The Safety Deposit Vault or Leased Metal Box: The Responsibility of a Bank to its Customer

A. L. Stein, Q.C.*

* Of the Bar of the Province of Quebec.

I. Definition of Terms and Essential Facts

a. *The Safety Deposit Box or Coffret de Sûreté*

In modern times the safety deposit box (or *coffret de sûreté*) is an object which hardly requires definition or description to the average citizen. In general terms, the safety deposit box is, in itself, a metal compartment in the form of a box which fits or slides into a steel cabinet fixed in a cement wall, and permently established in a larger vault or cement room which is barred with a steel door constituting its only entrance. The steel door or entrance to the safety deposit vault is opened by a time clock device and intricate electrical combination, the details of which are known only to the chief officers of the bank or branch. The individual compartment in which the safety deposit box, itself, is kept is closed with a small steel or metal door, and is also locked by means of a double lock for which two keys are given to the customer, but which requires for unlocking purposes the use of a master key retained by the bank.[1] Access to the vault is generally obtained by entrance through the bank premises, and bank regulations usually require the customer to sign a card or form upon admission, and to be attended by an employee or official of the bank, both upon entrance and departure from the vault.

The contract between the bank and its customer with respect to the use of such a safety deposit box is usually in written form, but there is nothing in our law to prevent such an agreement being reached on a verbal basis.

b. *The Safety Deposit Box Agreement*

Since Canadian banks have adopted the practice of making the safety deposit box agreement in its written form, reference will be made not only to the specific contract with which we are here concerned (Form 2072) — *Bail de Coffret de Sûreté* of the Banque Canadienne Nationale),[2] but also to three similar contracts obtained from other banks. These typical contracts will serve to indicate the widespread interest in the same legal problems relative to the agreement itself, as were dealt with by the courts in the *Mastracchio* case.[3]

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[1] *Mastracchio* v. *La Banque Canadienne Nationale,* [1962] S.C.R. 53, aff'g [1961] B.R. 1, [1959] R.L. 65 (C.S.), *per* Prévost, J.

[2] [1959] R.L. 65, at pp. 80 *et seq.*

[3] (a) Bank of Nova Scotia Form No. 902.
(b) Bank of Montreal Form No. 310 (Que.) 1301 and Fr. 87230.
(c) Royal Bank of Canada Forms 465 (1-60) and 7842 (10-52).

As is made apparent from the titles appearing on these forms, the Defendant Bank in the *Mastracchio* case, (as do the other banks whose contracts are listed below) adopted the position that it was dealing with a lease of an object or space. But does this nomenclature chosen by the bank, apparently in its own interest, necessarily determine the real nature of the contract between the parties? This writer respectfully submits that it does not. And in support thereof, one can do no better than to cite the learned trial judge's answer to the same question:

> La défenderesse prétend qu'il s'agit là d'un louage de chose pur et simple. Il est vrai que le contrat est intitulé «Bail de coffret de sûreté», que les mots «location», «louer», «locataire», «bail» s'y trouvent, mais il n'en reste pas moins vrai, et il existe d'ailleurs une nombreuse jurisprudence à cet effet, que le nom que les parties ont donné à un contrat importe peu; ce sont les conventions qui s'y trouvent consignées qui en déterminent la nature.[4]

c. *Practical Utility of Determining the Nature of the Basic Contract*

Before answering the question as to the nature of the basic contract, one may be inclined to inquire what legal significance is attached to this exercise in determining the nature of the basic contract. The answer given, as indicated below, is that the purpose of such determination would be to establish more exactly the essential contractual obligations of the bank. To this may be added, also, the intensity (*intensité*) of such obligations and finally the characterization as obligations *de moyens, de résultat,* or *de garantie.*[5]

Obviously, the learned trial judge considered this both advisable and necessary since he says:

> Il importe donc pour atteindre la solution d'étudier à la lumière de la preuve les obligations contractuelles respectives des parties et leur effet sur la responsabilité ou la non responsabilité de la défenderesse.[6]

Later, he also points out, that:

> La convention est la loi des parties, aussi convient-il d'abord de rechercher la nature du contrat (D.-1) liant les parties et l'intention de celles-ci[7]

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[4] [1959] R.L. 65, at p. 82.

