BOOK REVIEWS

BANKING AND BILLS OF EXCHANGE

BY JOHN DELATRE FALCONBRIDGE, SIXTH EDITION, TORONTO: CANADA LAW BOOK COMPANY LIMITED, 1956, PP. XX, 987. $27.00

For students of comparative law there can be few subjects of greater interest in Canada then the application of the federal Bills of Exchange Act with its common-law concepts and terminology in the civil law province of Quebec. To a lesser degree the operation in Quebec of the federal Bank Act also presents interesting material for comparative legal analysis. An increased emphasis on this aspect of his subject is a prominent feature of the sixth edition of Falconbridge's *Banking and Bills of Exchange,* for a long time now the leading Canadian work in these two fields. There are, of course, reasons of more general importance for welcoming a new edition of this valuable work. Apart from the need to bring the case references up to date (the author cites about forty new cases under banking and at least fifty under bills of exchange), there have been two decennial revisions of the Bank Act since the fifth edition was published in 1935. But while there has been no comparable change in the Bills of Exchange Act — only the amendment in 1951 permitting banks to close on Saturday — some very important writing on the subject of bills of exchange in relation to the civil law has come out of Quebec since 1935, and Falconbridge's commentary on these Quebec studies represents a substantial part of the additional material to be found in his sixth edition.

The Quebec work which Falconbridge discusses consists of Nicholls' admirable articles on prescription and novation in relation to the Bills of Exchange Act[1] which appeared soon after the fifth edition of Falconbridge's book, as well as a case comment by Nicholls on consideration in 1947,[2] and the late Antonio Perrault's comprehensive study of negotiable instruments which came out in 1940[3] and was the third, and as it turned out, the last volume in an ambitious project on the commercial law of Quebec. Perrault's book contained some rather controversial discussion of the opinions expressed by Nicholls on certain points and was reviewed by Falconbridge, with particular reference to Nicholls' articles, in a long piece in the Canadian Bar Review entitled, "The Bills of Exchange Act in the Province of Quebec".[4] Some of the argument contained in this review article is reproduced in the

[1]"The Bills of Exchange Act and Prescription in the Province of Quebec" (1936-37), 15 Revue du Droit 396, 459, 539, 608, and (1937-38), 16 Revue du Droit 26; "The Bills of Exchange Act and Novation in the Province of Quebec", (1938), 16 Can. Bar Rev. 602, 706.

[2](1947), 25 Can. Bar Rev. 397.

[3]Antonio Perrault, *Traité de Droit Commercial,* v. 3, 1940.

[4](1942), 20 Can. Bar Rev. 723.

sixth edition, but the article remains an important supplementary source of Falconbridge's thinking (some of it admittedly in a transitional stage of development) on several of the issues raised by Nicholls and Perrault. The general problem on which these authors concentrate is the field of operation which has been left by the Bills of Exchange Act to the civil law in Quebec. Falconbridge found much matter for criticism in Perrault's vigorous and provocative analysis of the Bills of Exchange Act from a civilian point of view, but he confessed that his own thinking had been greatly stimulated by it. However one may disagree with Perrault's arguments on particular points — and at times he goes very far in his claims on behalf of the civil law — lawyers in Quebec are deeply indebted to him for his detailed and pioneering work on a very difficult subject.

Perrault's chief preoccupation in his series on the commercial law of Quebec, particularly the first two volumes, was the distinction in Quebec between commercial and civil matters to which important consequences attach. Falconbridge has revised the section on Quebec commercial law in his introductory chapter entitled "Custom and the Law Merchant" by removing the discussion of the extent to which common law decisions may be applicable as well as the list of important differences between the two legal systems on matters of special concern to banks. He has substituted for this material a short paragraph emphasizing that the system of law which governs "commercial matters" and "traders" in Quebec is a "peculiar" one, unlike either the French or common-law approach. He does not point out the particular relevance of the distinction between commercial and civil matters for his own subject of banking and bills of exchange.

Nicholls and Perrault disagree as to whether the bill of exchange and the contract arising out of a bank deposit are always commercial for both parties to them. Nicholls' opinion that the contract formed by the bank deposit is always commercial for both banker and customer,[5] even where the customer is a non-trader, appears to have some judicial opinion to support it.[6] Perrault's opinion[7] is that the contract, while always commercial for the banker, may be either civil or commercial for the customer depending on the circumstances. This is an application of the "actes mixtes" theory, which Perrault would apply to all transactions (except where the Code clearly indicates otherwise), even those which might be called commercial by nature in the sense that they are objectively so for the party who is a trader and not merely commercial for him by virtue of the accessory theory because carried out in the interests of his business. However illogical the results of the mixed contract theory may appear (the benefit of the commercial rules, e.g. proof

[5]Nicholls, "The Legal Nature of Bank Deposits in Quebec", (1935), 13 Can. Bar Rev. 635, 720 at 723.

[6]*Dame Reimnitz* v. *La Banque de Montréal* (1928), 66 Que. S.C. 315, at p. 319.

[7]Perrault, *Traité de Droit Commercial*, v. 2, no. 940 and p. 385, note (1).

by testimony, may be claimed *against* the party for whom the transaction is deemed commercial but not by him) it has been applied to other transactions on many occasions by Quebec courts. Unless one is prepared to recognize some theoretical limit to the application of the mixed contract theory as, for example, that it should only apply where the contract is commercial for the trader in virtue of the accessory theory, it would seem to be consistent to apply it to the bank deposit as well as to other contracts. While the contract which is classified as commercial by nature, in the sense that it is always commercial for both parties, is much to be preferred from a practical point of view in its simplicity and uniformity of result to the complicated and in some respects illogical mixed contract theory,[8] the difficulty is to determine, in the absence of express legislation, when a contract is one which is always commercial for both parties. On one occasion it was said in the Supreme Court of Canada[9] that there was no reason for applying the mixed contract theory in Quebec. The case involved an action on a loan by a non-trader to a trader and the question was whether the prescription governing civil or commercial matters should apply. Since the lender was a non-trader and the transaction for her one of investment rather than commercial profit the court held the loan to be civil in nature and the prescription governing civil matters to apply. The same result would have been obtained in this case had the mixed contract theory been applied. If in determining what the nature of the contract is to be for both parties we must, in the case of loan, look at it from the point of view of the lender,[9a] then, logically it would be possible to argue in a given case that a bank deposit, which is a loan for consumption, was *civil* for both parties.

