C.S.M. (Juridiction criminelle) 10-375/67, Nov. 27, 1967, Mr. Justice Philippe Pothier.

Obscenity — Go-Go dancer — Indecent exposure — Undue exploitation of sex — Cr.C. 150.

The Crown appeals *de novo* from a judgment of Mr. Justice Pascal Lachapelle of the Municipal Court of Montreal (C. Mun. 17-6134, June 22, 1967) acquitting the respondent «d'avoir le 4 avril 1967 illégalement participé comme exécutante à un spectacle indécent...»

Mr. Justice Pothier

Les parties ont de consentement produit au dossier la preuve offerte en première instance et elles ont soumis leurs arguments. Cette preuve consiste dans le témoignage de deux constables qui ont assisté au spectacle. Le costume de l'accusée a aussi été produit. La défense a soumis un film représentant une danse semblable à celle pour laquelle elle avait été arrêtée.

Cette danse est du genre de celle que l'on appelle de nos jours la danse «à gogo». Elle consiste dans une sauterie accompagnée d'une agitation des bras alternativement de bas en haut et des hanches d'un côté et de l'autre et quelquefois d'avant vers l'arrière, le tout suivant un certain rythme qui lui est propre et généralement accompagné de musique. Les fignres en peuvent légèrement varier suivant l'imagination de l'exécutant.

Le costume se compose d'un triangle d'étoffe assez vaste servant de cache-sexe auquel sont attachés deux prolongements en mailles de filet pour couvrir les jambes. Les seins sont recouverts de cônes qui en dissimulent les promontoires.

Le Code pénal ne contient pas de définition explicite de l'obscénité, de l'immoralité ou de l'indécence. L'on s'est appuyé durant très longtemps sur une opinion du juge Cockburn [1] qui avait dit que le critère de l'obscénité était la tendance à dépraver et à corrompre ceux dont l'esprit est sensible à de telles influences immorales. Depuis 1959, l'article 150 du Code classifie comme obscène tout ce qui constitue l'exploitation indue (c'est-à-dire, excessive, exagérée) des choses sexuelles et la Cour est d'opinion que bien que cette disposition se réfère à la matière écrite, elle doit servir de gnide à la matière visuelle.

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[1] *Reg.* v. *Hicklin*, (1868), 11 Cox C.C. 19.

La Cour, corroborée par les deux agents de police, n'a trouvé aucune exploitation sexuelle indue dans l'exécution de cette danse par l'intimée. Elle n'y a vu aucun geste, aucune posture, aucun mouvement significatif d'érotisme ou de sexualité. C'est une danse aux mouvements rapides qui respire et reflète la vigueur, l'entrain et l'endurance de la jeunesse.

Le costume qui n'est pas exigu outre mesure recouvre suffisamment l'anatomie intime de la danseuse et ne laisse voir sensiblement que ce que l'on peut de notre temps regarder tous les beaux jours de l'été sur une plage fréquentée. La Cour admet que les seins sont légèrement plus découverts à leur base que ceux de la baigneuse mais il ne s'agit pas d'une exposition sexuelle indue et partant indécente aux termes de la loi. Il faut également se rappeler que ce spectacle est donné dans un établissement que seuls les adultes ont le droit de fréquenter et ne pas oublier que certain étalage qui pouvait être jugé indécent il y a cinquante ans est devenu, à force de l'exposer, d'aspect plutôt indifférent. En effet, l'habitude acquise avec les années d'avoir les mêmes choses sous les yeux a diminué, sinon fait disparaître leur élément d'attraction.

C'est donc en rapport avec les moeurs d'aujourd'hui que doit être examinée toute prétendue violation à la moralité publique. En cette matière, la Cour n'est pas d'avis qu'il doit y avoir nécessairement immutabilité. Les critères d'appréciation de l'indécence sont, selon les temps, les pays et les peuples, forcément inconstants.

Appel rejeté.

Comment

This judgment appears to mark a departure from previous Quebec decisions in this area. Furthermore, it has recently been followed by Mr. Justice Marcel Marier in four Municipal Court cases[2] dismissed without written reasons.

It is, however, essential to remember that the *topless* performance has not been sanctioned by the Court. The decisions of all three judges dealt with cases in which cone-shaped pasties covered the girls' breasts and do not offer any clear indication, it is submitted, of the attitude which can be expected in the near future regarding topless costumes.

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[2] *R.* v. *Nicolle Racette*, C. Mun. 17-9646, *R.* v. *Paulette Laporte*, C. Mun. 17-9879, *R.* v. *Sonia Paré*, C. Mun. 17-9880, *R.* v. *Claudette Brisebois*, C. Mun. 17-9881. All the decisions were rendered by Mr. Justice Marcel Marier on January 31, 1968.