WHAT IS AN APPARENT DEFECT IN THE CONTRACT OF SALE?

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1. Introduction

Sale is a consensual contract (article 1472 C.C.). Ownership is transferred instantaneously on the meeting of the minds even though the payment of the price and the delivery of the object have not yet been made. But the transfer of title does not alone suffice. The buyer must also be put in possession.[1] Thus one of the two principal obligations imposed on the seller is the delivery of the thing sold (article 1491 C.C.), delivery being the transfer of the thing sold into the power and possession of the buyer (article 1492 C.C.).

The seller's obligations do not end with delivery, however, for the buyer's possession of the thing must be both peaceful and useful if he is to benefit from it. If he is evicted or otherwise troubled in his possession, or if the thing is so affected by defects as to destroy the usefulness of his possession, the benefit of the thing to the purchaser may be nil or greatly reduced. Consequently, the second principal obligation of the seller is the warranty of the thing sold (article 1491 C.C.).[2] This warranty has two objects: eviction of the whole

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[1] Domat, *Oeuvres*, I (1822), page 311; Pothier, *Traité du Contrat de Vente*, ed. Bugnet (1861), paragraph 41.

[2] Domat, *Oeuvres*, I (1822), page 312; Faribault, *Traité de Droit Civil du Québec*, XI, pages 229-230.

or any part of the thing, and the latent defects of the thing (article 1506 C.C.).[3] We are here concerned with the warranty against latent defects.

2. The seller's warranty extends to latent defects only

It is a basic feature of the seller's warranty that he is responsible only for the *latent* (meaning hidden) defects in the thing sold. This principle is clearly set forth in the Civil Code. Article 1506 C.C., being the opening article of that section of the Code dealing with the vendor's warranty, states, as we have already seen, that the two objects of the vendor's warranty are eviction and latent defects. The sub-title that preceeds the articles relating to the latter warranty reads "Of warranty against latent defects", and this is immediately followed by article 1522 of which the opening words read: "The seller is obliged to warrant the buyer against such *latent* defects in the thing sold ... as render it unfit ..."[4] As if the matter were not already sufficiently clear, we find the principle reinforced by article 1523 C.C., which reads as follows: "The seller is not bound for defects which are *apparent* and which the buyer might have known of himself".[4] The reason for this is that the purchaser is presumed to be aware of such defects and to have set his price accordingly.[5] The corresponding articles of the French Civil Code (1641 and 1642) differ from articles 1522 and 1523 only slightly in their wording and have the same meaning.[6] We can therefore take it to be well established that the seller's obligation under both Quebec and French law to warrant the buyer against defects extends only to those that are hidden.

3. When is a defect held to be apparent?

A. *Introduction.* The principle that the seller is not responsible for defects that are apparent has been clearly laid down. Its very simplicity, brought about by the wording and style employed by the codifiers, gives it a certain beauty. This does not call any the less for skill, however, in its application to the great variety of situations that present themselves. For when can a defect be said to be latent,

[3] Pothier, *Traité du Contrat de Vente*, ed. Bugnet (1861), paragraphs 81 and 202; Mignault, *Le Droit Civil Canadien*, VII, page 84.

[4] Italics added.

[5] Mignault, *op. cit.*, VII, page 109; Faribault, *op. cit.*, XI, page 279; *Martin* v. *Galibert* (1915) 47 S.C. 181 (Court of Review).

[6] Article 1641 C.N. "Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage, que l'acheteur ne l'aurait pas acquise, ou n'en aurait donné qu'un moindre prix, s'il les avait connus." Article 1642 C.N. "Le vendeur n'est pas tenu des vices apparents et dont l'acheteur a pu se convaincre lui-même."

and when apparent? Is there any duty, for example, on the purchaser to examine the thing he is buying? Will the vendor be liable for a defect that would have been visible if the buyer had taken the trouble to look? Or, to go one step further, suppose the buyer is acquiring an object which he carefully looks over and which to his untrained eyes is not affected by defects, but which object an expert would quickly discover to be defective? Should we apply the following dictum: "A latent defect within the meaning of art. 1522 C.C. is one which is not apparent to an honest buyer, even though an expert, if he had been engaged prior to the purchase, might have discovered it."[7]? Or should we take the view that "... un défaut n'est pas caché par cela seul que l'acheteur ne l'a pas aperçu, ou qu'il n'en a pas apprécié la gravité; et que celui qui n'a pas les connaissances requises pour juger de l'état d'une chose qu'il va acheter doit s'assurer le concours d'une personne capable de le renseigner: l'art. 1522 C.C. n'est pas destiné à remédier aux conséquences de la légèreté ou de l'ignorance".[8] Or again, suppose the buyer takes the precaution of hiring an expert, engaging one who has a reputation for being competent, and the expert, through negligence, overlooks a defect which another expert would have noticed. Who will be protected here, the buyer who was prudent enough to consult a competent expert who happened to be negligent on that particular occasion, or the seller, who could argue that if the expert had shown diligence he would have discovered the defect, which was therefore apparent? And, finally, how far must the buyer (or his expert) go in their examination? Suppose, for example, that there is a bulge in the wall of a building which may or may not be caused by a defect, the answer only being obtainable on removal of bricks. Is the buyer or his expert responsible for the taking of such exploratory steps?

These are the questions which we shall now discuss.

B. *The buyer's duty to inspect.* The buyer must examine and inspect the object he is purchasing.[9] Even if the defect be a major

[7] Collins, J., in *Rothstein* v. *International Construction Inc.* [1956] S.C. 109 at 111.

[8] Pratte, J., in *Dallaire* v. *Villeneuve* [1956] Q.B. 6 at 9-10.

[9] Pothier, *Traité du Contrat de Vente*, ed. Bugnet (1861), paragraph 207; Mignault, *op. cit.*, VII, page 117; Faribault, *op. cit.*, XI, pages 277-278; Payette, *La garantie des défauts cachés chez les marchands de voitures usagées* (1961) 39 Thémis, page 148 at 149-150; Guillouard, *Traité de la Vente et de l'Echange*, 2nd edition, I (1890), page 448; Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit Civil, de la Vente et de l'Echange*, 3rd edition, XIX (1908), page 425; Laurent, *Principes de Droit Civil*, 4th edition, XXIV (1887), page 278; Planiol et Ripert, *Traité Pratique de Droit Civil Français*, 2nd edition, X (1956), pages 144-146; Aubry et Rau, *Droit Civil Français*, 6th edition, V (1946) pages 81-82.

one, if it would have been discovered by a prudent buyer it will be considered apparent and the seller will not be responsible for it. Pothier gives as examples a house that is falling into ruin, a horse that limps or is blind (aveugle);[10] Mignault's example is that of a horse that is blind in one eye (borgne).[11] A more modern example would be that of an automobile in which the brakes did not work.

We see an application of the rule that the buyer must examine the goods in *Independent Fruit Company* v. *Mallette*.[12] Independent Fruit was claiming the price of five hundred crates of tomatoes sold and delivered to Mallette. The latter admitted the claim insofar as two hundred and forty-eight of the crates were concerned, and pleaded he owed nothing for the balance of two hundred and fifty-two crates on the ground they were unfit for consumption. The sale had come about as follows: Independent Fruit had received a railroad car shipment of tomatoes from the United States. Mallette was allowed to visit the car to make such inspection of its contents as he deemed advisable, which he did, after which he bought the five hundred crates. These were delivered to him crate by crate at the car side. Three hundred and fifty-three crates were sent by Mallette to his customers, some of whom complained to him of their quality the next day. He then had a government fruit inspector inspect the one hundred and forty-seven cases still remaining in his possession, who condemned some but declared the rest to be marketable.

