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THE NOTION OF GOOD FAITH IN THE CIVIL LAW OF QUEBEC

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PRELIMINARY REMARKS

Although it is difficult to achieve a precise definition and delimitation of the term "equity", it is well accepted that equity is one of the principal ideals which positive law must pursue. I suggest that if in the meaning of equity one includes justice and morality on the one hand, and social expediency and order on the other, equity then becomes the chief, and perhaps even the sole, *raison d'être* of positive law in a civilized society. Indeed, good faith acts as the juridical needle which pulls the thread of equity through the various provisions of the civil law of persons, property, and obligations, in the province of Quebec.

Beginning with the basic division of the notion into two parts — "intellectual" good faith, and "intentional" good faith — one can subdivide these into two and three more parts respectively. "Intellectual" good faith may consist either of a "passive" ignorance in a state of affairs, or of an "active" erroneous behaviour. The ignorance phase is especially relevant in the field of property, while erroneous behaviour is found most commonly in persons.

"Intentional" good faith may be distinguished as between honesty and loyalty required in the execution of contracts; honesty and loyalty required in the exercise of rights; and the sense of equity that the judge must employ in the interpretation of contracts. These are the three roles which "intentional" good faith performs.

Chapter I

"INTELLECTUAL" GOOD FAITH

1. FUNCTIONS OF "INTELLECTUAL" GOOD FAITH

The "intellectual" notion of good faith might be termed as good faith in the strict legal connotation of the phrase. Unlike the moral popular good faith (the intentional notion), the law demands certain specific requirements before

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one can avail himself of this good faith. Its foundation, however, is still rooted in the popular sense of the notion, and its goal is equity.

The notion of good faith here plays the role of a protector. It protects those who act in error or those who suffer because of their ignorance. As long as a person sincerely believes that he conforms to the law, the law must treat him with indulgence if his actions should turn out to be misguided.

More specifically, in the law of persons the "intellectual" notion serves to protect the consorts, for example, whose marriage is annulled because one of them erred as to the formalities or substance of the marriage. If the error is genuine — *i.e.* if the parties were in good faith — the marriage is declared putative and bears all civil effects as if it had been valid. Similarly, in the law of property, a person who possesses land by virtue of a defective title for a certain period of years will be protected from revendication by the owner if he had been truly ignorant of the defects in his title.

2 Passive State Explained

The major area where this particular sense of good faith applies is that of the good faith possessor both as regards acquisitive prescription, and the acquisition of fruits by accession. Before examining the specific and practical role that good faith plays in this area, it is first advisable to survey some of the general principles which apply to this passive sense of good faith in prescription and accession.

One is confronted here with a legal phenomenon in which a certain state of mind on part of a possessor results in the protection of his possession, or at least of some rights in it. In most cases, the possessor has done nothing to acquire this state of mind, outside of the physical fact of "possessing"; he committed no positive act in order to achieve this state of mind. It is simply there. He is in it. Hence I have termed this as the passive aspect of "intellectual" good faith.

What precisely is this state of mind? To put it simply, it is a state of ignorance of certain facts. It is a lack of knowledge on the part of the possessor that there is some defect in his right to the possession. Viewed conversely, it is in fact his belief that he is not a mere possessor, but rather the rightful owner of his possession. It is a state of mind which will not give rise to any questions or doubts as to his right of ownership. It is the normal state of affairs.

Being a juridical notion, however, this ignorance demands some precise requirements in order that it constitute good faith. While it is fairly simple to outline some theoretical requirements, their practical application is much more difficult. Any state of mind is difficult to examine objectively. It is subjective and internal and external acts are usually not much help in indicating exactly what was their author's intention.

3. The Degree of Certainty

How certain must one's belief be in order that he may be in good faith? What, if anything, must one do to ascertain whether his belief is correct? These are two very important and difficult questions which must be answered before a possessor can claim good faith by virtue of his ignorance.

