APPARENT DEFECTS IN SALE REVISITED

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It was flattering to find that my recent article published in the McGill Law Journal on apparent defects in the contract of sale [1] was deemed worthy of comment by my colleague Professor Gow [2], who brought to bear upon it the benefit of his many years in the study of our sister system, the Scottish civil law and of its cousin, the common law.

In my article, I criticized our Court of Appeal for maintaining, in *Bourget v. Martel* [3], a redhibitory action where the purchaser had not even inspected the automobile before purchasing, much less had it examined by an expert. Professor Gow intimates that this indicates that I look with favour on the old Germanic maxim (for which he shows a healthy distaste): "He who does not open his eyes opens his purse" — nay, that I would go further and say: "He who does not have his eyes opened by all relevant experts, opens his purse." Moreover, Professor Gow infers that when I set forth what I believed to be the "only correct construction" of article 1522, what I was really doing was using this construction as a vehicle of my own social philosophy, which he apparently seems to feel may be somewhat reactionary, to put it mildly, for he says I am "opposed to anything which might smack of 'welfare' ".[3a]

Having, in my innocence, attracted a comment of this nature, does this mean that by writing my article I fell afoul of the old

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[1] What is an apparent defect in the contract of sale? (1963-64) 10 McGill L.J. 60.

[2] A comment on the warranty in sale against latent defects, (1963-64) 10 McGill L.J. 243.

[3] [1955] Q.B. 659.

[3a] The reader will have to judge for himself as to whether I am a reactionary, but in judging he might also take into account some of my other writings, such as those which relate to the effect of the *dation-en-paiement* clause in deeds of hypothecary loans. See my chapter on "Mechanics' Liens in Quebec" in *Mechanics' Liens in Canada* by Macklem and *Bristom* (1962) at page 272 and especially p. 288 ff, and my article entitled "The Articles of the Civil Code on the privileges of the builder" (1962) 8 McGill L.J. 176. See also my article on the position of the tenant as regards certain repairs: "The lessee's right to repair at the expense of the lessor" (1960) 7 McGill L.J. 43. It will be noted that the Quebec Legislature has since removed the abuses arising out of *dation-en-paiement* clauses by adding articles 1040A ff. C.C.

adage: "For fools rush in where angels fear to tread" ? [4] It is to be hoped that this is not so. The industrious editor of the Canadian Bar Review, Professor Jean Castel, once said that if you delayed writing until you knew everything to perfection, you would produce nothing. There could be added to that the thought that writing constitutes part of the learning process for both the author and his reader, and the sum total of knowledge is again increased by resulting comment and discussion. It would therefore seem preferable to take the plunge and write, rather than having to face another saying in one's old age: "I wasted time, and now doth time waste me." [5]

Let us now review the principal propositions set forth in my article before going on to deal with Professor Gow's comments. The seller is bound to warrant the buyer against those latent defects of the thing sold which meet the tests of article 1522 C.C. (e.g. as render the thing sold unfit for the use for which it was intended), but he "... is not bound for defects which are apparent and which the buyer might have known of himself" (article 1523 C.C.). The task facing the courts has been to determine in the individual cases that have been submitted to them whether the defects should be labelled as latent or apparent, and this has necessitated the setting down of standards by which to judge.

What tests are available and which have been applied in Quebec? The next question is whether the tests are desirable; and if not, can they be altered or abolished by a new interpretation of articles 1522 and 1523 or should these be amended?

The first test is whether the buyer has a duty to examine and inspect the object he is purchasing. In other words, is the defect to be considered latent simply because the buyer did not notice it, or will it be apparent if he could have discovered it by taking reasonable precautions in carrying out a careful examination? Our courts have constantly held [with the exception of the Court of Appeal decision of *Bourget v. Martel* (cited *supra*)] that there is a duty on the buyer to examine and inspect the object before buying it, and that the vendor will owe no warranty as regards a defect which an alert buyer would have discovered.

The other test is the one that is the more open to question, namely whether the buyer who is interested in buying something concerning which he is not technically competent to judge its condition (e.g. a house or a car) will be obliged to engage an expert to examine and inspect the thing for him. In other words,

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[4] Alexander Pope, *An Essay on Criticism*.

[5] Shakespeare, *Richard II*, Act V, Scene, line 49.

if the object suffers from a defect which an expert in the field would have discovered on an examination, will the defect be considered apparent even though the buyer would not have become aware of it if he had conducted an examination on his own? This test, like that relating to the duty to examine and inspect, has been consistently applied by the Quebec courts to sales of buildings, with the exception of new ones, but there has been a small degree of wavering when it comes to motor vehicles.

As to the exception in favour of the purchaser of a new building which is acquired from the contractor who built it, the courts have held that the buyer is entitled to rely on the contractor. I suggested in my article that this opinion is justified on the basis that the contractor is holding himself out as an expert and that in any event he cannot plead non-responsibility for the defects because such defence would rest on his own lack of skill. On the other hand, I also suggested that while the buyer from a contractor would be excused from hiring an expert, he would still be responsible for defects which he could himself discover, as negligence on his part would be no excuse, so that he would still have the duty to inspect.

It is when we come to motor vehicles that we discover dissenting views on the duties of the buyer. Articles 1522 and 1523 C.C. do not distinguish between moveables and immoveables, and the courts having held it was necessary for the buyer to examine and inspect a building and to engage an expert to do so in the case of ignorance on his part, it is not surprising that the courts applied the same two tests to the sale of motor vehicles, the outstanding exception being the case of *Bourget v. Martel*,[6] where the Court of Appeal put aside not only the buyer's duty to engage an expert but also his duty to examine and inspect the object before buying. It is because that particular decision went so far against both the letter and the philosophy of the other judgments, which had seemed reasonable enough to me, that I attacked it for being unfounded.

