Note Concerning Jurisdiction in Cross-Demand

L. Michael Blumenstein *

The problem of which court has jurisdiction to hear a cross demand when the principal demand is within the jurisdiction of the Magistrate's Court and the cross demand falls within the jurisdiction of the Superior Court has again arisen in the case of *Gignac* v. *Inter Quebec Aluminium Ltd.*[1] Comeau, J. held that the principal action should be heard in Magistrate's Court and accordingly dismissed defendant cross plaintiff's declinatory exception; as for the cross demand, he referred it to the Superior Court.

With all due respect, it is submitted that a court, when confronted with such a situation, should permit both the principal demand and the cross demand to be heard by the same judge at the same hearing. In order to justify this submission, an examination of the nature of the cross demand and a survey of the Quebec doctrine and jurisprudence are necessary.

A cross demand may be defined as the proceeding whereby a litigant exercises a right of action against another litigant when both litigants are already before the Court in connection with a previous action already instituted.

It lies, according to article 217 C.P., when defendant may make a claim arising out of the same causes as the principal action but which he cannot plead by defence. Defendant may also make a cross demand for any claim for money arising out of other causes — but such a cross demand is distinct from and cannot retard the principal action. The most frequent situation in which a cross demand is utilized is when a defendant asks the Court to liquidate a claim for damages against plaintiff and declare that judicial compensation takes place.[2] Under our Code, legal compensation of a liquidated sum may be pleaded in defence (art. 1138 C.C., art. 203 C.P.) but a debt which is not yet liquidated and therefore not exigible must, in order to permit judicial compensation, be pleaded by way of cross demand.

---

* Of the Senior Board of Editors, McGill Law Journal; third year law student.

[1] [1963] R.P. 354; [1963] C.S. 300.

[2] See, for example, *Jacobs v. Morris*, (1923) 29 R.L. n.s. 210.

In the *Gignac* case, cross plaintiff asked for judicial compensation plus a condemnation in damages against plaintiff cross defendant.

In deciding the issues, Comeau, J. relied upon two judgments for support.

Firstly, he cited the following statement made by Roy, J. (then chief judge of the Magistrate's Court) in the case of *Universal Auto Ltd. v. Turgeon*:[3]

> "J'hésiterais à déclarer que ce tribunal a juridiction et à décider que les mots toute réclamation de l'article 217 ne sont pas conditionnés par le chiffre $99.99 de l'article 61 (maintenant $199.99 de l'article 54)."

Secondly, he accepted the view expressed in *J. P. Martineau Enrg. v. Pouliot*[4] by Bilodeau, J. (then also chief judge of the Magistrate's Court and by coincidence, the attorney for successful plaintiff Universal Auto, twenty years earlier.) The learned judge agreed that defendant could exercise by cross demand any claim in his favour "mais à la condition que la réclamation que le défendeur entend exercer par demande reconventionnelle soit inférieure à deux cents dollars." Following the above statements, Comeau, J. at page 357, concluded that:

> "Quand l'article 217 est transporté pour ainsi dire dans les règles de procédures de la Cour de magistrat, il ne peut s'agir de demande reconventionnelle qui ne soit pas de sa juridiction. Une partie ne doit pas en faire une devant cette Cour lorsqu'elle n'est pas compétente."

A closer examination of the earlier decisions will, however, reveal that the learned judge was unjustified in relying upon them as a basis for his judgment. Undoubtedly, the statement of Roy, J. in the *Universal Auto* case was an *obiter dictum* as, in fact, he held that the Magistrate's Court was competent to hear both the principal demand and the cross demand. The case is moreover distinguishable from the *Gignac* case in that the former was concerned with a lessor-lessee action arising out of the non-fulfillment of obligations under the lease, whereas the latter nowhere mentions any lease. The *Martineau* decision on the other hand, appears to have been based very largely on French jurisprudence and doctrine which can have no application in Quebec inasmuch as the Code of Civil Procedure of France is not drafted in the same terms as that of Quebec.[5]

---

[3] (1931) 69 C.S. 155.