When Perrault wrote in 1940 he conceded that the weight of the Quebec doctrine and jurisprudence was against his view that the nature of the bill of exchange depended on the nature of the underlying transaction out of which it arose as well as the status or occupation of the persons involved.[10] If, for

[8]It is difficult to reconcile Perrault's recommendation that there be a fusion of commercial and civil law by extending the application of certain rules now reserved for commercial operations to all transactions (see Perrault, "Le Droit Commercial québecois: 1923-1947", (1948), 26 Can. Bar Rev. 137) with his insistence, so long as the distinction remains, that the mixed contract theory be applied to all transactions.

[9]*Darling* v. *Brown* (1876-77), 1 S.C.R. 360.

[9a]Cf. Roch & Paré, Vol. 13 (Trudel Series) p. 217.

[10]Perrault's opinion is found in Traité de Droit Commercial, v. 1, nos. 343, 478 and 479; v. II, nos 1130-1132; v. III, nos. 398-422; 768, 815. Quebec authors holding the contrary view that the bill of exchange, cheque and promissory note are always commercial in nature for all parties to them: Mignault, Droit civil canadien, v. 5, p. 480, v. 6, p. 64, note (e), v. 9, p. 526; Langelier, Cours de droit civil, v. 4, pp. 30, 223; Nicholls, "The Bills of Exchange Act and Novation", (1938), 16 Can. Bar Rev. 602, at p. 614; "The Bills of Exchange Act and Prescription in the Province of Quebec", (1936-37), 15 Revue du Droit at p. 606, note (93). See also his review of Perrault's first two volumes: (1937), 15 Can. Bar Rev. 733. Among the more important of the recent

example, the underlying transaction be a loan and commercial in nature for the lender, but civil for the borrower, the promissory note to which it gives rise will likewise, according to Perrault's theory, be deemed to be a mixed contract for the parties to it. Perrault felt very strongly that the general tendency of the courts to treat the bill of exchange as always commercial for all parties to it was a serious error, and he appealed to a new generation of lawyers and judges to correct the error. In his review of Perrault's book, Falconbridge noted the disagreement between Perrault and Nicholls on this point (Nicholls took the view that a bill of exchange was commercial by nature[11]) and without expressing a firm opinion himself, rather left the impression that Nicholls had come off better in the controversy.[12] It is interesting to note that in a case decided a few years ago the Superior Court applied Perrault's theory, holding in an action on two promissory notes, that verbal evidence could not be introduced against the plaintiff, payee of the notes, for whom the underlying transaction was civil in nature.[13] In *Banque Canadienne Nationale* v. *Labonté*,[14] an important case on the application of the Bills of Exchange Act in Quebec which Falconbridge does not cite, the Quebec court of appeal held that a promissory note, though given for a debt which was civil for both the maker and payee, was presumed to be commercial for all parties when negotiated to a holder in due course.[14a] There is a suggestion in some of the reasoning in this case of a compromise solution to the controversy: between the original and immediate parties a bill is presumed to be a commercial matter, but this presumption may be rebutted by proof that the underlying transaction is civil; negotiated, however, the bill becomes a commercial matter regardless of the original transaction out of which it arose. Those who favour Perrault's view could argue, perhaps, that the difference should follow the distinction between immediate and remote parties throughout the life of the bill. Where the issue is between immediate parties, whether original or subsequent, the nature of the bill would depend on the nature of the underlying transaction, if any: between remote parties it would always be commercial for both.

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decisions: *Bergeron* v. *Lindsay* 1940 S.C.R. 534 per Taschereau J. at p. 540. *Levesque* v. *Bergeron* (1939) 66 Que. K. B. 213, at p. 222 and 223; *Banque Canadienne Nationale* v. *Turcotte* (1942) Que. K.B. 383, at p. 391. Although the language of the judges at the places cited in these three cases strongly suggests a view contrary to Perrault's, on the particular facts of the cases the instruments could be held to be commercial by any test.

[11]See note (10), *supra*.

[12](1942) 20 Can. Bar Rev. 723, at pp. 736-737.

[13]*Mendel* v. *Torontour* 1953 Que. S.C. 409

[14](1947) Que. K.B. 415. The appeal to the Supreme Court of Canada in this case was abandoned.

[14a]Bissonnette J., whose reasoning on the general issue was adopted by the other judges, did not in principle exclude the right to rebut this presumption (p. 428).

The chapter entitled "Legislative Power and Conflict of Laws" has been entirely re-written by Falconbridge. It is now exclusively concerned with the subject of legislative jurisdiction, although the original title has been retained. The former material on conflict of laws is now found elsewhere, partly in the commentary on the conflict sections of the Bills of Exchange Act, but mainly in the author's *Essays on the Conflict of Laws*. An important feature of the revised chapter is the discussion of legislative jurisdiction in relation to limitation of actions or prescription. In the light of the Supreme Court decision in the *Winstanley* case,[15] Falconbridge has altered the opinion he expressed in the fifth edition that the prescription of bills and notes falls under provincial legislative jurisdiction.[16] He now contends that, apart altogether from conflict with specific provisions of the Bills of Exchange Act, such as section 74, inasmuch as the holder's right of action is part of the law of bills and notes in a strict sense, "it is beyond the scope of provincial legislative power to impose a time limit on the right to sue on a bill or note."[17] On the assumption that the reference in section 10 of the Bills of Exchange Act to the common law of England does not include statutory provisions such as the Statute of Limitations, provincial legislation on prescription of bills and notes which was in force at Confederation, like article 2260(4) of the Civil Code, remains in force until repealed by federal legislation. Falconbridge points out, however, that since the *Winstanley* case there have been two decisions of provincial courts holding provincial statutes of limitations passed since Confederation to be *intra vires* the provinces as regards actions on bills and notes.[18]

