Unreported Judgmeuts

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.

PROPERTY

EMILIEN MORIN *v.* BELLARMIN GREGOIRE, S.C. Joliette 19,539, January 4, 1967, Mr. Justice Albert Mayrand.

Petitory action — Possession in good faith — Compensation for increase in value — Simple tolerance — Permission of original owner — Verbal gift — Construction on another's immoveable property — Sui generis *right — Right of* superficies *— Real right — Natural obligation — C.C. 414, 417.*

Mr. Justice Mayrand

Le demandeur exerce une action pétitoire contre le défendeur, qui occupe une partie du lot numéro 342 aux plan et livre de renvoi officiels du cadastre de St-Paul, à Joliette. Le défendeur allègue qu'il est propriétaire de cette partie de lot; il ajoute qu'il en a été un possesseur de bonne foi et qu'à ce titre il a droit d'être dédommagé pour la plus-value qu'il a donnée au terrain et il conclut au renvoi de l'action. De plus, par demande reconventionnelle il réclame $5,000 pour coût des améliorations ou plus-value donnée au terrain. Pour fins de preuve et audition, les deux demandes ont été réunies.

Le titre de propriété du demandeur est incontestable. Mais, en 1949, il a permis au défendeur, son beau-frère, de s'installer sur une partie de sa terre et d'y construire une maison. Le demandeur prétend que c'est par simple tolérance qu'il a laissé le défendeur s'installer sur sa terre et que ce ne devait être que pour deux ans. La preuve révèle que ce n'est pas par tolérance mais avec la permission du demandeur que le défendeur s'est construit d'abord un chalet, puis un garage sur le terrain du demandeur.

Il y a en effet une différence entre l'acte de tolérance et la permission.[1] L'acte de tolérance est le fait du propriétaire courtois, qui s'abstient de protester, comme il en aurait le droit, contre les agissements qu'il n'approuve pourtant pas. La permission est une approbation de l'acte d'autrui auquel on aurait le droit de s'opposer. Rester passif, face à l'empiétement, c'est tolérer; autoriser ce qui, sans la permission, serait un empiètement, c'est permettre. La permission suppose, de la part de celui qui la donne, une renonciation à un droit; c'est pourquoi la situation juridique de celui à qui l'on a donné une permission est supérieure à la situation de celui que l'on a toléré. Dans le présent cas, le demandeur ne s'est pas contenté d'assister

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[1] *Le Berre* v. *Mossat,* Cass. civ., 29 mai 1958, Gaz. Pal. 1958.2.104.

comme un spectateur muet et passif à l'installation du défendeur et de sa famille sur une partie de la terre qui fait l'objet du présent litige. Il a autorisé cette installation; il a même invité le défendeur à se construire, à une époque où les relations familiales étaient cordiales. Le défendeur avait une fillette malade, qui sortait de l'hôpital, et à qui on recommandait la vie au grand air; de plus, le défendeur devait quitter la ville pour se rapprocher de son travail. Il importe peu de savoir si c'est le demandeur, qui a pris l'initiative d'inviter sa soeur et son beau-frère à se construire sur sa terre, ou si c'est ce dernier, qui en a parlé le premier au demandeur. Une chose est certaine: le demandeur a autorisé le défendeur à se construire, il lui a fourni quelques matériaux et, à l'occasion, il l'a même aidé à se construire une maison. Le défendeur a clôturé l'emplacement sur lequel il s'est construit et le demandeur était présent lorsque les lignes de la clôture ont été tirées; sur ce dernier point, la Cour préfère le témoignage du défendeur qu'elle trouve plus précis et plus sincère que celui du demandeur.

Le consentement des parties a formé un contrat d'où sont nés des droits et des obligations. Ce contrat verbal *sui generis* est malheureusement imprécis, mais les circonstances dans lesquelles il a été conclu et le comportement subséquent des parties permettent d'en déterminer les effets juridiques essentiels.

D'une part, le demandeur n'a pas entendu transférer la propriété absolue du fonds de terre sur lequel le défendeur et sa famille se sont installés. L'allégation d'une «donation verbale» au paragraphe 5 de la défense est mal fondée en fait et en droit.[2]

D'autre part, le demandeur a permis au défendeur de se construire sur le terrain, qui a été ensuite clôturé, et la convention ne prévoyait pas que les constructions appartiendraient au demandeur. Selon l'article 414 du *Code civil*, «La propriété du sol emporte la propriété du dessus et du dessous», mais ce n'est là qu'une présomption susceptible d'être renversée par une preuve contraire; des circonstances de fait peuvent faire échec à cette présomption.[3]

> Il n'y a rien dans ce texte qui justifie d'affirmer que si un tiers élève une construction, le maître du sol en acquerrera la propriété soit dès le moment de l'incorporation, ou soit par la suite.[4]

Le défendeur Grégoire est donc propriétaire des constructions qu'il a érigées sur le terrain de son beau-frère, le demandeur Morin. Depuis 1949, soit depuis 18 ans, il a payé à la municipalité de St-Paul la taxe foncière imposée sur les bâtisses et le terrain qu'il occupe. Il n'a jamais eu l'intention de construire au profit de son beau-frère.

Le demandeur prétend qu'il a permis au défendeur de s'installer pour une période de deux ans seulement. Ceci est invraisemblable. Le défendeur n'aurait pas assumé des frais relativement importants pour des constructions qu'il n'aurait utilisées que pendant deux ans. Effectivement, le demandeur n'a pas stipulé le délai pendant lequel le défendeur pourrait occuper le

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[2] *Montgomery* v. *McKenzie*, (1890), M.L.R. 6 C.S. 469 (Ct. of R.).

[3] Montpetit et Taillefer, *Traité de droit civil du Québec*, t. 3, (Montréal, 1945), p. 145.

[4] Cardinal, J.-G., *Théorie de l'accession immobilière*, (1966), 1 Thémis 285, at p. 287.

terrain. Les circonstances de la cause démontrent qu'il a entendu conférer au défendeur un droit de superficie sinon perpétuel, tout au moins pour la durée des immeubles bâtis avec sa permission. Baudry-Lacantinerie [5] expose clairement les conséquences d'une entente semblable à celle qui est intervenue entre le demandeur et le défendeur:

> Si les constructions ont été faites à sa connaissance (du propriétaire du terrain) et surtout avec son autorisation, il ne pourra pas les revendiquer comme lui appartenant, ni forcer le constructeur à les démolir. Il intervient, en pareil cas, entre le propriétaire du terrain et le constructeur un contrat *sui generis*, en vertu duquel le propriétaire du sol autorise le constructeur à jouir des constructions pendant un certain temps, autant qu'elles dureront. Il y a création au profit du constructeur d'une sorte de droit de superficie.