The Court of Appeal ordered Mallette to pay the full price. The defect in a portion of the tomatoes "... would necessarily have been discovered on the most cursory examination..."[13] and were consequently held to be apparent defects, and "... if they were not known to him when he bought the said tomatoes, it was because he had not taken the trouble sufficiently to examine and inspect them, and he should suffer the consequences of his own neglect".[14] That the necessary examination is not just a casual one is borne out by the fact the tomatoes being in crates, Mr. Justice Howard said Mallette should have torn the paper wrappings off the tomatoes through the openings between the slats of the crates. However, the judge, realizing that too heavy an onus should not be put on the purchaser, suggested that he "... might have done what the Government inspectors do, i.e., examine, say, every tenth box as it passed through his hands when taking delivery".[15]

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[10] Pothier, *op. cit.*, paragraph 207.
[11] Mignault, *op. cit.*, VII, page 109.
[12] (1931) 50 K.B. 137.
[13] *Ibid*, at page 140.
[14] *Ibid*, at page 139.
[15] *Ibid*, at page 142.

The courts have on many other occasions held defects to be apparent where the purchaser could have discovered them on an examination.[16]

It is easy to lay down the principle that the buyer must examine the thing. It is not so easy to determine the extent to which he must go in order to discover possible defects. What criteria are going to guide the courts when faced with individual situations? The examination must be as careful and serious a one as would be carried out

[16] *Hart* v. *Decarie* (concerning tomatoes) (1922) 60 S.C. 548 (Court of Review); *Hushion & Co. Ltd.* v. *Denault* (concerning hay) (1914) 20 R. de J. 277 (Court of Review); *Guest* v. *Douglas* (concerning wine) (1891) 20 R.L. 20 (Court of Appeal); *Marquis* v. *Poulin* (concerning merchandise) (1891) 20 R.L. 24 (footnote); *Crevier* v. *Chayer* (concerning a horse) (1880) 3 L.N. 84 (Mackay, J.); *Vincent* v. *Moore* (concerning pigs) (1885) 8 L.N. 3 (Loranger, J.); *Paquette* v. *Dépocas* (concerning a carriage) M.L.R. (1887) 3 S.C. 48 (Mathieu, J.); *Vipond* v. *Findlay* (concerning fish) M.L.R. (1891) 7 S.C. 242 (Tait, J.); *Blain* v. *Vincelette* (concerning a horse) (1898) 4 R. de J. 225 (Tellier, J.); *Fraser* v. *Magor* (concerning fish) (1892) 1 S.C. 543; *Duclos* v. *Pinette* (concerning a horse) (1901) 7 R. de J. 210 (Choquette, J.); *Marcotte* v. *Montreal Concrete Tile, Limited* (concerning artificial stone) (1914) 46 S.C. 483 (Demers, J.) confirmed by the Court of Review); *Arpin* v. *Francoeur* (concerning a house) (1930) 48 K.B. 231; *Gauthier* v. *Electrical Equipment Co.* (concerning electric light bulbs) (1922) 28 R.L. n.s. 151 (Court of Review); *Magnan* v. *Perkins Electric Company Ltd.* (concerning a movie projector) (1933) 39 R.L. n.s. 314 (Surveyer, J.); *Johnson* v. *Ranger* (concerning a horse) (1912) 18 R.L. n.s. 533 (Bruneau, J.), and (1914) 45 S.C. 325 (Court of Review); *Neiss* v. *Noiles* (concerning a fur coat) [1945] R.L. 253 (Mackinnon, J.); *Dumaine* v. *Comeau* (concerning hay) (1918) 24 R.L. n.s. 105 (Court of Review); *Cedillot* v. *Lalonde* (concerning plumbing nipples) [1951] S.C. 379 (Smith, J.); *Perron* v. *Morin* (concerning an automobile) [1957] R.L. 522 (Brossard, J.); *Labrecque* v. *Duckett* (concerning cheese) (1902) 22 S.C. 135 (Court of Review); *Dufresne* v. *Reilly* (concerning wood) (1884) 12 R.L. 433 (Mathieu, J.); *Bessette* v. *Lyall* (concerning bricks) (1910) 38 S.C. 474 (Court of Review); *The Dominion Lumber Company* v. *Auger* (concerning wood) (1911) 40 S.C. 184 (Lemieux, A.C.J., and, accordingly to him, confirmed in appeal — see (1921) 59 S.C. 107); *Dallaire* v. *Villeneuve* (concerning a garage) [1956] Q.B. 6; *David* v. *Manningham* (concerning a building) [1958] S.C. 400 (Jean, J.); *Laberge* v. *Gervais* (concerning a house) (1918) 53 S.C. 370 (Weir, J., and confirmed by the Court of Review); *Demontigny* v. *Dame Balthazard* (concerning a house) (1928) 66 S.C. 283 (Surveyer, J.); *Dame Tétreault* v. *Duffy* (concerning a horse) (1899) 16 S.C. 89 at 92 (Tellier, J., and confirmed by the Court of Review though the latter did not rule as to whether the particular malady affecting the horse was apparent or not); *Ledoux* v. *Lessert* (concerning hay) (1914) 20 R. de J. 529 at 541 (Bruneau, J.); *McDuff* v. *Fitzpatrick* (concerning wood) [1948] S.C. 426 (Surveyer, J.); *Dubé* v. *Cousineau* (concerning a florist refrigerator) (1940) 46 R. de J. 470 (Forest, J.); *Cormier* v. *Papy* (concerning an automobile) [1955] R.L. 106 (A.I. Smith, J.); *Contra* (by inference): *Dame Antil* v. *Bigras* (concerning defective foodstuffs in the sale of a grocery business) (1922) 60 S.C. 545 (Guérin, J.).

by an alert and wide awake buyer and the defect will be considered as apparent if the buyer could have discovered it so long as such discovery is possible even though attended by a greater or lesser degree of difficulty.[17] On the other hand, the buyer is not obliged to use special scientific methods or research.[18] For example, a buyer of foodstuffs is not obliged to subject them to chemical analysis. The defect will be hidden where, while it was noticed by the buyer at the time of acquisition, it looked as if it were one that would not normally render the thing unfit for the use for which it was intended, but in fact does so when the thing is put into regular operation subsequent to the sale.[19] A defect will also be considered as latent if it could only be found by out of the ordinary measures. Baudry-Lacantinerie cites a judgment relating to rotten supporting beams under a floor — the beams were completely concealed. The floors could have been taken up and the beams examined but it is not customary to so damage a house when inspecting it with a view to its purchase. The defect was therefore held to be latent.[20]

Our courts have in many situations held defects to be latent where unusual steps would have to be taken to discover them. We shall first look at examples relating to immoveables. Defects in underground drains are latent.[21] Where heating pipes were laid under the bottom floor of a building and were unprotected against moisture with the result that they rusted and sprung leaks within five years, the defect was held to be hidden.[22] A defect in foundations of a house is latent where a deep trench would have to be dug along the length of the foundation to discover it.[23] Defects in a roof caused by lack of ventilation are latent where they can only be discovered by breaking open the covering.[24]

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[17] Faribault, *op. cit.*, XI, pages 277-280; Guillouard, *op. cit.*, I, page 448; Aubry et Rau, *op. cit.*, V, pages 81-82; Laurent, *op. cit.*, XXIV, pages 278-279; Baudry-Lacantinerie, *op. cit.*, XIX, pages 425-426.

[18] Planiol et Ripert, *Traité Pratique de Droit Civil Français*, 2nd edition, X (1956), pages 144-146.

[19] *Ibid*, pages 146-147.

[20] Baudry-Lacantinerie, *op. cit.*, page 427.

[21] *Plotnick* v. *Bartos* [1961] S.C. 87 (Perrier, J.); *Gagnon* v. *Dame Moffett* [1946] R.L. 319 (Philippe Demers, J.); *Hanakova* v. *Girard* [1957] S.C. 344 (Brossard, J.); *Bourcier* v. *Donohue* [1956] S.C. 25 (Batshaw, J.).