Thus it was my conclusion in the article that any defect that would be discovered by an alert and wide awake buyer or expert engaged by him who conducted a careful and serious examination would be considered an apparent one for which the seller would not be responsible, unless the buyer protected himself by obtaining from the seller an express guarantee, the effect of which being to make the seller responsible for apparent as well as latent defects.

The reader is reminded that my article did not pretend to cover in depth the subject of apparent and latent defects as regards all

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[6] [1955] Q.B. 659.

types of objects. At page 68 it was pointed out that the article would concentrate on buildings and used automobiles, these being the subject matter of most of the reported judgments. There is no reason to suggest, however, that the principles expounded should not be applied to analogous cases. In fact, this would in many instances be quite simple. For example, we have seen that the courts have not required the engaging of experts where a new building is bought. Presumably this could be said of any new object when the same is bought from the person who has made it, and for the same reasons: the purchaser is entitled to rely on the manufacturer as the latter is holding himself out as an expert and cannot plead non-responsibility for defects as the same would have resulted from his own lack of skill (subject to the purchaser not being able to pursue the contractor for blatantly apparent defects as he would then in effect be asking to be excused for his own negligence).

Then there is the express guarantee, which, it will be recalled, renders the vendor responsible for apparent as well as latent defects. One receives the impression, as an ordinary consumer in the North American economy, that the great majority of automobiles, machines and appliances come with the manufacturer's express guarantee. In fact, some automobile manufacturers advertise that they guarantee some components of their products for 50,000 miles or five years.[7]

When we take into consideration the rules in favour of the buyer of a new object who has bought it from its manufacturer and the situation where there is an express guarantee, we see substantial areas where the purchaser's obligations to examine and inspect and to engage an expert are substantially lessened.

As to the remaining areas, where it has been held to be necessary for the buyer to examine and inspect the object and to engage an expert to do so where he is ignorant, my article pointed out that the buyer is not expected to do the impossible. Thus where the Court of Appeal held that a buyer of crated tomatoes had a duty to examine them, this did not mean opening every crate and looking over all its contents. It meant simply tearing the paper wrappings off the tomatoes through the openings between the slats *of every tenth box* (page 63 of my article). Moreover, the buyer is not obliged to use special scientific methods or research, such as subjecting foodstuffs to chemical analysis, or cows to tests, or other out of the

[7] If the manufacturer fails to carry out the terms of the guarantee, there is always the possibility for the purchaser to apply to the courts and ask that the same be cancelled, thus causing the legal warranty to apply (*Touchette v. Pizzagalli* [1938] S.C.R. 433.)

ordinary measures such as taking up the floor of a house to see if the supporting beams are rotten, or taking down an engine (pages 65 and 66). Also, a defect is latent if it can only be discovered on putting the machine into operation (page 66). Then if the circumstances render it impractical for the purchaser to examine the goods until after delivery, all the defects are deemed to be latent for him (page 66).

Then there is the situation where the vendor goes beyond the bounds of a reasonable sales talk and his representations are so enthusiastic as to amount to fraud. This is what occurred in *Lortie v. Bouchard*,[8] where the Supreme Court annulled the sale of a bus because the vehicle was not at all what it had been represented to be. The vendor had declared that it was a 1933 Reo, that the body had been renewed two years previously, that the mechanism was in excellent condition, that the brakes, differential and tires were new, and that the motor had been rebored ("percé") once and could be used for 10,000 to 15,000 miles. It turned out that the bus was, if anything, a 1928 Gotfredson, but in reality it was a mixture of old parts from various sources. The body, instead of being two years old, was of an ancient Chevrolet which had been retired from use on account of age, it leaked in wet weather, it vibrated abnormally as soon as it reached fifteen miles per hour, and the chassis was broken and threatened to collapse under the weight of the passengers. Various other parts were of General Motors and Reo origin. The clutch had to be replaced and the transmission required several repairs by reason of wear. The brakes leaked and hardly worked and the tires were practically worn out. The motor was in an advanced state of decay. It burnt quantities of oil and an intolerable smoke got into the body from the exhaust pipe, and so on and so forth.

To an expert, such as a mechanic, these defects could hardly have been more apparent, and the purchaser had not engaged an expert. But the sale was set aside nonetheless. This was done, not on the basis of latent defects, but of fraud. In the words of Mr. Justice Taschereau (at page 517): "Il ne s'agit pas dans la présente cause d'une demande en annulation pour défauts cachés, mais bien d'une demande en annulation pour fausses représentations." [9] Here, then, is another protection for the buyer who has "been taken for a ride".

[8] [1952] 1 S.C.R. 508.

[9] See Baudry-Lacantinerie et Saignat, *Traité de Droit Civil*, third edition, XIX (1908), page 427.

Moreover, it is well established in Quebec law that where the vendor excludes warranty against latent defects, such exclusion will be null as fraudulent if he knew of their existence, or even if he was presumed to, such presumption lying in the cases of the manufacturer and of the specialized vendor.[10]

What, then, is all the fuss about? Apparently it is not as regards immoveable property. Professor Gow seems content on this score, but feels that corporeal moveables should be treated differently.

As a preliminary point, I would disagree with his statement that: "To the non-lawyer, article 1522 states its policy quite clearly, namely that the seller is obliged to supply a thing which by and large is worth the price the buyer has paid or promised to pay."[11] The Civil Code must be read as a whole, and article 1012 states that "Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only." Thus if I am fool enough to pay $10,000 for a ten year old Chevrolet, I will have no redhibitory recourse against the seller under article 1522 C.C. even if the car is worth only $200 (unless it suffers from latent defects), and I will only be able to have the contract annulled if there has been fraud on the part of the vendor.

When Professor Gow refers to the disparity between the non-lawyer's reading of article 1522 (which for him would mean "... that the seller is obliged to supply a thing which by and large is worth the price the buyer has paid... "), and "... its construction by at least some lawyers in Quebec",[12] whom does he mean by "some lawyers" ? Am I right in suspecting that these "some lawyers" consist of the judges who have rendered the vast majority of the judgments interpreting this provision of the Code and whose judgments formed the basis of my article?

