WHAT'S RIGHT ABOUT THE SENATE

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As its title implies, the purpose of this article is to emphasize the benefits, actual and potential, which derive from the existence of the Senate. Attention is concentrated on the things the Senate does, the purposes it serves and the principles on which it operates.

There are several reasons why the adoption of such an approach could result in a helpful contribution to the available literature on the subject.

Ever since Confederation, the Senate has been subject to sporadic attacks—not always or even usually well-informed—on its organization, functions and functioning. The reform and, indeed, the abolition of the Senate has been advocated from time to time by prominent Canadians and has even been embodied in the platforms of major political parties in Canada. Moreover, particularly since the so-called "Coyne Affair", and the recent refusal by the Senate to accept without amendment a government bill to confer discretionary powers on the Minister of National Revenue in respect of certain aspects of the customs tariff, there have been indications that the volcano of "Senate Reform", never extinct but for some time dormant, may erupt once more.

It is a major premise of this article that, in whatever program of reform may be seriously advanced, care should be taken to preserve the positive benefits flowing from the existence of the Senate as it now operates within the constitutional structure of Canada.

There exists a great deal of written material on the subject of what's wrong with the Senate. It has been variously, and often contradictorily, criticised as not being responsible to the people, as being a rubber stamp for the House of Commons, as being a threat to the supremacy of the House of Commons, as being over-loaded with the henchmen of one political party or another, as being either inactive or over-active. It has also been suggested that an age-limit should be prescribed for Senators, as for Judges, or that Senators should be appointed for fixed terms. The proposals for reform have hitherto been about as varied as the personalities of the reformers themselves.

On the other hand, when "Senate Reform" has been embodied in party platforms, it has been so embodied in vague and general terms. No specific proposals have been so embodied, before an election subsequently won, and in consequence no Government can thus far be said to have received a popular

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mandate for any specific reform or set of reforms. It should be added that "Senate Abolition"—which might loosely be described as a sort of drastic reform—remained in the C.C.F. party platform until the C.C.F. party was replaced nationally by the New Democratic Party in 1961. The latter party has as yet no plank in its platform relating to the Senate. The Progressive Conservative party during the 1957 election campaign advocated the calling of a Dominion-Provincial conference to consider ways and means of making the Senate a "more effective arm of democracy" and thus the Government may be said to have a popular mandate for the calling of such a conference. It should be added that it has been reported in the press that at a meeting of the Progressive Conservative Association held in Ottawa in 1961 a resolution was passed asking the Government to consider the establishment of a fixed retirement age for Senators. This is as specific a proposal as has as yet been put forward. However, no specific retirement age was indicated, nor was it indicated whether or not an age-limit should apply retroactively in respect of existing Senators: and, needless to say, no opportunity has as yet been afforded, election-wise, to obtain a popular endorsation of this proposal.

The adventures of Mr. Mackenzie King with respect to Senate reform are illustrative of the difficulties attending its consummation.

"Senate Reform"—not further defined—was first included in the Liberal Party platform at the convention of 1893, and confirmed by that of 1919. Mr. King was annoyed by the Conservative majority in the Senate which defeated some important government bills during his first administration. He was also particularly irritated whenever any Senator appointed by a Liberal administration refused to vote for legislation introduced by a Liberal government: for example, he is said to have been furious at the Liberal Senators who either were absent or voted against the Old Age Pensions Bill in 1926. Accordingly, prospective Senators in the mid-twenties undertook, before their appointment, to accept whatever measures of reform a Liberal government might propose in the future. The matter of Senate reform was discussed at the Dominion-Provincial Conference of 1927, but the discussion showed that there was little or no chance of agreement on any specific reform or set of reforms.

Shortly thereafter, the balance of power in the Senate changed and no further understandings were reached with prospective Senators, nor did Mr. King ever introduce into Parliament any positive measure for the reformation of the Senate. Mr. King's own explanation, delivered in the House of Commons on February 4, 1948, in answer to a question put by Mr. Stanley Knowles, M.P., was as follows:—

> There was nothing in the nature of a written pledge. There was no pledge made to the government, as a government. It was an undertaking that was given to myself, as the one who was responsible for nominating members to the Senate. How many there were from whom I received that assurance, I cannot say at the present time. Nor am I in a position to say just when I ceased to raise that question. It did not become as important later on, when we had a majority in the Senate, and were in a position to see that permanent legislation originating in this house was not defeated because of action on the part of a hostile opposition in the upper chamber.

In the end, Mr. King is said to have regretted ever having recommended reform, not because he had abandoned his earlier view that some reform was desirable, but because of his embarrassment at being unable to implement his undertaking without undue controversy. The succeeding St. Laurent administration exhibited no enthusiasm whatever for "Senate Reform", although that administration did recommend to the Governor General several appointments of persons who were not supporters of the Liberal Party. "Senate Reform" was not mentioned in any of the resolutions adopted by the National Liberal Convention of 1948, or subsequently.

No doubt, any man-made institution, including the Senate, is susceptible of reform. No doubt, also, being in favour of reform *per se* is like being against sin. Nevertheless, any successful reform must rest jointly on a thorough knowledge of what is being reformed and on a firm assurance that what is proposed in the name of reform will in fact result in an improvement over what has gone before. And indeed, if there are to be basic constitutional revisions, such as would be involved in any major reform of the Canadian Senate, the history related above suggests that those revisions, in their specifics, should follow and not precede a clear indication of popular support therefor, including the support of the several provincial legislatures.

If these conditions precedent were met, all the evidence suggests that such revisions would not be resisted, but on the contrary would be facilitated, by the Senate. And, of course, under our existing constitution, the Senate must concur in all proposed legislation emanating from the House of Commons, including legislation proposing Senate reform.

Two classic statements by eminent Senators may usefully be quoted in support of what has just been said.

In 1957, the Honourable W. Ross Macdonald, in delivering his first speech as Leader of the Opposition in the Senate following the Progressive Conservative election victory in that year, stated as follows:—

> I think that we would all do well to remember that the Senate has not, traditionally, resisted the adoption of any piece of government legislation for which a government has received a clear popular mandate, whether as the result of a general election or otherwise. Nor would it, in my view, be inclined to do so in future, in the absence of the most compelling reasons for believing that the issue should be referred once again to the electorate.
>
> So far as I am concerned, I propose to have full regard to these important precepts and principles. However, in so doing may I add this: there will be room for argument as to whether or not there has been a popular mandate for any particular bill. All government bills will be examined in an honest endeavour to determine whether there has been such a mandate, but this examination will not be conducted in any unfair or hypercritical way.

Earlier, the Right Honourable Arthur Meighen had addressed the Senate in the following terms:—

> Where there is a mandate for legislation which comes before the Senate; where such legislation was clearly discussed and placed on the platform of the successful party in an election, then only in most exceptional circumstances should there be any attempt or desire on the part of the Upper House to refuse to implement a mandate by its concurring imprimatur. No one, however, who has thought the subject out can say that under no circumstances should legislation coming to the Senate from the Commons, though clearly supported by a popular

> mandate in an election, fail of support in the Second Chamber. It has been plainly and tersely enunciated by Sir John Macdonald, by George Brown and by Maritime statesmen, as well as by Taché of Quebec, that the Senate's duty, or one of its duties, is to see not only that wise legislation, having for its purpose nothing but the public good, is allowed, irrespective of mandate, to become law, but in certain conceivable events to see to it as well that the public of Canada, which may at one election have endorsed extraordinary proposals, has opportunity, if such proposals are of a particularly dangerous or revolutionary character to think the subject over again; in a word, that the Senate may, under certain circumstances, be allowed to appeal from the "electorate of yesterday" to the "electorate of tomorrow".

The position of the Senate in the constitution of Canada, as one of the two Houses of Parliament, was established by the British North America Act, 1867, as part of the accommodation reached by the federating provinces at a series of conferences which took place successively in Charlottetown, Quebec and London. It was set up in its present form because otherwise the Confederation of Canada would either have died aborning or have been indefinitely delayed.

The authors of Confederation—of whom it has been said "they builded better than they knew"—desired a constitutional system similar in principle to that of the United Kingdom. In particular, the less populous provinces wanted an assurance of equal treatment, regardless of population, in at least one of the two Houses of the new Parliament. They wanted to ensure also that the Upper House had the right either to concur in or reject any piece of legislation emerging from the House of Commons. They clearly wished to establish an Upper House which would be independent both of the executive and of the House of Commons.

For the foregoing reasons there were, in the formulation of the Canadian concept of an Upper Chamber, two deliberate departures from the British tradition. In the first place, all Senators were to be appointed by the Governor General for life; and secondly, the principal geographical areas of Canada were to have equal numerical representation in the Senate without regard to population. Obviously, the application of any hereditary or aristocratic principle would have been inappropriate in the new world, and Prince Edward Island alone of the negotiating provinces argued for an elected Upper House.

No question arose as to the inclusion of a "swamping power", whereby an unlimited number of Senators could be appointed by the executive so as to alter the composition of the Senate to its own advantage. Rather, the principle embodied in the Constitution of the United States, whereby the United States Senate was to be equally representative of the individual States of the Union, was adapted to Canadian purposes. The maximum number of Canadian Senators is accordingly fixed in the British North America Act, 1867, and is alterable only by a formal constitutional amendment. (It should be added for complete accuracy that special provision is made in the Act for the appointment of four, or eight, additional Senators equally representing the four main territorial divisions of Canada. This is a small concession to the idea of a "swamping power", but the provision has not been invoked since Confederation).