[4] [1951] R.P. 415 at p. 419.

[5] See Sampson, R. G., *Jurisdiction in Cross Demand*, (1953) R. du B. 275 at p. 278 for references.

The heart of the controversy is the interpretation of paragraph one of article 217 C.P. which reads:

> The defendant may set up by cross demand any claim arising out of the same causes as the principal demand, and which he cannot plead by defence.

The Quebec doctrine is split over the construction to be placed upon the words "any claim". On the one hand, there is the argument that: "Rien n'autorise à penser que l'article 217 envisage une reconvention qui ne tombe pas sous la juridiction de la cour dont il parle".[6] This leads to the conclusion that a lower court cannot be deprived of jurisdiction by a cross demand which is outside its jurisdiction *rationae materiae*. The counter-argument is that the word "any" is not restricted to a particular amount[7] and thus, if defendant claimed by way of cross demand a sum exceeding the jurisdiction *rationae materiae* of the Magistrate's Court, he would be entitled to the transfer of the record to the Superior Court before which both demands could be heard at the same time.

Comeau, J. in the *Gignac* case subscribes to the first opinion (that any claim must be restricted as to its amount by the jurisdiction of the court in which the principal action was taken). In support of his view, he quotes art. 1131 C.P. (added to the Code in 1959)[8] which stipulates that:

> In any case resulting from an accident in which a motor vehicle is involved, the defendant may set up, in his defence, any claim accruing to him from the same accident, *provided that it does not exceed the jurisdiction of the court.*
>
> The court then adjudicates upon both claims at the same time and, if it maintains both, declares then to be compensated up to the amount of the lesser of the two condemnations.
>
> Articles 217, 218 and 219 do not apply to cases provided for by this article.

The learned judge comments (at page 356) that although the article is limited to accidents involving motor vehicles, it is indicative of the intention of the legislature that the defendant should not be permitted to advance a claim exceeding the jurisdiction of the Magistrate's Court (inasmuch as art. 1131 is found in the section "Proceedings in the Magistrate Court"). He then applies this argu-

---

[6] Bergeron, T. L., *Traité de Procédure Civil*, [1960] R.L. 293 at p. 296 — Part of a study prepared for submission to the Revising Commission.

[7] Sampson, *loc cit.*, at p. 276. Note also his comments concerning "objectionable" legislation by interpretation — *viz.* limiting any claim to "any claim up to the amount of $199.99" as was done in both the *Universal Auto* and *Martineau* judgments.

[8] 7-8 Eliz. II, S.Q., c. 42, s. 3. Italics added.

ment by analogy to article 217 C.P. in order to refute the argument that the word "any" is unrestricted.

It seems, however, that the purpose of the legislature was to preclude the operation of art. 217 as regards the new provisions of art. 1131 — this can be seen from the third paragraph of art. 1131. Art. 1131 may thus be viewed as an exception to the general rule expressed in art. 217; as an exception, it must be strictly construed and *not* extended by analogy. Obviously, had the legislature wished to restrict the application of the words "any claim" in art. 217 it would have passed an amendment to that article similar to the limitative clause in the first paragraph of art. 1131. Thus in the absence of legislative action indicating the contrary, one must conclude that the reasoning of the "unrestricted claim" theory is the more convincing of the two arguments.

How have the courts interpreted article 217 C.P. ? Fairly consistent jurisprudence indicates that if an action is properly taken before the Superior Court, a cross demand arising out of the same causes but claiming a sum *less than* two hundred dollars (formerly one hundred dollars) is within the jurisdiction of the Superior Court.[9] A principal demand for a non-appealable sum can be appealed by a cross plaintiff if the plaintiff is given judgment and the cross demand for an appealable sum is dismissed.[10] The unresolved problem is that which arises when an action is taken before the Magistrate's Court and a cross demand is filed which falls outside the jurisdiction *rationae materiae* of the lower court and within the jurisdiction of the Superior Court.