Nos tribunaux ont reconnu qu'en des circonstances semblables ou analogues, le propriétaire du terrain concède un droit de superficie pour une période indéfinie.[6]

Le demandeur, n'ayant rien exigé du défendeur, peut-il invoquer que la constitution gratuite du droit de superficie est nulle, parce qu'elle n'a pas été faite selon la forme requise pour la validité d'une donation? L'argument est sérieux, puisque le droit de superficie est un droit immobilier et que la donation d'un immeuble doit être faite par acte notarié et porter minute, à peine de nullité.[7] Cependant, l'on ne doit pas considérer la constitution de superficie faite par le demandeur comme une véritable donation. Dans les circonstances, l'autorisation donnée au défendeur de se construire une maison pour lui et sa famille était, de la part du demandeur, un acte de charité que les circonstances et un esprit de solidarité familiale élevaient au niveau de l'obligation naturelle. Si la souscription en faveur d'une université peut être considérée comme l'exécution d'une obligation naturelle,[8] à plus forte raison doit-il en être ainsi de l'acte de charité en faveur d'une soeur, d'un beau-frère et d'une nièce. Cet acte échappe donc aux formalités des donations.[9] Le demandeur avait le devoir moral de venir en aide à son beau-frère et à sa soeur, alors qu'ils étaient en difficulté, à cause de la santé précaire de leur fillette. Le fait que trois ans auparavant le demandeur avait reçu de son père, par donation, deux terres, dont une comprenait le terrain en litige, avec une maison et autres bâtisses et tout le roulant de la ferme (moyennant de légères charges, dont le paiement de $100 à sa soeur, épouse du défendeur), rendait encore plus impératif l'acte charitable posé en faveur de ce dernier.

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[5] *Traité de droit civil*, t. 6, 3rd ed., No. 372, p. 257.

[6] *Fauteux* v. *Parent*, [1959] C.S. 209; see the comment by J.-G. Cardinal, (1958-59), 61 R. du N. 540; *Duriez* v. *Corp. d'Aqueduc Laval, Terrebonne et l'Assomption*, (1929), 67 C.S. 441; *Bégin* v. *Prévost*, (1927), 65 C.S. 539; *Tremblay* v. *Guay*, [1927] S.C.R. 29, reversing (1928), 44 B.R. 536; *Cloutier* v. *Cloutier*, [1951] B.R. 521.

[7] Article 776 C.C.; Cardinal, J.-G., *Le droit de superfécie*, (Montreal, 1957), No. 84, p. 190.

[8] *Hutchison* v. *Royal Institution for the Advancement of Learning*, [1932] S.C.R. 57.

[9] Dupeyroux, J.J., *Contribution à la théorie générale de l'acte à titre gratuit*, (Paris, 1955), No. 411, p. 410; *Pesant* v. *Pesant*, [1934] S.C.R. 249.

Le demandeur est donc propriétaire de l'immeuble décrit au premier paragraphe de sa déclaration, mais il ne peut demander le déguerpissement du défendeur et l'abandon des bâtisses que ce dernier a érigées sur la partie de sa terre décrito au plan fait le 26 octobre 1964 par l'arpenteur-géomètre Larose; car, il a conféré au défendeur un droit de superficie sur cette partie de sa terre et les bâtisses qui s'y trouvent appartiennent au défendeur qui les a construites. Quoique le défendeur ait invoqué uniquement un droit de propriété du terrain qu'il occupe, la Cour estime qu'elle peut lui reconnaître le droit de superficie, droit réel inférieur au droit de propriété.

Par demande reconventionnelle, le défendeur à l'action principale se prétend propriétaire de tout l'immeuble qu'il occupe, y compris le terrain clôturé. Mais, pour le cas où il ne serait pas déclaré propriétaire, il demande que soit reconnu son droit de retenir l'immeuble aussi longtemps qu'il n'aura pas été payé de la somme de $5,000, coût des améliorations ou plus-value donnée au terrain.

Le défendeur possède en vertu d'un titre et il a construit ses bâtisses sur un terrain affecté de son droit réel de superficie; l'article 417 du *Code civil* est donc sans application. Par conséquent, il n'y a pas lieu de se demander si le défendeur a été un possesseur de bonne foi, ni de déterminer le coût de ses bâtisses ou la valeur que ses bâtisses ont donnée à la terre du demandeur.[10] La demande reconventionnelle se trouve donc sans fondement, vu la décision sur l'action principale.

Vu les circonstances de cette affaire, la Cour croit équitable de n'accorder aucun frais, ni pour l'action principale ni pour la demande reconventionnelle. Elle exprime son regret qu'une querelle de famille, qui est survenue en juin 1964 et dont la cause n'a pas été révélée, ait mis fin aux relations amicales et familiales des parties, entraînant des frais et suscitant une animosité stérile. Le refus d'en arriver à un arrangement après l'audition, malgré les tentatives des avocats, n'a pas porté fruits.

Considérant que le demandeur est propriétaire de l'immeuble décrit au premier paragraphe de sa déclaration, mais qu'il a consenti un droit de superficie au défendeur sur une partie du terrain compris dans ledit immeuble;

Considérant que le défendeur est propriétaire des bâtisses qu'il a érigées sur le terrain affecté à son droit de superficie et qu'il ne peut en être expulsé;

Considérant que le demandeur reconventionnel ne peut à la fois demeurer propriétaire des bâtisses qu'il a érigées, exercer son droit de superficie et demander que lui soit reconnu un droit de rétention jusqu'au paiement du coût des bâtisses et améliorations ou de la plus-value donnée à tout l'immeuble.

Principal action maintained (in part)
Cross-demand dismissed [11]

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[10] *Tremblay* v. *Guay*, *supra*, n. 6; see also the comment by J.-G. Cardinal, *loc. cit.*, *supra*, n. 6, at p. 544.

[11] Plaintiff is declared the owner of the immoveable property, subject, nevertheless, to a right of *superficies* in the Defendant. The Defendant is also adjudged owner of the building thereon, and his cross-demand for the reimbursement of the value of the improvements is necessarily dismissed.

Comment

The general rule of law on the subject is found in Article 414 C.C.: "Ownership of the soil carries with it ownership of what is above and below it." Therefore, the owner of the land is presumed to be the owner of any building attached thereon; this presumption is however rebuttable, as pointed out by Mr. Justice Mayrand. Upon a finding that a building is erected on the land of someone else, and that it was so erected in good faith, Article 417 (3) C.C. applies; the owner of the land must pay the builder either the cost of the improvement, or an amount equal to the increase in value of the land as a result of the improvement.