[5] R. Demogue, *Traité des Obligations,* (1925), t. 5, no. 1237, p. 536 *et seq.*; H.L. Mazeaud et A. Tunc, *Responsabilité Civile,* t. 1, no. 103-2 *et seq.,* p. 113 *et seq.*; A. Tunc, *La Distinction des Obligations de Résultat et des Obligations de Diligence,* J.C.P. 1945.I.449; G. Marty et P. Raynaud, *Droit Civil,* t. 2, Vol. 1, no. 468 *et seq.,* p. 503 *et seq.*

[6] *Mastracchio* v. *La Banque Canadienne Nationale,* [1959] R.L. 65, at p. 79.

[7] *Ibid.,* at p. 80.

This was identical to the view expressed by Brossard, J. in *Franco-Canadian Dyers Ltd.* v. *Hill Express Depot Limited*[8] where a similar legal problem regarding the nature of a contract — a storage agreement — was in issue:

> Pour fixer les obligations de la défenderesse, il convient tout d'abord de connaître la nature du contrat intervenu entre elle et la demanderesse.[9]

Both modern French, and Canadian, authors support this procedure.[10]

In the *Mastracchio* case, however, only one of the judges of the Court of Queen's Bench, Rinfret, J., and none of the judges of the Supreme Court believed it necessary to thus determine the exact nature of the contract between the parties. This is the more remarkable, in view of the fact that the learned trial judge dealt with this problem at length, and attempted its solution in an excellent *résumé* of the leading jurisprudence and doctrine on the legal issues, as set out in his notes.[11] On the other hand, we find Owen J. stating:

> If the obligations of the bank towards the holder of the safety deposit box are to be determined in the present case I do not think that it is necessary to decide the nature of the basic contract because the obligations of the bank towards plaintiff in this connection have been spelled out in the abovementioned clause of the contract.
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> The purpose of ascertaining the nature of the basic contract would be to determine the obligations of the bank in the event of loss or of damage to the contents of the safety deposit box. However in the present case the parties have provided by contract that in the event of disappearance of or total or partial loss of the contents of the box the responsibility of the bank will depend upon whether or not it has exercised ordinary precautions to prevent the opening of the safety deposit box by a person other than plaintiff or his *fondé de pouvoir*. Accordingly the obligations of the bank are the same in virtue of clause 7 of the contract whether this contract be one of lease and hire or of deposit or of some other nature.[12]

Similarly, Montgomery, J. said:

> Despite the erudition that has been displayed in presenting this appeal, it is primarily a question of fact...
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> In determining the bank's liability for such unauthorized opening the legal principle to be applied is simply this: *Le contrat fait la loi des*

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[8] [1951] C.S. 177.

[9] *Ibid.*, at p. 177.

[10] Mazeaud et Tunc, *op. cit.*, n. 5, no. 105, p. 132; A. Burn, *Rapports et Domaines des Responsabilités Contractuelle et Délictuelle*, (Paris, 1931), no. 174, p. 189; Marty et Raynaud, *op. cit.*, n. 5, no. 367, p. 335 *et seq.*; P.-A. Crépeau, *Régimes de responsabilité civile*, (1962), 22 R. du B. 501, at p. 519.

[11] [1959] R.L. 65, at pp. 82-96.

[12] [1961] B.R. 1, at p. 3.

parties. Did the bank take, in the words of the contract (as quoted in the notes of Mr. Justice Owen) "les précautions ordinaires pour empêcher l'ouverture de ce coffret par une autre personne que le soussigné ou son fondé de pouvoir?" If it did, it is not responsible.[13]

Furthermore, Pratte J. (dissenting) regarded the issue of liability as though it was determined solely on the basis of clause 7 of the agreement:

S'agissant de responsabilité, il faut savoir d'abord quelle était l'obligation de la banque à l'égard du coffret et de son contenu Or, l'art. 7 du contrat intervenu entre les parties porte précisément sur le point. Voici le texte de cette stipulation:

«La responsabilité de la banque en vertu du présent bail est limitée à l'obligation pour celle-ci de prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une personne autre que le soussigné ou son fondé de pouvoir. La disparition ou la perte totale ou partielle des objets ou valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir.»

Les parties ayant ainsi déterminé elles-mêmes l'étendue de l'obligation de la banque, il est sans intérêt, pour la décision du litige, de rechercher quelle peut être exactement la nature du contrat dit de location de coffre-fort.[14]

Only Mr. Justice Rinfret in the Court of Queen's Bench considered it important to examine the essential elements of the contract, as he did:

L'objet principal, l'élément essentiel du contrat soumis est la conservation de la chose.