In legislation, the two Houses were to be co-equal, saving only that so-called "money bills"—measures designed to impose taxes or authorize the expenditure

of public moneys—were to be introduced (as in the United Kingdom) only in the House of Commons.

These are the principal historical reasons for the existence and operation of the Canadian Senate in its present form.

Perhaps it should also be noted that the Senate was never intended to be a competitor of the House of Commons in the field of legislation. It was intended primarily as a reviewing body exercising quasi-judicial powers: in one of its principal aspects its duty was, in the words of Sir John A. Macdonald, to take a "sober second look" at measures emanating from the House of Commons.

By virtue of sections 21 and 22 of the British North America Act, 1867, as amended, the Senate is now composed of 102 Senators, all appointed for life by the Governor General of Canada on the explicit recommendation of the Prime Minister. There are 24 from Quebec; 24 from Ontario; 10 from Nova Scotia; 10 from New Brunswick; 4 from Prince Edward Island; 6 from Manitoba; 6 from British Columbia; 6 from Saskatchewan; 6 from Alberta; and 6 from Newfoundland. In the case of Quebec, each of the 24 Senators is appointed for one of the 24 electoral divisions of what was Lower Canada.

The qualifications of a Senator are that he be at least thirty years old; be a natural-born or naturalized British subject; own real property to the value of at least four thousand dollars over and above all encumbrances in the province for which he is appointed; own property real and personal worth at least four thousand dollars over and above his debts and liabilities; and be resident in the province for which he is appointed. In the case of Quebec, he must have his real property qualification in the electoral division for which he is appointed, and be resident in that division.

A Senator may resign at any time by addressing his resignation to the Governor General, and becomes disqualified if he fails to attend during two consecutive sessions of Parliament; if he takes an oath of allegiance or becomes a citizen or subject of a foreign country; if he is adjudged bankrupt or insolvent or applies for the benefit of any law relating to insolvency; or if he is attainted of treason or convicted of felony "or any infamous crime". In addition he must continue to be qualified in respect of property and residence.

All questions relating to the qualifications of Senators or to vacancies arising from disqualification are, in accordance with section 33 of the constitutional Act "heard and determined by the Senate".

The Governor General (in practice, the Government) appoints the Speaker of the Senate and "may remove him and appoint another in his stead".

The equality of legislative power, as between the two Houses, is established by sections 91 and 17 of the British North America Act, 1867. Section 91 assigns "exclusive legislative authority" in the federal matters therein enumerated to the Parliament of Canada. Section 17 provides as follows:—

> 17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

The Parliament of Canada is thus a trinity, on the British model, and in the enactment of legislation can only function as a trinity. Each proposed legislative measure must be passed both by the Senate and House of Commons and thereafter receive the Royal Assent, which is given, on the Queen's behalf, by the Governor General. The giving of the Royal Assent is now a formality only, but in the legislative process there must still be a meeting of minds between the two Houses of Parliament: any disagreement between them which is not resolved by a joint conference results in the defeat of the proposed legislation. It should also be noted that since the constitutional amendment of 1949, which added what is now Head 1 to section 91 of the British North America Act, the Parliament of Canada is competent to enact measures of Senate reform without reference either to the Parliament of the United Kingdom or to the provincial legislatures. The basic fact remains that the concurrence of the Senate therein would be necessary.

The sittings of the Senate usually lack the glamour and excitement, and the atmosphere of political contention, which characterize the sittings of the House of Commons. The debates in the Senate are generally restrained and the speeches relatively brief and to the point. Purely political speeches, procedural wrangles and filibusters are at a minimum. Bills are explained and discussed in what is ordinarily a tranquil atmosphere. The circumstance that Senators do not need to have an eye to their own re-election makes for an economy of words. Thus, during a parliamentary session the Senate meets less frequently and its sittings are shorter than those in the Commons where there is an ever-present current or undercurrent of political controversy. It has been said, however, that if anyone wants to understand a particular bill he should read the debates in the Senate, where attention is usually concentrated on the merits or demerits of the proposed legislation.

It was clearly understood by the authors of Confederation that Senators would be chosen from the ranks of the supporters of the party in power, and it was thought that there would always be available in the ranks a sufficient number of able and experienced men in all parts of the country. This particular expectation has in the main been realized. However, it was also expected that, having in mind particularly the experience of the united Province of Canada, there would be comparatively rapid changes of administration, so that the supporters of one political party or another would not have an ascendancy in the Upper House for any extended period of time. This expectation has not been realized; the balance has changed from time to time, but very slowly.

However, in the Senate, though it is organized along party lines with a Leader of the Government and a Leader of the Opposition as in the House of Commons, party lines are not in ordinary circumstances severely drawn. An eminent parliamentarian, the Honourable Raoul Dandurand, said to the Senate in February, 1936:—

> The framers of the Confederation intended this chamber not to be a duplicate of the Commons . . . if we felt and acted as though we were, our usefulness as a second chamber would

> be gone. The Senate is not a duplicate of the House of Commons. We stand above the sharp divisions of party that exist in the other chamber, and we approach all questions with a desire to do our best for the general interest of the country.

And the Honourable John T. Haig, in his maiden speech as Leader of the Government in the Senate, had this to say in October, 1957:—

> All I urge on the Opposition here is that, in reaching a decision upon any issue, if they cannot justify their proposed action as something which the Senate ought to do in the interests of Canada, and on that basis alone, they should not do it. If, however, they believe that some measure which is proposed by myself or my associates is in the interests of this country, their duty is plain.

As an eminent parliamentarian once said, the Senate is "a work-shop, not a theatre". It would be more accurate, though less picturesque, to say that it supervises the activity of a number of work-shops. This is because the Senate does its most effective parliamentary work through its standing and special committees. Anyone whose knowledge is derived solely from reading or observing the debates in the Senate itself knows less than half enough about the Senate. There is in the Senate a considerable reservoir of sagacity and experience from which Senate committees draw their sustenance.

The work of the Senate may be classified under three headings, not necessarily in order of importance: private legislation, public legislation, and the reports of special committees on matters of national importance. Attention will be concentrated on these three headings in the remainder of this article. However, it should be noted here that the Senate, as does the House of Commons, provides a forum for the free discussion of national and international affairs, for the declaration and criticism of government policy and administration and for the airing of particular grievances. Canada is a country of substantial economic, geographic and ethnic diversity needing ties to draw it together — centripetal forces to counteract the ever-present centrifugal forces which would split the country asunder. In either House, representative views from all parts of Canada may be publicly expressed, and any idea or grievance, from whatever part of Canada it emanates, may be fully ventilated under the protection of "parliamentary privilege".

The Senate has the principal initiative in respect of private bills — which provide for exceptions to the general law — all of which now originate in the Senate. At each session approximately 400 private bills are passed by the Parliament of Canada, the bulk of them bills of divorce to annul, or dissolve on the ground of adultery, the marriages of persons domiciled in Quebec or Newfoundland where there are no divorce courts. Included, however, are bills to incorporate banks, railway companies, extra-provincial pipeline companies, telephone companies, insurance companies, trust companies, loan companies, small loan companies and eleemosynary and religious bodies. There are three principal reasons for private bills: some kinds of companies are required by a general Act of Parliament to be so incorporated; in some instances, the procurement of an Act of Parliament is the only way in which a particular problem

can be resolved — as for example, the divorce of persons domiciled in Quebec or Newfoundland; and, lastly, the finality and prestige of an Act of Parliament are often desired, especially by charitable and religious bodies seeking incorporation.

Elaborate precautions are taken to ensure that all persons who might be affected by the passage of the bill are notified and given an opportunity to support or oppose it.

Each private bill receives the careful attention of the appropriate standing committee of the Senate. The sponsors of any such bill must "prove the case" with great meticulosity. In the committee, any opponents are heard in opposition. The committee carefully considers whether the facts are as alleged and whether a good case has been made for the enactment of the bill, and in particular whether the bill is within the legislative competence of the Parliament of Canada; whether any private interests would be unfairly and adversely affected by its enactment; and whether the bill is in accordance with sound public policy. The principal effort in respect of such bills is expended by the Senate and it is rarely indeed that a private bill is rejected, or even amended, when it is subsequently dealt with in the House of Commons.

In respect of public legislation — bills making changes in the general law — the principal initiative rests with the House of Commons. This is partly because money bills must be introduced in the popularly elected body. It is also true that, in general, government bills are introduced in the House of Commons where the responsible Minister of the Crown may best pilot their passage. Exceptionally, however, numerous government bills having a technical character and no direct financial or political implications — such as the recent revisions of the Bankruptcy Act, the National Defence Act and the Criminal Code of Canada — are by design introduced in the Senate so that the House of Commons may have the benefit of their prior scrutiny and amendment by a standing or special committee of the Upper House. Some of the best work of the Senate has been done in this legislative area.

Generally, however, the work of the Senate in respect of public legislation is of a quasi-judicial character: it takes through its committees, in the words of Sir John A. Macdonald quoted above, a sober second look at legislation emanating from the Commons — legislation which may have been passed in haste or on impulse, or as a matter of compromise, and for which there exists no popular mandate. At the session just concluded, for instance, it made many amendments to public bills which were accepted, and indeed welcomed, by the Commons. One notable example is the provision, in the Act distinguishing between capital and non-capital murder, which provides for a poll of each juryman on the matter of clemency. On the other hand, it insisted on its proposed amendment in respect of the customs tariff, alluded to above, and rejected the government bill to declare vacant the office of Governor of the Bank of Canada.