However, the learned judge preferred to find, instead, that the Plaintiff had verbally consented to and granted a right of *superficies* to the Defendant. However, as pointed out by J.-G. Cardinal,[12] the right of *superficies* is an immoveable right, and thus the prohibition of Article 776 (1) C.C. should apply.[13] The Court held that the Plaintiff never made a "gift" of the right of *superficies*, but actually it constituted the discharge of a natural obligation owed to the Defendant (that of helping his relatives in time of great need), and so it did not have to follow the rule concerning gifts *inter vivos*.

Although there are precedents in our jurisprudence to support the decision, one cannot help but wonder whether the reasoning of the Court is convincing, and whether an absolute prohibition, in fact a rule of public order, can be avoided merely because it constitutes the discharge of a natural obligation, which in any event is unenforceable in our law *per se*.[14]

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[12] *Supra*, n. 7.

[13] Article 776(1): "Deeds containing gifts *inter vivos* must under pain of nullity be executed in notarial form... Gifts of moveable property, accompanied by delivery, may however be made and accepted by private writings, or verbal agreements..."

[14] Note that the case on which Mr. Justice Mayrand is relying for the proposition that the rule as to gifts *inter vivos* does not apply in the case of a gift constituting a discharge of a natural obligation, *Hutchison* v. *Royal Institution for the Advancement of Learning*, *supra*, n. 8, deals with the case of a verbal gift of or promise to give a sum of money, similarly in *Pesant* v. *Pesant*, also referred to by Mr. Justice Mayrand, *supra*, n. 9.

PRIVATE INTERNATIONAL LAW — DOMICILE

NATIONAL TRUST CO. LTD. *v.* CATHERINE McGLORY, S.C. Hull 4,002, May 22, 1964, Mr. Justice François Chevalier.

Private International Law — Domicile — Marriage and divorce — Petitory action — Community of property or not — Is domicile of intention valid? — Foreign divorce — Jurisdiction — Res judicata *— Proof of foreign law — C.C. 79, 80, 81, 83.*

The Plaintiff instituted the present action in order to have the court declare it owner of certain immoveable property, order the Defendant to abandon possession of the property and condemn the Defendant to pay damages for refusal to vacate the premises. The Defendant admitted refusing to vacate the premises, but argued that the immoveable belonged to the community as, at the time of the acquisition of the property by her husband, she was married under the regime of community of property according to the laws of Quebec. She further argued that the immoveable was sold to the plaintiff for the price of $1.00 in order to defraud her of her share in the community, and asked that the sale be declared null and void, and that her right to occupy the premises be upheld.

Mr. Justice Chevalier

The marriage between the Defendant and William Richard Miller took place in the City of Ottawa, Province of Ontario, on the 9th of July 1938. At the time, the Defendant was domiciled in Ottawa and her future husband lived in a place near Hull, in the Province of Quebec. As is common practice, the wedding took place in the parish where the bride to be was residing.

During the summer months of 1938, which followed the nuptials, the newlyweds lived in a cottage situated at Meach Lake, in this province. The furniture they had acquired was brought there and it seems that they spent most of their time at the summer place. It is to be noted that the Meach Lake area is almost entirely populated with summer residents who are domiciled either in Ottawa or Hull and who spend there the period between June and September.

In late September or early October of the same year, the husband and wife came back to Ottawa where they lived and where the husband was working. According to the evidence of the Defendant, they continued however to spend almost every weekend at Meach Lake, while during week days they kept their house in Ottawa.

In 1941 they rented another cottage at Kirksferry, while in the meantime a permanent house was being built at Cascades, both locations being in the Province of Quebec. However, the Defendant admits that during the period of the construction, she and her husband were domiciled in Ottawa.

It is also established that the two children born of the marriage, William Richard (1940) and Henry Gérard (1944) went to school at the Upper

Canada College, in Toronto, Ontario, before their departure from Canada in 1953 with their father.

Mr. Justice Chevalier then quoted articles 79, 80, 81 and 83 C.C. and continued:

Although, as a general rule the regime of property falls under the law of the domicile of the husband at the time of the marriage, that principle must be interpreted in such a manner as to take into consideration his intentions as to their permanent future domicile once married.

Mignault, t. 1, p. 243:[1]

L'endroit dont les lois régissent les droits matrimoniaux des époux, c'est le domicile du mariage et les effets de ce domicile durent autant que le mariage lui-même. Ce domicile peut-être *réel*, celui que les époux avaient lors de leur mariage ou *d'élection, c'est-à-dire, celui où les époux ont convenus de transporter le siège de leur association conjugale.* [Emphasis added by Mr. Justice Chevalier.]

J'ai déjà posé le principe que des personnes domiciliées en pays étranger, et qui s'y marient, restent sujettes aux lois de ce pays, quant à leurs droits matrimoniaux, même lorsqu'elles viennent se fixer dans la province de Québec. Si au contraire les époux avaient, lors de leur mariage l'intention de fixer ailleurs le siège de leur association conjugale, c'est la loi de cet autre endroit qui règlera leurs rapports matrimoniaux. (Aubry et Rau, *Cours de droit civil français*, t. 5, No. 504 bis, p. 275. Langelier, t. 1, p. 187:[2]

Le domicile s'acquiert par la réunion de deux circonstances: l'établissement de la résidence, et l'intention que cette résidence soit permanente. Lorsqu'un individu a plusieurs résidences, pour savoir laquelle constitue son domicile, il faut se demander laquelle il considère comme sa résidence permanento. Il y a un grand nombre de cas dans lesquels cela ne présente aucune difficulté. Par exemple, un individu va passer tous les étés à la campagne; il y réside deux ou trois mois; il est évident qu'il n'y a pas de domicile, puisqu'il n'a aucune intention d'y résider en permanence.

The circumstances in this present case point to the following situation. Although the husband was, in the period immediately following the celebration of the marriage, living in Quebec, although the wedding took place in the Province of Ontario where the Defendant was domiciled, and notwithstanding the fact that from July to September following the newlyweds resided at a summer cottage in this province of ours, their ulterior actions indicate that their ultimate intention was to live permanently in Ontario. So much so that in September they came to Ottawa, rented an apartment in that City, spent their week days in those premises, sent their children to Ontario schools and, as far as the husband was concerned, earned their living from that province. It is only four or five years after the marriage that they came to reside in Quebec.

There is another aspect to this question that is interesting to look into.