[22] Unreported judgment of Brossard, J., in *Ridgewood Court Inc.* v. *Zaritsky*, February 18, 1963, S.C.M. 367238.

[23] Notes of St. Jacques, J. in *Gauthier* v. *Comité de Réalisation de la Cité-Jardin* [1955] Q.B. 100 at 103. See a similar statement of principle by Dorion, J. in *Renaud* v. *Huguet* (1930) 49 K.B. 271 at 273-274, though in that particular case it was his opinion that the defect was apparent for other reasons.

[24] *Rothpan* v. *Drouin* [1959] Q.B. 626.

We shall now look at examples of defects affecting moveables that were held to be latent: a fracture in the base of a diesel engine that could only be discovered when the engine had been taken down and the bearing removed;[25] defects in a refrigerator which could only be discovered on its being put into operation;[26] the sickness of brucellose (the premature dropping of the young) affecting cows, which cannot be diagnosed by a veterinary surgeon on an examination without the taking of tests;[27] arthritis in a horse which can only be discovered by X-Ray;[28] balkiness and viciousness in a horse, defects which could be discovered only by harnessing it and trying to drive it;[29] and bales of hay that are rotten inside.[30]

Mignault suggests that if the parties are not in the presence of the thing sold, the seller will be responsible for apparent defects.[31] It could perhaps be better stated this way: the buyer will be relieved of his obligation to examine and inspect the object before the sale where circumstances or the nature of the object render it impractical.[32] In such a case when the thing is delivered to the purchaser he will be in a position to regard all the defects as latent. It must be borne in mind, however, that to preserve his rights to the redhibitory action or the action *quanti minoris* (which must be taken with reasonable

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[25] *Mallory* v. *Canadian Fairbanks Morse Co. Ltd.* [1942] S.C. 132 (Errol McDougall, J.). Apparently the motor made no unusual noises when running, as opposed to the automobile case of *Churchill* v. *Parker* [1953] R.L. 509 (Ralston, J.), where a connecting rod concealed inside the motor which broke soon after the sale was held to be an apparent defect as an expert would have heard and recognized a foreign sound when the engine was going.

[26] *Dame Norbert* v. *Belanger* [1953] S.C. 295 (Ferron, J.).

[27] *Mercier* v. *Saucier* [1960] S.C. 305 (Lacroix, J.).

[28] *Remillard* v. *Beaulieu* [1960] S.C. 657 (Challies, J.).

[29] *Mercier* v. *Morin* (1914) 20 R. de J. 549 (McCorkill, J.).

[30] *Marchand* v. *Campeau* (1891) 20 R.L. 24 (Taschereau, J.).

[31] Mignault, *op. cit.*, VII, page 109.

[32] See, in this connection, Faribault, *op. cit.*, XI, page 280; *Dame Goudreau* v. *Stanford's Ltd.* (1923) 61 S.C. 83 (Maclennan, J.); *Brown* v. *Gagnon* (1921) 59 S.C. 102 (Court of Review); *Jardine* v. *Dame Allen* [1952] S.C. 126 (Demers, J.). It is to be noted that some French authors recognize the possibility of usages in certain trades whereby the buyer is entitled to wait until the goods have arrived at his premises before he examines them (Guillouard, *op. cit.*, I, pages 449 to 451; Laurent, *op. cit.*, XXIV, page 279; Baudry-Lacantinerie, *op. cit.*, XIX, pages 431-433); Aubry et Rau, *op. cit.*, V, page 82, footnote 8. It would be a question of fact as to whether such a usage existed in a particular trade or locality in Quebec. In this connection, see *Julius Kayser and Co. Ltd.* v. *C. & G. Lingerie Co. Ltd.* [1963] S.C. 504 at 508-509 (Batshaw, J.).

diligence under article 1530 C.C.), the purchaser must examine the object immediately on its receipt.[33]

C. *The buyer's duty to obtain expert advice.*

(i) *Introduction.* We have seen that the buyer must examine the object which he is acquiring and that the seller will not be responsible for defects which an alert buyer would have noticed in a careful and serious examination. The question now to be considered is whether an examination by the buyer alone will suffice. If so, the criterion as to what is an apparent defect will become both relative and subjective rather than absolute and objective; for while the courts would impose on buyers the duty of care, they would have to make allowance for the fact that some purchasers are more skilled than others. Thus an architect buying himself a house would be regarded as in a better position to discover defects than an ordinary person. As a consequence, the extent of the warranty owed by the seller would vary in relation to the individual purchaser.

Moreover, let it not be forgotten that the law dislikes uncertainty and that it should be the constant aim of the law to lessen the likelihood of litigation. If a relative and subjective standard were to apply to the buyer, the courts would be faced with having to determine the degree of skill possessed by each individual buyer involved in litigation over defects, a hard if not impossible task that would tend to be rendered the more difficult by attempts by buyers to hide their expert knowledge. Also, allowing a buyer to purchase without the benefit of skilled advice and then after the sale to sue on the basis of defects which an expert could have pointed out to him, would certainly increase litigation.

The alternative, then, is to require the buyer to adhere to a more absolute and objective standard when purchasing.[34] The only way that this can be achieved is where a prior examination by an expert is carried out, because a reasonable degree of uniformity of standards can be expected from each profession or trade. A buyer who purchases after the object has been examined by an expert is much less likely to acquire something suffering from serious defects, and

[33] Durnford, *The Redhibitory Action and the "Reasonable Diligence" of Article 1530 C.C.*, (1962-63) 9 McGill L.J. 16 at 27; Mignault, *op. cit.*, VII, page 119; Faribault, *op cit.*, XI, page 302; *Ross* v. *Baker* (1891) 20 R.L. 203 (Court of Review); *Guest* v. *Douglas M.L.R.* (1888) 4 Q.B. 242; *Fraser* v. *Magor* (1892) 1 S.C. 543 (Pagnuelo, J.); *Vipond* v. *Findlay* (1891) 14 L.N. 298 (Tait, J.); *Cushing* v. *Strangman* (1892) 1 S.C. 46 (Court of Review); *Marchand* v. *Dame Gibeau* (1892) 1 S.C. 266 (Court of Review).

[34] See *Magnan* v. *Perkins Electric Company Ltd.* (1933) 39 R.L.n.s. 314 (Surveyer, J.).

the extent of the vendor's warranty will be much more clearly defined, for he will only be responsible for defects that are hidden to an expert in the field. The result is greater certainty and less cause for litigation.

Doctrine has for the most part opted for the buyer being required to consult an expert concerning an object with respect to which he is not technically qualified to judge for himself its condition.[35] This means that if a defect is one that an expert would have discovered it will be considered as being apparent and the seller will not owe any warranty to the buyer against it. We shall now examine the jurisprudence of our courts on the matter. The reported judgments nearly all relate to buildings and used automobiles, presumably because these involve relatively substantial purchases on the part of quite a large section of the public and are frequently subject to defects. Thus the remainder of this article will concentrate on those two items.[36]

The jurisprudence has almost unanimously taken the same view as the majority of the doctrine with respect to buildings, with one important exception. When it comes to motor vehicles, the courts have sometimes wavered.

(ii) *The case of a building.* The strong line taken by the courts respecting the necessity for a buyer to consult an expert is reflected a number of decisions. A good illustration is *Dallaire* v. *Villeneuve*,[37]

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[35] Pothier, *Traité du Contrat de Vente*, ed. Bugnet (1861), paragraph 207 ("... il ne tenait qu'à lui [the buyer] d'examiner la chose avant que de l'acheter, ou de la faire examiner par quelqu'un, s'il ne s'y connaissait pas lui-même."); Faribault, *op cit.*, pages 278, 279; Louis Payette, *La garantie des défauts cachés chez les marchands de voitures usagés*, (1961) 39 Thémis, page 148 at 150; Planiol et Ripert *op. cit.*, X, pages 144-145; Baudry-Lacantinerie, *op. cit.*, XIX, pages 426-427. *Contra*: Mazeaud, *Leçons de Droit Civil*, III (1960), pages 840-841; Aubry et Rau, *op. cit.*, V, page 82, footnote 8; Walter S Johnson, *The redhibitory action and buildings — Implications of acceptance of work*, (1952) 12 R. du B. 322, at 331, footnote 24. The latter two of these last three works only make passing reference to our problem.