It should be added here that it is the invariable custom of the Senate to refer all controversial bills, public as well as private, to one of its standing committees, where any person may give evidence either for or against their passage. In the Commons, public bills are not always, or even usually, referred to standing or special committees so that often the first and only opportunity afforded to a person desiring to oppose the passage of a particular bill is when that bill is referred to a committee of the Senate.

Finally, the Senate at the request of the executive or on its own initiative regularly establishes select committees to examine into and report upon matters of national importance. Recent examples may be found in the fields of narcotics, national housing, inflation, land-use, manpower and employment. In most cases, such reports are followed sooner or later either by positive legislation or changes in government policy. A special committee of the Senate provides an excellent forum for the examination of witnesses from all parts of the country. The operation of such committees is much less costly than the operation of Royal Commissions, and their reports have been at least as enlightening and productive as those of Royal Commissions.

The foregoing represents an attempt to describe, in general terms and from an historical point of view, the functions and functioning of the Senate. This article neither proposes nor opposes Senate reform, but could be regarded as at least one backdrop against which the question might usefully be viewed. And this particular backdrop, confessedly, has been painted in the manner of one who, in Shakespeare's words, "finds sermons in stones, tongues in trees, books in the running brooks and good in everything".

THE ARTICLES OF THE CIVIL CODE ON THE PRIVILEGES OF THE BUILDER: SOME OF THE PROBLEMS THEY POSE AND SUGGESTED AMENDMENTS THERETO

John W. Durnford*

Privileges are an exception to the rule that all creditors rank rateably in relation to the assets of their debtor (articles 1981 and 1982 C.C.), and unlike hypothecs, which can be created by private agreement, privileges exist only in those instances provided for by law. Consequently, the only claims that are privileged are those listed as such in the Civil Code (the privileges on moveable property are set forth in articles 1993 and following, and those on immoveable property in articles 2009 and following), together with a number of additional privileges especially created by statute, *e.g.* under the Quebec Succession Duties Act (1943, 7 G. VI, ch. 18), government claims for succession duties are also privileged.

Why are certain claims declared privileged? Article 1983 C.C. states that the cause of the preference granted to the privileged creditor is based on the origin of his claim. In other words, certain claims are declared privileged because of their special nature rather than because of the personality of the creditor. Accordingly, funeral expenses are privileged because of the desirability of the dead being buried rather than with a view to favouring the undertaker over other creditors. This is in contrast to hypothecs, which are designed to protect certain creditors. In a conventional hypothec, it is the specific creditor who has demanded the security who is protected. Perhaps a more apt example would be the legal hypothec, which results, like privileges, from the law alone but which is applied for the protection of certain creditors because of the particular qualities of those creditors — thus, for example, married women have a legal hypothec to secure certain claims against their husbands (article 2029 C.C.), and minors and interdicts have a legal hypothec upon the immoveables of their tutors or curators for the balance of the tutorship or curatorship account (article 2030).

From the foregoing, we can presumably deduce that it is by reason of the special nature of the claims of the workman, supplier of materials, builder and architect that the same are declared to be privileged. As the said claims find their origin in work done on buildings, it might be suggested that this rule is a corollary to the principle set forth in article 1688 C.C. that the builder and architect will be jointly and severally liable in the event of the perishing of the building within five years, this provision being one of public order and consequently not susceptible to being derogated from by private agreement[1]. In

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[1]Mignault, *Le Droit Civil Canadien*, VII, p. 407; Faribault, *Traité de Droit Civil du Québec*, XII, p. 440.

other words, it being in the public interest that buildings be properly constructed, the securing of the claims of the builder is not only a necessary and desirable but also an equitable counterpart to the heavy onus placed on him[2]. There is, however, apparently another equitable cause for the existence of these privileges, namely, the builder having added to the value of the property, it would not be fair if the other creditors of the debtor were allowed to benefit from the additional value at the builder's expense — thus the provision for him to be disinterested first[3]. Let us now consider whether the Code articles contain adequate provisions to secure the claims of the builder.

The provisions of the Civil Code as to the construction privileges have suffered from many vicissitudes, having been amended in 1894, 1895, 1904, 1916, 1924, 1947 and 1948. The mere fact of so many changes in the law discloses in itself an unsatisfactory situation, and the articles were not all models of good and clear drafting at their various stages of amendment. In the case of *Archibald v. Maher*[4], Mr. Justice Brodeur was moved to say:

> (at pages 470-471) . . . il y a des oublis bien évidents et qui nous démontrent bien que toute cette législation a été rédigée bien hâtivement et qu'elle donne lieu à certain doute et à une certaine ambiguité qui doivent nous faire rechercher l'intention du législateur (art. 12 C.C.).

Mr. Justice Mignault, in the same judgment, described the articles as:

> (at page 476) . . . this frequently amended and somewhat unskilfully drafted legislation.

It should be noted, however, that this judgment, while it was rendered in 1921, was applying the law in force prior to the 1916 amendments, which were substantial. Moreover, of the post-1916 amendments, the 1924 one only affected article 2013e and the 1947 and 1948 ones merely altered the method of registration of the privileges. This means that the rules governing the construction privileges have not been altered in substance for a respectable length of time. As the large scale of building activity that has occurred has caused this part of the Code to be frequently applied and subjected to litigation, the lack of further amendments might be taken as an indication that the articles as they now stand have on the whole proved satisfactory. While this may be true in a general way, there are nonetheless various improvements that could be made.

Article 2009 C.C. lists those privileges that affect immoveables. In *seventh place* is found:

> The claim of the workman, supplier of materials, builder and architect, subject to the provisions of articles 2013 and following;

We then find that article 2013 C.C. reads as follows:

> The workman, supplier of materials, builder and architect have a privilege and a right of preference *over all the other creditors on the immoveable*[5], but only upon the additional value given to such immoveable by the work done or by the materials.

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[2]As to the notion of equity, see the remarks of Brodeur, J., in *Archibald v. Maher* (1921), 61 S.C.R. 465 at 467.

[3]*Masson v. Salomon* (1937), 62 K.B. 50, at 53 and 58-60.

[4](1921), 61 S.C.R. 465.

[5]The *italics* are mine.

According to this latter article, the builder ranks first (even though this will only be in relation to the additional value he has brought about and he will not rank as a privileged creditor at all on the rest of the immoveable's value), but this is in contradiction to his having been classified as ranking in seventh place in article 2009. It may well be that the phrase in article 2013 is merely to give the builder precedence over a hypothecary creditor[6], but the article does not say so. Marler[7], in referring to this article, merely italicizes the words "by preference over all other creditors" with a view to underlining their importance and thus seems to infer that they cause the builder's privilege to override the six preceding privileges listed in article 2009, but he does not actually say so. Giroux[8], on the other hand, is of the definite opinion that the construction privileges will rank after the other six, but tempers this by suggesting that of those six only law costs and assessments and rates are likely as a general rule to outrank the construction privileges, the rest of the six being rarely claimed at the same time[9].

The difficulty that we are faced with here may have been caused by a misinterpretation of articles 2009 (7) and 2013. It has been frequently held that the builder's privilege affects ouly the additional value[10]. Is this accurate? If the two articles are read together, do they not mean that the builder ranks first as regards the additional value he has given to the immoveable and seventh as regards the balance of the immoveable's value?

In any event the exact meaning of the articles is not clear and it is submitted that an amendment should be made to clarify the situation.

* * *

In whose favour do the construction privileges avail and for what services performed and materials supplied? Are they limited to pure construction and then only when performed directly in relation to the building being erected?

[6]That these privileges will rank before a hypothec appears from: Marler, *The Law of Real Property*, pp. 342, 376 and 377; Giroux, *Le Privilège Ouvrier*, pp. 34, 37, 46 and 407-408; "Des Privilèges et des Hypothèques" by Philippe Demers, J., Journées du Droit Civil Français, p. 527; "Etude sur la loi des privilèges" by Oscar Desautels (1927-28), 30 R. du N. 144 at 145; *La Perrelle Lumber Co. Ltd. v. Langlois* (1939), 77 S.C. 1 (Pratte, J.) (where the hypothec was registered on May 2, the end of the work occurred on July 16 and the privilege was registered on August 6); *Supertest Petroleum Corporation Ltd. v. Jacques-Cartier Automobiles Inc.*, [1960] S.C. 329 (Edge, J.) together with the case comment thereon by Roger Comtois (1960-61), 63 R. du N. 109 (but it should be noted that the judgment is presently under appeal).

[7]*The Law of Real Property*, p. 362.

[8]*Le Privilège Ouvrier*, pp. 404-407.

[9]See *Ethier v. Duguay*, [1961] R.P. 399 (Marquis, J.), at p. 404, where the law costs and assessments and rates were made to rank before the privilege of the supplier of materials.

[10]*Ethier v. Duguay*, [1961] R.P. 399 (Marquis, J.); *Gadbois v. Stimson-Reeb Builders Supply Company*, [1929] S.C.R. 587 at 594; *In re: Legault* (1939), 67 K.B. 356; Marler, *The Law of Real Property*, p. 354; Giroux, *Le Privilège Ouvrier*, pp. 390 and 407.