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[1] *Droit civil canadien*, (Montreal, 1895).
[2] *Cours de droit civil*, (Montreal, 1905).

In 1953, the husband left Canada to go to Switzerland with his two sons. His wife followed him later on and a suit for divorce was instituted in that country by Miller. His wife disputed the action. The Swiss Tribunal enquired about the domicile of the parties at the time of the marriage as it was a point to be decided upon, as to whether or not the marriage was annulable in that country.

Judgment was passed on June 8th, 1960 by the Court of the District of Lausanne and the certified copy of the "arrêt en divorce" was filed as Exhibit P. 3.

Here are some extracts of the decision:

Page 1:

"William Richard Miller and Catherine McGlory, tous deux de nationalité canadienne et originaires de la province d'Ontario, se sont mariés le 9 juillet 1938 à Ottawa (Ontario).

Le premier domicile des époux a été Ottawa."

Page 6:

"Les époux n'ont pas conclu de contrat de mariage. Dans la province d'Ontario, où ils se sont mariés et ont eu leur premier domicile commun, le régime matrimonial légal est celui de la séparation de biens."

"Le demandeur a établi à satisfaction de droit que dans la province d'Ontario la juridiction en matière de divorce est fondée exclusivement sur le domicile; que le divorce de citoyens canadiens originaires de cette province, comme le sont les parties, mais domiciliés en Suisse ressortit à la juridiction des tribunaux suisses et doit être prononcé en application du seul droit suisse; enfin, qu'au regard du droit en vigueur dans l'Ontario les époux Miller - McGlory sont domiciliés en Suisse."

These findings have a direct reflexion on the proceedings before the present Court. According to the Canadian Constitution, if a person is domiciled in the Province of Quebec, a divorce can be obtained only on the basis of adultery and the proceedings have to be instituted before the Parliament of Canada. As there was no such grounds in the action taken by Miller in Switzerland, it is only through the recognizance of the marital domicile in Ontario that the Lausanne Court acquired jurisdiction. If, at the time of that litigation, a satisfactory proof would have been offered that Mr. and Mrs. Miller had been married according to the Quebec law, it is to be presumed that the Swiss Court would have declined jurisdiction in that matter.

Although the judgment before the foreign Court does not constitute *res judicata*, as far as the question of the matrimonial status is concerned, it justifies this Tribunal to infer that in 1960 the Defendant was not averse to believe and be satisfied that she too was married under the Ontario law.

This being so, the Court cannot help thinking that her present contention that she is common as to property is intended as an afterthought to regain possession of an asset belonging to her husband "en propre".

As to the immoveable itself it was acquired in 1940. The deed of acquisition is in the husband's own name and does not include that of his wife, the Defendant.

The Ontario law has not been proven before this Court although both counsels have agreed that if the Court comes to the conclusion that the said law applies, it means that the parties are separate as to property.

The principle is that if a foreign law is not proven, the dispositions of the *Civil Code* apply as to the extension of the rights involved. The consequence is that, unless the title deed is in the name of the wife as well as of the husband, he alone is owner of the immoveable.

Action maintained (in part)[3]

Comment

This case raises a number of interesting points. The first is that the Court held that the domicile of the marriage is the place where the parties intend to establish their domicile after the marriage. This principle is of French origin,[4] and, although the learned judge cites Mignault[5] and Langelier,[6] it has not achieved wide reception in our law. On the contrary, the courts have been applying the common law doctrine that the domicile of the husband at the time of marriage governs the marital affairs of the consorts.[7]

The second point of interest is that the learned judge, relying heavily on the finding of the Swiss Court, held that the law applicable to divorce is the law of the original domicile of the marriage (*i.e.* that of the intended domicile in this case). However, the leading English authority, currently applied in Quebec, is the *Le Mesurier* case,[8] where it was held that the only Court which has jurisdiction in

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[3] The Court upheld the Plaintiff's title to the immoveable property, ordered the Defendant to vacate the premises and abandon possession, but did not grant damages as concluded for by the Plaintiff as none were proven.

[4] See Aubry et Rau, cited by Mr. Justice Chevalier, *supra*, at p. 109.

[5] *Supra*, n. 1.

[6] *Supra*, n. 2.

[7] *Pagé* v. *Mercure*, (1929), 46 B.R. 459. See also Johnson, *Conflicts of Laws*, 2nd ed., (Montreal, 1962), pp. 317-318. Note that even in England, some authors would go as far as to accept domicile of intention as in French law; see especially, Cheshire, G.C., *Private International Law*, 7th ed., (London, 1965), pp. 277-278.

[8] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; *Magurn* v. *Magurn*, (1883), 3 O.R. 570, affirmed in 11 O.A.R. 178. This doctrine has been modified through the years. In *Gauvin* v. *Rancourt*, [1953] B.R. 663, it was held that if the parties have elected a new domicile, then the Court of that new domicile is competent to grant a divorce. See also, *Armitage* v. *The Attorney-General*, [1906] P. 135, where it was held that a decree of divorce will be recognized, even if the parties were not domiciled in the place where it was granted, if the law of their domicile does recognize that foreign divorce. And finally, see *Schwebel* v. *Ungar*, [1965] S.C.R. 148, affirming [1964] 1 O.R. 430 (C.A.O.); (1964), 42 D.L.R. (2d) 622 (C.A.O.), where it was held that a decree granted in a court where the parties are not domiciled will be recognized, if the law of the place of their subsequent domicile recognizes it, notwithstanding the fact that the law of their original domicile does not. The new Canadian *Divorce Act*, 16-17 Eliz. II, S.C. 1968, c. 24 allows the wife a separate domicile to institute an action in divorce under certain precise circumstances.

matters of divorce is the Court of the husband's domicile at the time of the institution of the action, which in this case was Switzerland. Thus, according to our rules of private international law, the Swiss Court should not have referred to Ontario law to ascertain its jurisdiction and the grounds admissible for the action, but should have applied its own law.

Finally, it is to be noted that although a foreign judgment cannot be received as *res judicata* in our courts, it can nevertheless be accepted in evidence, and be given much weight.

OBLIGATIONS — LEASE

ROGER MORRIS *v.* LES PROJETS BELLEVUE LTEE, P.C.M. 100,584, June 3, 1968, Mr. Justice Théodore Lespérance.

Lease — Immoveables — Offer of lease accepted by lessor's agent — Lease entered into — Unilateral resiliation by the lessor — Refusal to give key — Lessee was a coloured person — Racial discrimination — Liability of the lessor — Damages — C.C. 1053.