Another preliminary point: Professor Gow reproaches me for explaining that the word "latent" means "hidden", on the basis that the latter is more suggestive of positive concealment.[13] I suggest with respect that this part of the discussion is irrelevant, for article 2615 C.C. directs that if there be a difference between the English and French texts, "... that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded." The French version speaks of "caché", and the codifiers indicated as one of their sources of article 1523

[10] Mignault, *Le Droit Civil Canadien*, VII (1906), pages 109 and 111 ff.; Faribault, *Traité de Droit Civil du Québec*, XI (1961) pages 289 and 294 ff.

[11] *Op. cit.* page 243.

[12] *Ibid.*

[13] *Ibid.* page 244.

(which is intimately tied to article 1522) paragraph 207 of Pothier's *Traité du contrat de Vente* (Bugnet edition) which reads as follows:

> On ne répute pas vices redhibitoires ceux qui, quoique considérables, peuvent facilement s'apercevoir. Par exemple, ce n'est pas un vice redhibitoire pour un cheval, s'il est boiteux, s'il est aveugle, etc.; ni pour une maison, si elle tombe en ruine; parce que ces vices pouvant facilement se connaître, l'acheteur est présumé en avoir eu connaissance, et avoir bien voulu acheter la chose avec ce vice, et par conséquent n'avoir souffert aucun tort, *nam volenti non fit injuria.* Et quand même il ne l'aurait pas connu, il ne serait pas encore recevable à se plaindre du tort qu'il souffre de ce contrat; car c'est par sa faute qu'il le souffre: il ne tenait qu'à lui d'examiner la chose avant que de l'acheter, ou de la faire examiner par quelqu'un, s'il ne s'y connaissait pas lui-même. Or, un tort qu'une personne souffre par sa faute, n'est pas un tort auquel les lois doivent subvenir, les lois n'étant pas faites pour entretenir la négligence: *Damnum, quod quis culpa suâ non sentit, non videtur sentire.*

From this we see that these provisions of our Code were based by the codifiers on the principles concerning the duty of the buyer to examine and inspect the object before buying and to retain an expert in the event of his ignorance. I submit that this refutes the suggestion that "the seller is obliged to supply a thing which by and large is worth the price the buyer has paid..."

A further preliminary point: Professor Gow makes a rather biting reference to attempts at analysis of the meaning of a code article through the interpretation of its key words (such as the word "latent"). He says "The truth is that there can be no solution in terms of verbal jugglery. As Humpty Dumpty said to Alice, 'When I use a word it means just what I choose it to mean, neither more nor less...' The question is, which is to be master..."[14] My answer to this is that it is the Legislature that is the master, but that once it has spoken, while there may be a certain latitude in the interpretation of the words that it has used, in the last resort these words are our masters until the Legislature sees fit to speak again, and in the meantime it is our task to interpret them as best as can be done on the basis of their own meanings and in keeping with the law as a whole.

Professor Gow's principal complaints seem to be, on the one hand, that we are still living under a nineteenth century social philosophy from which the common law has progressed, but which neither the civil law of Quebec nor myself has shaken off, and on the other, that we have forsaken some ancient Roman law principles.

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[14] *Op cit.* p. 244.

As to the Roman law, while it constitutes the origin of the civil law system, I think it can safely be said that our codifiers generally followed Pothier's adaptation of the civil law more than the original Roman law, and we have seen above the passage from Pothier that lies behind the present Code articles.

As to the fact that Quebec civil law thinking on the subject of defects, unlike the common law, has not moved since the nineteenth century, does this alone mean that the common law has improved and the civil law has fallen behind the times? Let us look at the modern law of France. This has a double advantage in that France is a modern and civilized country, and the wording of articles 1641 and 1642 C.N. is close to that of our articles 1522 and 1523.

It is worthy of note that the view was at one time held in France that the buyer of a second hand car was entitled to no warranty against defects at all.[15] It was felt that the buyer had to expect from a used object less in durability and power, so that the buyer was necessarily buying at his own risk. Furthermore, it was also sometimes argued that the defect was not hidden as the vendor did not disguise the second hand nature of the article. On top of this, a rather derogatory view was taken of the second hand purchaser as being rather slyly on the look-out for speculative bargains. Then there was the idea that the economy would be adversely affected if second hand buyers were favoured as production would be slowed down. Thus used cars were regarded as being sold in the condition in which they were in save in those cases where an express warranty had been stipulated.

This viewpoint has since been put aside.[16] Articles 1641 et seq. C.N. (which correspond to our articles 1522 et seq. C.C.) make no distinction between new and used objects. It also came to be realized that the second hand buyer was not necessarily an unsavoury character who was speculating, but often a person of modest means who could not afford a new article. Furthermore, second hand purchases ceased to be considered as detrimental to the economy — to the contrary, they assisted in the circulation of goods, and by relieving owners of their present cars made it possible for them to acquire new ones. Moreover, the fact of having been used did not change the very nature of the thing nor did it in itself constitute a defect, but simply

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[15] Henri Roland, *Observations sur la vente des véhicules d'occasion*, [1959] Recueil Dalloz, *Chronique*, 161 at 167 ff.; [1952] 1 Gazette du Palais (table), page 163, no. 14.

[16] Henri Roland, *op. cit.*, page 168; Jean Carbonnier (1955), 53 Rev. trim. dr. civ. 128. See also *Curetti v. Boyer* [1953] Recueil Dalloz, 745 (Tribunal Civil de Draguignan) and the accompanying case note by J. Hémard.

put it into a different class. A defect really involved a failure to function. Thus it is now well established in France that the vendors of second hand objects are liable in warranty against the latent defects in the think sold.[17]

Now as to the French view of the requirements that the buyer examine and inspect the thing and his obligation to engage an expert where he is ignorant, the authorities are firm on the first point; less firm, we shall see, on the second.