La banque offre à ses clients un espace aménagé dans une enceinte de béton, protégé d'abord par une petite fermeture en acier munie d'une serrure impossible à ouvrir sans la participation active du client et de la banque, espace enclos derrière une grille solide fermée à clé, que seul le préposé de la banque peut ouvrir, le tout gardé par une immense porte barrée électriquement en dehors des heures de bureau. En principe, cette installation est inexpugnable.

La banque met à la disposition de ses clients un coffret où ils pourront, en sûreté, placer leurs valeurs. Point n'est besoin pour la banque de connaître le contenu du tiroir: l'emplacement est construit de telle façon à parer à toute éventualité, hormis cas fortuit ou force majeure. Le client, de son côté, recherche la sécurité, la tranquilité que lui procurent les armatures de béton et d'acier.

Un contrat intervient par lequel la banque délivre et le client accepte un coffret de sûreté avec toutes les garanties que comporte ce mot. S'il ne se mêlait pas un élément humain, il est évident que la banque aurait cédé et le client obtenu la fin que tous deux se proposaient, la sécurité

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[13] *Ibid.*, at p. 13.
[14] *Ibid.*, at pp. 16-17.

> des valeurs que tous deux savent à l'avance devoir être placées dans ce coffret.
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> La voûte ne saurait pourtant être constamment et hermétiquement fermée: les usagers ont le droit de se servir de leurs coffrets et la banque, l'obligation de les accommoder. La banque assume donc — c'est même la seule obligation expresse qu'elle assume par le contrat (la solidité de la construction de sa chambre forte étant implicitement comprise par les parties) — l'obligation de 'prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une autre personne que le soussigné ou son fondé de pouvoir'.[15]

In the light of the importance of the issues raised in the *Mastracchio* case and the possible general application of the same principles to be made in many similar contracts, it is rather disappointing that the majority of the above-mentioned judges preferred to treat this case as a *cas d'espèce*, and dependent largely on its own facts; [rather than lose] an opportunity to enunciate the basic legal principles in more general terms, in order to determine similar problems which might be raised in other instances. In the forefront of this view, we find Owen J. who, in his concluding remarks, clearly indicates his attitude [on this score]:

> Without attempting to lay down any rules as to the general nature of contracts between banks and their customers with respect to safety deposit boxes in this country and elsewhere or as to the nature of the responsibility under the common law of bankers in general in connection with safety deposit boxes, I would find *in this particular case on the facts proved herein* that the bank is responsible for the disappearance of the $12,750 on the ground that the bank failed to live up to its contractual obligation to take ordinary precautions to prevent the opening of the safety deposit box by a person other than Plaintiff or his *fondé de pouvoir*.[16]

In the Supreme Court, the same attitude seems to have prevailed. The Chief Justice merely found it necessary to construe the agreement, itself, without determining or examining the nature of the contract. Similarly, Martland J. refers to the agreement, itself, rather than examine the nature of the contract in the light of all the surrounding facts, intentions of the parties, etc. Even in his dissenting opinion, Taschereau J. (as he then was), who does make reference to the nature of the agreement, does not, in his usual profound and learned manner, support his opinion with the additional authority and argument to which we are accustomed in his case. And, finally, the learned judge does not pretend to resolve the issue with any degree of finality, but merely expresses a laconic opinion in the following terms:

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[15] *Ibid.*, at pp. 4-5.

[16] *Ibid.*, at p. 4 (Emphasis mine).

> Il ne s'agit sûrement pas entre l'appelante et l'intimé d'un contrat de dépôt et l'on ne peut, en conséquence, trouver dans l'entente intervenue les caractéristiques des obligations du dépositaire, qui sont essentiellement de conserver la chose, et de la rendre à première réquisition. Il s'agit plutôt, à mon sens, d'un louage ordinaire où la Banque moyennant un prix stipulé, a mis un coffret à la disposition de l'intimé.[17]

Basically, what each of the judges did (with the exception of the trial judge and Rinfret J. of the Court of Appeal) was to consider the contractual obligation of the bank solely in the light of, and in the context of the alleged provision of limitation of liability. In other words, the Appellate Courts both treated the problem as if the only contractual obligation of the bank to be concerned with was the one expressed in the written agreement, and even that one as allegedly limited by the aforesaid provisions of the said clause 7. In effect, therefore, both courts ignored all other obligations implicit in the contract, or resulting from the provisions of article 1024 C.C., though equally binding upon the parties thereto.