In *Bernier v. Foucault*[11], the Court of Appeal held that workmen engaged by a supplier of materials to cut stone in a quarry that was to be furnished for the construction of a church (situated at about 95 miles from the quarry) had no privilege on the church property for their wages, their work not having been done on the immoveable in question. This unquestionably is a sound decision on the provisions of the Code, and if the privileges, which are by nature exceptional, are to be kept within any reasonable bounds (*i.e.* work done directly on the immoveable itself), the law on the point appears to be fair. Similarly, it would only seem right that where a workman is engaged for the levelling of a vacant lot and the planting of sod thereon, he should have no privilege on the property, no building construction being involved (as was held in *Boileau v. Terreault*[12]).

We are faced with a more borderline situation, however, where we see a supplier of materials being denied a privilege in connection with the furnishing of gravel for the levelling of ground around a building being erected[13]. It is true that article 2013e grants a privilege to the supplier of materials ". . . on the immoveable in the construction of which the materials supplied to the proprietor or builder have been used . . .", but as good building is regarded by the law as being in the public interest, and as the construction of a building in the larger sense is not complete until the ground has been properly levelled around it, can it not be argued that he who has participated in such levelling has made a contribution to the construction entitling him to a privilege? It is submitted that an amendment might possibly be in order here.

A far more serious problem, however, poses itself. Suppose a building needs a new roof. This would be classed as a repair. Or suppose an old building is modernized and/or substantially renewed or altered; this would be renovation. It is in the public interest that good buildings be constructed — is it not just as much in the public interest that buildings be kept in good repair and condition? It might be objected that if anybody doing repair work on a building were to be granted a privilege, *e.g.* a plumber for replacing a pipe, a bricklayer for repointing a few bricks and a painter for repainting a few rooms, the door would be opened to a flood of privileged claims which would run contrary to the policy of the law: namely, that a privilege constitutes an exception to the general rule that all creditors rank equally. Is this objection well founded? The same limiting factor would apply as already affects all construction privileges — namely, that the privilege would only affect whatever additional value might be given to the property by the work done or by the materials furnished (article 2013). Thus the mere replacement of a pipe, the repointing of some bricks and the repainting of a few rooms would probably not confer any privilege on the plumber, the bricklayer or the painter because of the absence

[11](1941), 70 K.B. 315.

[12](1935), 73 S.C. 129 (Chase-Casgrain, J.).

[13]*Robert v. Bouliane*, [1956] R.L. 446 (Drouin, J.).

of additional value, in just the same way as a person partaking in the original construction whose work or materials failed to add to the value would have no privilege either.

Do the courts hold that repairs and renovations are eligible to be declared privileged? There is no clear-cut answer to this question as the courts have wavered in the face of unclear Civil Code provisions.

In the case of *Rochon v. Garneau*[14], Mr. Justice Chase-Casgrain held that the work that plaintiff plasterer had done was nothing more than repairs to the interior of the building consisting of maintenance work and decoration which were not necessary to prevent the perishing and deterioration of the building and did not constitute construction work, which alone was accorded a privilege by the Civil Code. However, it should be noted that the court held that plaintiff was too late in any event, and it seems unlikely that the work met the criterion of article 2013 of adding value to the property.

In the very same volume of the Superior Court reports, a diametrically opposed decision was rendered by a highly regarded judge, Mr. Justice Philippe Demers, in the case of *Masson v. Solomon*[15]. He cited Troplong and Pothier to show that in the old French law the privilege covered repairs. This was reproduced in the famous Registration Ordonnance passed by the Special Council in 1841[16] of which section 31 reads in part as follows:

31. Et qu'il soit de plus Ordonné et Statué, que les créanciers privilégiés, des privilèges et droits et réclamations privilégiés desquels il sera et pourra être enregistré des sommaires en conformité avec cette Ordonnance, sont et seront déclarés être les suivants, savoir:— . . . Quatrièmement les Architectes, constructeurs, ou autres ouvriers, employés à l'édification, reconstruction, ou réparation de bâtisses, canaux, ou autres travaux ou ouvrages, . . .

31. And be it further Ordained and Enacted, that the privileged creditors, of whose privileges and privileged rights and claims, memorials shall and may be registered, in pursuance of this Ordinance are, and shall be adjudged to be, the following, that is to say:—. . . Fourthly, Architects, builders, or other workmen employed in the building, re-building, or repair of buildings, canals, or other erections or works; . . .

Much the same wording was used when these provisions were reproduced in the 1861 Consolidated Statutes for Lower Canada[17].

26. Les créanciers privilégiés dont les réclamations devront être enregistrées dans le but de conserver leur priorité d'hypothèque à cet égard, sont les suivants:

4. Les architectes, constructeurs ou autres ouvriers employés à la construction ou reconstruction ou réparation de bâtisses, canaux ou autres édifices et ouvrages; . . .

26. The privileged creditors whose claims shall be registered in order to preserve their priority of hypothec therefor, are the following:

4. Architects, builders or other workmen employed in the building, re-building or repair of buildings, canals, or other erections or works; . . .

Having referred to the foregoing old law, the judge pointed out that the codifiers were obliged to reproduce the old law in the Code. He dealt with the objection that the codifiers employed only the word "construction" in the

[14](1935), 73 S.C. 5.

[15](1935), 73 S.C. 196.

[16]4 Victoria, chapter 30.

[17]Chapter 37, section 26.

French text by saying that they also dropped the mention of "canaux ou autres ouvrages" and that in the English version the word "works" was used in place of the words "building, rebuilding and repairs" of the old law, and that under article 2615 it is the English text reproducing the previous law which prevails.

It should be noted that this discussion by the judge is based on the original text of 2013 as prepared by the codifiers (and which had been replaced in the meantime by the present article 2013 in 1916), the relevant part of the article then reading as follows:

2013. Le constructeur, ou autre ouvrier et l'architecte ont droit de préférence seulement sur la plus-value donnée à l'héritage par leurs constructions . . .

2013. Builders, or other workmen, and architects, have a right of preference . . . only upon the additional value given to the immoveable by their works . . .

Thus he concluded that the Code had not changed the law and that accordingly the privilege covered repairs as well as construction. Moreover, he held that this was also true under the present version of article 2013 which speaks of "travaux ou matériaux":

2013. L'ouvrier, le fournisseur de matériaux, le constructeur et l'architecte ont un privilège et un droit de préférence sur l'immeuble, mais seulement quant à la plus-value donnée à cet immeuble par leurs travaux ou matériaux, à l'encontre de tous les autres créanciers.

2013. The workman, supplier of materials, builder and architect have a privilege and a right of preference over all the other creditors on the immoveable, but only upon the additional value given to such immoveable by the work done or by the materials.

Furthermore, Mr. Justice Demers argued that the word "constructeur" was not limited to "celui qui bâtit", but that instead a "constructeur" does all kinds of work: construction work, improvements and repairs.

In support of his view that the privilege covers repairs as well as construction, Mr. Justice Demers cited *Desbiens v. Vilandré*[18], in which Chief Justice Sir François Lemieux said "Il est de doctrine que le mot constructeur s'entend de l'entrepreneur de travaux tant de construction proprement dite que de réparation" (but it should be noted that in that case it was held that the builder had lost his privilege through tardy registration, which detracts from the weight of the opinion expressed); Langelier[19], who said (in commenting on article 2013) "Comme vous voyez, le privilège mentionné dans cet article[20] est pour garantir toute créance résultant de travaux faits sur un immeuble pour y construire un édifice, ou le réparer" (but apparently he did not expand on this bare statement); and the following statement in the head note of the Supreme Court decision in *Riordon Co. Ltd. v. John W. Danforth Co.*[21]: "A person who has supplied work and material in the construction or repair of a building and who under provincial law has acquired a lien or privilege upon the increased

[18](1923), 61 S.C. 124 at 125.

[19]*Cours de droit civil*, VI, p. 228.

[20]Article 2013 was no longer in its original form but was not yet in its present form. At the time that Langelier wrote, it conferred a privilege". . . upon the additional value given to the immoveable by the work done (travaux faits)".

[21](1923-24), 4 C.B.R. 248 at 249.

value of the real property by reason thereof is a 'secured creditor' for the amount of such lien or privilege within the definition of sec. 2 (gg) of the Bankruptcy Act. . ." (but there seems to be an absence of remarks in the notes of the judges supporting this statement that repairs are privileged).

The judgment of Mr. Justice Demers was taken to appeal under the name of *Masson v. Salomon*[22]. In appeal it was argued that while under the old French law and under the Napoleonic Code repairs were included, our law had been changed by our Civil Code in that repairs were omitted. The Court of Appeal maintained the trial judgment but with two out of the five judges dissenting (Dorion and Rivard, JJ.). Chief Justice Sir Mathias Tellier held that the builder's privilege included repair work as well as new construction work (though of course only insofar as the same gave additional value to the property), and pointed out that under article 2013 a privilege is conferred on the builder et al when "*par leurs travaux ou matériaux*" they have added to the property's value, it being irrelevant whether the work or materials are applied to the erection of a new building or the repair of an old one, there being no distinction in the Code.

Mr. Justice Walsh was of the opinion that ordinary repairs would not give rise to a privilege. This statement was probably meant to be modified by a subsequent statement to the effect that the builder and workmen should be protected if their work and material enhanced the value of the immoveable, which would apparently not exclude those repairs which qualified. However, there is no escaping the fact that Mr. Justice Walsh was in favour of granting the privilege only on the basis of there having been renovation to the point of partial reconstruction. He felt that there was such partial reconstruction in this instance.