The question of prescription raises in a particularly interesting form not only the whole problem of legislative jurisdiction as it affects bills and notes but the proper interpretation of section 10 of the Bills of Exchange Act as well. This section reads: "The rules of the common law of England, including the law merchant save in so far as they are inconsistent with the express provisions of the Act, apply to bills of exchange, promissory notes and cheques." In terms of the approach which the courts have so far adopted toward the subject of legislative jurisdiction, it can be said that Parliament has exclusive jurisdiction to legislate in relation to matters coming within the subject of bills of exchange and promissory notes and may also legislate on matters which would otherwise be within provincial legislative jurisdiction but are ancillary or necessarily incidental to the effective exercise of its ex-

[15]*Attorney-General for Alberta and Winstanley* v. *Atlas Lumber Co.* (1941) 1 D.L.R. 625; (1941) S.C.R. 87.

[16]Fifth edition at p. 514. This change of opinion was foreshadowed in his review of Perrault's third volume in 1942.

[17]Sixth edition at p. 51.

[18]*Dorfer* v. *Winchell* (1941) 2 D.L.R. 772, (1941) 1 W.W.R. 541; *Attorney-General for Saskatchewan and Costley* v. *Allen* (1942) 3 D.L.R. 76, (1942) 2 W.W.R. 239. See also *Weingarden* v. *Moss* (1955) 4 D.L.R. 63. mentioned by Falconbridge in Addenda and Corrigenda.

clusive jurisdiction. On this second class of matter the provincial legislatures have jurisdiction so long as the matter comes within any of the classes of subject assigned to them by section 92 of the BNA Act and there is no conflicting federal legislation. The line between the exclusive federal jurisdiction in regards to bills and notes and what may be called the occupiable field is a difficult one to draw. Can the same criterion apply here as that which governs, in the opinion of Falconbridge, the interpretation of section 10 of the Bills of Exchange Act?

There is a strong suggestion in the sixth edition that Falconbridge would adopt essentially the same criterion for both problems.[19] He holds the effect of the cases with regard to section 10 to be that in the absence of an express provision in the Act the English common law will apply to matters which come within the limits of "the law of bills and notes in the strict sense", but that matters outside these limits may be governed by provincial law. It appears reasonable to take the view that the exclusive federal jurisdiction over bills and notes covers the law of bills and notes in the strict sense, and that beyond these limits lies the occupiable field. If any matters affecting bills and notes fall to be regulated by provincial law it is clearly not in virtue of section 10, which in its terms, far from mentioning provincial law, makes a sweeping reference to the English common law, but because provincial law on these matters is valid in virtue of section 92 of the BNA Act. Nicholls has said, "The proper interpretation of section 10 is in the final analysis a constitutional question. The Dominion in enacting it cannot be presumed to have intended to interfere improperly with the right of the provinces to legislate on property and civil rights, as it would be doing if the section were given its broadest, and perhaps most obvious meaning."[20] Technically the question is one of statutory interpretation, but in searching for that will-o-the-wisp "the intention of the legislature" and making what is in the final analysis a decision of policy, one is naturally influenced by the current distinctions of constitutional law. Did Parliament in enacting section 10 intend to cover only those matters not covered by express provision in the Act which fall within its exclusive legislative jurisdiction or did it intend as well to occupy the occupiable field? As far as this reviewer is aware, the courts have not formulated any rule of interpretation to deal with this problem. There is presumably no reason in principle why the occupiable field should not be occupied in this wholesale fashion — and there is nothing on the face of section 10 to justify any restriction or qualification — but as a matter of policy, in view of the obvious impropriety of introducing a whole body of English common law in this way into a provincial legal system, particularly the civil law system of Quebec, without a careful consideration of the detailed implications, it is probably reasonable to hold as most of the cases and com-

[19]Sixth edition at pp. 48-47. See also (1942), 20 Can. Bar Rev. 723, at 731.

[20](1938) 16 Can. Bar Rev. 602, at pp. 602-603.

mentators have in effect done, that this cannot be presumed to have been the intention of Parliament. This interpretation is not at open variance with the language of section 10; it merely gives it a restricted application. Parliament may in fact have thought that it was providing a uniform system of law to cover every aspect of bills and notes but there are practical limits to the extent to which this can be carried out in a bi-legal country. So long as we frankly acknowledge that this is ultimately a decision of policy and do not try to dress it up in a pseudo-legal proposition, we avoid argument at cross-purposes.

Of course the mere adoption of the criterion stated by Falconbridge does not solve all problems. Nicholls has called the criterion "inadequate and on occasion positively misleading".[21] It is inadequate, or "not particularly helpful", as he puts it in another place,[22] because it still leaves us with the difficult task of determining what falls within the law of bills and notes in a strict sense. (Examples usually given are the form, issue, negotiation and discharge of bills and notes.) It is misleading because a matter like prescription, which Nicholls also considers to come within the law of bills and notes in a strict sense, is governed by provincial law.[23] In his review of Perrault's book Falconbridge conceded that in the light of the Quebec cases on prescription there might be some force in Nicholls' criticism of the criterion.[24] In the sixth edition, however, he retains the criterion without qualification, although he does not go on as formerly to give examples of matters which are governed by provincial law. It is wiser not to attempt to formulate in positive terms a

[21](1937-38), 16 Revue du Droit 26, at pp. 42-43.

[22](1938), 16 Can. Bar Rev. 602, at p. 603. Cf. Nicholls, (1947) 25 Can. Bar Rev. 397, at p. 939.