This writer submits that both the principal action and the cross demand should be referred to the Superior Court and that both the principal and cross demand be heard at the same *enquête*. It is further submitted that the jurisprudence supporting this contention is sound both from a procedural and equitable point of view.

A decision of the Superior Court in the case of *Vaillancourt v. Tetrault*[11] dealt with the following facts: Plaintiff initiated action in Recorder's Court. Defendant filed a cross demand for a sum ex-

---

[9] *Butt v. Black*, (1935) 38 P.R. 105; *Champagny v. Latraverse*, (1927) 29 R.P. 401; see also Ferland, P., *Traité Sommaire et Formulaire de Procédure Civile*, v. 1, p. 246, fn. #11.

[10] *Chalifoux v. Precision Tool*, [1948] B.R. 458; *Trudeau v. Keenan*, (1935) 58 B.R. 515; *Ouellette v. Cie. Levesque*, (1923) 35 B.R. 261; *McIntyre v. Patterson*, [1924] B.R. 499; *Dame Catellier v. Dame Belanger*, [1924] S.C.R. 436; *contra: Bourassa v. Marchand*, [1946] R.L. 79 (B.R.).

[11] (1922) 60 C.S. 210.

ceeding the jurisdiction of that court and the cross demand was dismissed "par défaut de juridiction". On a writ of *certiorari*, the Superior Court decided that *it* was the court competent to hear both the principal action and the cross demand.[12]

In *Gootman* v. *Salonin*,[13] an action was taken in the Superior Court and a cross demand was filed claiming a sum within the jurisdiction of the Superior Court. Defendant cross plaintiff filed a declinatory exception on the ground that the principal action concerned a lease and was within the jurisdiction of the Circuit Court (a lower court). This exception was granted and both the principal and cross demand were referred to the Circuit Court. This court, however, decided that it was incompetent to hear the cross demand and returned the record to Superior Court. Plaintiff then made a motion to have both demands referred to Circuit Court for trial on the merits. This motion was dismissed, the *ratio decidendi* being:

> "Considérant que le demandeur reconventionnel a droit à un seul procès pour ces deux demandes, et que c'est la Cour supérieure seule qui est compétente à entendre et juger ledit procès." (at p. 436).

This judgment was applied in the case of *Desroches v. Desroches*.[14] The learned judge (Cadotte, J. of the Magistrate's Court), applying the principle expressed in *Gootman v. Salonin mutatis mutandis* (in order to widen the scope of the principle beyond the matter of a lease which was at issue in the *Salonin* case), advanced a most interesting, cogent, and persuasive argument as the basis of his decision, *viz.*:

"La juridiction *rationae materiae*... se trouvant modifiée et déterminée *de novo* par la demande reconventionnelle" and consequently the Superior Court becomes the court competent to deal with " toute la contestation".[15]

The judgment in *Parizeau v. Lafond*[16] fully endorses the reasoning of the *Desroches* case thus supporting the view that the nature and/or extent (i.e., the amount) of the cross demand can redefine the issues and result in a lack of jurisdiction *rationae materiae* of the Magistrate's Court. For as Mr. Justice Lesage in his

---

[12] "Considérant que la Cour du recorder, incompétent sur la demande reconventionnelle, était aussi incompétente sur la demande principale, pour les raisons ci-dessus et, notamment, parce que les deux demandes étaient indivisibles..." (at p. 218).

[13] (1927) 29 R.P. 436.

[14] [1949] C.S. 131.

[15] *Ibid.*, at p. 133.

[16] [1962] C.S. 538.

well-reasoned and fully-documented judgment observed that to decide otherwise would render the recourse of the cross demand not only illusory but non-existent.

What then is the proper procedure for the principal defendant to follow when he wishes to file a cross demand for an amount exceeding that within the competence of the court seized with the principal action in order that he may force the record to be transferred to the competent court ? There are two possible ways in which he may procede — by evocation or by declinatory exception.