Obviously, they must be decided according to the facts and circumstances of each individual case. In the final analysis, it is the judge who must use his discretion to decide whether a person truly believed in the validity of his title, or whether he purposely avoided searching for proof of its validity. Yet some general principles may be drawn as to the type and extent of ignorance required to satisfy good faith.

Modern opinions compromise between an extreme degree of certainty[1], and one which allows every type of negligence to serve as a basis for good faith. Joron requires the possessor to show some "alertness" at discerning whether or not his right is free of defects. Tetreault comes closest to defining the limits of certainty and the excusability of ignorance in his following definition: "Une certitude morale appuyée sur un jugement relativement prudent mais non éclairé."[2] The judgment must be "relatively prudent"; *i.e.* it must be interpreted according to the intellectual development of the person in question. In his conscience, the person must be morally certain that his judgment leads to a belief in his right of possession. But Tetreault adds that to require every person to do his utmost to discover the real truth is to carry things too far. There is hardly a good faith which could stand such serious examination.[3] Finally Tetreault concludes that because of the relativity of good faith, there can be no absolute or empirical principle which can be applied to defining the exact measure of the amount of certitude or ignorance necessary for good faith.[4]

The courts of Quebec on the whole have similarly shown a tendency to compromise and require only a reasonable amount of ignorance. There is a case, however, which goes so far as to maintain that a person who is actually duped into ignorance by his notary cannot claim such ignorance as a basis for good faith because he should have been more careful in choosing his notary.[5]

Most judges, however, simply require that the conduct of the person claiming good faith "be consistent with common honesty."[6] Mignault J. in the Supreme Court Case of *Grossman v. Barrett*[7], in discussing the presence of

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[1]Joron, U. *Prescription, Bonne foi et Enregistrement*, 37 R. de N. 109, at p. 111.

[2]Tetreault, S., *Une Définition de la Bonne Foi*, 37 R. de N. 222.

[3]*Ibid.*, pp. 225-227.

[4]Tetreault, *Prescription, Enregistrement, Bonne Foi*, 34 R. de N. 466, at p. 470.

[5]*Roberge v. Bergeron* (1940) 69 K.B. 533, at p. 535; see also dissent of Taschereau J. in *St. Laurence Terminal v. Hallée* 39 S.C.R. 47, at p. 53.

[6]*Herbert v. Fennell* (1863) 13 L.C.R. 385, at p. 387.

[7][1926] 1 D.L.R. 257.

good faith in a subsequent purchaser of a car, held that, "Good faith does not need to be *une foi éclatante*, it suffices that it be an honest belief that the vendor is the owner of the thing sold. Nor if there be an error on the part of the purchaser is it necessary that the error be invincible."[8] As Dorion J. pointed out in a Court of Appeal decision: "Le Code ne crée pas de présomption légale au point de vue de la bonne foi, il ne fait pas de distinction entre l'ignorance invincible et l'ignorance".[9] Negligence, moreover, may give rise to good faith.[10]

Other cases refer to good faith as "la croyance pleine et entière" in the valid title of the author of the acquirer[11]: or, a more firm and positive requirement: "La conviction, découlant de l'ignorance de tout droit contraire, qu'a l'acquéreur que son titre lui confère, sans contestation possible, la propriété de l'immeuble qu'il a acheté".[12]

Last there is the question of doubt. It can be seen readily that all the above definitions imply that doubt is exclusive of good faith. In requiring certainty of belief to satisfy good faith, they in fact assimilate doubt to bad faith.[13]

Some authors, however, do draw distinctions regarding the effect of doubt. Their distinctions depend on the subject of the doubt, and the time of the doubt. Thus where doubt is a *simple incertitude* whether an object belongs to a possessor, such doubt is not sufficient to vitiate good faith. But a possessor must still be certain and without any doubt that he actually acquired the object from its owner.[14]

Where, then, in the positive provisions of the law are these principles of the passive sense of "intellectual" good faith applied? The next two chapters on acquisitive prescription and accession of fruits serve to answer this question.