[36] As to sales involving other types of objects: in *Magnan* v. *Perkins Electric Company Ltd.* (1933) 39 R.L.n.s. 314 (Surveyer, J.), it was held that a purchaser of a movie projector who lacks the necessary technical knowledge should engage an expert. The same rule was held to apply to a horse: *Dame Tétreault* v. *Duffy* (1899) 16 S.C. 89 at 92 (Tellier, J., and confirmed by the Court of Review though the latter did not rule as to whether the particular malady affecting the horse was apparent or not). On the other hand, in *Dame Antil* v. *Bigras* (1922) 60 S.C. 545 (Guérin, J.), an action *quanti minoris* based on defective foodstuffs in the sale of a grocery business was maintained where the purchaser and her husband actually alleged their ignorance of this line of business. It is hard to consider this judgment as being well founded.

[37] [1956] Q.B. 6.

which involved the sale of a garage. The purchaser sued on the basis that the roof and the heating system were affected by defects which he claimed were latent. The Court of Appeal agreed that the defects complained of not only existed but were serious. The framework of the roof had so little strength that it sagged under the roof's weight and steel beams were necessary to prevent its collapse. The heating system's steam boiler had not been equipped with the safety devices required by law, and the inspection service of pressure vessels (being part of the Department of Labour) had advised that the necessary permit would not be issued until certain changes had been made.

The Court held the defects to be apparent. Mr. Justice Pratte said that a defect is not latent by the mere fact that the buyer did not notice it or did not appreciate its gravity; that a person who lacks the necessary knowledge to judge the condition of a thing he is going to buy must obtain the assistance of a person able to inform him: article 1522 C.C. is not intended to remedy the consequences of casualness or ignorance. As to the roof, the purchaser should have climbed up into the attic through a trap-door in the ceiling, and the inadequacy of the construction would have been evident. As to the boiler, a buyer who was ignorant in such matters, but prudent, would have obtained expert advice or would at least have asked to be shown the permit required by the Pressure Vessels Act. Consequently the purchaser's claim on the grounds of defects in the roof and in the heating system was dismissed.[38]

The Court's attitude that a defect is apparent if it would have been discovered by an expert is reflected in a number of cases.[39] It is true that statements have been made in at least two judgments that a buyer is not required to engage an expert and that a defect is only apparent where an ordinary buyer could have found it on his own.[40] However, these cases are isolated; moreover, they relate to

[38] The buyer was successful as regards another claim which related to defects in the garage equipment which was sold under an express guarantee — see the discussion under the heading "The buyer's protection: an express guarantee."

[39] *E. and M. Holdings Inc.* v. *Besmor Investment Corporation* [1961] Q.B. 376; *Arpin* v. *Francoeur* (1930) 48 K.B. 231; *Dame Gagnon* v. *Dame Houle* (1923) 34 K.B. 11 at page 18 (notes of Rivard, J.); *David* v. *Manningham* [1958] S.C. 400 (Jean, J.); *Ridgewood Court Inc.* v. *Zaritsky*, unreported judgment of Brossard, J.; February 18, 1963, S.C.M. 367238; *Dame Kirsh* v. *Boisjoly* [1962] S.C. 604 (Robinson, J.) (this case held fire doors which contravened city fire by-laws to be an apparent defect as the purchaser should have engaged an expert to examine the building to see if it conformed with the by-laws — this judgment seems better founded than that of the Court of Appeal in *Piersanti* v. *Dame Laporte* [1956] Q.B. 210, where infringements of city and provincial health by-laws were held to be latent defects).

[40] *Lauzon* v. *Levesque* (1929) 67 S.C. 470 (Philippe Demers, J.); *Rothstein* v. *International Construction Inc.* [1956] S.C. 109 (Collins, J.).

new buildings, a special category which will be discussed under the next heading.

Having established that a prospective purchaser should consult an expert before buying a building, we must now consider how far the expert should go in his examination, and whether a defect will be declared to be latent or apparent where a competent expert happens to overlook it. These problems are considered in the most interesting case of *Levine* v. *Frank W. Horner Limited.*[41] The Horner Company had owned the building in question and had carried on business in it since about 1916. During the Company's ownership additions had been made. It originally had three storeys. In 1919 a fourth floor was added; the front wall of the additional storey was supported by a large concrete beam which extended across the front of the building. In 1922 or 1923, the building was extended to the North; the addition was built against the northerly wall of the existing part of the building, the old wall being left in place. Almost the entire front of the old part of the building was made up of a single window, whereas the new part had smaller windows with bricks between. In order to make the appearance of the enlarged building more uniform, the owner partly bricked over the large window. When the Levines bought the building, they did so with the intention of carrying out substantial alterations including the removal of the wall between the old and new parts.

Before acquiring the building, the purchaser had it inspected by both an architect (Bernstein) and an engineer (Berenstein). Bernstein had been in practice as an architect for sixteen years, and the general competence of these two professional men was not questioned. They made a reasonably thorough examination that lasted about two hours. Bernstein noticed a bulge in the brickwork but considered it to be of no significance and did not bother to report it to the buyers. During the course of the alterations being carried out by the Levines after they had bought, it was discovered that the beam that had been put in to support the front wall of the fourth storey had tilted, causing its lower part to move outwards and make the bulge in the brickwork. The old large window on the front of the old part of the building was also found behind the bricks. The result was that the front of this part of the building had to be rebuilt at a cost of over $8,000. There was no bad faith on the part of either party — they were both unaware of the defects.

At trial, the defendant company called its own architect, Chadwick, "... who stated that if he saw a bulge in the position in which the

[41] [1961] Q.B. 108, confirmed by [1962] S.C.R. 343. See also the case comment by Graham Nesbitt (1961-62) 8 McGill L.J. 232.

bulge in question occurred, he would consider the matter seriously, that he would examine it to find its cause and that such bulges should be considered serious when they are found in a wall face having such a large proportion of window area and, consequently, such a small proportion of supporting brickwork".[42] The late Mr. Justice Ralston, of the Superior Court, while acknowledging that a superficial examination by an architect might not have led to the discovery of the defect, said he was convinced that if the architect Bernstein had examined into the cause of the bulge (by stripping the building sufficiently to find the beam), he would have found the defect, which could therefore not be "... considered as in any way latent within the meaning of the Articles covering such matters in the Civil Code, and particularly Article 1523 C.C." [43] Bernstein had made an error in judgment when he discounted the bulge which he saw, and Chadwick's reasoning was "... unassailable from the scientific point of view." [44] It was Mr. Justice Ralston's view that while the Levines had taken such reasonable precautions as they could to verify the soundness of the structure which they intended to purchase, "... they were undoubtedly misled, albeit in good faith, by their own architect, and in this the Court has every sympathy with them. However, their remedy does not lie against the Defendant under such circumstances and their action must be dismissed".[45]

The Court of Appeal upheld the trial judgment three to two, with Montgomery and Choquette, J.J. dissenting. Mr. Justice Montgomery felt that too heavy a burden had been imposed on the buyers. They had had the building looked over by two competent professional men who had conducted an inspection lasting about two hours, and in order to discover the defects they would have had to remove either a part of the exterior brickwork or of the interior panelling. He said, in short, that "I am of the opinion that it is going too far to deny their (the buyers') recourse because some professional man, perhaps more cautious than others, might have made a further examination which would have disclosed these defects." [46] To this, Mr. Justice Choquette added that the buyers did not have the duty to open the wall, which was the only way the defects could be found. He cited Baudry-Lacantinerie to the effect that a defect is latent when it can only be perceived by means of unusual operations.[47] The example is cited of rotten beams concealed under

[42] Extract from the judgment of Ralston, J., November 12, 1954, S.C.M. 322763.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] *Levine* v. *Frank W. Horner Limited* [1961] Q.B. 108 at 111.
[47] *Ibid,* at pages 116-117.

floors and above ceilings, it being unnecessary for the buyer to demolish either the floor or the ceiling for the purposes of inspection. As to whether the bulge indicated a defect, the learned judge felt that the disagreement between the experts as to the significance of the bulge constituted a debate of a technical order which was not one for the court to settle. The purchasers had fulfilled their duty in hiring experts who were competent and conducted a careful examination. He therefore considered the defect to be latent.