[23]From all of Nicholls' statements on the right to legislate with regard to the prescription of bills and notes (some of these statements are found in the article on novation as well as the one on prescription) it would appear, as Falconbridge suggests in his review of Perrault's book, that Nicholls, while he speaks of prescription as being a matter of the law of bills and notes in a strict sense, would justify federal legislation on the subject as being ancillary or necessarily incidental to the effective exercise of Parliament's exclusive jurisdiction in relation to bills and notes. But his precise meaning is not too clear, because at one point (16 Revue du Droit at p. 41) he says, "With the exception of matters relating to evidence, the Dominion would probably have the power to legislate on this prescription as part of the *exclusive* jurisdiction granted it by section 91-18 of the British North America Act over bills of exchange and promissory notes". (Italics mine). In a word, does Nicholls contend that in the absence of federal legislation the province has the right to amend its civil code provisions governing the prescription of bills and notes, or does he merely mean that the pre-Confederation provisions apply until repealed by Parliament? If the latter, Falconbridge (sixth edition, p. 52) would agree with this, on the ground apparently that the English statute law on limitations cannot be made to apply in virtue of section 10. Nicholls emphasizes the apparent intent of Parliament in not including the provisions of the civil code governing prescription of bills and notes among those expressly declared to be repealed.

[24](1942), 20 Can. Bar Rev. 723, at p. 732. But this was before Falconbridge had [illegible] to the effect that the Quebec

general statement of what is governed by provincial law. It is submitted that the expression "the consequences of the contracts entered into by the parties to the instrument", which Nicholls seems to treat as the accepted description of what is excluded from the application of section 10,[25] is too vague to be of much use, nor is it at all clear that this is precisely the way in which Falconbridge uses it. What Falconbridge can be interpreted as saying is that the law of bills and notes in the strict sense does not include *all* the consequences of, or all the rights and liabilities resulting from, the contracts entered into by the parties to bills or notes.[26] The safest statement that has ever been made about section 10 is Nicholls' own: "No *a priori* rule can be given for the proper interpretation of section 10 of the Bills of Exchange Act. All that can be done is to examine the civil law in all its possible applications to bills of exchange, cheques and promissory notes, to weigh the propriety of applying the civil law or the common law in each instance, and to evolve from that examination a series of particularized rules-of-thumb to cover the most common situations that might arise."[27]

Although it is not always easy to determine what comes within the law of bills and notes in the strict sense, if anything would appear at first sight to fall into this category, apart from such obvious matters as the form and negotiation of the instrument, it is the classification of defences and the determination of where a particular defence stands in the classification, for this goes to the very essence of negotiability. It is what makes the rights of the holder in due course what they are, as distinct, for example, from those of the ordinary civil law assignee. Falconbridge states this view of the subject of defences for the first time, in his book, in the new edition.[28] (It was advanced first in his review of Perrault's book — a good example of the stimulating effect of some of Perrault's arguments on the development of his own thinking). Yet here too there is disagreement and a few rather good examples of the type of comparative law question which is thrown up by the application of the Bills of Exchange Act in Quebec.

One such question is the defence of *non est factum*. A person signs a negotiable instrument under the impression that it is some other contract or

cases have gone so far as to hold that the province has legislative jurisdiction over the subject, at least in the absence of the conflicting federal legislation (and it is not known that any have gone this far) there is no contradiction between Falconbridge's criterion for the application of section 10 and the present application of provincial law on prescription of bills and notes.

[25](1947), 25 Can. Bar Rev. 397, at 399. See also (1936-37), 15 Revue du Droit 396, at 398.

[26]Sixth edition, p. 435. (Italics mine.) Cf. fifth edition, p. 511, and fourth edition, p. 509, where he says, "These, as a general rule, are governed by provincial law . . . ". Cf. also *Lusher* v. *Lacroix* (1947) 23 R.L. n.s. 212, at p. 214 — "toutes les autres conséquences civiles de ce contrat".

[27](1938) 16 Can. Bar Rev. 602, at p. 603.

[28]Sixth edition, at p. 672. See also (1942), 20 Can. Bar Rev. 723, at p. 750.

document. On common law authority since *Foster* v. *Mackinnon*[29] this is a real defence, good in the absence of negligence against a holder in due course. In practice the case may be rare where there will not be a finding of negligence, but an interesting difference of opinion has arisen between Perrault and Falconbridge as to whether this defence should be characterized in Quebec as a real defence or at most a defect a title.[30] At common law it appears to have been treated as a real defence because there is an absence of consent which renders the contract void rather than merely voidable. The tendency of the common-law commentators has been to refer to the case as one of fraud, but although fraud is frequently if not usually present in the *non est factum* situation, the distinguishing feature of the situation in civil law terms is error as to the nature of the contract. Perrault expresses the opinion that error as to the nature of the contract in Quebec is a cause of relative rather than absolute nullity, a *vice de consentement* rather than an *absence de consentement,* which amounts to no more than a defect of title, good against a remote holder for value but not against a holder in due course. Falconbridge believes that in the silence of the Act the defence to which the *non est factum* situation gives rise must be determined in Quebec by the common law of England, because such a determination falls within the law of bills and notes in a strict sense. There is much force in this argument. The Quebec jurisprudence on this question has been far from uniform.[31] Most of the cases have held that the contract was non-existent and an absolute nullity and therefore a holder in due course could not recover,[32] but it is only in the later cases that the judges have begun to cite *Foster* v. *Mackinnon*.[33] If one takes Falconbridge's view of the problem there is no need to consider the Quebec civil law on error as to the nature of the contract. But from a civilian's point of view the issue raised by Perrault is an interesting one, and one may be forgiven for pursuing it further in view of Falconbridge's own statement that even looking at the matter from the point of view of civil law, he would be inclined to attach more weight than Perrault does to the "implications" of the judgement of the Supreme Court of Canada in *W. T. Rawleigh Co.* v.

[29](1869), L.R. 4 C.P. 704.

[30]See Perrault, *op. cit.* vol III, nos. 620 ff; Falconbridge, sixth edition, pp. 669 ff, also (1942), 20 Can. Bar Rev. 723, at pp. 748 ff.