On the need for the buyer to examine and inspect:

> *Mazeaud*[18]*:* "...le vice est apparent lorsqu'un homme de diligence moyenne l'aurait découvert en procédant à des vérifications élémentaires, ou 'un acheteur sérieux' en procédant à un 'examen attentif'..."
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> *Aubry et Rau*[19]*:* "Les défauts qui se rencontrent dans la chose vendue n'engagent la responsabilité du vendeur qu'autant qu'ils sont cachés.
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> "Les *vices apparents,* c'est-à-dire ceux dont l'acheteur aurait pu se convaincre par une vérification exacte de la chose vendue, ne donnent lieu, sauf convention contraire, soit expresse, soit tacite, à aucun recours contre le vendeur, lors même que cette vérification aurait présenté plus ou moins de difficulté au moment de la vente."
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> *Guillouard*[20]*:* "L'article 1642, développant l'idée déjà exprimée dans l'article 1644 par ces mots 'défauts cachés', porte que le vendeur n'est pas tenu 'des vices apparents et dont l'acheteur *a pu* se convaincre lui-même'. Il n'est donc pas nécessaire que le vendeur prouve que l'acheteur *a connu* ces vices; il suffit qu'il ait *pu les connaître,* par l'examen de la chose vendue, et s'il a été négligent, s'il a acheté la chose sans l'examiner, il supportera la peine de sa négligence, et ne pourra réclamer à propos de vices qu'il dépendait de lui de connaître.
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> "Bien plus, il importe peu que la découverte de ces défauts fût plus ou moins facile: du moment où elle était *possible,* même avec une certaine difficulté, l'acheteur doit s'imputer de n'avoir pas été vigilant. S'il achète la chose après un examen hâtif et superficiel, il court le risque de se tromper, et la loi ne vient pas en aide à ceux qui ne prennent pas le soin de veiller à leurs intérêts."
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> *Baudry-Lacantinerie et Saignat*[21]*:* "Le défaut doit être considéré comme *caché* toutes les fois que l'acheteur n'a pu le découvrir par un examen attentif de la chose vendue; il doit au contraire être considéré comme *apparent* toutes les fois qu'au moyen de l'examen attentif qu'un homme sérieux apporte aux marchés qu'il traite, l'acheteur a pu les remarquer. Un défaut n'est pas caché par cela seul que l'acheteur ne l'a point vu; si celui-ci n'a fait de la chose qu'un examen superficiel, il ne peut se prévaloir

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[17] See, for example, *Mauduit v. Boulleveau* [1954] Recueil Dalloz, 697 (Cour de Cassation); *Curetti v. Boyer,* [1953] Recueil Dalloz, 745 (Tribunal Civil de Draguignan).

[18] Henri, Léon et Jean Mazeaud, *Leçons de Droit Civil,* III (1960), page 835.

[19] *Droit Civil Français,* sixth edition by Paul Esmein, V (1946), pages 81-82.

[20] *Traités de la Vente ct de l'Echange,* second edition, I (1890), page 448.

[21] *Traité de Droit Civil,* third edition, XIX (1908), pages 425-426.

d'un défaut qu'il dépendait de lui de remarquer. L'art. 1642 dit que le vice est *apparent* si l'acheteur a *pu* s'en convaincre; donc quand le vendeur prouve qu'il était possible à l'acheteur, au moment de la vente, de découvrir le vice, ce vice n'est pas *caché.*

"Peu importe même que la découverte du vice offrit quelques difficultés; la simple possibilité de le découvrir suffit pour qu'il ne soit point caché."

Laurent[22]: "Quand les défauts sont-ils apparents? L'article 1642 donne, sinon une définition, du moins une explication des défauts apparents en disant que ce sont ceux dont l'acheteur a pu se convaincre lui-même; il n'est donc pas nécessaire qu'ils frappent les regards; l'acheteur doit examiner la chose et la vérifier, et s'il la vérifie, il s'apercevra des défauts qui la vicient. Mais, s'il ne fait pas cette vérification, pourra-t-il prétendre qu'il ne connaissait pas le vice? Non; on lui répondrait, avec l'article 1642, qu'il a pu s'en convaincre lui-même, et que s'il ne l'a pas fait, il doit supporter les conséquences de sa négligence."

Roquier v. Bissireix[23]: "Le vice apparent doit s'entendre non seulement de celui qui saute aux yeux ou apparaît au moindre examen superficiel, mais aussi du défaut qu'un homme de diligence et d'expérience moyenne est capable de découvrir en procédant à des vérifications faciles."

Juris-Classeur Civil[24]: "S'agit-il d'un défaut qui, bien que non superficiel, peut être décelé par un examen quelque peu sérieux, que l'acheteur pouvait faire lui-même, ou faire effectuer par une autre personne, le vice est apparent."

Gazette du Palais[25]: *"Notion de vices cachés.* — S'agissant de la vente d'une couveuse électrique d'occasion, les juges du fond ont justifié leur décision rejetant l'action redhibitoire en constatant que les thermostats présentaient une usure engendrée 'par un usage normal' et que l'isolant du câblage intérieur devrait être remplacé, que ces imperfections 'n'empêchent pas un fonctionnement de l'appareil', très proche de la normale, qu'il peut d'ailleurs y être remédié par des modifications mineures et que l'acheteur avait la possibilité de s'en convaincre par un essai personnel adéquat'. *Cass. civ.* 29 *mai* 1963, *Gaz. Pal.* 1963.2.363."

Meunier-Collin v. Grange[26]: "Attendu que le vice apparent n'est pas seulement celui qui est ostensible et que révèle un examen superficiel mais celui qu'un homme de diligence moyenne aurait découvert en procédant à des vérifications élémentaires."