The majority judges were St. Jacques, Casey and Badeaux, JJ. Mr. Justice St. Jacques (with whom Mr. Justice Casey agreed), did not feel that the defect was hidden to the extent that a competent expert would not have found it. He agreed with Chadwick that the presence of the bulge was a sufficient indication of a defect. It should also be borne in mind, however, that it was Mr. Justice St. Jacques' view of the facts that the defect did not affect the solidity of the building as regards the way the vendor had been using it and the way the purchasers could have used it if they had not altered it — that it was the transformation by the purchasers that had made necessary the reconstruction of the wall.[48] He also expressed skepticism as regards the very basis of the action, namely whether the purchasers really would not have bought or would have paid $12,000 less [49] in light of the price that was paid of $140,000 and of the alterations that were carried out amounting to about $80,000.

Mr. Justice Badeaux also felt that Bernstein had not attached sufficient importance to the bulge that he had noticed. He, too, pointed out that the Horner Company had used the building for the purposes of its business for many years with no trouble, and that it was Chadwick's view that a buyer desirous of making the changes that the Levines had contemplated should have made a more careful examination.

Thus it was the ruling of the majority of the Court of Appeal that the defect was apparent. The Levines appealed to the Supreme Court,[50] where the judgment was delivered by Mr. Justice Abbott. After setting forth the facts, the learned judge's sole comments were as follows:

> "Assuming as I do, but without deciding, that the sale was one made with full legal warranty, the sole question in issue here is whether the defect complained of was a latent defect within the meaning of art. 1522 of the *Civil Code*. The learned trial judge and the majority in the Court below have held that it was not and I am in respectful agreement with that finding."

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[48] Choquette, J., dissenting, disagreed — it was his view that the repairs would have had to be done anyway.

[49] They had claimed damages as well as the cost of the rectification of the defect.

[50] [1962] S.C.R. 343.

"The appeal should be dismissed with costs." [51]

There are some in this Province who say that cases involving the civil law should not be submitted for decision to the Supreme Court as it is to a large extent imbued with common law principles, thereby endangering the purity of the civil law system. Others say that the Supreme Court should sit in two divisions, with only judges trained in the civil law deciding private law cases from Quebec. These arguments may or may not be well founded. Perhaps they are outweighed by considerations of a national order or because of the importance of actions involving civil liberties (which often arise as private law cases). In any event, the Supreme Court has no right to abdicate its functions of its own accord. Where important principles of law require a clear and definitive interpretation, it is the function of the court of last resort to give that interpretation, and where the questions concern Quebec law it is up to the civilian judges in the Supreme Court to furnish it. Outstanding judgments on the Quebec civil law have been rendered in the past by our highest court. Take, for example, the notes of Chief Justice Anglin in *Samson & Filion* v. *The Davie Shipbuilding & Repairing Co.*,[52] where the liability of the vendor for damages caused by the latent defect in the object sold was discussed. It is up to the Supreme Court to carry on this tradition.

So what are we left with in the *Levine* v. *Frank W. Horner Limited* case? We have a majority opinion on certain key questions relating to the interpretation of what is an apparent defect under article 1523 C.C. Firstly, as to whether the purchaser must engage an expert when acquiring a thing concerning which he lacks technical knowledge: None of the five judges of the Court of Appeal denied the necessity for the consulting of an expert, though this question did not really present itself because the buyer had in fact engaged experts. However, in view of the three other unanimous Court of Appeal decisions (cited *supra*) of *E. and M. Holdings Inc.* v. *Besmor Investment Corporation*,[53] *Dallaire* v. *Villeneuve* [54] and *Arpin* v. *Francoeur*,[55] it can now be taken that insofar as the purchase of buildings is concerned (subject to the exception of new houses discussed under the next heading), defects which an expert would have discovered will be considered apparent even though the buyer himself might not have noticed them.

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[51] *Ibid*, at page 346.
[52] [1925] S.C.R. 202.
[53] [1961] Q.B. 376.
[54] [1956] Q.B. 6.
[55] (1930) 48 K.B. 231.

Secondly, as regards how far the expert must go, and who will bear the loss in the case of an oversight on his part: It was the view of the majority (in the *Levine* Court of Appeal decision), that a defect is apparent not only where an expert is able to see the defect itself but also where he can only see the exterior indication of a possible defect which may or may not exist beneath the surface. Thus a bulge, while found from time to time in an old building and may or may not be caused by an inner defect, will constitute sufficient notice to the purchaser of the existence of a possible defect so as to render that defect apparent if it exists. It is felt by some that it is putting a heavy onus on a buyer to require him even to engage an expert, partly because article 1523 C.C. does not mention such a requirement. Then to force the expert to explore what may well be a harmless bulge may be forcing the buyer to go too far. Graham Nesbitt, in his comment on this case,[56] took this view. The strength of the decision is weakened by a feeling on the part of the majority judges that if the building had not been subjected to alterations but had continued to be used as the vendor had used it, no difficulty would have been experienced. One senses that it was felt that the buyers had brought the trouble on themselves.

Putting this factor aside, let us consider the validity of the principle that a defect is apparent where there is nothing more than an exterior sign indicating the possibility of a defect underneath, for not having *stare decisis* in our system of law, the principle laid down by the majority of the Court will only be followed if it can be regarded by judges deciding future cases as being sound. The two dissenting judges, Montgomery and Choquette, JJ., felt it was not sound — it was too much to expect of a buyer to open up the wall and explore behind the bulge. The latter quoted Baudry-Lacantinerie to the effect that a defect will be hidden if it could only be found "... au moyen d'un travail qu'il n'est pas dans l'usage de faire." [57] No one can quarrel with this. But the example then given by that French author as an illustration does not accord with the situation in the *Levine* case. Baudry-Lacantinerie speaks of a house where the beams under the floors were rotten. The beams, "... étant couverts et enveloppés dans toute leur étendue par les planchers et les plafonds, se trouvaient *dérobés à tous les regards*. On aurait pu, sans doute, en enlevant les planchers et en abattant les plafonds, connaître l'état des poutres et sommiers; mais il n'est pas d'usage de faire de telles dégradations quand on visite une maison pour l'acheter".[58] It is to be

[56] (1961-62) 8 McGill L.J. 232.

[57] *Levine* v. *Frank W. Horner Limited* [1961] Q.B. 108 at 116.

[58] *Ibid*, at page 116. Italics added.

noted that in the foregoing example the rotten beams were entirely hidden and there was no exterior sign to act as a warning, in contrast to the bulge in the wall in the *Levine* case.