[31]There are two conflicting judgments of the court of appeal on cases governed by the provincial law prior to the federal act: *La Banque Jacques-Cartier* v. *Leblanc* (1892) 1 Q.B. 128, holding that it was not a good defence against a holder in due course; *Banque Jacques Cartier* v. *Lescard* (1887) 13 L.C.R. 39 (C.A.), holding that it was.

[32]In addition to the Lescard case above see *L'Abbé* v. *Normandin & Hickman* (1888), 11 L.N. 123 (C.C.); *Banque Jacques-Cartier* v. *Lalande* (1901) 20 Que. S.C. 43 (Langelier J.) .

[33]*Cote* v. *Brunelle* (1917), 51 Que. S. C. 35 (Demers J.); *Bank of Montreal* v. *Amireault* (1937) 75 Que. S.C. 406 (Chase-Casgrain J.), (1938) 65 Que. K.B. 1.

Dumoulin.[34] Moreover, in *Bank of Montreal* v. *Amireault,* [35] which appears to be the last reported decision in Quebec on the defence of *non est factum* in a bills of exchange action, there was considerable difference of opinion among the judges of the Court of Appeal. The question is therefore one which invites some comment.

Perrault supports his conclusion chiefly by reference to article 1000 of the Civil Code and to the well-known comments of the Codifiers upon the part of the Code dealing with the requsites to the validity of contracts and causes of nullity in them. Article 1000 reads: "Error, fraud, and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them." The Codifiers' statement is: " . . . the Commissioners have avoided, as subtle and useless, the questions so much discussed by civilians, whether a consent which is surprised or constrained be a consent at all, and whether error, fraud and violence vitiate contracts directly, because they destroy the consent, or indirectly because it would be immoral to sustain contracts made under their influence. Those questions and the cognate one, whether the effect of these vices be that they prevent the formation of the contract, or merely that they render the contract bad, are absolutely without practical consequence. The result is always the same in giving to the parties interested and to no other, a right of action to avoid liability under the contract. The duty of the Commissioners is to prepare a series of articles expressing the practical rules by which civil rights are regulated and determined, and not to theorize upon nice and unprofitable distinctions, however logical they may seem to be."[36]

This statement and the text of the Code, which does not make any distinction with respect to nullity between error as to the nature of the contract and other kinds of error,[37] provide a strong foundation for Perrault's opinion. Yet the majority of the commentators[38] hold that such a distinction must of necessity be read into the Code; that when there is error as to the nature of the contract (some of them also include error as to the object of the contract) there is absence of consent, no contract at all, and therefore absolute nullity. There is a considerable amount of judicial opinion to support this view. In *Rawleigh Company Ltd.* v. *Latraverse*[39] (not the case to which Falconbridge refers), the defendant had signed a contract of suretyship believing it, as a result of the fraudulent representations of the debtor, to be a mere character

[34](1926) S.C.R. 551.

[35]See note (33), *supra.*

[36]Cod. 1st Rep. p. 10.

[37]See also arts. 991 and 992 C.C. Cf. arts. 1109, 1117 C.N. Planiol & Ripert, v. 6, no. 176.

[38]Mignault, Le droit civil canadien, v. 5, pp. 212, 235, 236-237; Trudel, Traité de droit civil du Québec, v. 7, pp. 154, 164, 208; Baudouin, Le Droit civil de la province de Québec, pp. 673-674, 675.

[39](1924) 36 Que. K.B. 334.

reference. In maintaining the judgment dismissing the creditor's action to enforce the contract, the Quebec court of appeal held that error as to the nature of the contract rendered it non-existent or absolutely null. In effect the decision was that there was no *lien de droit* between the parties. The court cited Mignault and certain French authors without specific reference to the terms of the Quebec Code.[40]

In *Rawleigh* v. *Dumoulin*, the case to which Falconbridge refers, the facts were almost identical. From some of the langnage used by Mignault J., who delivered the judgment of the Supreme Court, one might infer that he would regard the contract as never having been formed and the nullity as an absolute one.[41] (In any event, it may be assumed that he still held the opinion expressed in his doctrinal work on the subject). But apart from this it is difficult to see the "implications" in this decision which have a bearing on the issue raised by Perrault. In neither of these cases was it strictly necessary to find that there was an absolute nullity. The nullity was being invoked by the parties who had been led into error. The plaintiff was a party to the contract which the defendants were seeking to have annulled. The precise nature of the nullity might have been in issue had the plaintiff company been a third party, stranger to the contract.[42] In attaching special importance to *Rawleigh* v. *Dumoulin* Falconbridge appears to have been influenced by what was said about the case by Hall J. dissenting in *Bank of Montreal* v. *Amireault*.[43] This judge's references to the case appear, however, to be concerned chiefly with two points: whether the nullity can be invoked against the other party when it was not his fraud which was responsible for the error, and whether negligence by the party signing the instrument bars him from invoking the nullity.

The case of *Bank of Montreal* v. *Amireault* reveals a wide range of opinion on the defence of *non est factum* in Quebec. The trial judge held that error as to the nature of the contract was a good defence against a holder in due course and that negligence was no bar or *fin de non recevoir*. On this last point he relied on *Rawleigh* v. *Dumoulin* as well as on the fact that negligence had not been alleged by the plaintiff. All of the judges in the Court of Appeal, except Hall J., agreed that the defendant could not succeed because of her negligence, Barclay J. stating that the burden was on her to prove that she had not been negligent. Barclay J. makes a careful study of the conflict of common-law

[40]Hall J. dissenting, held that the defendants should not be allowed to succeed because of their negligence. In addition to this case there are the bill of exchange cases in which error as to the nature of the contract has been held to render the contract non-existent and absolutely null. See notes (31) and (32), *supra*.

[41]"L'erreur quant à la nature même du contrat est alors cause de nullité aux termes de l'article 992 C.C., car alors il n'y a pas eu de consentement . . . " (p. 555) and " . . . cette erreur suffit pour rendre le contrat non avenu . . . " (p. 557).