It has been held by our courts that a declaration of evocation under art. 43, paragraph two of the Code of Procedure is not the correct proceeding to be filed.[17]

In the *Gignac case,* the learned judge holds that the cross plaintiff *cannot* file a declinatory exception under art. 170 C.P. for being plaintiff in the cross demand, he is not the party "summoned before a court" specified in the article. The jurisprudence and doctrine have, however, adopted the opposite stand as expressed so succintly by Mr. Justice Ouimet in the case of *Berk v. Beauchamp*:[18]

> "Considérant que la procédure régulière pour transférer une cause d'un tribunal à un autre, lorsque le premier est incompétent *rationae materiae,* est la motion [exception] déclinatoire..."

For if one accepts the *de novo* argument advanced in the *Desroches* and *Parizeau cases,* the inescapable conclusion is that, inasmuch as the jurisdiction has been redefined so as to place the issues outside the competence of the Magistrate's Court, the principal plaintiff has (in effect) taken his action before the wrong court and the defendant cross plaintiff is thus permitted to file a declinatory exception in order to have both demands transferred to the Superior Court.

The learned judge in the *Gignac* case refused to permit both the principal action and the cross demand to be heard together in the Magistrate's Court but rather referred the cross demand *(proprio motu)* to the Superior Court. It has been shown above that the courts consider this course of action as one to be avoided — the reason being that it could lead to undesirable consequences. For

---

[17] *Beauchesne v. Thibault,* (1896) 10 C.S. 423 (Cour de Revision); *Berk v. Beauchamp,* [1958] R.P. 289; *contra: Lamy v. Roy,* [1959] B.R. 444. The report is not clear as to whether the Appeal Court impliedly accepted evocation as the correct procedure or whether it considered the judgment permitting evocation to be final inasmuch as the case was beard by the Superior Court. The judgment in evocation does *not* seem to have been in appeal.

[18] [1958] R.P. 289. See also *Desroches v. Desroches*; *Parizeau v. Lafond* at p. 542 (both cited above). See also Sampson, *loc. cit.,* at p. 217.

example (to use the one mentioned frequently in the *doctrine*) an insolvent plaintiff receives payment from the defendant in virtue of an *ex parte* judgment, dissipates the money, and cannot pay the cross plaintiff who gets judgment against him in the Superior Court.

Another hazard is the risk of possible contradictory judgments. It is extremely unlikely that the date of the *enquête* of the principal action in the Magistrate's Court will coincide with that of the cross demand in the Superior Court (to which it has been referred). Most certainly, two different judges will hear the issues. Understandably, confusion may be the result and as a consequence, "la dignité de la justice et la foi... seraient atteintes."[19] The social policy of the law cannot permit contradictory judgments. It is desirable, therefore, that the same judge have before him all the relevant facts relating to the issues — indeed, the litigants should have a right to such a hearing.

Conclusion

It is submitted that there is clear authority under our Code for the transfer of both the principal action and cross demand from the lower court (Magistrate's) to the higher court (Superior) when the amount claimed in the cross demand exceeds the sphere of competence of the lower court and arises out of the same causes as the principal demand. It is further submitted that the proper procedure is by way of declinatory exception under art. 170 C.P.

It should be noted that the new Draft Code of Procedure (Bill ‡20) eliminates the cross demand in favour of allowing defendant to include a claim (liquidated or unliquidated) in his plea (proposed art. 172).[20] Should a jurisdictional conflict appear in proceedings under the Draft Code, proposed Article 36 states that the Superior Court alone is competent to hear the entire case and that "the record must be sent to it at the diligence of the parties." By what procedure this transfer is to be effected is *not*, however, specified. It is submitted that the procedure should be by way of motion made by defendant cross plaintiff in the Practice Division of Magistrate's Court which would result in an automatic judicial order to transfer the record to the Superior Court. The procedure would thereby come under some measure of judicial control while at the same time eliminating undue holdups.

---

[19] Bergeron, *loc. cit.*, p. 299.

[20] The right given to the defendant is limited to any claim arising from the same source as the principal demand, or from a related source.