Chapter II

PRESCRIPTION

1. The General Rule of Prescription

Both the French and the Quebec Codes as a general rule do not require good faith for the purposes of prescription. Art. 2242 C.C. states:

> All things, rights and actions the prescription of which is not regulated otherwise by law, are prescribed by thirty years, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith.

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[8]*Ibid.*, at p. 264.

[9]*Guay v. Thomas* (1926) 41 K.B. 451, at p. 458.

[10]*Brims v. Brown* (1908) 34 S.C. 272, at p. 281.

[11]*Chauvin v. Laramée* (1940) 46 R.L.n.s. 501.

[12]*St-Pierre v. Boyer* (1918) 57 S.C. 112.

[13]See: *Asselin v. Lévesque* (1913) 19 L.C.J. 72, at p. 77; *Roberge v. Bergeron*, *supra*, at p. 533; "Considering that doubt is destructive of good faith."

[14]See also: *Chinic Hardware Co. v. Laurent* (1895) 1 R. de J. 278: in certain instances there may be "un moyen terme pour les cas ou il n'y a précisément ni bonne foi, ni mauvaise foi." (at p. 287.)

Laurent objects to the similar provision in the French Code as in his opinion it tends to sanction bad faith.[15] He points out the Canon Law refused to allow this and required good faith in all kinds of prescriptions. Undoubtedly the fact that in Canon Law bad faith was considered a capital sin contributed to this requirement. He admits that, both in Roman Law and the Coutume, good faith was not needed for thirty-years prescription, but he holds that the reasons[16] for this provision are not valid. His main objection is a moral one: "Sans doute le domaine du droit n'est pas celui de la morale, mais cela ne veut pas dire que la loi doive encourager et récompenser l'immoralité."[17]

This view seems to be somewhat of an exaggeration resulting in all likelihood from a religious influence. The basis of good faith is that of equity, and while morality is undoubtedly the most important factor and unit of this equity, social expediency must sometimes supercede morality if the law is to carry out its function as an institution for ordering human relations.

2. Ten-Year Prescription by Subsequent Acquirers

Exceptionally, the Code demands good faith as one of the basic requirements necessary to prescribe moveables or immoveables acquired through translative title. Good faith — the "intellectual-passive-ignorance" phase of good faith — is the heart of ten-year prescription (twenty years in case of absentees) by subsequent purchasers.

As regards immoveables the Code states (art. 2251 C.C.):

> He who acquires a corporeal immoveable in good faith under a translatory title, prescribes the ownership thereof and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of such title during ten years.

Thus, prior to the ten-year possession, the acquisition itself must be in good faith.[18]

Much litigation has arisen in the Quebec courts regarding the provision of art. 2251 C.C. enabling a possessor to liberate himself from all the charges on the land. With respect to hypothecs, the question presents itself whether an acquirer whose land is burdened with a hypothec may still prescribe the land through ten-year possession. In an early case of *Kaigle v. Pierce*,[19] the Quebec Court of Appeal held that knowledge by a donee of such a hypothec on the object of the donation is not a bar to prescription. Eight years later, however, the same court came to a different conclusion on similar facts although this

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[15]Laurent, F., *Principes de Droit Civil*, v. 32; no. 369.

[16]Both Rome and the Coutume considered good faith and title as correlative terms. Hence since title is not required neither should good faith be. Moreover in thirty-years prescription proof of good faith becomes a difficult matter.

[17]*Ibid.*

[18]"Ce n'est pas à la possession, mais à l'acquisition que la bonne foi doit s'ajouter." *Lamarre v. Côté* (1928) 45 K.B. 245, at p. 251.

[19](1870) 15 L.C.J. 227.

time a sale, and not a donation, transferred the immoveable.[20] The question seemed to have been settled by the Supreme Court of Canada in 1893,[21] where it was held that proof of actual knowledge of existence of a registered hypothec was sufficient to rebut the presumption of good faith. This decision was, nevertheless, distinguished in a later Quebec Superior Court case, which held that knowledge of a hypothec was not a bar to good faith if such hypothec was renounced by the vendor.[22] The Supreme Court decision, however, was followed in an even later case also in Superior Court.[23]

It would seem, then, that Supreme Court case correctly states the law, and that actual (not presumed) knowledge of a hypothec will prove a bar to good faith necessary for prescription.