II. Determination of the Nature of the Basic Contract Between the Parties

a. *Dominant Intention of Parties to Contract*

Let us first examine what is the real intention of the parties, and particularly the bank's customer, in obtaining the use of the said safety deposit box. It is accepted by all that the purpose for which the said box is intended to be used is the storing of "valuables or other property and papers" which the customer wishes to place, store or deposit therein. As corroboration of this generally accepted use of the safety deposit box one need only refer to paragraph 3 of the Conditions of the Contract in the case of the Bank of Nova Scotia agreement which actually prohibits the use of the said box for "any purpose other than for the deposit of valuables or other property and papers".

What is more important, however, is not the intended use for deposit, storage, or placement of values in the said box, but the feature of acquiring thereby a form of security and protection which otherwise would not be available to the customer either at his own home or place of business or by the use of a small safe, or a vault at home. In addition, one must include the intention of the customer to relieve himself of the "responsibility of possession"

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[17] [1962] S.C.R. 53, at p. 56.

of the valuables in question, by placing, depositing or storing them in the said safety deposit box in the vault of the bank.

It is in this feature of special security and protection that the basic relationship between customer and bank is to be found. This essential intention is deliberately ignored in the terms of the bank's contract, save implicity, by the attempt to limit its responsibility (under clause 7, already mentioned above). But here, article 1024 of the Civil Code comes to the aid of the banker's customer:

> Art. 1024. The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

In consequence, it is hardly reasonable to assume, that the customer merely sought to lease a space within which to place certain objects without regard to the security and protection features which are described above.

Contrary to the submissions of the bank and the formal provisions of the so-called "lease", it may be reasoned that the object of leasing of space, and the use of the safety deposit box, are both merely accessory to the main objects — of the customer —

a) the security and protection of the contents; and

b) their return to the customer when required.

On the other hand, what are the objectives sought by the bank with respect to the same contract? Primarily, it desires to retain a more continuous contact with and to render a service to its customer whereby it enhances its image of safety, security, etc. to its depositors as well as to obtain a fee for the use of its safety deposit box and vault by the customer. Secondarily, it implicitly, at least, offers to the customer, the use of the box in its vault as a means of security and protection for his valuables, papers, etc. Despite its own choice of nomenclature for the agreement, the very use by the bank of the phrase "safety deposit box" or *coffret de sûreté* in the said title and its description of the article thereby, are indications, if not tacit admissions by it, of this most important factor in its agreement and relationship with its customer.

Having thus rather briefly reviewed the intention of the parties what, in law, is the nature of the basic contract between them?

b. *Nature of the Contract Louage — Dépôt or Contrat Innomé* —

On this issue, the writer accepts the reasoning and authoritative support given thereto, as expressed by the learned trial judge in his judgment: [18]

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[18] [1959] R.L. 65, at pp. 82-88.

> La Cour doit donc admettre la théorie de la demande à l'effet que le contrat, pièce D.-1, est un contrat innommé participant à la fois du louage de choses, du louage de services et du dépôt avec les conséquences et les obligations réciproques qui en découlent.[19]

The learned judge also cited at considerable length, the note of the distinguished French Jurist, Mtre. André Tunc, criticizing the decision of the Cour de Cassation in *Credit Lyonnais* v. *Kintz et autres*.[20] The problem there, as in the *Mastracchio* case, arose out of the relationship of a bank to its customer with respect to a safety deposit box. Mtre. Tunc concludes that the contract was one of deposit rather than lease and that the "l'obligation de la banque est au contraire une obligation de résultat".[21]

c. *Effect of Alleged Limitation of Liability (Clause No. 7) on Contractual Obligation of Bank*

The trial judge dealt specifically with this problem in the following terms:

> Il y a lieu de se demander maintenant si la clause 7 du contrat D.-1 que la défenderesse qualifiée de 'stipulation de non-responsabilité' limite les obligations de la banque et l'exonère dans le cas soumis.
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> La clause 7 se lit comme suit:
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> 7. La responsabilité de la banque en vertu du présent bail est limitée à l'obligation pour celle-ci de prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une autre personne que le soussigné ou son fondé de pouvoir. La disparition ou la perte totale ou partielle des objets et valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir
>
> D'abord s'agit-il là d'une stipulation de non-responsabilité proprement dite, il semble bien que non. La première partie de cette clause ne fait que limiter les moyens que la défenderesse s'engage à prendre pour assurer la sécurité des objets déposés au coffret et, la seconde partie, ne fait qu'éliminer la présomption dérivée de la disparition des objets comme moyen de preuve que le coffret a été ouvert par un autre que par le soi-disant locataire du coffret ou son fondé de pouvoir.
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> Le mot 'responsabilité' dans la première ligne est loin d'être heureux et doit évidemment s'entendre dans le sens du mot 'obligation'.[22]

In addition to the abovementioned comments, to which the writer subscribes wholeheartedly, it should also be noted that on the basis of the usual rule of restrictive interpretation of such a

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[19] *Ibid.*, at p. 87.
[20] Besançon, 11 février 1946, D.1946.365.
[21] *Ibid.*
[22] [1959] R.L. 65, at p. 96.

clause, it would be limited solely to the case of preventing the opening of the safety deposit box by a person other than the customer.[23]

It is submitted, therefore, that this limitation even if accepted in its full import cannot have any effect other than with respect to those precautions relating to preventing the opening of the box by an unauthorized person. It does not, by its own terms, limit or restrict the other contractual obligations of the bank, whether expressed or implicit in the contract. Nor is it to be assumed that this standard (ordinary precautions of a *bon père de famille*) is to be applied to all other contractual obligations of the bank in the event of inexecution thereof.

The majority of the judges of the Court of Appeal seemed to treat this clause as though it determined in all respects, all the obligations of the bank towards its customer.[24]

In the Supreme Court the treatment and interpretation given to this clause was very similar.[25] Only Mr. Justice Rinfret in the Court of Appeal seemed to adopt the same reasoning as the trial judge when he said:

> J'estime, pour ma part, qu'une telle clause doit se lire et s'interpréter avec la phrase précédente, contenue dans la même clause, et que, si la banque peut se prévaloir de cette disposition lorsqu'elle a rempli son obligation de bon père de famille, elle ne saurait y trouver abri, dans l'alternative contraire.
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> Toutefois, même si l'on doit douner effet à cette clause, j'estime qu'elle est restreinte à la seule disparition ou à la seule perte, sans autre preuve.[26]

It is to this latter opinion (Rinfret J.) that the writer inclines as being the proper interpretation to be given to the effect of the said clause No. 7 as an alleged limitation of liability of the bank.

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[23] *Cf.* the safety deposit box rental agreement of the Bank of Montreal which is identical in its French version and reads in the English as follows:

> Shall be limited to the exercise of ordinary diligence to prevent the opening of the said box by any person other than the lessee or the duly authorized officer of the lessee.

Similarly, in the case of the Royal Bank agreement entitled "Safety Deposit Box Lease", par. 4.

[24] [1961] B.R. 1: Owen, J., at p. 3; Montgomery, J., at p. 13; Pratte, J. (although dissenting), at p. 17; Choquette, J., at p. 20.

[25] [1962] S.C.R. 53: Kerwin, C.J., at p. 54; Taschereau, J. (dissenting), at p. 56; Martland, J., at p. 59.

[26] [1961] B.R. 1, at p. 11.

d. *Effect of the alleged limitation of liability and the attempt to derogate from the normal rules of presumption from the facts and the burden of proof*

A most interesting provision of the important clause No. 7 in the contract in the *Mastracchio* case is set out in the last sentence thereof, as follows:

> La disparition ou la perte totale ou partielle des objets et valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir.

A similar version of this provision may be found in the Form No. 310, Fr. 87230 Bank of Montreal Agreement and which reads as follows:

> Le locataire, en outre, reconnaît que la perte partielle ou totale du contenu du coffret ne pourra pas constituer une preuve d'ouverture dudit coffret;

In the English version of the same form (Form 310, Que. 1301, Bank of Montreal) the same provision reads as follows:

> ...and that such opening shall not be presumed from proof of partial or total loss of the contents.

In the case of the Royal Bank form (Formule 7842, 10-52) this provision appears in clause No. 4 in the following terms:

> ...et il convient qu'une perte, partielle ou totale, du contenu du coffret ne constituera pas une preuve ni une présomption que le coffret a été ouvert sans autorisation.