The Plaintiff entered into a lease with the Defendant through an agent on August 8, 1966, for a period of twenty months, commencing on September 1, 1966 and terminating April 30, 1968, for the sum of $2,200 payable at a monthly rate of $110, the first instalment being due on October 1, 1966. At the time of entering into the contract, the Plaintiff paid in advance by cheque payable to the Defendant's agent the first month's rent, which cheque was cashed as his commission. On or about August 23, 1966, the Plaintiff requested the keys to the premises from the Defendant, only to be informed that the premises were unavailable as they had apparently been rented previously to a third party. The Plaintiff protested vehemently. The Defendant then proceeded to insult the Plaintiff and his wife and stated that under no circumstances would he give occupation of the premises to the Plaintiff because of his colour.

The plaintiff instituted the present action and claimed the following:

a) $200, representing increase in rental for his new premises at $10 a month for 20 months;

b) $500, for moral debasement;

c) $100, for loss of time and inconvenience;

d) $110, representing the first month's rental paid to Defendant's agent.

The Defendant denied everything, alleging that the Plaintiff never attempted to move in, and that the first month's rent was never received; the Defendant further tendered the keys and concluded that the Plaintiff be condemned to pay to the Defendant all the rental due for the said first month and for every other month until the termination of the lease.

Mr. Justice Lespérance

L'agent d'immeuble Mansour témoigne qu'au cours de son travail exécuté à titre d'agent du président de la défenderesse, il eut une entrevue avec le demandeur qui par son intermédiaire loua le logement susdit. Une fois le bail signé, l'agent demanda la clef au président de la défenderesse qui répondit qu'il ne pouvait donner la clef parce qu'il ne pourrait pas vendre la maison si le logement était loué à une personne de couleur. Le chèque de $110 fut encaissé par l'agent comme prix de sa commission. Le demandeur témoigne qu'il s'adressa à Mansour pour obtenir la clef, une demi-douzaine de fois mais n'eut que des promesses. En fait il ne l'obtint jamais. Finalement il rencontra Hébert, président de la défenderesse, qui lui dit avoir loué le logement à une autre personne et comme le demandeur lui parla du bail, il lui répondit par des paroles blessantes. Devant cette situation le demandeur dut résilier certains engagements et dut trouver un autre logement. Il en trouva un sur la rue Henri Bourassa au prix de $120 par mois, soit $10 de plus par mois que le précédent. Le demandeur est corroboré par son épouse quant à l'entrevue avec le président Hébert qui selon elle ajouta qu'il ne se souciait pas d'eux. Ce dernier prétend avoir signé le bail après qu'on lui eut mentionné que le locataire était une personne de couleur. Il prétend que les clefs n'étaient remises que la veille du déménagement, alors que Mansour dit que la clef était généralement livrée après la signature du bail.

La prépondérance de la preuve est à l'effet que la cause de non livraison du logement est un motif de ségrégation raciale. Le président de la défenderesse s'est exprimé clairement là-dessus, aussi bien à son agent Mansour, qu'au défendeur et son épouse; si lui-même déclare n'avoir pas de préjugé à cet égard, il n'était pas justifiable de se gnider par les préjugés de tiers pour refuser de donner suite pratiquement au contrat.

Action accueillie ($910).

Comment

A new trend is now emerging from the lower courts of the Province of Quebec. There is reason to believe that the judges of the lower courts might no longer be inclined to follow the decision of the Supreme Court of Canada in *Christie* v. *York Corp.*[1] In that case, the Supreme Court held that the general principle of the law of Quebec was complete freedom of contract, and thus, if the keeper of a tavern did not want to serve a coloured person by reason of

[1] [1940] S.C.R. 139, affirming (1938), 65 B.R. 104.

his colour only, he was free to do so, unless there existed a specific law or a rule of public order and good morals prohibiting such acts.[2]

The decision of Mr. Justice Lespérance is, however, in line with the recent decision of Mr. Justice Nadeau in *Gooding* v. *Edlow Investment Corp.*,[3] where the Court held that racial discrimination was against public order and good morals and was actionable as a delict under Article 1053 C.C.:

> Considérant que toute discrimination raciale est illégale parce que contraire à l'ordre public et aux bonnes moeurs;
>
> Considérant que le geste discriminatoire posé par la défenderesse constitue une violation des règles couramment admises de la morale applicables à la vie en société; qu'il est aussi de la catégorie des actes attentatoires à l'ordre public, étant de nature à troubler la paix dans la société;
>
> Considérant qu'un tel acte de discrimation posé dans les circonstances exposées plus haut constitue une faute civile délictuelle, dont la défenderesse doit répondre.

A succession of similar decisions may result in the imposition of a duty to contract should racial discrimination be the only motive in not contracting, as racial discrimination would be considered as against public order and good morals. The breach of that duty would thus become a separate cause of action, notwithstanding any contractual relations existing between the parties, and actionable under Article 1053 C.C. If this latest decision by Mr. Justice Lespérance is an indication of the prevailing view among members of the Bench, then the day when racial discrimination will give rise to a separate cause of action is not far away. Thus, in addition to compensation for any breach of contract, the Court will award damages for "moral debasement", as it did in the present case.[5]

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[2] See in particular, the notes of Rinfret, J., at p. 142.

[3] [1966] C.S. 436. See also, the comment by L. Tanny, (1967), 13 McGill L.J. 186.

[4] [1966] C.S. 436, at pp. 442-443.

[5] In the *Gooding* case, the Court also awarded damages for humiliation. Mr. Justice Nadeau also relied on art. 13 C.C., which does not seem to apply here, unless we construe this reference to art. 13 C.C. to mean that just as no one may contravene the laws of public order and good morals by private agreement, one may not contravene them by one's acts.

CONTRACT

THE WINGATE CHEMICAL CO. *v.* GLOBE PARKING LTD., S.C.M. 494,952, May, 13, 1963, Mr. Justice Harry Batshaw.

Contract — Parking lot — Stolen automobile — Recovered stripped of parts and accessories — Type of contract — Liability of operator — C.C. 1071, 1072, 1220.

The Plaintiff was an habitual customer of a parking lot operated by the Defendant, and claims that his automobile was stolen from there and recovered later by police, stripped of parts and accessories. The Plaintiff claimed $810.00, the cost of replacement, for which he instituted the present action against the Defendant.

The Court dealt with preliminary issues of fact. The Plaintiff was in the habit of having his automobile serviced at the adjoining service station, while it was parked on the defendant's lot. The question was whether the car was in the care of the parking lot attendant or the garageman at the time of the theft. Mr. Justice Batshaw had no difficulty in finding that the automobile was in fact on the lot at the time of theft. The second issue dealing with whether or not the Plaintiff's manager was negligent in leaving the car keys in the ignition was summarily dismissed as this lot was not a "park and lock" operation, and thus it was essential for the Defendant's convenience in operating its business that the keys be left in the ignition of cars parked thereon.