If it is agreed that a prospective purchaser must carefully examine and inspect the object of his purchase, and that if he lacks the necessary knowledge to do so properly, he must hire an expert, then surely there is no point to such an examination unless it is a careful one. All outward indications of possible defects are then communicated to the buyer, who may then (1) assume the risk of there being a defect, (2) advise the seller of his refusal to purchase without the possible defect being explored or (3) demand an express guarantee from the seller.[59]

It was agreed by Mr Justice Montgomery that the buyer had carried out his duty of consulting competent experts, and he felt this sufficed — that the buyer should not be penalized because another more cautious expert might have made a further examination. If it were a pure question of a technical debate between experts, one would agree with the learned judge. But is there not here a hint of negligence on the part of the purchasers' experts? Not to even bother mentioning a bulge (which, after all, could hardly be considered a healthy looking thing for a building wall to have) to their clients was casual, to say the least.

This leads to another aspect of the problem. Where the buyer fulfils his duty by consulting an expert of recognized standing and competence, this expert is just as subject as any of the rest of us to being momentarily careless, or, to use a colloquial expression, to having an "off day". This is why even the most competent of professional men carry liability insurance. Where the expert commits an oversight and does not see a defect which he as an expert should have noticed, or fails to report to his client what might be considered to be indications of a possible defect, both the buyer and the seller will be innocent parties. Which of them is to be penalized by the expert's negligence, in other words will the defect be held to be latent or apparent? If the evidence discloses that a careful and diligent expert would have warned of the defect or the possible existence of the defect, then surely the defect will be considered to be apparent and the buyer will have his recourse in damages against his expert.

It may be protested that such a heavy onus is being placed on the buyer that he will no longer feel safe with only one overall expert such as an architect, that he will have to have a group of specialists, "... because so many trades and materials enter into the construction

[59] See the discussion under the heading "The buyer's protection: an express guarantee" (*infra*)

of the house, such as plumbing, heating, roofing, masonry work, foundation, etc." [60] The answer to this was furnished by Mr. Justice Hyde in *E. and M. Holdings Inc.* v. *Besmor Investment Corporation.*[61] He said "I am not suggesting that a buyer... is obliged to retain the services of an expert in each of the building trades, but that is very different from proceeding without any expert advice at all." The learned judge suggests that if the purchaser had been prudent and had engaged a builder or architect to advise him, the expert, after seeing the building, might have advised an examination by an electrical expert.

The foregoing would seem to supply the key to the situation: the buyer must consult a competent general expert such as an architect, who will report all defects which his skill and knowledge make apparent to him and will report to his client the necessity for specialized experts where there exist indications of the possibility of other defects. Where there are no defects or signs of possible defects (warranting specialized experts) visible to the architect, then any defects in the building will be latent.

(iii) *The special case of the new building.* Where a person buys a new home from the contractor who built it, is he obliged to have an expert examine it? That he is not was held in *Tellier* v. *Proulx.*[62] Plaintiff bought a modest two storey dwelling from the defendant contractor who constructed it. The heating system was defective — the upstairs radiators were too small and had to be replaced by larger ones and the circulating pump also had to be changed. In answer to defendant's claim that plaintiff should have had an expert examine the house, Mr. Justice Batshaw said that this was not necessary for the buyer of a modest dwelling, which was built by an apparently reliable contractor. "The vendor contractor is presumed to have built in a workmanlike manner and in accordance with the rules of the building art . . . The buyer of a new house is entitled to assume it was built with reasonably good and adequate materials, and with due compliance with the building art, without being obliged to resort to detailed tests or technical computations to verify this to be the case. Accordingly, the plaintiff in the present case was entitled to assume that the radiators which appeared to be of normal and satis-

[60] Collins, J., in *Rothstein* v. *International Construction Inc.* [1956] S.C. 109 at 111.

[61] [1961] Q.B. 376 at 379.

[62] [1954] S.C. 180 (Batshaw. J.).

factory size were adequate to heat the premises he was purchasing." [63] Similar remarks were made by Mr. Justice Boulanger in *Bourdon* v. *Lamontagne* [64] (though in that particular instance the purchaser had had the house examined by an architect). In that case part of the new floors would have had to be taken up and a hole fourteen feet deep would have had to be dug in order to discover the defect which caused the floor to collapse hardly one month after the purchase.

There are two other cases that also relate to new buildings. *Rothstein* v. *International Construction Inc.*[65] concerned a duplex in which the radiators were inadequate and four of them had to be replaced. It was in this judgment that Mr. Justice Collins made his statement that a latent defect is one which is not apparent to the honest buyer even though an expert, if one had been engaged, might have discovered it. While the Court of Appeal has decided otherwise, nevertheless this statement of principle is consistent with *Tellier* v. *Proulx (supra)* if restricted to the purchase of a new building from the contractor who built it. A similar view can be taken of *Lauzon* v. *Lévesque* [66] which involved a three storey apartment building.[67]

How sound is this exception in favour of the buyer of the new house? It does not seem to have been ruled on by the Court of Appeal as yet. In *E. and M. Holdings Inc.* v. *Besmor Investment Corporation*,[68] Mr. Justice Hyde, in referring to *Tellier* v. *Proulx*, *Rothstein* v. *International Construction Inc.* and *Lauzon* v. *Lévesque*, said: "Whether these cases were properly decided or not, and this is a question I do not propose to discuss, I agree that they can be so distinguished." Thus the question is still open, but as the principle is a sound one, it should continue to be applied. Perhaps the following line of reasoning could be followed in support of the principle: in making the buyer responsible for apparent defects, article 1523 C.C. does not expressly require him to engage an expert to look for defects, but the reasonable man who is not himself an expert will take the precaution of consulting one when purchasing something concerning which he is ignorant. On the other hand, when acquiring a new house from the contractor who built it, the reasonable man will feel entitled to rely on the con-

[63] *Ibid*, at page 182-183. See the interesting article by Walter S. Johnson, *The Redhibitory action and buildings — Implications of acceptance of work*, (1952) 12 R. du B. 322. At page 333 he discusses the situation where a contractor has built a house for an owner, which is somewhat similar to a person buying a new house from a contractor builder.

[64] [1945] S.C. 269.

[65] [1956] S.C. 109 (Collins, J.).

[66] (1929) 67 S.C. 470 (Philippe Demers, J.).

[67] See also *Dame Fortin* v. *Grimard* [1958] S.C. 381 (Batshaw, J.).

[68] [1961] Q.B. 376.

tractor, who is holding himself out as being an expert in construction, and so the reasonable man will not in such an instance feel it necessary to engage his own expert. Another line of reasoning is that the contractor-vendor who is sued cannot plead non-responsibility for the defects because his defence rests on his own lack of skill (which caused the defects) and the law will not permit one to plead his own turpitude. Whichever line of reasoning is followed as regards the contractor-vendor, it must be borne in mind that the purchaser will not be excused for his own negligence either — thus while he may be protected as regards defects which are not visible to the inexpert eye, he will not be so protected as regards those that are. Hence, if a reasonable man is able to see that the chimney on the house is leaning to the extent that it is about to collapse, then the defect will be an apparent one and will be the responsibility of the buyer even though it may be a new house that he is acquiring from a contractor-vendor.

An additional reason for imposing a heavier burden on the vendor-contractor is that the buyer of an older house has a certain advantage in that it will have been tried and tested, with a good chance of defects arising from errors of a technical order on the part of the builder having been discovered and remedied. The buyer of a new house, on the other hand, is more at the mercy of the builder insofar as defects are concerned.