The only place in the entire Civil Code where good faith is defined is in the chapter dealing with accession of fruits. Art. 412 C.C. reads:

> A possessor is in good faith when he possesses in virtue of a title the defects of which, as well as the happening of the resolutory cause which puts an end to it, are unknown to him. Such good faith ceases only from the moment that these defects or the resolutory cause are made known to him by proceedings at law.

There arises the question, then, what application does this definition have in respect to the good faith mentioned in art. 2251 C.C.

Mignault in discussing the good faith required in this prescription applies directly the definition of art. 412 C.C.[24] Rodys agrees with him, and points out that it would be illogical to think that the Code would create two different notions of a possessor in good faith.[25] This argument of logic is rather weak since there is really nothing inherently illogical about two different notions of good faith. As was pointed out above, good faith takes on different aspects throughout our law.

Joron disagrees with Mignault and Rodys.[26] He maintains that the definition of art. 412 C.C. applies only to the good faith required in accession of fruits by a possessor. For main support of his argument, Joron relies on the fact that some of the authorities cited by the Codifiers in connection with art. 412 C.C. emphasize the distinction between the good faith required in fruits and that necessary for prescription. Marcadé, especially, draws that distinction.[27]

On reading the articles, the plain meaning of the words does seem to suggest a difference between the two requirements of good faith. Art. 2251 C.C. re-

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[20]*Blain v. Vautrin* (1878) 23 L.C.J. 81.

[21]*Baker v. La Société de Construction Métropolitaine* 22 S.C.R. 364.

[22]*Desjardins v. Giboulcau* (1927) 35 R.L.n.s. 411; at p. 420.

[23]*Chauvin v. Laramée, supra.*

[24]Mignault, P. B., *Le Droit Civil Canadien*: v. 9, p. 502.

[25]Rodys, W., *Traité de Droit Civil du Québec*, (Trudel Series) v. 15, p. 98.

[26]Joron, p. 116.

[27]Marcadé, V., *Explication du Code Napoléon*; v. 2, under article 550 C.N.

quires that good faith be present in a person who "acquires" an immoveable; *i.e.* the act of acquisition must be executed in good faith. Art. 412 C.C., on the other hand, talks of a "possessor" in good faith; *i.e.* the possession itself must be in good faith. Quite obviously one could acquire something in good faith, and if he should happen to find out some time later that there is a defect in his title, his possession will be in bad faith although his "acquisition" would still be considered in good faith. Thus it would seem that the only manner in which one could apply the definition of art. 412 C.C. to the good faith required in art. 2251 C.C. would be to maintain that the good faith in possession and the good faith in acquisition are one and the same. Most authorities and writers do, in fact, hold that this is so.[28]

Some of the differences and similarities between the notion of good faith in accession of fruits and that notion in prescription will be further examined in the discussion of the next two topics: the requirement and relation of "title" to good faith; and the question of time and duration of good faith.

3. Title and Good Faith

"He who acquires a corporeal immoveable in good faith under a *translatory title* . . .", reads art. 2251 C.C. in part. A title, then, is a requirement for ten-years prescription.

The question of title in prescription is a subject in itself, but what specifically interests us here is the exact relationship between this title and good faith. Are they merely two separate requirements necessary for prescription? Or rather, is the existence of a title merely an element of proof of good faith?