Mr. Justice St. Jacques said it was unnecessary to compare the French and English versions of the Code to come to the proper answer; that the answer lay in the principle common to all legal systems that as a matter of equity all works done on an immoveable will give rise to a privilege; that the omission from the Code of specific reference to repair work did not exclude the same; and that the real criterion was that the builder's privilege was based on the increase in value resulting from the works done.

Mr. Justice Dorion, dissenting, said that if a privilege existed for repairs, it could only be if the Code articles in their latest amended form provided for it, and because of the various amendments that had occurred it was not permissible to have reference to the pre-Code law or to the opinion of Pothier. This statement is based on unanswerable logic, and Mr. Justice Dorion then proceeded to interpret the Code in the following manner: the articles speak only of construction, not repairs, *e.g.* article 2013 uses the word "constructeur" (builder), and in article 2013a is found the word "construction" both in relation to the definition of the term "end of the work" and of the term "supplier

[22](1937), 62 K.B. 50.

of materials". The judge did admit, however, that provided that repairs comprised partial constructions or reconstructions, they would qualify for the privilege but only insofar as they constituted construction. In other words, besides the necessity for the work and materials to have met the criterion of having added to the value of the property, the judge is holding that they must also constitute construction.

Mr. Justice Rivard (also dissenting), after stating that privileges are to be interpreted narrowly, pointed out that the Legislature deliberately omitted repairs and that repairs could not be included in construction, as the latter means to build according to a plan, the act of building being to erect on the ground works of masonry or woodwork (or to enlarge a building already built), whereas repairs of an already existing house will not constitute construction. It is significant that Mr. Justice Rivard dismissed the work done in the present case as being mere decorating work and the repair of deteriorated surfaces, unlike Mr. Justice Walsh who labelled it renovation or partial reconstruction and consequently entitling the contractor to a privilege which the latter judge stated would not exist for ordinary repairs.

Thus the decision of the Court of Appeal in the case of *Masson v. Salomon* on the question of repairs being eligible for a privilege is a weak one. Only two of the judges, Tellier and St. Jacques, JJ. held that repairs were covered, the two dissenting judges disagreed, and Mr. Justice Walsh was of the opinion that ordinary repairs did not qualify, but only renovations amounting to partial reconstruction.

In a comment on the foregoing Court of Appeal judgment[23], Me. Henri Turgeon was inclined to feel that the view of the dissenting judges that repairs were not privileged would prevail. He relied in part on the opinion of Giroux[24], who cites article 2013f to the effect that the builder (constructeur) has a privilege on the immoveable for the work he has done as such, and then defines a builder as one ". . . qui bâtit, qui édifie, qui construit", *i.e.*, one whose activity constitutes construction work. From this Giroux concludes that a person is only entitled to the privilege of article 2013 if he is a builder (constructeur) and does construction work, which he defines as consisting of the erection or enlargement of a building. The following passage is of particular interest:

> (Page 85-86) . . . il doit, pour être appelé le constructeur de l'article 2013, faire des travaux de construction sur un immeuble; il doit donc ériger tout un édifice ou une partie; il doit faire un assemblage de matériaux d'où résulte un bâtiment ou de ses oeuvres vives; il doit faire les travaux, soit au total soit pour une partie, pour qu'une bâtisse existe comme bâtisse; en un mot, il doit, par son oeuvre, soit créer un édifice, soit en transformer un. Les travaux de construction ne sont donc que ceux qui font exister un édifice ou qui l'agrandissent; ne peuvent donc porter ce nom, tous les divers travaux qui ont pour but de maintenir en bon ordre une propriété, de l'orner, de l'embellir, de la décorer ou de lui adjoindre des commodités. En conséquence, ne concourant pas à la construction d'un édifice, ne peuvent être le constructeur de l'article 2013 et jouir d'un privilège comme tel, ceux qui font sur l'immeuble des travaux d'entretien, *v.g.*

[23](1936-37), 39 R. du N. 381.

[24]*Le Privilège Ouvrier*, pp. 84-86, 113-121. It should be noted that this book was published in 1933.

ceux qui réparent le système de chauffage, qui posent du papier de tenture sur les murs d'une pièce, qui vernissent des planchers, etc.; ceux qui font sur l'immeuble des travaux de réparation, *v.g.* ceux qui refont une couverture, qui placent du ciment dans les interstices des pierres d'un mur, qui refont plancher, qui replacent du plâtre sur les murs, etc.; ceux qui font sur l'immeuble des travaux d'embellissement, *v.g.* ceux qui posent des tapisseries, des boiseries, qui décorent un appartement, qui y disposent les tentures, ceux qui y placent les tapis, qui y entrent les meubles meublants ou qui les choisissent, etc.; enfin, tous ceux qui, par leurs travaux, augmentent les services et l'utilité d'une propriété, *v.g.* ceux qui y installent des machineries, bouilloires, frigidaires, en un mot, toute la série d'objets mobiliers susceptibles de devenir, par le service qu'ils procurent à une propriété ou par leur attache matérielle, immeubles par destination; et, pour terminer, ceux qui aménagent un terrain en parc, en jeu de tennis, etc.

The author seems to go somewhat further in the following passage taken from page 118:

. . . Mais ne peuvent faire naître de privilèges ouvriers: tous les travaux d'entretien d'un édifice; tous les travaux de décoration ou d'ornementation d'une propriété; tous les travaux de réparations; tous les travaux de réfection, *v.g.* remplacer par un toit plat une couverture à pignon, transformer en magasin le rez-de-chaussée d'une maison résidentielle, modifier les divisions d'un appartement, convertir en plusieurs logements une propriété à un seul logement, etc.; . . .

It seems to be going rather far to suggest that it is not construction to replace a flat roof by a gable one, to convert the ground floor of a house into a store, and to convert into several lodgings a property which consists of a single lodging.

With the rather weak decision of the Court of Appeal in the *Masson v. Salomon* case and Giroux's hostile opinion as background, what subsequent views have been expressed on the question of repairs?

Mr. Justice Duranleau, in *Sirois v. Novis*[25], in connection with the claim for wages of a workman (a carpenter) hired by the contractor for repair work which the latter was carrying out, was very definitely of the opinion that repairs were included, and he held that in this instance the repairs and additions (which were not specified in the reported judgment) were important and of a nature to add to the property's value.

On the other hand, Mr. Justice Denis, in the 1945 decision of *Hudon v. Clitsky*[26], expressed grave doubt as to whether repairs were included, but he was able to avoid ruling on the issue because he held that the repairs had not added to the property's value. In *Bellefeuille v. Bellefeuille*[27], Mr. Justice P. Cousineau held that a claim for painting was not eligible for a privilege.

Demers, in *Traité de Droit Civil du Québec*, XIV, at pages 167-168 says the following:

. . . Il couvre les travaux de construction, de même que ceux de réparation ou d'amélioration pourvu que ces dernières réparations et améliorations, aient donné à la bâtisse en question une plus-value réelle et appréciable. Car s'il ne s'agit que de réparations ordinaires qui ne servent qu'à remettre en état des choses endommagées ou vieillies, on ne peut prétendre qu'il a là une plus-value quelconque de donnée à l'édifice. C'est là que peut entrer en jeu le caractère de l'édifice dans l'appréciation de la plus-value. Pour une construction donnée, les réparations peuvent ne pas donner une plus-value, pour une autre, c'est différent. . .

[25][1943] R.L. 418.

[26][1945] S.C. 201.

[27][1953] R.L. 170.

Thus the Courts are divided on the issue as to whether repairs are included. It is the opinion of the writer that the present provisions of the Code are not satisfactory on this subject. There is, first, the criterion that the work or materials must have resulted in an additional value. There is, secondly, the other criterion of rather doubtful application that the additional value must have resulted from construction. Is there any reason why the repairer should not be entitled to a privilege just as much as the builder who constructs insofar as additional value is given to the property, or insofar as the repairs prevent a diminution of the value of the property by preventing or forestalling deterioration? It might be argued that repairs that are such as to have added to the value of the property must necessarily constitute construction and therefore qualify for the privilege. This will undoubtedly be true in many instances. However, there are repairs (*e.g.* painting an old house) which will in no way constitute construction but which may nevertheless add value. Is it sound, then, to have any criterion other than the addition of value to the property by work done or by materials? Would it not be better to omit the requirement that construction be involved?

It is suggested that it should be borne in mind that this privilege is based in part at least on the equitable principle that a debtor's other creditors should not benefit from the additional value given to a debtor's property by a particular creditor without first disinteresting that creditor. Is it relevant how the additional value was brought about? Furthermore, we have seen that it is in the public interest that good buildings be built. It is just as important that buildings already erected be properly maintained.