Mr. Justice Batshaw

There remains the basic question of liability. There has been considerable discussion in our jurisprudence as to the exact name to be applied to this type of contract where an automobile is parked in a garage or in a parking place for a fee. It is obviously not a contract of simple deposit which is essentially of a gratuitous nature. It has rather all the characteristics of a bilatoral and onerous agreement which is reciprocally binding on both parties. It may not even be necessary to designate it by a special label, although the one of "onerous deposit" suggested by Mr. Justice Bissonnette in *St. Lawrence Quick Service Garage Ltd.* v. *Davis*[1] certainly appears to meet the situation adequately. Dealing with the obligations which flow from such a contract, Mr. Justice Bissonnette wrote in that case:

> Quoi qu'il en soit, ce contrat, qui s'assimile au contrat d'entreposage, comporte, pour le dépositaire, des obligations plus onéreuses que celles résultant du dépôt simple volontaire. L'objet même de son obligation, la cause de son contrat, c'est de préserver et de conserver la chose qui lui a été confiée. Il est rémunéré pour cela. Indépendamment des obligations pouvant naître du dépôt, si la chose périt en tout ou en partie (les avaries, c'est une perte partielle), le dépositaire ne pourra s'affranchir

[1] [1956] B.R. 885.

de son obligation qu'en prouvant que la perte s'est produite sans son fait ni sa faute, ce qui revient à dire qu'il doit rapporter preuve du cas fortuit.[2]

In this unanimous decision, in which Mr. Justice Hyde and Mr. Justice Owen concurred, the former invoked the earlier decision of the Court of Appeals in *Lavigueur* v. *Globe Indemnity Ltd.*[3] in which it was held that the garage owner who was unable to return a car which had been entrusted to him for repairs could only be liberated from his responsibility by proving a fortuitous event or by establishing that the inexecution of the obligation resulted from a cause which conld not be imputed to him (C.C. Art. 1071, 1072 and 1200). The same rule was also upheld in an earlier decision of *Bachand* and *Dionne* v. *Birs* .[4]

The Court considers that the foregoing principles should be applied in the present case notwithstanding tbe isolated and earlier decisions which the Defendant has invoked in its favor. Under the circumstances, there is no doubt that the Defendant has failed to offer any defence which would exculpate it from the obligation of returning unbarmed the car left on its parking lot.

Moreover, even if one were to take the view urged by the Defendant that a positive act of negligence must be proven by the Plaintiff, tbere are several elements of proof which would go far to establish same. There were some 150 cars parked on the premises having two entrances and there was only one kiosk in the centre from which employees could see what was happening. As far as the number of employees is concerned, the Defendant claims that there were two, although tbe Plaintiff and one of his witnesses affirmed tbat there was only one. Be that as it may, tbe previous owner of this lot testified that he required at least three employees to supervise adequately the operations of this parking lot.

Action maintained ($810).

Comment

The question of the parking lot operator's liability for damages caused to an automobile stolen from his lot while under his care is not a new one for our Courts. Yet it is still a delicate question. Mr. Justice Batshaw is not so much interested in classifying the contract in any of the known types, nor in trying to invent a new one. He is satisfied to find that there is a contractual relationship between the parties, and thus refuses to sanction any negation of liability based on contract. The only accessible means of exculpation left is a fortuitous event, in that the inexecution of the obligation was not due to a cause imputable to Defendant.[5]

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[2] *Ibid,* at p. 886.
[3] (1929), 47 B.R. 100.
[4] (1921), 31 B.R. 365.
[5] See *Engels* v. *Globe Parking Ltd.,* (1967), 13 McGill L.J. 178.

SALE

JEAN CLAUDE FAVREAU *v.* THOMAS LEMAY, S.C.M. 516,306, May 9, 1963, Mr. Justice Harry Batshaw.

Sale — Fonds de commerce — Misrepresentation — Earnest — Payment on account of the purchase price — C.C. 1477.

The Plaintiff sought to have annulled a promise of sale between the Defendant and himself, and asked further that the Defendant be condemned to pay him the sum of $2,000, being double the amount he alleges having paid to the Defendant in earnest upon the completion of the contract.

Mr. Justice Batshaw

D'après la preuve, le demandeur a proposé d'acheter la pharmacie du défendeur et il y a eu plusieurs entretiens entre eux à ce sujet. Le prix devait inclure un montant assez considérable pour l'achalandage et le demandeur était très intéressé à savoir le chiffre d'affaires brut du défendeur. Il ne fait aucun doute que le chiffre déclaré par le défendeur était de $75,000.00 par année: d'abord la preuve du demandeur n'est pas contredite sur ce point; ensuite le défendeur l'admet dans le paragraphe 12 de sa défense; et en plus, le défendeur l'a admis dans son témoignage, sauf qu'il a prétendu, à l'encontre de l'écrit P-1, que ce chiffre était un estimé pour l'année courante, dont il ne s'est écoulé que quatre mois.

En outre, la position prise par le défendeur que le Tribunal trouve d'ailleurs tout à fait invraisemblable est à l'effet que le demandeur avait examiné le livre de caisse avant de signer la promesse de vente et, malgré que celle-ci stipulait le chiffre de $75,000.00, le demandeur savait d'après sa propre inspection du livre que le chiffre était moindre. Quant à lui, le demandeur nie avoir fait cette constatation. Un autre témoin, Mme Morin, a déclaré qu'elle aurait vu le défendeur montré un livre au demandeur, mais son témoignage était plutôt vague; elle était alors occupée à travailler dans son bureau de poste et le Tribunal considère qu'elle n'a pas apporté beaucoup de corroboration à la version du défendeur. Le Tribunal dans son appréciation de ce témoiguage contradictoire estime qu'il y a lieu d'accepter de préférence le serment du demandeur sur ce point.

En plus, il reste toujours certain que les parties se sont entendues sur la clause suivante dans la promesse de vente:

> Je déclare que le chiffre d'affaires brut dudit commerce, par moi opéré, est de soixante quinze mille dollars ($75,000.00) environ par année et je permets au promettant acquéreur de vérifier ou faire vérifier par un comptable mes livres à cet effet, et ceci avant la vente devant notaire.