Demoiselle de Yrigoyen v. Cie des Assurances Générales[27]:

"On ne peut considérer comme cachés que les vices dont un acheteur diligent et attentif n'aurait pu se rendre compte."

Ferrero v. Boyer[28]:

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[22] *Principes de Droit Civil,* fourth edition, XXIV (1887), page 278.

[23] [1950] *La semaine Juridique* (Juris-Classeur Périodique) (Somm.), IV, page 128 (Bordeaux); also reported at [1950] Recueil Dalloz, 24.

[24] Annexes, IV, *Vices Rédhibitoires,* no. 24, page 7 (1954).

[25] [1963] Gazette du Palais, second semester, page 256, number 51.

[26] [1957] Recueil Dalloz, 47 (Tribunal Civil de la Seine); also reported at [1957] Recueil Sirey, 120.

[27] [1929] Recueil Dalloz, second part, 81 (Bordeaux).

[28] [1950] Recueil Dalloz, 556 (Tribunal Civil de Nimes).

"LE TRIBUNAL; — Attendu qu'il semble bien résulter du rapport de l'expert Coulet, que Ferrero a acheté pour un prix de 300 000 fr. une voiture qui était bien loin de valoir cette somme; qu'on ne sache que, s'agissant d'une voiture automobile, un prix même excessif soit un motif d'annulation de la vente; — Attendu sans doute que l'acheteur est fondé à demander l'annulation de la vente lorsque la chose qui fait l'objet de l'achat recèle un vice caché; que tel n'est pas le cas en l'espèce; que Ferrero a eu toutes facilités pour se rendre compte de l'état d'usure et des imperfections que présentait le véhicule dont il entendait faire l'achat; que, dans ces conditions, on n'aperçoit pas la base juridique sur laquelle Ferrero fonderait une demande en nullité de vente;

Par ces motifs, déboute Ferrero de ses demandes tendant à l'annulation de la vente portant sur l'automobile litigieuse;"

To this we may add the following extract from the note which follows the judgment:

"L'art. 1642 c. civ. dispose que le vendeur n'est pas tenu des vices apparents et dont l'acheteur a pu se convaincre lui-même. La jurisprudence donne aux mots 'a pu' le sens de 'a eu la possibilité'. Il n'est pas nécessaire que l'acheteur ait connu effectivement ces vices; il suffit qu'il ait pu les connaître."

In *Société d'Equipement industriel et commercial v. Goldnadel*,[29] the Paris Court of Appeal was faced with the sale of a second hand car of which the motor suffered a major breakdown after travelling 400 kilometres on a trip that was started the day after the sale, which breakdown was caused by a blockage of the engine oil system by dirt. The expert who examined the motor after the breakdown indicated that it was impossible for the buyer to be aware of the hidden defects in the motor which could only have been revealed by having it taken down. The Court overruled the expert's finding, however. It held that the cause of the breakdown was lack of lubrication caused by a blockage and that this was not a latent defect. The buyer's director "... aurait dû, faisant l'acquisition d'une voiture d'un prix élevé, procéder à une vérification plus poussée du moteur..." Article 1641 (being the equivalent of our article 1522) "...ne peut s'appliquer qu'à des défauts d'une particulière gravité, échappant à tout examen attentif au moment de l'achat..." The buyer's representative "...aurait pu s'apercevoir de la défectuosité que présentait cette voiture en ce qui concerne le graissage du moteur; qu'il aurait pu en effet se rendre compte au cours des essais... que cette voiture fumait anormalement."

The foregoing would seem to establish that the French authorities interpret the Code articles on the warranty against latent defects as requiring the purchaser to examine and inspect the thing before buying.

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[29] [1964] Recueil Dalloz, 253.

Let us now look at the French authorities on the question of whether the buyer should consult an expert before buying. We shall first list those in favour of this requirement.

French authorities holding that the buyer should engage an expert:

Planiol et Ripert: [30]

"Il arrivera fréquemment que le défaut de la chose apparaîtra manifestement aux yeux de l'acheteur, sans que celui-ci puisse ignorer que ce défaut constitue bien un vice dont l'existence rend la chose impropre à l'usage projeté. Le vice est alors apparent sans aucune difficulté. Il en serait ainsi même si le vice est tel que, échappant à un acheteur inexpérimenté, il apparaîtrait immédiatement aux yeux d'une personne plus compétente; l'acheteur qui se sait inhabile doit faire appel au secours des gens compétents et il est en faute d'avoir trop présumé de ses capacités. Ainsi l'acquéreur d'un immeuble perd le droit d'invoquer la garantie s'il n'a pas aperçu un vice qu'un architecte aurait immédiatement découvert; le vice est, dans ce cas, apparent."

Baudry-Lacantinerie et Saignat: [31]

"Nous pensons même que l'inhabileté et l'inexpérience de l'acheteur ne permettent pas de considérer comme caché quant à lui un défaut qu'aurait aperçu une personne plus compétente; celui qui n'a pas les connaissances nécessaires pour apprécier la chose qu'il veut acheter doit demander le concours de gens capables de le faire. Ainsi celui qui veut acheter une maison doit, s'il ne connaît pas lui-même les constructions, recourir aux conseils d'un architecte; mais il ne pourra pas se prévaloir de son inhabileté, de son ignorance pour faire résilier la vente à raison de défauts qu'il n'a pas vus, mais que rien ne cachait. C'est faire de la chose un examen superficiel que de le faire seul quand on n'en est pas capable."

Ferrero v. Boyer.[32] The following remark appears in the note following the judgment in this case which concerned the sale of a second hand automobile.

"L'inhabileté et l'inexpérience de l'acheteur ne permettent pas de considérer comme caché quant à lui, un défaut qu'aurait aperçu une personne plus compétente."