It is therefore submitted that the Code should be amended so as to confer the privilege on all those who add to the value of an immoveable by work done or by materials and whether by construction or otherwise, and so as to confer the privilege also on those who by their work or materials prevent the deterioration of a building which would lead to a diminution of its value. That these ideas are neither revolutionary nor new appears from the following passage from Marler:

> (page 354) The creditor who has done any work whatsoever on an immoveable which has given to it an additional value is entitled to the privilege for what is due him.

and from the following passage from the notes of St. Jacques, J. in *Masson v. Salomon* (*supra*):

> (page 60) L'idée dominante de notre loi en cette matière de privilèges accordés à l'ouvrier, ou fournisseur de matériaux, au constructeur et à l'architecte, procède de ce principe: que la plus-value donnée à l'édifice ou à l'immeuble par leurs travaux doit être attribuée lorsqu'il y a concours entre les créanciers, au paiement des travaux qu'ils ont faits, et ce, dans la mesure et jusqu'à concurrence de l'augmentation de valeur.
>
> C'est là, à mon avis, le véritable critère pour déterminer de quelle façon se partagera le prix de vente d'un immeuble lorsqu'il est insuffisant pour acquitter toutes les créances qui l'affectent.

* * *

The valid exercise of construction privileges depends on their being registered and/or sued on within specified delays reckoned from the date of the

"end of the work", failing which the privileges are lost. It is therefore crucially important to be able to determine when this date occurs. The definition of article 2013a is exceedingly vague, perhaps deliberately so in order to give the Courts latitude in deciding individual cases[28]:

> The words "end of the work" mean the date at which the construction is ready for the use for which it is intended.

The Courts have filled out this definition with a series of rules that on the whole have been consistent and logical. Thus the occupation of the building by the owner or tenant is not in itself conclusive evidence that the end of the work has been reached[29]; the end of the work occurs only when all or substantially all the work has been accomplished[30], and the end of the work has been held to have been reached even though other work was subsequently carried out only where the circumstances were somewhat special, *e.g.* the additional work was very minor or did not form part of the work contracted for[31]; and where the work is abandoned, the end of the work occurs on the date of abandonment[32], but where the work is merely suspended, the delays for exercising the privilege run only from the date of final completion[33], with

[28]*Billet v. Loranger*, [1945] S.C. 160 (Forest, J.).

[29]Marler, *The Law of Real Property*, p. 357; Demers, *Traité de Droit Civil du Québec*, XIV, p. 174; Walter S. Johnson Q.C., "The 'End of the Work' " (1951), 11 Rev. du B. 245, at 247ff; Giroux, *Le Privilège Ouvrier*, p. 300; *La Banque Jacques-Cartier v. Picard* (1900), 18 S.C. 502 (Langelier, J.); *Quintal v. Bénard* (1901), 20 S.C. 199 (Langelier, J.); *Letellier de Saint-Just v. Blanchette* (1912), 21 K.B. 1; *The Brunswick Balke Collender Company v. Racette* (1916), 49 S.C. 50 (Court of Review); *J. L. Vachon & Fils, Ltée v. Corbeil* (1929), 35 R.L.n.s. 453 (Walsh, J.); *Commission des Ecoles Catholiques de Montréal v. Canada Iron Works Co.* (1935), 58 K.B. 565 at 570ff; *Kirallah v. Gagnon* (1936), 61 K.B. 264; *La Perrelle Lumber Co. Ltd. v. Langlois* (1939), 77 S.C. 1 (Pratte, J.); *Jubinville v. Dagenais*, [1942] S.C. 475 (Loranger, J.); *Asconi Building Corporation v. Creswell-Pomeroy Ltd.*, [1942] K.B. 718, at 720 and 722.

[30]*La Banque Jacques-Cartier v. Picard* (1900), 18 S.C. 502 (Langelier, J.); *Quintal v. Bénard* (1901), 20 S.C. 199 (Langelier, J.); *The Brunswick Balke Collender Company v. Racette* (1916), 49 S.C. 50 (Court of Review); *Blouin v. Dame Martineau* (1925), 63 S.C. 73 (Letellier, J.); *J. L. Vachon & Fils, Ltée v. Corbeil* (1929), 35 R.L.n.s. 453 (Walsh, J.); *Commission des Ecoles Catholiques de Montréal v. Canada Iron Works Co.* (1935), 58 K.B. 565 at 570ff; *Kirallah v. Gagnon* (1936), 61 K.B. 264.

[31]*Desbiens v. Vilandré* (1923), 61 S.C. 124 (Sir François Lemieux, C. J.); *Paquin v. Beauchamp* (1931), 69 S.C. 139 (Philippe Demers, J.); *Schulte United Properties (Ltd.) v. Germain* (1932), 53 K.B. 386; *Alppi v. Hamel* (1939), 66 K.B. 448; *Léo Perrault Ltée v. Easterbrook*, [1943] S.C. 79 (Mackinnon, J.).

[32]*Léo Perrault Limitée v. Brault*, [1957] Q.B. 827; *Rochon v. Garneau* (1935), 73 S.C. 5 (Chase-Casgrain, J.); *Blais v. Blais*, [1958] S.C. 715 (Marier, J.); *Dorval v. Plante*, [1951] S.C. 359 (Casgrain, J.); there is also *Cook v. Archibald* (1920), 29 K.B. 364, which was confirmed on different grounds by the Supreme Court, under the name of *Archibald v. Maher* (1920), 61 S.C.R. 465—however, see the remarks made in *Léo Perrault Limitée v. Brault* (supra) concerning the reasoning of the Supreme Court, and see also Walter Johnson, "The 'End of the Work' " (supra) at pp. 256-257. There is as well the borderline decision of *Billet v. Loranger*, [1945] S.C. 160 (Forest, J.). See the discussion by Giroux, *Le Privilège Ouvrier*, pp. 309ff.

[33]*In re: Leblanc*, [1960] Q.B. 661; *Provost v. Dinardo*, [1946] S.C. 477 (Mackinnon, J.); *Jubinville v. Dagenais*, [1942] S.C. 475 (Loranger, J.); *Kirallah v. Gagnon* (supra); there is also the borderline decision of *J. L. Vachon & Fils, Ltée v. Corbeil* (1929), 35 R.L.n.s. 453 (Walsh, J.).

the additional fact of the owner going into bankruptcy not constituting in itself conclusive evidence of an abandonment[34]. There is, however, one problem still not entirely settled, and that is as to whether the end of the work occurs only on the completion of the whole building or following each stage of construction. In other words, where a workman has been employed only on the building of the foundations, does the end of the work occur for him on the completion of the foundation or of the building as a whole? In *Vezio v. Lessard*[35], Mr. Justice Duclos held that in the erection of a building there are several constructions, that of the walls, of the roof and so forth, and that when, for example, the construction of the foundations is completed, the end of the work has occurred, as they have become ready for the use for which they are intended, namely to receive the walls. The workman who was suing consequently lost his privilege by reason of not having taken action within thirty days after the foundations had been finished. The writer feels that this is an untenable position based on an excessively narrow interpretation of the phrase ". . .the date at which the construction is ready for the use for which it is intended". Surely the Legislature was contemplating the use for which the completed building was intended. A number of strong judgments[36] have put *Vezio v. Lessard* into a minority position. However, certain remarks of the Court of Appeal in *Asconi Building Corporation v. Creswell-Pomeroy Ltd.*[37] disclose that a certain danger still exists of this theory rearing its head again. Moreover, the danger is made the greater by the fact that Demers in the *Traité du Droit Civil du Québec*[38] simply reiterates the holding in *Vezio v. Lessard* and the remarks in *Asconi Building Corporation v. Creswell-Pomeroy Ltd.* In view of the foregoing, it is submitted that the Code should be amended so as to make it clear that the end of the work will occur only when the construction in its entirety is ready for the use for which it is intended.

* * *

Where the supplier of materials contracts with the builder (*i.e.* a general contractor), instead of with the owner himself, he must notify the owner of his contract with the builder for the delivery of materials, and he will only have a privilege as regards the materials delivered after the giving of notice,

[34]*In re: Leblanc* (*supra*); *Re: Legault* (1939), 67 K.B. 345; and see also Walter Johnson, "The 'End of the Work' " (*supra*) at pp. 257-258. *Contra*: Demers, *Traité de Droit Civil du Québec*, XIV, p. 175.

[35](1926), 64 S.C. 298; this judgment was commented on by Oscar Desaurels in "Etude sur la loi des Privilèges" (1927-28), 30 R. du N. 144 at 151ff.

[36]See especially *Raymond v. Tremblay*, [1955] R.P. 399 (Challies, J.) and *Picard v. Rome*, [1959] S.C. 23 (Brossard, J.) together with a comment on the latter judgment by Hubert Sénécal, (1959-60), 6 McGill L.J. 131.

[37][1942] K.B. 718; see the criticism of this judgment by Walter S. Johnson, Q.C. in "The 'End of the Work' " (1951), 11 Rev. du B. 245 at 253-255.

[38]XIV, pp. 174-175.

so that if he gives no notice, he will have no privilege (article 2013e). This article stipulates that such notice must be *in writing*. This makes it comparatively easy to establish whether the owner was notified or not, and whether the terms of the notice were adequate.

The sub-contractor is in a position similar to the supplier of materials—he too must give notice to the owner where he has been engaged by the general contractor (article 2013f). Probably through legislative oversight, however, the form of the notice is not specified. Consequently the notice need not be in writing. If a verbal notice was given, its proof will depend on the application of the complex general rules of evidence. If the owner does not actually admit having received the notice, there might at least be a commencement of proof in writing opening the door to testimony on the part of the sub-contractor. But in the absence of an admission and of a commencement of proof in writing and where the amount in question exceeds fifty dollars (which it is almost sure to), the only other ground on which the sub-contractor could use testimony would be if the matter were commercial for the owner (article 1233, para. 1). Here the sub-contractor will run up against the well-known general principle that immoveables cannot be the objects of commercial contracts[39]. An exception to this rule is that a contract affecting an immoveable will be commercial where the owner of a commercial enterprise (*e.g.* a store) engages a builder to enlarge his store for the purpose of furthering his business[40]. Consequently, where the sub-contractor is working on a house, he will be out of luck; he will only be able to testify that he has given notice if the matter happens to be commercial for the owner[41]. From the foregoing, it will be seen that the sub-contractor's right to prove that a verbal notice has been given will depend on varying factors which detract from the consistency and relative certainty that would exist if a written notice were required. It is, therefore, submitted that article 2013f should be amended so as to provide for the notice by the sub-contractor to be in writing.