(iv) *The case of a motor vehicle.* The Court of Appeal having strongly laid down the rule that the buyer of a building should have it inspected by an expert on the basis that any defect that a competent expert should have found will be considered an apparent defect for which the seller will not be liable, one would expect, as articles 1522 and 1523 C.C. do not distinguish between different types of objects, to find the same rule applied to the purchase of a motor vehicle. It has been — in some cases. In *Sirois* v. *Demers*,[69] an exchange of two automobiles took place, shortly after which plaintiff discovered that the car he had acquired was in poor condition. A mechanic testified that it was easy to discover the defects on taking a short drive. The Court cited Planiol et Ripert to the effect that for automobiles, "... le vice est caché toutes les fois qu'il n'aurait pu être découvert que par un expert procédant à des vérifications minutieuses ou après quelques milliers de kilomètres de circulation" and held the defects to be apparent.[70]

In *Lincourt* v. *Généreux*,[71] the six year old second hand car that

[69] [1945] K.B. 318.
[70] *Ibid*, at pages 322-323.
[71] [1944] S.C. 438 (Archambault, J.).

was purchased suffered from a crack in the cylinder block, which the buyer discovered soon after the sale. The vendor had offered to have the automobile examined by a mechanic before the sale, but the purchaser said this would not be necessary. After a thorough review of the authorities, Mr. Justice Archambault held the defect to be apparent. He said that if the purchaser was not competent to examine the car, he committed a fault in not accepting the offer to have it inspected by a mechanic; if he was competent, he was negligent in not having carefully examined the cylinder block. In either case, the defect could easily have been found. A prudent buyer, unless he was an expert, would not have bought a six year old car without having it minutely examined by an expert.

In *Churchill* v. *Parker*,[72] a second hand Hillman Minx automobile was purchased by plaintiff. It had been driven just under 20,000 miles. Plaintiff examined the car superficially before buying, including driving it for several city blocks. When he was on his way home after the purchase, a connecting rod broke inside the engine, causing considerable damage. It is true that a motor must be at least partly dismantled in order for a connecting rod to be visible. The defect was nevertheless held to be apparent because of testimony to the effect that a garage mechanic listening to the motor would probably have heard a noise that would have indicated the likehood of the break that took place. Mr. Justice Ralston said that a person is very imprudent if he does not have a second hand automobile inspected by a competent garage mechanic or some other expert before buying it. There was a similar holding in *Perron* v. *Morin*.[73]

In view of the foregoing attitude shown by the courts, it is with some surprise that we now study the unanimous Court of Appeal decision rendered in 1955 by Galipeault, C.J., and Gagné and Martineau, JJ. in the case of *Bourget* v. *Martel*.[74] Plaintiff Martel had bought a second hand Buick automobile that was five years old. He did not examine the car before buying it nor did he have a mechanic do it for him. Two or three days after taking possession, Martel showed the car to two mechanics, one of whom testified that the car "...n'était pas en état de marcher dans le chemin." In his recital of the facts, Mr. Justice Gagné mentioned that the car was undergoing repairs at the time of the sale. He also referred to the attempts by Martel and his wife to prove an express guarantee (Bour-

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[72] [1953] R.L. 509 (Ralston, J.).

[73] [1957] R.L. 522 (Brossard, J.). See also *Canadian Auto Corporation* v. *Morin, Limitée* [1950] Q.B. 581; *Omer Barré Ltd.* v. *Gravel* (1940) 78 S.C. 262 (McDougall, J.); *Racine* v. *Demers* [1949] S.C. 370 (Belleau, J.).

[74] [1955] Q.B. 659.

get "... leur a dit que la voiture était en bonne condition et qu'ils n'avaient rien a craindre".).[75] These two factors might have constituted a sound basis for the judgment which resiliated the sale — if the car was under repairs at the time of the sale, it could have been argued that no proper examination and inspection could have then been carried out, meaning that the defects were latent for the purchaser,[76] and an express guarantee extends the vendor's warranty to cover apparent as well as latent defects.[77] Instead of this, Mr. Justice Gagné said: "Certes, il eût été préférable pour l'acheteur de faire examiner l'automobile par un homme compétent avant de la prendre. *Il est évident que la vente n'aurait pas eu lieu.*" [78] He also said that the conventional warranty that plaintiff had tried to prove was unnecessary — the affirmation that the car was in good condition and they had nothing to fear "... n'ajoute rien à l'obligation prise par un vendeur d'automobile, même s'il s'agit d'une voiture usagée." [79] The basis of the court's judgment is to be found in his following key words: "A tout événement, il est certain que lorsqu'on achète une automobile usagée, *on s'attend et on a droit de s'attendre à recevoir une voiture qui fonctionne normalement* et non pas une voiture sur laquelle il faudrait dépenser quelques centaines de dollars pour la mettre en état de s'en servir." [80] Does this not go directly contrary to the provisions of articles 1522 and 1523 C.C.? It is true that under article 1522 the seller must warrant the buyer against defects in the thing sold which "... render it unfit for the use for which it was intended ...", but the article is specifically referring to *latent* defects. The seller is not responsible for *apparent* defects (article 1523 C.C.). Have we not seen strong authority, both doctrinal and jurisprudential, to the effect that a defect is apparent if it would have been discovered by an examination on the part of the buyer or by an expert where the buyer is technically ignorant? There was no prior examination in this instance. Moreover, a mechanic who examined the vehicle after the sale testified that defects were such

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[75] *Ibid*, at page 663. It should be noted that in *Benoit* v. *Metivier* [1948] S.C. 53, Sévigny, C.J., resiliated the sale of a defective automobile where the vendor had declared that the motor was running well.

[76] See the discussion in the last paragraph under the heading "The buyer's duty to inspect" (*supra*).

[77] See the discussion under the heading "The buyer's protection, an express guarantee" (*infra*).

[78] [1955] Q.B. 659 at 664. Italics added.

[79] *Ibid*, at page 663.

[80] *Ibid*, at page 664. Italics added. Martineau, J., even added that the buyer has the right to receive a car that is worth approximately the price that was paid for it (at page 668). Is this not a question of lesion, which does not avail in favour of persons of age (article 1012 C.C.)?

that the car was not even fit for the road. Surely this means that the defects were glaringly apparent?

It should be noted that the Court of Appeal never once even mentioned article 1523 C.C. in its judgment. The only authority cited was the Supreme Court decision in *Lortie* v. *Bouchard.*[81] In that case the sale of a bus and other assets was annulled on grounds of fraud. In *Bourget* v. *Martel,* the Court of Appeal was dealing with a redhibitory action. The two are not the same.[82] It is respectfully submitted that to hold that one is entitled to receive, when buying a used car without examination and in the absence of fraud and of an express guarantee, a vehicle that functions normally, is not to decide in accordance with our law.[83]

Another decision with which the author respectfully differs is that of *Longpré* v. *St. Jacques Automobiles Ltée.*[84] Plaintiff Longpré purchased a second hand Mercury from the defendant. There was a crack in the motor, rendering it defective. The car was sold "tel que vu et sans garantie." In order for Longpré's redhibitory action to be successful, this exclusion of guarantee had to be ruled invalid. This required twin findings by the court: one, that the seller either knew or was presumed to know of the defect, thus making the clause of non-warranty fraudulent, and two, that the defect was latent (the

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[81] [1952] 1 S.C.R. 508.

[82] See *Commercial Credit Corporation of Canada Ltd.* v. *Legault* (1939) 77 S.C. 520 (Forest, J.).

[83] A judgment that might be said to resemble that in *Bourget* v. *Martel,* is the old one in *Connolly* v. *Bédard* (1890) 19 R.L. 304 (Court of Appeal), which concerned the sale of pine lumber. The Court of Appeal confirmed a Superior Court judgment which held a sale to be uncompleted where the seller knew what kind of lumber the buyer wanted and also the purpose for which he required it and delivered lumber of inferior quality which was unfit for the use for which the purchaser wanted it. This might be considered analogous to the situation where a used car dealer is selling a car — he knows that the purchaser wants something that will run. There is also *Laverdure* v. *Lahaie* [1945] R.L. 69 (Loranger, J.), where it was held that the buyer of a second hand car is entitled to receive one that is in a good functioning condition. However, on examining the judgment we find that the purchasers had beforehand advised the seller that they were putting their trust in him to supply them with a car suitable for making outings, with its motor and working parts in good order. Instead, the vendor sold them an old wreck — "ce vieux bazou". One could perhaps justify this judgment on a basis of an implied guarantee on the part of the seller to furnish the purchasers with what they had requested: "Ce n'est pas du vieux fer que les demandeurs ont achetés; c'est une voiture de promenade" (at page 73). We also find Mazeaud, *op. cit.,* III, pages 834-835, saying that if the buyer lacks technical knowledge, the defects will be latent if only an expert is able to find them. This statement is apparently based on automobile cases that are cited in the text.