Judgment of Tribunal Civil de Metz: [33]

"Les vices doivent être cachés; il y a des vices cachés quand leur existence ne peut être révélée que par des recherches appropriées ou ne peut être découverte que par un expert procédant à des vérifications minutieuses; les qualités intellectuelles de l'acquéreur n'ont pas à être prises en considération en la matière." — Trib. civ. Metz, 26 Oct. 1956, Rev. As. Lorr. 1957, 329.

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[30] Second edition by Joseph Hamel, X (1956), pages 144-145.

[31] *Op. cit.*, page 426.

[32] [1950] Recueil Dalloz, 556, (Tribunal Civil de Nimes).

[33] Summarized in Gazette du Palais, Répertoire Universel de la Jurisprudence Française (1956-60), no. 407, page 932.

Demoiselle de Yrigoyen v. Cie des Assurances Générales.[34] This case involved the purchase of a building that was infested with termites. The Court held:

> "... attendu, en l'espèce, que s'agissant d'un immeuble de valeur situé à Bordeaux et destiné à l'habitation, l'inexpérience ou l'incompétence de l'acheteur ne paraissent pas pouvoir être invoquées, parce qu'en pareille matière il est de prudence élémentaire de se faire assister d'un architecte."

The following is an extract from a case note by Pierre Voirin that accompanied the judgment:[35]

> "Au premier abord, l'arrêt rapporté semble imposer des conditions bien sévères. Il faudrait qu'il n'existât aucun vice 'dont un acheteur *diligent et attentif* aurait pu se rendre compte' et dont 'une *visite attentive des lieux par un architecte* eût décelé l'existence'. Pourrait-il, au regard d'une telle conception, se rencontrer une seule application du vice caché? Ainsi comprise, la notion d'apparence se dilue, puisque l'indication donnée par la situation de fait, devant être corroborée par une expertise, perd sa spontanéité. Enfin on pourrait opposer la jurisprudence antérieure qui se borne à exclure la garantie lorsqu'il existe un vice que révèle 'un examen superficiel', sans qu'il soit besoin de recourir à une expertise. A la réflexion pourtant, l'arrêt de la cour de Bordeaux, loin de faire dissidence, s'encadre dans les précédents judiciaires dont l'ensemble forme une construction homogène que soutiennent les deux éléments essentiels de la notion d'apparence."

Meunier-Collin v. Grange[36]:

> "... Attendu qu'avant de passer convention, un sentiment d'élémentaire prudence devait lui commander de procéder à un examen attentif de la voiture et d'effectuer au besoin les essais nécessaires avec l'assistance d'un homme de l'art s'il jugeait ses propres connaissances insuffisantes; ... Attendu que le vice apparent n'est pas seulement celui qui est ostensible et que révèle un examen superficiel mais celui qu'un homme de diligence moyenne aurait découvert en procédant à des vérifications élémentaires; — ..."

See also R. Demogue: "Qu'est-ce qu'un vice caché ?"[37]

Société d'Equipement industriel et commercial v. Goldnadel.[38] In this decision of the Paris Court of Appeal, which we have already seen, it is at least implied that the purchaser should have retained the assistance of an expert.

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[34] [1929] Recueil Dalloz, second part, page 84 (Bordeaux).

[35] It is interesting to note that in 1954 the Cour de Cassation held that infestation of a building by termites constituted a latent defect, but it was pointed out that in the circumstances of that instance the defect would have been hard to discover even for an architect or a contracter. [1954] Recueil Dalloz, 417.

[36] [1957] Recueil Sirey, 120 (Tribunal Civil de la Seine). Also reported at [1957] Recueil Dalloz, 47.

[37] (1907) 6 Rev. Trim. dr. civ. 111.

[38] *Supra*.

The following French authorities are of the view that the buyer need not engage an expert:

Mazeaud [39]:

> "... le type de comparaison à l'égard duquel on se demandera s'il aurait ou non découvert le vice, c'est *une personne disposant des mêmes connaissances techniques que l'acheteur*. En conséquence, si l'acheteur n'a aucune connaissance technique quant à la chose achetée, le vice est caché lorsque seul un technicien était capable de la découvrir; la jurisprudence l'a souvent affirmé à propos de la vente des véhicules automobiles."

C... v. G...[40] This involved the sale of a second hand automobile. The Court held:

> "... il n'y a pas vice apparent, mais vices cachés, si l'expert commis indique formellement qu'il fallait être idoine en la matière pour déceler les vices de la voiture."

Société Générale des Industries Economiques v. Société Parisienne des Biscuits Millez.[41] The following is an extract from the headnote:

> "Les vices d'un moteur à gaz, qui a été l'objet d'une vente, peuvent être considérés comme non apparents lorsque l'acheteur était, suivant les affirmations de l'expert, incapable de s'en rendre compte par suite de son ignorance en matière de constructions mécaniques et de moteurs à gaz (c. civ. 1641, 1642);..."

The accompanying case note states that:

> "Il avait déjà été jugé, dans le même sens, qu'un vice doit être considéré comme caché s'il n'est apparent que pour des personnes jouissant de connaissances spéciales."

Roquier v. Bissireix.[42] The Court held that:

> "... le vice qui ne peut être découvert qu'en démontant le moteur ou en se couchant sous la voiture constitue un vice caché, qui ne peut être décelé normalement que par un mécanicien professionnel."

Jean Hémard, in a case note accompanying the judgment of the Cour de Cassation in *Etablissements Saelen-Loff v. Sicoit* (relating to the sale of a second hand tractor): [43]

> "... il était hors de doute qu'il s'agissait bien d'un vice caché, le rapport établissant que le groupe cylindre présentait des cassures et des traces de soudure électrique dont l'acquéreur ne pouvait s'apercevoir sans faire procéder au démontage du moteur par un homme de l'art..."

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[39] *Op. cit.*, pages 834-835.

[40] Tribunal civil de Lille, summarized in [1957] Gazette du Palais, second semester, number 52, page 279.