* * *

There is a certain anomaly in the jurisprudence as to the obligation of the supplier of materials and the sub-contractor to advise the owner in the notice of the price of the materials or the sub-contract. In either case the owner may retain out of the contract price a sufficient amount to cover the claims (article

[39]Perrault, *Traité de Droit Commercial*, Volume I, p. 327.

[40]*Blais v. Paradis* (1933), 54 K.B. 495.

[41]The following are judgments on the question of the admissability of testimony to establish that a verbal notice has been given: *Richman v. The Seni Construction Co. Ltd.* (1929), 67 S.C. 400 (Archer, J.), also reported at (1929), 35 R. de J. 193; *Billet v. Loranger*, [1945] S.C. 160 (Forest, J.); *Belisle v. Riendeau*, [1950] S.C. 39 (Duranleau, J.) and see brief write up of this case in (1949-50), 52 R. du N. 452; *Norio v. Better Homes Builders Ltd.*, [1960] S.C. 224 (André Demers, J.); *Renaud v. Roussel*, [1961] R.P. 384 (Ste. Marie, J.).

2013e and 2013f). However, while article 2013f sets forth a procedure (by reference to article 2013d) whereby the owner may ascertain a suitable amount to be retained (to protect himself against the sub-contractor's claim) (by means of the sworn certificate of an architect or engineer) article 2013e does not provide for any such procedure in the case of the supplier of materials. Despite this, it has been held that the sub-contractor's notice must indicate the nature of the sub-contract and the price for which it is being carried out so as to enable the owner to ascertain the amount he should retain from the contract price[42]; whereas on the other hand it has been held that the supplier's notice need not mention the price of the materials nor indicate to the owner the amount which he should retain.[43] Thus in the case of the supplier of materials, not only does the supplier not have to state the price of materials, but there is no procedure for their value to be fixed by an architect or engineer. How is the owner to know what amount he should retain?

It is submitted that the foregoing gives rise to the need for amendment. Should this amendment be to the effect that the notice must mention the value and price of the materials or set up a procedure for an architect or engineer to give a certificate of evaluation? The former would appear preferable — it would be simpler, and the price of materials is easier to establish than the value of a workman's labour and of a sub-contractor's work.

* * *

While this is not the place for a detailed examination of the nature and effect of resolutory clauses in deeds of sale and of dation en paiement clauses in deeds of loan and of the problems posed by the same, an article on the desirability of amending the Code in relation to the construction privileges would be incomplete if the effect on these privileges of the exercise of these clauses were not pointed out.

A contractor erects a building for Jones, the owner of the property. He does so on the comfortable assumption that if Jones does not pay him he will have a privilege on the property which will secure his claim. If the contractor is informed that a balance of price is owing by Jones to his vendor, he will logically answer that his privilege will rank before that of the vendor (article 2009). If he is told that Jones has borrowed money and that the loan is secured by a hypothec on the property, the contractor will rightly point out that there is strong authority to the effect that as regards the increased value he has brought

[42]*Hamelin v. Perron* (1941), 79 S.C. 418 (Archambault, J.); *Renaud v. Roussel*, [1961] R.P. 384 (Ste. Marie, J.); Demers, *Traité de Droit Civil du Québec*, XIV, p. 191.

[43]*Papillon v. Bérubé*, [1946] K.B. 310; *Morissette v. Pichette*, [1955] S.C. 231 (Choquette, J.); *Faille v. Lefrançois* (1927), 33 R.L.n.s. 100 (Trahan, J.); Demers, *Traité de Droit Civil du Québec*, XIV, p. 186. *Contra*: *Millen et Frère Ltée v. René* (1940), 78 S.C. 534 (Chase-Casgrain, J.).

about to the property his privilege will rank before that of the hypothecary creditor even though the hypothec may have been registered before the privilege[44].

What a shock may come to the unfortunate contractor! Jones runs out of funds and fails to pay the contractor, who then registers his privilege within thirty days after the end of the work. Jones also fails to meet the payments due to his vendor or the hypothecary creditor, as the case may be, and one of these now strikes with the aid of the resolutory clause (in the sale) or of the dation en paiement clause (in the loan). What happens? The vendor or hypothecary creditor rebecomes/becomes the owner of the property retroactively to the date of the sale/loan, free and clear of the contractor's privilege by reason of the stipulation in the clause providing that the property shall be free of all privileges and other encumbrances. And all this without regard to what may be owing to the vendor/lender — hence if the balance owing is only $5,000, he will nonetheless get clear title to a property worth $100,000 of which the contractor may have contributed $75,000 through the erection of a building, leaving the contractor with only a personal claim against the insolvent owner. Highway robbery! And yet the contractor will not have any right to claim from the vendor/lender on the basis of unjust enrichment, which recourse does not lie where the enrichment has been caused by a clause in the contract between the owner and the vendor/lender[45]. Not everyone agrees that these clauses are valid or desirable insofar as they extinguish the builder's privileges[46]. Demers, for his part, gives the advantage to agile lawyers by taking both sides of the question in one book[47] without making any cross-references:

> (page 157-158) La jurisprudence a eu souvent à étudier le cas où un immeuble est vendu à une personne qui par la suite fait des améliorations pour lesquelles les fournisseurs de matétiaux ou les constructeurs enregistrent un privilège. Qu'advient-il alors de ces privilèges? Subsistent-ils ou les voit-on tomber tout simplement? La Cour supérieure avait prononcé en faveur du maintien du privilège (1934 C.S. Lamoureux v. Robert, 41 R.J. 29.) et l'année suivante la Cour du Banc du Roi décida le contraire (1935 B.R. Vachon v. Deschênes, 59 B.R. 193). Plus tard la Cour supérieure revint à la charge en maintenant le privilège (1936 C.S. Gowan v. Laffite Ltée, 43 R.L. 190) et il semble, pour les raisons données dans ce jugement, que c'est cette dernière décision qui est la plus juste. En effet, dit le jugement, il est injuste que celui

[44]Article 2013 C.C.; Marler, *The Law of Real Property*, pp. 342, 376 and 377; Giroux, *Le Privilège Ouvrier*, pp. 34, 37, 46 and 407-408; "Des Privilèges et des Hypothèques" by Philippe Demers, J., Journées du Droit Civil Français, p. 527; "Etude sur la loi des privilèges" by Oscar Desautels, (1927-28), 30 R. du N. 144 at 145; *La Perrelle Lumber Co. Ltd. v. Langlois* (1939), 77 S.C. 1 (Pratte, J.) (where the hypothec was registered on May 2, the end of the work occurred on July 16 and the privilege was registered on August 6); *Supertest Petroleum Corporation Ltd. v. Jacques-Cartier Automobiles Inc.*, [1960] S.C. 329 (Edge, J.), together with the case comment thereon by Roger Comtois, (1960-61), 63 R. du N. 109 (but it should be noted that the judgment is presently under appeal).

[45]Reference should be made to Challies, J., *The doctrine of unjustified enrichment in the law of the Province of Quebec*, 2nd edition, pp. 104-108, and to André Morel, *L'évolution de la doctrine de l'enrichissement sans cause*, pp. 104-107.

[46]Marler, *The Law of Real Property*, pp. 365-366; Faribault, *Traité de Droit Civil du Québec*, XI, pp. 345-346 and 525; Bergeron, "De la clause dite 'dation en paiement' dans les contrats de prêts hypothécaires" (1960) 4 Cahiers de Droit, page 5.

[47]*Traité de Droit Civil du Québec*, XIV.

qui reprend sa propriété profite de la plus-value donnée à son immeuble sans encourir de responsabilité. D'autant plus que le jugement de la Cour du Banc du Roi dans la cause de *Vachon v. Deschesnes* a souvent reçu une fausse interprétation; le contrat de vente qui y est discuté contenait certaines conditions de résolutions qui concernaient spécialement les améliorations, et comme l'acte était enregistré, la Cour du Banc du Roi lui a donné un caractère public qui remplaçait l'avis et la connaissance du fournisseur.

(page 169) . . . la résolution de vente (1934 C.S. Dussault v. Grenier, 72 C.S. 138; 1936 C.S. Gowan v. Lafitte Ltée, 43 R.L. 190; Contra: 1939 C.S. Lanthier v. Rink 78 C.S. 20; 1935 B.R. Vachon v. Deschênes, 59 B.R. 193), ne le (the privilege) fait pas disparaître, autrement on violerait le principe de justice qui défend à quiconque de s'enrichir *sans cause* aux dépens d'autrui.

(page 185) . . . s'il s'agit d'une vente avec clause résolutoire et que la vente soit annulée en vertu de cette clause, l'annulation fait disparaître le privilège du fournisseur (1939 C.S. Lanthier v. Rink, 78 S.C. 70).