[84] [1961] S.C. 265 (Drouin, J.).

seller not being liable for an apparent defect even when aware of the same).[85] The car was apparently not examined by an expert prior to its acquisition and the defect was held to be latent, "... puisque l'acheteur, simple citoyen, ne peut pas, sans défaire le moteur, se rendre compte d'un tel trouble".[86] The defect being hidden and the seller being a dealer in automobiles, the seller was presumed to know of the defects and so the exclusion of warranty was put aside. Thus the learned judge relieved the buyer from the obligation of having an expert examine the car before its acquisition even though he was ignorant in such matters. This would not seem to be in keeping with our law. Moreover, the author disagrees with his statement [87] that the same principles applied as were laid down in *Lemire* v. *Pelchat*,[88] a significant difference being that in that case the purchaser had had the tractor examined by a mechanic before the sale,[89] and it was only after difficulties had been experienced and the machine had been dismantled six or seven months after the sale that the full extent of the defects could be ascertained.[90]

So much for the jurisprudence on the purchase of old cars. We have seen the courts lay down the same strict rules as they did with respect to the purchase of old houses, namely that the buyer must conduct an examination before the sale, and consult an expert if he lacks the necessary technical competence himself. However, we have also seen wavering on the part of the courts, including statements to the effect that an expert need not be engaged, and that a buyer is entitled to receive a car that runs. These inconsistencies may perhaps be explained on the basis that the courts are reluctant to allow used car dealers take advantage of innocent members of the public. This equitable objective may be laudable, but cannot be satisfactory as it conflicts with the principles laid down in articles 1522 and 1523 C.C., which must be applied as they are unless the legislature sees fit to amend them. As Mr. Justice Choquette said in *La Caisse Populaire de Scott* v. *Guillemette*: [91]

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[85] The seller is not liable for an apparent defect except where there is an express guarantee, (see the discussion under the heading: "The buyer's protection: an express guarantee"), possibly where a new house is involved (see the discussion under the heading C.(iii) "the special case of the new building"), or where the contract is being set aside on grounds of fraud (as in *Lortie* v. *Bouchard* [1952] 1 S.C.R. 508: Pothier, *op. cit.*, paragraphs 207 and 208; Faribault, *op. cit.*, XI, page 278; Mignault, *op. cit.*, VII, page 117; *Vincent* v. *Moore* (1885) 8 L.N. 3 (Loranger, J.); *David* v. *Manningham* [1958] S.C. 400, at 402 (Jean, J.).

[86] [1961] S.C. at 267.

[87] *Ibid.*

[88] [1957] S.C.R. 823.

[89] *Ibid*, at page 825.

[90] *Ibid*, at page 826.

[91] [1962] Q.B. 293 at 298.

"Sans doute encore, faut-il reconnaître la rigueur de cette clause dite dation en paiement aux termes de laquelle le débiteur incapable de continuer ses versements peut se voir enlever sa propriété, sans indemnité et au grand détriment de ses créanciers, même s'il a payé les trois quarts de sa dette, ou plus. Mais c'est au législateur qu'il appartient d'intervenir pour tempérer cette rigueur... Les tribunaux, eux, ne peuvent que donner effet aux conventions qui ne dérogent pas aux lois d'ordre public ou aux bonnes moeurs (C.C. art. 13), sauf les causes de nullité dont il n'est pas question ici (C.C., art. 991)".

It is therefore submitted that when one is buying a used car, he must examine it and consult an expert if he is not himself mechanically knowledgeable, and that any defect that a competent expert would have found will be apparent and consequently the sole responsibility of the buyer. This will apply so long as the defects are apparent, even though the vehicle may not even be fit for the road, unless, of course, the buyer has the necessary grounds for taking an action to annul the sale on the grounds of fraud (as was maintained in *Lortie* v. *Bouchard.*).[92]

As to new automobiles, the same are generally covered by an express guarantee. As to what will happen where an automobile manufacturer fails to fulfil the terms of the conventional warranty which he has stipulated, see *Touchette* v. *Pizzagalli.*[93]

4. The buyer's protection: an express guarantee

The law puts apparent defects at the charge of the buyer (article 1523 C.C.). The parties may, however, add to the obligations of legal warranty (article 1507 C.C.). Where there is an express guarantee that the thing is in good condition, the effect is to make the vendor liable for apparent defects.[94]

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[92] [1952] 1 S.C.R. 508.

[93] [1938] S.C.R. 433. Note: this case does not relate to what are apparent defects, but rather to the question whether the manufacturer is entitled to benefit from the restrictive terms of the conventional warranty where he has been unsuccessful in performing his obligations under the same.

[94] Faribault, *op. cit.*, XI, page 280; Durnford, *The redhibitory action and the "reasonable diligence" of article 1530 C.C.*, (1962-63) 9 McGill L.J. 16 at 28; *Dallaire* v. *Villeneuve* [1956] Q.B. 6 at 11; *Arpin* v. *Francoeur* (1930) 48 K.B. 231 at 233-234; *Carter* v. *Limoges* (1917) 23 R.L.n.s. 52 (Court of Review); *Fitzpatrick* v. *Tremblay* (1915) 21 R.L.n.s. 148 (Court of Review); *Benoit* v. *Metivier* [1948] S.C. 53 (Sévigny, C.J.); *Independent Fruit Company* v. *Mallette* (1931) 50 K.B. 137 at 144; *Stewart* v. *Atkinson* (1894) 22 S.C.R. 315; *Shorey* v. Henderson (1895) 7 S.C. 35 (Tait, A.C.J.); *Dougall* v. *Chouillon* (1906) 15 K.B. 300 at 307; *Vermette* v. *Typewriter and Appliance Co. Ltd.* [1948] S.C. 139 (Trahan, J.); *Jardine* v. *Dame Allen* [1952] S.C. 126 (Demers, J.); *Kearns* v. *Fleming* (1933) 71 S.C. 285 (Martineau, J.). See also *Massé* v. *Fraser* (1914) 23 K.B. 247; *Bouchard* v. *Vaillancourt* [1961] S.C. 171 (Montpetit, J.).

5. Conclusion

"The seller is not bound for defects that are apparent..." (article 1523 C.C.). We have seen that this has been interpreted to mean that the buyer must examine the thing before he buys it and that the examination must be as careful and serious a one as would be carried out by an alert and wide awake buyer and that he must engage an expert to do so for him where he lacks the necessary technical knowledge and skill. Consequently, a defect that a careful buyer or an expert should have discovered will be an apparent one for which the vendor will not be liable in warranty. We have seen the courts make an exception to this rule where a new building is being purchased from the contractor-builder. We have seen the courts sometimes waver where used automobiles are involved, probably on doubtful grounds of equity. We have also seen the exception arising out of the express guarantee, where the vendor has made himself responsible in warranty for all the defects.

While at first sight it may seen harsh to require the buyer to examine and to hire an expert where he is ignorant, these requirements are in the interests of the parties and of society: the purchaser is buying with proper information at his disposal as to the qualities of the thing, sellers are protected from claims made by buyers ignorant of what they were getting into, the use of experts who are of a recognized standing (e.g. those belonging to a profession, such as an architect) removes to a great extent the variety of standards that the courts would have to apply if each case was determined on the basis of what the particular individual buyer should have noticed, and litigation will be reduced.