[42]Cf. Trudel, *op. cit.* p. 215.

[43](1938), 65 Que. K.B. 1, at pp. 35-36.

opinion on the subject of negligence, but unlike Hall J., he concludes that the weight of it is to the effect that negligence estops a party from raising the defence of *non est factum* against a holder in due course. Two of the judges, Bernier and St. Jacques JJ., were of the opinion that even in the absence of negligence, error as to the nature of the contract was not a real defence. They do not appear to base themselves, however, on the civil law as Perrault does, but on the terms of the Bills of Exchange Act, in particular section 56, which says that "the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill . . . by fraud . . .". There is no mention of "error" in this section, as Bernier J. at one point seems to assume.[44] Moreover, there is a distinction between *non est factum,* which is essentially a question of error, and the case where a party has been induced by fraud to sign or deliver a negotiable instrument knowing it to be such. As to whether the Bills of Exchange Act did away with the rule in *Foster* v. *Mackinnon,* it is generally agreed that the better opinion is such common law authority as *Lewis* v. *Clay*[45] holding that it did not.

The conclusion that common law decisions should apply to *non est factum* in Quebec promotes uniformity which is obviously desirable in the field of bills and notes. On the other hand one may logically ask whether the theory that the classification and determination of defences is a matter of the law of bills and notes in a strict sense should go so far as to apply common law criteria to the fact situation itself or merely to the fact situation as legally characterized by the proper provincial law of contract. The distinction in the *non est factum* case is that if we adopted Perrault's view of the Quebec civil law of error as to the nature of the contract as the starting point, we would still be obliged to turn to the provisions of the Act, and in the silence of the act to the English common law, for the criteria by which to classify the legal result under provincial law as a defence within the law of bills of exchange. Assuming that, with reference to *non est factum,* the basis in common law of the distinction between a real defence and a defect of title is the difference between a void and voidable contract, we conclude that a relative nullity is merely a defect of title.

The defence of compensation affords a good illustration of this distinction between characterization of the fact situation by provincial contract law and classification of the legal result as a bills of exchange defence. The statutory right of set-off in common law jurisdictions and the civil law *legal* compensation,[46] (that which takes place by sole operation of law) are different things, and it would clearly be wrong to apply the common law classification of set-off as a bills of exchange defence to legal compensation merely because a fact situation which at civil law would result in legal compensation would at

[44]*Ibid.,* p. 21.

[45](1897), 67 L.J.Q.B. 224.

[46]Art. 1188 C.C.

common law give a right of set-off. Whereas the right of set-off is not a defect of title but a mere personal defence available to prior parties among themselves, to use the language of the act,[47] legal compensation taking place by mere operation of law at or after maturity between, for example, the maker and payee of a note, should be a good defence *pro tanto* against a remote holder for value to whom the payee negotiates the note after it is overdue. Turning to the act, we may regard such compensation as a form of discharge, equivalent to partial or full payment. Turning to the common law, we find that an *agreement* to set-off, which may be compared in its effect to legal compensation, has been treated by the courts as a defect of title.[48]

The application of the Bills of Exchange Act in Quebec, as discussed by Falconbridge in his sixth edition as well as in his review of Perrault's book, raises many other questions of considerable interest but limitations of space forbid serious discussion of them. For the first time (perhaps encouraged by a similar opinion expressed by Nicholls in his case comment in 1947) Falconbridge comes out squarely in the sixth edition in favour of the view that consideration falls within the law of bills and notes in a strict sense.[49] He still concedes, however, that sections 53 of the act "does not by its *terms* exclude the application of the rules of law of a particular province or country as to what amounts to consideration.[50] For those who do not agree that consideration is a matter of the law of bills and notes in the strict sense, this appears to be a better rationale of the Quebec cases which recognize a natural or moral obligation as sufficient consideration for a bill or note than Perrault's opinion that the term "simple contract" is to be understood in Quebec as *simply* "a contract".[51]

There are some changes of interest in Falconbridge's discussion of the holder in due course. In the fifth edition he admitted as a possible interpretation of the Act that a holder could be a holder in due course without having given value himself so long as he was a holder for value within the meaning of section 54.[52] This statement is omitted from the sixth edition. The question is important, particularly in view of the opinion of such commentators as Jacobs[53] and Cowen[54] that to be a holder in due course a holder must himself have given value. The context and spirit of the act tend to support this view, particularly section 57, which allows a holder "whether

[47]*Oulds* v. *Harrison* (1854), 10 Ex. 572.

[48]*Ching* v. *Jeffrey* (1885-86), 12 O.A.R. 432.

[49]Sixth edition, p. 600.

[50]*Ibid.* p. 599. Italics mine.

[51]*Op. cit.* v. 3, no. 254.

[52]Fifth edition, p. 668.

[53]Jacobs, *The Law of Bills and Exchange,* 3rd ed. p. 188. See also Britton, *Handbook on the Law of Bills and Notes,* 1943, p. 390.

[54]Cowen, *The Law of Negotiable Instruments in South Africa,* 3rd. ed., 1955, pp. 251-252. Cowen refers to Falconbridge's statement in the fifth edition.

for value or not" to have all the rights of the holder in due course through whom he derives his title.

The author has revised and expanded his discussion of the burden of proof placed on the holder by the terms of section 58(2). He discusses the commentary on this section which is found in some recent cases, chiefly the decision of the Quebec court of appeal in *Vincent* v. *Bellhumeur*.[55] His criticism of the concluding words in section 58(2) — "unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill *by some other holder in due course*"[56] — is repeated with some qualification, as is his recommendation that the last seven words be struck from the act. With great respect, this reviewer has never been able to appreciate the author's objection to these words. It would appear that upon proof of the defect of title the burden is on the holder to prove that he is a holder in due course and this burden remains on him until he proves one of two things: either (1) that he is a holder in due course, or (2) that he derives his title through a holder in due course so that he takes the benefit of section 57. This view of the section seems to be the one taken by Gagné and Martineau JJ. in *Vincent* v. *Bellhumeur,* but in his discussion of the case Falconbridge does not make this as clear as he might. It is difficult to concede his claim that the words used by him in commenting on this section in the fifth edition do not lend themselves to the interpretation placed on them by the trial judge.