[41] [1908] Dalloz, 148 (Cour de Cassation).

[42] [1950] La semaine Juridique (Juris-Classeur Périodique), (Somm.) IV, page 128 (Bordeaux). Also reported at [1950] Revueil Dalloz, 24.

[43] [1962] Recueil Dalloz, 46 at 47.

This case can only be considered in the light of the fact, however, that the vendor had made declarations as to the good condition of the tractor.

Case note, accompanying the judgment of the Cour de Cassation in *Chaud v. Cornen* [44] (relating to the sale of a second hand tractor) (extract):

> "...dès lors qu'il y a obligation de démonter un appareil, un moteur, pour déceler un vice dont il est atteint, ou que sa découverte exige l'intervention d'un homme de l'art, la jurisprudence considère qu'il y a vice caché."

It should be noted, however, that an express guarantee was present in this case.

Reiss v. veuve Souyris (a judgment of the Cour de Cassation relating to the sale of a second hand tractor).[45] The court held:

> "...pour se rendre compte du mauvais état des organes, il aurait fallu démonter partiellement le tracteur et que, seul, un homme de l'art aurait pu procéder à de telles investigations."

Filliol v. Chuzel.[46] (A judgment of the Cour de Cassation relating to the sale of oak wood to be used for flooring which contained larvae which caused it to be worm eaten after the delivery; the only evidence of the presence of the larvae were "piqûres" (tiny holes) on the surface; the buyer was a dealer in such products.) The Court upheld the findings of the experts that the defect was hidden because:

> "...pour reconnaître la gravité de ce vice, il faut des connaissances scientifiques, qu'il serait peut-être exagéré de vouloir exiger d'un simple praticien."

In the case of *Soc. Rouy et Cons. Rouy v. Delente,*[47] the Cour de Cassation subjected an ordinary buyer to different treatment from that meted out to an expert buyer, from which it may perhaps be inferred that the ordinary buyer need not engage an expert. Delente, a farmer, sold a used tractor to the Rouy brothers, "garagistes", who resold it to Dabert. In a first judgment, Dabert's redhibitory action was maintained by the Court of Appeal and the Cour de Cassation rejected the appeal against this judgment. On the other hand, the Cour de Cassation dismissed the action of the Rouy brothers against Delente for the reason that as experts in agricultural equipment they could not have overlooked the defects, which for them were not latent. Thus, defects that were deemed apparent to the professional buyers, had been considered hidden

[44] [1957] Recueil Sirey, 6.
[45] [1952] *Bulletin civil de la Cour de Cassation,* III, no. 390, p. 302.
[46] [1907] Receuil Sirey, first part, 438.
[47] [1963] Recueil Dalloz, 114.

for the farmer, from which it might be concluded that the view of the Court was that an ordinary buyer need not consult an expert.

Juris-Classeur Civil - Annexes:[48]

> "S'agit-il... d'un vice qui, pour être décelé, exige des connaissances scientifiques particulières, que même un professionnel ne possède généralement pas, par exemple, le recours à des procédés mécaniques ou chimiques, le vice sera le plus souvent tenu pour caché."

The reader is also referred to the case note by J. Hémard accompanying the Judgment of the Tribunal civil de Draguignan in *Curetti v. Boyer*[49] and the discussion in the Juris-Classeur Civil under *Vente, garantie des vices cachés.*[50]

It must be acknowledged that the proposition that a buyer must engage an expert where he is ignorant has not been unanimously adopted in France. However, the negative never seems to have been squarely put forward by the courts, and what is really significant, there is no trend of change such as that shown by Professor Gow to have existed in the Common Law. It must also be borne in mind that not all the authorities in favour of relieving the buyer of retaining an expert's services are as strong as they may at first appear: the case involving a gasoline engine may well have concerned a new engine purchased from the manufacturer, and some of the cases involved express guarantees, in both of which situations Quebec courts would probably not require an expert. In other cases, no mere examination of experts would have disclosed the defect — the thing would have had to be taken apart or subjected to special tests for the defects to be discovered — Quebec law would not require this either. In any event, even if one were to argue that the effect of the French authorities is not to require the buyer to use an expert, there remains the consistently held view that the buyer must be alert and examine and inspect the thing carefully. This is a far cry from the Quebec Court of Appeal decision in *Bourget v. Martel* (cited *supra*) where the sale was set aside because of defects even though the purchaser had not examined the car before the purchase.

The reader may wonder why I have gone into the French authorities to such an extent. After all, as regards my having criticized the Court of Appeal judgment in *Bourget v. Martel* (cited *supra*) on the ground that there is strong authority, both doctrinal and jurisprudential, to the contrary, Professor Gow said: "He may

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[48] IV, Vices Rédhibitoires, no. 25.

[49] [1953] Recueil Dalloz, 745 at 746.

[50] No. 63, arts. 1641 ff. C.C.

well be right. Whether he is or not is not the concern of this comment. Its concern is to suggest that if he is right, that the policy which he advocates should not be accepted as being the law of Quebec for the remainder of this century without considerable consideration being given to the needs of that time-span." [51] I have delved into the French authorities for two reasons. Firstly, to show that the interpretation of the majority of the Quebec judgments of the meanings of latent and apparent defects in articles 1522 and 1523 C.C. is not dissimilar to that of the French doctrine and decisions. This gives support to the view that the Quebec judicial interpretation is well founded, and I submit that this weakens Professor Gow's statement that "... article 1522 states its policy quite clearly, namely that the seller is obliged to supply a thing which by and large is worth the price the buyer has paid or promised to pay. It appears, so far as language is trustworthy, to reject the policy of *caveat emptor*, or, as the old Germanic law put it, 'He who does not open his eyes opens his purse.'" My second reason for going into the French authorities is to suggest that the similarity between the French and Quebec positions means that the fact that the common law has changed does not lead to the inevitable conclusion that the Quebec stand is archaic.