Le demandeur a témoigné que le défendeur n'a pas voulu lui montrer les livres avant qu'il fasse le versement de $1,000.00 et qu'il a signé la promesse de vente pour démontrer qu'il était un acheteur sérieux — ce qui semble raisonnable d'ailleurs. Le comptable du demandeur a vérifié que le chiffre d'affaires pour l'année 1958 était environ de $45,000.00 et pour l'année 1959 de $54 000.00. Pour l'année 1960, il était impossible de déterminer le chiffre d'affaires, puisque l'année n'était pas encore terminée et

que ce n'était que les meilleurs mois avant les fêtes dont les chiffres étaient disponibles. Même si les chiffres de ces mois indiquaient un taux estimé de $75,000.00 par année, ce n'est pas ce que le défendeur a garanti par son écrit: son contrat dit que le chiffre d'affaires «est de $75,000.00 environ par année», et ceci ne veut pas dire un estimé ou un taux mais stipulait un fait déterminé et existant.

Vu les faits précités, la conclusion s'impose que le chiffre d'affaires dévoilé par les livres du défendeur était matériellement moindre que le montant de $75,000.00 stipulé dans le contrat. En conséquence, le Tribunal trouve qu'il y a eu une présentation erronée des faits par le défendeur et que le demandeur est bien fondé dans sa demande d'annuler et de résilier la promesse de vente en question.

Le demandeur peut-il réclamer le double du $1,000.00 qu'il a versé comme arrhes? L'article 1477 C.C. dit bien que «Si la promesse de vente est accompagnée d'arrhes, chacun des contractants est maître de s'en départir, celui qui les a données, en les perdant et celui qui les a reçues, en payant double».

D'abord, il faut signaler la prétention du défendeur qu'on ne peut pas considérer le montant de $1,000.00 comme ayant été versé uniquement à titres d'arrhes, car le contrat stipule que le prix de $16,000.00 serait payable «Mille dollars ($1,000.00) à l'acceptation des présentes, ladite somme devant être considérer également versée à titre d'arrhes». Cependant, le Tribunal est d'avis que la mention expresse que le montant est versé également à titre d'arrhes n'enlève pas ce caractère du fait qu'il pourrait être en même temps un paiement sur le prix au cas où la vente se ferait. Cette stipulation expresse enlève le doute qu'on rencontre souvent en essayant de déterminer s'il s'agit vraiment d'un contrat de dédit. L'étude que le Tribunal a fait d'ailleurs sur cette question l'a convaincu que d'après la doctrine et la jurisprudence il y a lieu d'appliquer l'article 1477 C.C. dans l'espèce, et que le demandeur est bien fondé de réclamer le double de son versement comme montant forfaitaire de ses dommages.

Action accueillie ($2,000).

Comment

This judgment is rather unique, as it accepts the proposition that a sum of money may be given simultaneously in earnest and on account of the purchase price. This result is probably due to the peculiar clause in the promise of sale: "Mille dollars ($1,000.00) à l'acceptation des présentes, ladite somme devant être considérer également versée à titres d'arrhes."

Notwithstanding the clause in the promise of sale, the finding of the Court is rather startling, as earnest is usually given with a view to guaranteeing the execution and completion of the sale. On the other hand, a sum on account of the purchase price is given once the deal is completed to bind the bargain.[1] It may very well be that

[1] *Bricot dit Lamarche* v. *Brien dit Desrochers*, (1914), 23 B.R. 565.

a sum of money originally given in earnest will ultimately be applied to the purchase price once the sale is completed. However, to say that such sum of money may be given simultaneously as a payment on account and as insurance that the parties will honour their obligations, reflects the general misunderstanding of the concept of earnest.

It is respectfully submitted that one must not confuse earnest as used in Article 1235 (4) C.C. and earnest as used in Article 1477 C.C. They are both distinct and cannot be equated. The former constitutes proof of the contract and serves to make it irrevocable,[2] while the latter renders the contract revocable, subject, however, to a penalty.[3] In such case, he who has given earnest forfeits it; he who has received it must pay double. But nowhere is it said that a sum of money given upon entering into a promise of sale, is given both in earnest and as an account on the purchase price simultaneously.[4] The concept of earnest has often been misunderstood in recent years, and should be removed from our law altogether, as the same result can easily be achieved by stipulating penalty clauses in the event of non-performance of the obligations contracted by either party.

LEASE

PINE AVENUE CONSTRUCTION CO. *v.* REPUTATION HOSIERY MILLS LTD., S.C.M. 687,125, December 13, 1966, Mr. Justice G.B. Puddicombe.

Lease — Immoveable — Civil or commercial transaction — Writing cannot be produced — Evidence — Admissability of testimony — C.C. 1233.

This is an action taken by a landlord against a tenant for rent due under a lease which was allegedly in writing but could not be produced. The Defendant admitted the existence of the lease, and further admitted that its term expired on April 30, 1962. However, it appeared from the testimony that Defendant remained in possession of the premises only until November 30, 1961. The Plaintiff therefore claimed the sum of $1,650 in damages "which represents loss of rent for the months of December, 1961 and January, February, March and April, 1962, at the rate of $330 per month".

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[2] *Arrha in signum consensus interpositi data.*

[3] *Arrha quae ad jus penitendi pertinet.*

[4] See generally: Faribault, *Traité de droit civil du Québec*, t. XI, (Montreal 1961), pp. 103-108; Mignault, *Droit civil canadien*, t. 7, (Montreal, 1906), pp. 32-33; Pothier, *Traité du contrat de vente*, (Paris, 1781), Nos. 497-509.

The Court found as a matter of fact that the Defendant actually remained in physical possession of the premises until about October 15, 1961, when it removed all effects therefrom except an air conditioner, and this with the full knowledge of the employees of Plaintiff-Company. The Court also remarked that Defendant-Company nevertheless paid its rent for the whole of October and November, 1961.

The Defendant alleged that the lease had been terminated by mutual agreement and consent as of November 30, 1961. Proof of such termination was offered verbally and taken under reserve. The Plaintiff objected that the contract of lease, irrespective of the qualities of the parties thereto, must always be deemed a civil contract, proof of which must be in writing.

Mr. Justice Puddicombe

> In my view, as I have held before, in *Kirally* v. *Jay-Ell Realties*,[1] reversed by the Court of Queen's Bench sitting in appeal,[2] contracts which have to do with immoveables are not necessarily civil because of that fact alone. In my opinion, the deciding factor is the quality of the participants in the contract. In other words if the lessor's business is leasing premises and the lessee's reason for entering into the lease is commercial then the contract is a commercial contract. It is well understood that this concept has lacked the approval of the higher Courts until quite recently.