The author has taken advantage of the opportunity afforded by a new edition to improve the format, typography and arrangement of his book and to make it generally a more convenient work to consult. The sections of the Bank Act and the Bills of Exchange Act, which in the former edition were typographically indistinguishable from the commentary, have been set apart clearly in bold print, and there is a reference at the top of each page to the section of the act which is being discussed. Long quotations have also been put into distinctive print and the titles of cases italicized. There is a more complete or detailed table of contents than the one in the fifth edition, and there is an even greater use made of the very helpful table of contents at the beginning of long or important chapters. In some cases the chapter divisions and sub-headings have been altered, and the changes seem generally to be beneficial ones. The discussion of the complex subject of security under sections 86 and 88 of the Bank Act, which was formerly contained in one long chapter of about seventy-five pages, has been broken up and a separate chapter devoted to sections 86, 87, 88, 89 and 90. They are preceded by a new chapter on "Bills of Lading and Sale of Goods." Similarly, the long chapter in the fifth edition on incapacity, forgery and want of authority has been divided up, with some considerable revisions and expansion, into four

[55](1955) Q.B. 443.

[56]Italics mine.

chapters. In particular the author has revised and expanded his discussion of the capacity of the insane person and the right of a bank to recover money paid out on a forged endorsement or material alteration. In connection with the latter subject the author's bibliography on unjustified enrichment at page 558 would, in view of its inclusion of a comparative law article on the subject, have been made more complete by reference to the Honourable Mr. Justice Challies' book on the Quebec law.[57]

GERALD E. LEDAIN*

[57]Challies, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec*, 2nd ed., 1952.

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MALPRACTICE LIABILITY OF DOCTORS AND HOSPITALS
(Common Law and Quebec Law)

By W. C. J. Meredith, Q.C., The Carswell Co. Ltd. 1956.
Pp. xv 300. $7.75.

Previous to the publication of this very useful work, the only book published in Canada was a brief treatment in 1947 of the subject by K. G. Gray[1] which was recently expanded into a larger volume.[2]

It is a curious coincidence that in 1956 there should appear two works on Medical Responsibility written by distinguished members of the legal profession in the Province of Quebec. The first is — "La Responsabilité Civile du Médecin et de l'établissement Hospitalier" by Paul A. Crepeau.[3] The second work is the book under review.

There are in the Province of Quebec as elsewhere an appreciable number of cases involving the responsibility of doctors and hospitals, and it is a reasonable assumption that there have been and will be many more potential cases which have required a study by members of the legal and medical professions of this important branch of the law.

The author, who is Dean of the Faculty of Law of McGill University and the author of two very useful and widely used works[4] and who has been counsel for one of the large Montreal hospitals for many years, is particularly well qualified to write a book on Medical Responsibility. In his preface he says:—

"My object has been to produce a short book that will be useful to doctors and lawyers both in Quebec and in the other Canadian provinces". In this he has admirably succeeded. The book deals successively with relations between doctor and patient; professional secrecy; the doctor as a witness; malpractice in diagnosis and treatment; liability of hospitals; civil courts and procedure; assessment of damages; and criminal malpractice. The chapters on "Malpractice in Diagnosis and Treatment" and "Liability of Hospitals" are particularly useful and set forth succinctly and in non-technical language, the law of the common law provinces and the law of Quebec.

The author points out that the civil law does not differ materially from the law of the common law provinces in the matter of Malpractice Liability.

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[1] *Law and the Practice of Medicine*, K. G. Gray, Toronto, 1947.
[2] Second edition 1955.
[3] Wilson et Lafleur Ltée, Montréal. 1956.
[4] *Insanity as a Criminal Defence* — 1931. *Civil Law on Automobile Accidents* (Quebec) — 1940.

The necessary conditions for a successful malpractice suit (whether in Quebec or the other provinces of Canada) are stated as follows at p. 61:—

"FIRST: There must have been a *legal duty* on the part of the doctor towards his patient to exercise care. This duty arises as a matter of law when the doctor takes on the case, and as already stated, is independent of contract.

SECOND: There must have been *negligence* on the part of the doctor, i.e. a breach of his legal duty to conform to the standards of proficiency and care required by law. These standards are discussed in the present chapter.

THIRD: The patient must have suffered *loss or injury*. Negligence not resulting in loss or injury provides no ground for a civil action in damages.

FOURTH: The patient's loss or injury must have resulted *directly* from the doctor's negligence. In other words, the negligence must have been the determining (as distinct from the indirect or remote) cause of the damage."

The treatment by the author of the question of "Standards of Proficiency and Care" is most interesting. He illustrates with actual cases which must pretty well exhaust the possibilities of medical and surgical carelessness.

The chapter on "Liability of Hospitals" is subdivided in order to differentiate between doctors, internes and nurses in a hospital's employ; doctors not in a hospital's employ; interns and nurses under direction by third parties; and special nurses. The chapter is completed by useful information on "Consents to Operations" and "Autopsies".

The writer's conclusions are supported by detailed footnotes which contain references to authors and jurisprudence in England, France, the United States, and all the provinces in Canada, and appear to comprise all the relevant jurisprudence up to the end of 1955. For ease in reading, the footnotes do not appear at the bottom of each page, but are found at the end of each chapter.

The only possible criticism that the reviewer can offer (and it is a very minor one) is that it would have been useful to have a biography of works in French and English on Medical Responsibility. Perhaps this can be added to the second edition.

There is a detailed table of cases and a very complete index. The typography, binding, proof-reading and arrangement of the book are excellent. It is written in an admirably clear style. The work should prove very useful to members of the medical profession. For the lawyer it provides an accurate and detailed treatment of the legal problems involving doctors and hospitals.