Now to come to the most important matter at hand: to deal with Professor Gow's contention that the present interpretation of Quebec law is unreasonable to the buyer. Let us review our position. The buyer has the duty to examine and inspect the thing before buying, but with these exceptions: where it is impractical for this to be done (such as by reason of delivery from elsewhere, or otherwise), where there is an express guarantee, or where the vendor has made misrepresentations to the extent that the contract may be annulled on the ground of fraud. I have also expressed the view that where a new object has been acquired from the person who made it, the purchaser should only be responsible for finding defects that are blatantly apparent. Is the foregoing unfair to the buyer? Surely only an irresponsible person is going to purchase something without looking it over. To fall back on the test of what a *bon père de famille* would do, surely he would consider it only reasonable to examine the thing. Here, the balance of the equities favours the seller, for it is to be presumed that the buyer would have taken such defects into consideration when agreeing on the price.

As to the principle that the buyer must be assisted by an expert when he is ignorant as to the object: we have seen the view of the

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[51] *Op. cit.* fn. 2, page 246.

Quebec courts on the matter, that an expert is necessary under such circumstances, and Professor Gow has found this to be unreasonable.

It must be acknowledged that the jurisprudence has taken a strong line on this matter, but it must be borne in mind that the reported judgments requiring experts have largely related to a relatively small field: buildings that are not new and used automobiles. What must be remembered is that in the majority of instances no expert need be engaged: where there is an express guarantee, where the contract is vitiated by fraud, or where the object is bought from its manufacturer. As to new objects not purchased from their manufacturers (e.g. automobile and television sets bought from dealers), while I have conducted no surveys and have no statistics at my disposal, it is my own personal experience in this commercially oriented North American society in which we live, not only that modern manufacturers almost invariably furnish express guarantees, but also, and this is even more important, many merchants seem to realize that it is good business to stand behind a policy of "goods satisfactory or money refunded", which maxim goes far beyond the legal obligation of warranty against defects.

Let us consider sales of second hand objects, such as buildings not purchased new from their builders and used automobiles and appliances. It is here that Quebec law requires an expert to be engaged. Once more, however, the requirement of an expert will be waived where there is an express guarantee or where the contract can be annulled because of fraud on the part of the vendor. We could probably also include the case where the object sold has been rebuilt by the seller, and even perhaps where repairs of a major nature have been effected.

Let us now consider the instances where an expert must be hired: as to old buildings, it is only common sense for anybody investing such a large sum of money to have the advice of an expert, no matter what recourses in warranty the law may give him against his vendor. As to used automobiles and appliances, it is commonly known that such goods are easily susceptible to defects. A purchaser who is wise but technically ignorant, will only consider it reasonable to obtain the advice of a mechanic, in the absence of an express guarantee. Where a used car is being bought from a private person, the buyer is not at a disadvantage, and it would seem in the interests of society that in such a situation the seller be protected against the recourses of the buyer who has not had an adequate examination carried out.

Should a dealer be treated differently? Unlike the average private seller, he is deemed to be an expert and is presumed to be aware of the defects. Where he has rebuilt the thing or carried out major repairs to it, he may be on the same footing as the manufacturer of a new object. But where he has done neither of these, the resulting problem is not a simple one to solve. I still feel that a reasonable man, when acquiring an object of a worthwhile magnitude, will protect himself by retaining an expert, unless he is able to obtain an express guarantee. Professor Gow may disagree. However, it must be borne in mind that buyers of such objects are not at the mercy of their sellers — there is heavy competition amongst the latter which gives the buyer some choice and the courts will naturally tend to take a more severe attitude towards a dealer than an ordinary vendor, with the result that they are often able to discover the presence of an express guarantee, and sometimes of fraud. In short, it would seem reasonable for a buyer of a used object such as a car to engage an expert or insist on an express guarantee, and failing that, to go elsewhere. If I may be permitted to refer, as did Professor Gow, to a principle of Roman law, I would like to cite a maxim that I feel still has relevance even in this twentieth century welfare state of ours: *Vigilantibus non dormientibus juvat lex.*

In closing, it is surprising to find Professor Gow, a lawyer trained in the civil law of Scotland which has long struggled against English domination in the form of statutes passed by the U.K. Parliament and decisions of the House of Lords, advocating a Uniform Sales Act for Canada. Our Civil Code forms a unit, with the title of obligations at its heart. This title of obligations sets forth the general rules applying to all contracts, including the contract of sale. The title of sale merely gives additional or special rules that apply to that contract alone. A Uniform Sales Act would not fit into this scheme. Moreover, the civil law and the common law, while their application to individual cases may produce similar judgments, have an approach, a style and a language of their own which lead to confusion in terms. This is why the Bills of Exchange Act and the Criminal Code make such difficult reading for a person trained in the civil law. Why upset our civil law system by inserting what would be to a great extent a common law enactment? The most important factor, however, is that the civil law system of Quebec is one of the bases of Quebec culture, just as, according to Professor T. B. Smith, "Since her Union with England in 1707, Scotland has in a sense survived as a nation by and through her Laws and Legal System".[52] While we should always be prepared

[52] A Short Commentary on the Law of Scotland (1962), vii.

to amend the Code where this has shown itself to be necessary or desirable (indeed, the Nadeau Commission is at work on this at this very moment), such amendments must be of a civilian nature and in keeping with the style of the Civil Code, and it is unthinkable that the Quebec Civil Code provisions on the contract of sale should be replaced by a Uniform Sales Act, as the same would undoubtedly be quite different in its approach. As Quebec already has its own civil law system, why introduce another which would inevitably lead to confusion because of the differences of language and style?

All in all, while I have not changed the views on apparent defects as expressed in my previous article, which only covered a relatively small part of the subject, I am grateful to Professor Gow for giving me this opportunity to round out the picture in the way it should have been done in the first article.