In English, the equivalent form of the same bank (Form 465, 1-60 Royal Bank) appears in clause 4, as well, and in the following terms:

> ...and that no loss of the contents of the Box or any part thereof shall constitute any proof of presumption that the Box has been opened without authority.

It would appear that the abovementioned provisions constitute an alleged agreement between the parties to derogate from the normal rules with respect to presumption and burden of proof as established by our law and jurisprudence. Article 1242 C.C. specifically provides that:

> Presumptions not established by law are left to the discretion and judgment of the court.

The question to be asked and answered, therefore, is whether the parties to an agreement can validly contravene this provision of law contained in our Civil Code and thereby deprive the presiding judge of the exercise of this discretion in such an important matter. Apparently, the validity of the said provision was not challenged specifically in the legal issues before the court. In the respectful opinion of this writer, such a provision is completely invalid and

could have no effect whatsoever upon the normal rules of evidence, dealing with presumption from the facts, (as provided under article 1242 C.C.). Nor could such a clause be deemed valid so as to effect a shifting of burden of proof upon plaintiff — when otherwise the evidence was held established by a presumption from the facts as accepted by a trial court.[27]

Once the purported effect of this provision of clause 7 has been removed from the issues, the burden of proof remains upon the defendant bank to explain the disappearance or loss of the safety deposit box or its contents, and then only to exonerate itself by proving *force majeure,* or *cas fortuit* or the fault of the plaintiff, himself. Failing such proof, the defendant would be held responsible for the loss which had occured.

Martland, J. in the Supreme Court dealt with this aspect of the interpretation of clause 7:

> The Appellant contends that by virtue of clause 7 no inference of any kind whatever can be drawn from the loss of the contents of the box. In other words, the Respondent must prove by other evidence that an unauthorized person has gained access to his safety deposit box. In my opinion the wording of the clause does not go that far.
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> Furthermore, so to construe this portion of the clause would be to render the obligation of the Appellant, defined in the first portion of the clause, virtually nugatory. Both portions of the clause must be considered together (article 1018 of the Civil Code). The second portion of the clause should not, if there is any doubt as to its meaning, be construed so as to have such an effecct.[28]

However, the learned judge did not go far enough when he inferred that if there was ambiguity in the meaning of this clause it should be construed against the bank, rather than stating that the clause was invalid and therefore of no effect upon the presumptions to be made from the evidence of loss or disappearance.

Taschereau, J. in the Supreme Court seems to have considered this problem as well,[29] but took the position that the contract, being the law of the parties, no presumption could be made against the bank according to the terms of the said provision. He also held that this would be the result even if the civil law of the province were to be invoked. Thereafter, of course, he dealt with

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[27] P.B. Mignault, *Droit Civil Canadien,* t. 6; L. Beaudouin, *Droit Civil de la province de Québec,* p. 1270; Mazeaud et Tunc, *op. cit.,* n. 5, t. 2, no. 1707-1708, p. 685; C. Demolombe, *Cours,* t. 30, nos. 243-244, pp. 227-228; Aubry et Rau, *Droit Civil,* 4e éd., no. 766, p. 358.

[28] [1962] S.C.R. 53, at p. 63.

[29] *Ibid.,* at p. 56.

the issue on the basis that the onus of proof was entirely upon the plaintiff to prove the fault of the defendant. Strangely enough, the late learned Chief Justice of the Supreme Court singled out this last sentence of clause 7 for special attention, but failed to make any comment thereon, either as to its validity, or its effect upon the rule of presumption from facts or the burden of proof. He, too, disposed of the case on the basis of the finding of the facts by the lower courts and ruled that these should not be disturbed.

On this point, it is also respectfully submitted that the said provision, even if valid, could have no legal effect whether the bank's contractual obligation was determined either as an *obligation de résultat*, or as an *obligation de moyens*. For if the said clause has any meaning by the use of the terms 'disappearance' *(disparition)*, and 'loss' *(perte)* it must exclude any act of the plaintiff or his agent, since in such event it would be neither a 'disappearance' nor a 'loss' in any way giving rise to the bank's liability in relation to the safety deposit box.