(page 189) . . . le constructeur ne perdra pas son privilège sous prétexte que la propriété est retournée entre les mains du vendeur en vertu d'une clause résolutoire faute de paiement. Le vendeur ne peut s'enrichir sans cause aux dépens du constructeur (1933 B.R. Dechêne v. Rochon, 56 B.R. 160; 1934 C.S. Dussault v. Grenier, 72 C.S. 138; 1899 C.R. Latour v. L'Heureux, 16 C.S. 485).

(page 237) La clause résolutoire contenue au titre d'acquisition ne rendra pas le débiteur incapable de consentir une hypothèque, mais si plus tard la vente est annulée en vertu de cette clause résolutoire, les hypothèques consenties entre la vente et son annulation tomberont et seront purgées. (1937 B.R. Krukowsky v. Paré, 63 B.R. 126; 1939 C.S. Pilon v. Amiot, 42 R.P. 340.—Tout comme nous avons vu que le privilège du fournisseur de matériaux était purgé par l'annulation de la vente en vertu de la clause résolutoire: 1939 C.S. Lanthier v. Rink, 78 C.S. 70. 1935 B.R. Vachon v. Deschesnes, 59 B.R. 193.—1936 B.R. St. Pierre v. Lefebvre, 61 B.R. 168. *Contra* 1934 C.S. Lamoureux v. Robert, 41 R.J. 29).

No one will quarrel with the hypothecary lender or with the seller to whom a balance of price is owing that he is entitled to security adequate to ensure payment. Surely the hypothec or vendor's privilege above is designed by the law to constitute in itself sufficient security — this is reflected in the fact that the builder's privilege may only be exercised against the additional value which his work or materials have given the property, thus leaving unaffected that part of the value of the property affected by the hypothec or vendor's privilege. To this it might be objected that where the loan is being made for construction purposes, *i.e.* the borrower needs the money in order to build, the privileges will affect the whole of the value of the building and will rank entirely before the hypothec of the lender. To this the answer would be in the maxim: *Vigilantibus non dormientibus juvat lex.* The lender should not advance the proceeds of his loan until the construction is well under way, because should the building remain uncompleted the lender will in any event have virtually no security. He should also make sure that the accounts of the architect, contractors, sub-contractors, suppliers of materials and workmen are being paid and/or they have waived their privileges. In this way, the lender will have proper security on the house as originally constructed.

Even were it to be granted, however, that the lender should have the additional security of the dation en paiement clause (or the vendor of the resolutory clause), surely the exercise of such right should be subjected to the builder's privilege, for while technically speaking the builder's claim against the owner will not fall into the category of unjust enrichment on a technical basis, it certainly constitutes an unjust enrichment in the larger sense.

The Courts in the majority of the reported cases have maintained the exercise of the resolutory and dation en paiement clauses[48]. The justification for depriving the builder of his privilege is that he should have conducted a search at the registry office before undertaking the work. As the law now stands this would indeed be a wise precaution. However, it would add considerably to the contractor's costs to arrange for the title examination, and it would be no answer to this objection to suggest that such examinations be limited to the instances where large contracts are involved, for a small contract is just as important to the small contractor as a large one is to a big contractor.

It is therefore submitted that the Code be amended so as to provide that where a resolutory clause or a dation en paiement clause is exercised, it be subject to the builder's privilege.

* * *

One final plea! The Civil Code represents one of the finest and most valuable parts of our Province's heritage. Its original provisions stand out for the beauty of their drafting. The same may not, alas! be said for all the amending provisions. While the articles on the builder's privileges may, as a result of their numerous changes, meet most of the requirements in this field, they do not attain the standard of true civil law drafting as is found in the Code as originally drafted. Instead of setting down principles to be interpreted and applied by the courts, they are a poorly drafted attempt at detailed regulation.

A heavy responsibility lies on the shoulders of those whose task will be the revision of our Civil Code, not only to bring the same up to date with modern conditions, but also to transform the vile-looking amendments that have been made in the long intervening years since 1866 into a style befitting that of the original codifiers.

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[48]As to the resolutory clauses: *Latour v. L'Heureux* (1899), 16 S.C. 485 (Court of Review); *Provost v. Paquin* (1913), 44 S.C. 511 (Court of Review); *Vachon v. Deschenes* (1935), 59 K.B. 193; *Lanthier v. Rink* (1940), 78 S.C. 70 (McDougall, J.). *Contra: Dussault v. Grenier* (1934), 72 S.C. 138 (Bouffard, J.), but see the critical comment by Henri Turgeon, (1934-35), 37 R. du N., 540; *Lamoureux v. Robert* (1935), 41 R. de J. 29 (Trahan, J.); *Gowan v. Laffitte Limitée* (1937), 43 R.L.n.s. 190 (Chase-Casgrain, J.); *Barbeau v. Chalifour* (1926), 41 K.B. 536. See also the general cases of *Krukowsky v. Pare* (1937), 63 K.B. 126; *Pilon v. Amiot* (1939), 42 R.P. 340 (Foresr, J.); *Perras v. Godin*, [1956] Q.B. 871; *Sharpe v. Purity Flour Mills Ltd.*, [1959] Q.B. 633; *Dansereau v. Boissy*, [1955] S.C. 385 (Brossard, J.); *Charbonneau v. Doucet*, [1958] R.L. 186 (Brossard, J.); *Fortier v. Roy*, [1957] Q.B. 664; *Val Morin Mountain Lodge Inc. v. Laperle*, [1961] Q.B. 410 and comment thereon by Roger Comtois, (1961), 21 Rev. du B. 530. As to dation en paiement clauses: *G. A. Brown Inc. v. Dame Allan*, [1953] S.C. 349 (Lalonde, J.); *Dame Dumberry v. Dame Moquin*, [1959] S.C. 184 (Prévost, J.) and see the comment by Roger Comtois, (1959-60), 62 R. du N., 165. See also the general cases of *Plouffe et Cie Ltée v. Aubin* (1931), 50 K.B. 280; *Goldsmith v. Montreal Motor Transport* (1934), 72 S.C. 277 (Mackinnon, J.); *Decarie v. Dame Decarie* (1922), 60 S.C. 143 (Mercier, J.); *In re: Michelin* (1958-59), 37 C.B.R. 101 (Montpetit, J.) and see the comment thereon by Roger Comtois, (1958-59), 61 R. du N. 224; *In re: Beauchatel Construction Inc.*, [1961] S.C. 145 (Brossard, J.); *In re: Frank Ireland*, unreported judgment of Mr. Justice Bernier, S.C.Q. 6791-F (1961); *Dame Goulet v. Coco Island Inc.*, [1961] S.C. 402 (Ferland, J.); *Côté v. La Caisse Populaire de Montmorency Village*, [1958] S.C.R. 121; *Alarie v. Credit Mauricien Inc.*, [1956] Q.B. 693; *Thibeault v. Dame Lafaille*, [1951] S.C. 188 (Lalonde, J.).

THE REGULATION OF ACTIVITIES IN EXTRA-AERONAUTICAL SPACE, AND SOME RELATED PROBLEMS

René H. Mankiewicz*

Introduction

Space and pre-space law

The time has finally come to put an end to the interesting, but purposeless discussion of the question whether and in what manner existing legal rules, particularly those regarding sovereignty over airspace, apply or whether they may be construed in such a manner as to make them apply to the status and legal regime of extra-aeronautical space. It is gratifying to note that speakers at the Fourth Colloquium on the Law of Outer Space, held at Washington in October 1961, were less concerned with finding out where the outer limit of airspace lies under the present law, and concentrated instead on the more practical problem of where actually to draw the lower limit of extra-aeronautical space which, it seems now agreed, is not subject to the sovereignty or jurisdiction of the underlying State. On the other hand, it is urgent indeed to develop and to agree on the rules to govern the steadily expanding and increasingly daring space activities.[1]

Space activities have presented humanity with a "novel case". Hence, it is useless to attempt to base the legal regime of outer space on the traditional law of nations or on the existing rules of international air and maritime law.[2] Like any "case of first impression", a legal system for outer space, including its geographical scope, will be established by decisions of an essentially political character, even though some attempt will be made to vest these decisions with a semblance of legal respectability by the use of such juridical alibis as restrictive, extensive, literal or historic construction of existing rules, analogy

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[1]Writings on this subject have become so abundant that even a select bibliography becomes unwieldy. An important selection of papers and a comprehensive bibliography have been published in March 1961 by the Legislative Reference Service of the Library of Congress, Washington, under the title: "Legal Problems of Space Exploration — A Symposium," for the use of the Committee on Aeronautical and Space Sciences of the United States Senate — Senate Document No. 26, 87th Congress, 1st Session.

[2]The question of the bearing of article I of the Chicago Convention on the legal status of outer space has been authoritatively discussed in many publications and statements by J. C. Cooper. See in particular: "Legal Problems of Upper Space" (1956) Journal of Air Law and Commerce, p. 308; Proceedings of the American Society of International Law (1956), p. 84; "High Altitude Flight and National Sovereignty" (1951) International Law Quarterly, p. 411; Hearings of the Select Committee on Astronautics (Washington, 1958), p. 1277; *see* also my comments in Annuaire français de droit international (1959), p. 129 and p. 149 *et seq.*, and E. Pepin, "The Legal Status of the Air Space in the Light of Progress" in Aviation and Astronautics, (Publication No. 2 of the Institute of International Air Law, Montreal, 1957).