Mr. Justice Puddicombe then referred to the notes of Tremblay, C.J., in *Colonia Development Corp.* v. *Belliveau*,[3] which marks a change in the interpretation by the Court of Appeal of this problem of characterising contracts as civil or commercial:

> Il n'y a pas de doute que le demandeur est un commerçant et que la preuve testimoniale est admissible contre lui. En effet, il est bien établi que l'entrepreneur qui construit une maison pour autrui, est un commerçant s'il spécule sur les matériaux ou la main d'oeuvre.[4]

He also referred to the notes of Owen, J., in the same case, who went further:

> In my opinion it should no longer be held that if a contract is with respect to an immoveable then such contract is *per se* a civil matter. At one time it may have been the accepted view that gentlemen dealt with land and that such transactions were on a higher level and distinct from those entered into by persons lower in the social scale who were engaged in trade and dealt in moveables. Today, however, there is no justification for such a distinction. A person who buys and sells or otherwise deals with immoveables for the purpose of private gain or profit is just as much a trader or a *commerçant* as the person who does the same thing with respect to moveables.

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[1] S.C.M. 438,549, May 2, 1961, Mr. Justice G.B. Puddicombe.
[2] B.R.M. 7577, May 10, 1962.
[3] [1965] B.R. 161.
[4] *Ibid.*, at p. 163.

Instead of merely looking at a contract and, on seeing that it relates to an immoveable, declaring that such contract is *per se* civil, it is now necessary in my opinion to look behind such a contract and consider the parties and their purpose in entering into the agreement.[5]

Mr. Justice Puddicombe then continued:

Now, in my opinion, the proof of the termination of this lease although made verbally must be accepted. There can be no doubt but that the parties involved entered into the lease as "commerçants". Plaintiff, obviously, leased not only the premises in question but all the surrounding premises in the same building to different tenants. Nor can there be the slightest doubt but that defendant was occupying and using the premises for commercial purposes. Beyond the assertion by defendant that the lease terminated by agreement is the fact that all the effects of defendant were removed from the premises in October 1961 to the full knowledge of plaintiff and that the rent was paid to the end of November, 1961. It also seems apparent that after defendant vacated the premises if not leased to other parties, they, the premises, were used by either plaintiff and/or its employees, or with plaintiff's consent by others. It is to be noted too that the action was served on defendant on the 29th of June, 1965, that is to say, forty-four months after the termination of the period for which the rent was paid. While, of course, there is no question of prescription in regard to this delay, it nevertheless tends to corroborate, together with other facts proved, that the lease was, in fact, terminated by the parties in accordance with the contention of the defendant.

It is also noted that the written lease which plaintiff says has been lost has not been produced. Surely, if in the plaintiff's mind there was contemplation of an action in damages at the time defendant left the premises the written lease would have been carefully kept. Again, its loss proves nothing; but, also again, the non-production by plaintiff, whose manager, Halickman, could give no explanation for the loss, together with all the other factors, creates the suspicion that the present action is not a straightforward one.

Action dismissed.

Comment

This case is an attempt to reconcile legal practice with the realities of the commercial world. The dichotomy between both is far from being resolved. Our jurisprudence, until recently, had always considered any transaction involving immoveables to be a civil transaction. This interpretation was founded on the *Code de Commerce* of France, which was never formally adopted as such in Quebec, but which has always been looked upon as the basis for the rule that only moveables can, in principle, be objects of commercial operations.

Mr. Justice Puddicombe, once again, sought to derogate from this rule by holding that proof of the termination of a lease by mutual

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[5] *Ibid.*, at p. 166.

consent, and proof of the content of such lease by verbal testimony was admissible as "the deciding factor is the quality of the participants in the contract". This is in sharp contrast with the recent decision in *St. Geneviève Shopping Centre Ltd.* v. *Dalfen's Ltd.*[6]

France has now amended the *Code de Commerce* to allow immoveables to be the objects of commercial operations.[7] Thus Quebec seems to be again in the familiar position of tenaciously clinging to the old French law while France itself has faced reality and abandoned it. It should be obvious that principles of commercial law enacted in a medieval context would have no place in this modern age where the principal source of wealth is no longer immoveable property.

It is true that recent jurisprudence, including the present case, has gone a long way to rid our law of a very inappropriate rule.[8] The question to be asked is, however, whether our Courts should be the body to have to take it upon themselves to "amend" our law, or whether such result should rather be sought through legislative action. Surely the latter is preferable, if only for greater certainty!

Mr. Justice Puddicombe's decision rests on the fact that "the parties involved entered into the lease as 'commerçants' ", as the Plaintiff was in the business of leasing its immoveables, and the Defendant "was occupying and using the premises for commercial purposes". However, if the "quality of the participants in the contract" is to be the guiding principle, then how are we going to resolve the case where the lessor's business is not that of leasing commercial premises, but where, for example, there is only one such premises to be leased and where the lessee of the commercial premises is clearly going to occupy and use them for commercial purposes? Are we going to apply the rules of "mixed transactions", whereby the party for whom the transaction is civil will be able to make, at any time, verbal proof against the party for whom the transaction is commercial, but

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[6] [1964] C.S. 554. Mr. Justice Batshaw held, at p. 558: "The matter concerns one of the conditions in the lease of an immoveable, and the leasing of an immoveable property has generally been regarded as a civil and not a commercial matter. Moreover, this is true even when the immoveable itself will be used to house commercial premises, as appears from a number of cases cited by Perrault...". See Perrault, *Traité de droit commercial*, vol. 2, (Montreal, 1936), pp. 202 ff.

[7] Enacted July 13, 1967, and came into force on January 1, 1968. See generally, the comments of John W. Durnford, (1968), 14 McGill L.J. 290; Alfred Jauffret, (1967), 20 Rev. trim. dr. comm. 748.

[8] *Colonia Development Corp.* v. *Belliveau, supra*, n. 3; *Gamma Realty Ltd.* v. *Brummer*, [1962] C.S. 607 (Prévost, J.).

the latter will be bound to make his proof against the former by writing only? This solution is hardly satisfactory and rational as the burden of proving a lease by written proof would always be on the lessee, the commercial party in the example above, while the landlord, who is more often than not the Plaintiff in these cases, would be allowed to make his proof verbally.

It is respectfully submitted that this type of "judicial amendment" is necessarily "piecemeal legislation" as, by definition, a case can only decide on the precise fact situation considered by the Court and can only be extended to other cases by analogy. What is sorely needed is a rational reconsideration by the Legislature of the whole problem of the distinction between civil and commercial matters, especially in relation to immoveables. Until such legislation is passed, it is hoped that our Courts will continue in this present trend.