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LEÇONS DE DROIT CIVIL

PAR HENRI, LÉON ET JEAN MAZEAUD, 1955 PARIS, ÉDITION MONCHRESTIEN

Pour apprécier la valeur réelle de cet ouvrage, le premier d'une nouvelle série, il faut avant tout dégager le sens de la réforme des études de Droit, réforme entrée en vigueur en France, en Novembre 1955.

Les études de Droit ont été portées de trois à quatre ans. Au cours des deux premières années, se dispense un enseiguement théorique commun à tous les étudiants; après ces deux années, les étudiants peuvent opter entre le droit civil, le droit public, comprenant les sciences politiques, et le droit des sciences économiques. C'est en fonction de ces cours communs que le droit romain est désormais étudié dans le cadre de l'histoire des institutions, et que le droit constitutionnel se complète par l'étude des institutions financières et internationales. Enfin, remarquable et nécessaire réforme, les institutions judiciaires qui n'étaient étudiées qu'en troisième année, sont maintenant enseiguées dès la première année. On voit par là le souci de faire connaître à tout étudiant en droit tout ce qui fait la vie du droit.

Mais, l'essentiel de la réforme consiste à avoir institué à titre obligatoire des travaux pratiques (une heure et demie, deux fois par semaine). Tout étudiant qui ne justifie pas d'une excuse valable à son absence à ces travaux pratiques, est radié. Ces travaux pratiques sous la direction du professeur du cours sont conduits en fait par des magistrats du corps judiciaire, des magistrats du Conseil d'Etat et de la Cour des Comptes et par des docteurs en droit ayant subi des examens pédagogiques spéciaux.

Ainsi donc par l'institution de cette sorte de tronc commun des deux premières années consacrées à l'étude des grandes disciplines du droit, la réforme sème le germe d'une culture générale indispensable avant toute spécialisation.

Grâce à l'institution des travaux pratiques obligatoires, on a voulu décongestionner la partie par trop théorique de l'enseignement pour mettre davantage l'étudiant au fait de la vie réelle du droit. Les travaux pratiques ne doivent pas suppléer au cours, comme le font parfois les séminaires pratiqués dans les pays de common law, mais ils en sont le complément nécessaire. Le cours ouvre l'intelligence aux principes supérieurs de droit dans les différentes disciplines, tandis que les travaux pratiques donnent le sens de la réalité vivante de ces mêmes principes au sein de la vie sociale.

L'ouvrage de MMrs. Mazeaud répond en tous points tant à l'esprit qu'à la lettre même de la réforme.

Les "Leçons de droit civil" (première année) sont divisées en quatre-vingts leçons, ce qui représente trois heures de cours par semaine durant l'année universitaire.

Chaque leçon est composée de manière à former un "tout".

Une leçon doit exposer un sujet. Or celui qui fait de l'enseignement sa profession sait ce qu'une leçon de ce genre représente de puissance de synthèse de clarté, non pas pour épuiser le sujet (les auteurs ne le prétendent pas, et personne avec eux ne pourrait le prétendre), mais pour mettre au moins l'étudiant en contact avec les problèmes que chaque sujet doit susciter à son esprit.

Il faut ajouter à cela que MMrs. Mazeaud ont su agrémenter, (le mot n'est pas trop fort, car les textes choisis sont significatifs) chaque leçon de "lectures" c'est-à-dire d'extraits d'articles de droit de livres ou de décisions jurisprudentielles les plus importants ou les plus originaux. C'est en cela que cet excellent ouvrage répond vraiment à l'esprit de la réforme. Il est en effet permis d'espérer que l'étudiant moyen ou même l'étudiant paresseux se cultivera pour ainsi dire malgré lui. Il est aussi permis d'espérer que cette méthode éveillera chez les meilleurs étudiants le désir d'aller plus loin dans la lecture des textes et décisions rapportés.

Ce n'est pas une des moindres qualités de cet ouvrage que d'avoir su rendre attrayantes des théories qui traditionnellement chez les étudiants passent pour ennuyeuses ou rébarbatives, telles celles des nullités, de la preuve ou de la distinction entre actes et faits juridiques.

Enfin, il faut rendre hommage aux auteurs d'avoir su se mettre au niveau de l'étudiant (ce qui ne diminue en aucune façon la haute tenue intellectuelle de l'ouvrage) en faisant débuter chaque leçon par un sommaire. Les auteurs n'ont pas oublié que l'étudiant lors de la période des examens doit travailler sous pression. Le sommaire vient à point pour les aider à "se rafraîchir la mémoire". Mais il ne faudrait pas croire que ce sommaire vise uniquement à cela. "Il ne saurait suffire à une préparation sérieuse". Ce sommaire est à la fois une entrée en matière qui conduit l'étudiant à saisir l'ensemble des problèmes que la leçon et la lecture doivent nécessairement compléter, et un aide mémoire utile en vue des examens. Lorsqu'on se donne la peine d'analyser ce sommaire on peut constater que les auteurs en ont fait aussi un "tout" c'est-à-dire quelque chose qui dépasse le seul stade de la mémoire. Le sommaire est conçu à la fois comme une introduction à la leçon et comme une conclusion. Il doit donc par une sorte de travail d'osmose faire appel à autre chose qu'à la seule mémoire de l'étudiant; il doit réveiller en lui ses connaissances profondes.

Pour porter à son maximum l'éveil de l'intelligence de l'étudiant MMrs. Mazeaud n'ont pas craint de noter parfois les projets de réforme législative à l'ordre du jour. Il faut leur savoir gré de n'avoir pas négligé cet aspect de la

culture générale. Les auteurs développent ainsi chez l'étudiant le sens de l'esprit critique averti sans lequel aucun progrès réel ne peut être fait. L'étudiant prend ainsi conscience du rôle que plus tard in pourra peut-être jouer dans la société. Il mesure par là que le droit est et doit être en constante évolution.

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