Moreover, whether the bank's obligation is *de résultat* or *de moyens* — the burden of proof is always on the plaintiff to establish first, that there was a 'disappearance' or a 'loss' of his valuables deposited in the box, and that such disappearance or loss excluded the removal of the valuables by himself or his agent. Such proof could result either from positive facts or from a presumption from facts proved — but this must be a conclusion arrived at by the trial court first, in order to find that there has (or there has not) been a disappearance from the box for which the defendant bank may be liable. Once the 'loss' or 'disappearance' has been held as proved and recognized (as is suggested by the terms of the said clause) there can no longer be any question of a presumption that the box was opened by the plaintiff or his authorized agent, — the two situations are mutually exclusive — in relation to the contract with which we are here concerned. The only conclusion remaining at this point — whether arrived at by proof or by presumption — is that the valuables were removed by a person other than plaintiff or his representative. There then arises the issue and consideration of whether such 'proved' disappearance or loss — *per se* — engenders the bank's liability on the basis of its obligation being *de résultat* (and thus obliging it to exonerate itself on grounds of *cas fortuit*, etc.) or whether, if the obligation is *de moyens* plaintiff is able, in addition to establishing the loss, also to prove the fault of the bank as a cause thereof.

This is the same type of error in reasoning which is explored by Professor P.-A. Crépeau in his article entitled *Des régimes contractuel et delictuel de responsabilité civile en droit canadien*[30] wherein he states:

> D'ailleurs, dire que la clause a pour seul effet de renverser le fardeau de la preuve, en mettant celui-ci à la charge du créancier, n'a aucun sens et enlève à une telle clause, pourtant jugée valable, toute efficacité lorsque le débiteur n'est tenu qu'à une obligation de moyen, car alors, on le sait, le fardeau repose toujours en ce cas sur le demandeur.[31]

III. Conclusion

a. *Restricted Effect of the Final Judgment in the Mastracchio Case.*

Unfortunately, (for other pleaders dealing with the same or similar issues as were raised in the *Mastracchio* case) the applicability of this final judgment will be restricted narrowly, because of the great emphasis on the facts in that case and the reluctance of the court to express its views on the legal issues arising out of the contract, itself, in wider terms. Moreover, the citation of Owen, J. quoted above, pinpoints this restriction to "the particular facts" in this "particular case".

b. *Failure to Apply the Provisions of Article 1024 C.C. to Contract*

As resumed above, the *Mastracchio* case fails to apply the provisions of article 1024 C.C. It thus fails to implement the express terms of the basic contract between the parties with the additional obligations which result from, or are the consequence of, the nature of the contract itself, or usage, or the law. The decision in this case also fails to determine with any degree of finality the exact nature of the contract between the parties with respect to the use of safety deposit boxes, a determination which could have resolved many other similar cases, depending upon whether the court of last resort considers the bank's obligation thereunder, one of *result* or an obligation of *means* only.

c. *The Alleged Clause of Limitation of Responsibility*

As shown above, the majority of the judges in both the Court of Appeal and Supreme Court, chose to interpret the limitative

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[30] (1962), 22 R. du B. 501.
[31] *Ibid.*, at p. 517.

clause (clause No. 7) as though this determined the entire responsibility of the bank. For the reasons already given above, this writer respectfully urges that this should not have been the interpretation given to the said clause.

As a result, the burden of proof was unduly shifted from the defendant to the plaintiff. Fortunately, for the plaintiff, however, the court of original jurisdiction found as a fact that there was evidence of fault on the part of the bank. As a consequence, in the final result, this shift of burden of proof did not have the disastrous effect it might have had in another case where such proof either was not available or in any event was not undertaken by the plaintiff in making his case. Thus, if the views of the late Taschereau, J. (dissenting in the Supreme Court) and Pratte and Choquette, JJ. (dissenting in the Court of Appeal) had been adopted by the majority of the Bench, these serious effects of the interpretation given by the Court to the alleged limitative clause (no. 7) would have been realized and plaintiff's action would have been dismissed.

As anticipated by this writer (with some apprehension), a totally different result was obtained by the claiming depositor in a later case.[32] There, Tellier J. dismissed Plaintiff's action (in the Superior Court) and the Court of Appeal dismissed the appeal by relying chiefly on the principles enumerated in the earlier case both with respect to the limitative clause contained in the lease and the requirement of ordinary precaution (the execution of ordinary diligence) on the part of the Respondent bank.

Thus, it remains for some future litigant to retry the issue "the safety deposit vault or a leased metal box" — which is it?

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[32] *Stewart* v. *Bank of Nova Scotia,* [1967] B.R. 699.