Laurent points out [29] that under the *Ancien Droit*, a just or translatory title was simply an element of good faith, but the Code Napoléon requires title translative of property as a separate condition from good faith in prescription. Laurent, however, is not in agreement with this proposition put forth by the French Code. He goes on to say that good faith itself must be based on a title. If the possessor knows that his author had no title, then there can be no good faith. Laurent simply cannot visualize that a person may have a translatory title and yet be in bad faith. Yet this anomalous situation arises, he argues, if one separates the requirement of good faith from that of title. As an example of this anomaly he describes the case where the possessor believes that the title of his author is valid, but knows that his own title is not because of his own incapacity. If we separate good faith and title, as the French Code does, then the possessor in this example possesses by virtue of a translatory title, and yet he is in bad faith. If, on the other hand, we consider title as merely an element of good faith — according to Laurent — then the possessor

[28]For explicit application of the definition of art. 412 C.C. to prescription, see: *Larivière v. La Cité de Montréal* (1925) 63 S.C. 398, at p. 402.

[29]Laurent, v. 32, no. 406.

possesses by virtue of a translatory title and consequently must be automatically in good faith. The latter proposition, concludes Laurent, is the more realistic of the two.[30]

Riou also maintains that a translatory title is a condition of good faith: "La bonne foi du possesseur, c'est de se croire propriétaire. Il ne peut pas avoir cette croyance, s'il n'a qu'un titre précaire, non translatif de propriété."[31] In other words, even if one believes that he is possessing in virtue of a valid title and thereby believes himself to be owner, he is still not in good faith if his belief is mistaken and his title is, in fact, not a translative one. A putative title cannot serve as a basis for good faith. In view of what has been said up to now regarding the "intellectual" notion of good faith, this does not seem to be sound. The "intellectual notion" of good faith is based solely on one's belief and state of mind. It is precisely when the title is not a valid one that good faith enters the picture and comes to the aid of a person in a state of ignorance. The only justification for Riou's statement is that good faith and title are two separate requisites for prescription.

Such a view is held by many modern writers.[32] Rodys holds that the two must be separated since "la bonne foi n'a trait qu'à la croyance dans les droits de l'aliénateur".[33] Mayrand goes even as far as to say that a title fraught with violence may still be translative and if its acquirer is *also* in good faith, then the requirements for prescription exist.[34]

It would certainly seem to be reasonable to interpret art. 412 C.C. to include a translatory title as one of the elements of good faith: "A possessor is in good faith *when* he possesses in virtue of a title, etc." In other words, to be in good faith, one must first of all have a title. On the other hand, the words of art. 2251 C.C. will not be stretched from their natural meaning, if one were to read the article as requiring two separate conditions for prescription: a) good faith; b) translatory title. The meaning of the article would not be changed at all if the word "and" had been inserted between "good faith" and "under a translatory title".[35] If this analysis is correct, then it is only logical to assume that those authors which hold that title is an element of good faith in prescription (art. 2251 C.C.) support the view that the definition of art. 412 C.C. applies to prescriptive good faith; while the others, who maintain that good

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[30]*Ibid.*, no. 410.

[31]Riou S.C., *La Possession et la Bonne Foi*, [1927-8] R. de D. 33 at p. 35; for other authors with the same view, see: Demolombe, C., *Traité de la Distinction de Biens*, v. 1, p. 540; Dalloz, *Répertoire Pratique*, v. 9, no. 162.

[32]*e.g.* Josserand and Aubry et Rau — for citation see: Mayrand, A., *Bonne Foi et Prescription par Tiers Acquéreurs* (1942) 2 R. de B. 9, at p. 16.

[33]Rodys, W., p. 99.

[34]Mayrand, p. 17.

[35]This is the wording of art. 2253 C.C.. ". . . with title *and* in good faith . . ."

faith and title are separate elements, do not support that proposition. If the latter view is accepted then one is faced with a basic difference between good faith in accession of fruits, and good faith in prescription: in fruits, according to art. 412 C.C., good faith (*i.e.* lack of knowledge of defects) must apply to one's *own* title, and *a fortiori* to the author's title; in prescription, however, good faith is necessary only in respect to the author's title. It would seem that this view is entirely consistent with the difference in the wording between art. 412 C.C. and art. 2251 C.C. The former article talks of good faith as being necessary during one's *possession.* Art. 2251 C.C. on the other hand, requires good faith in respect to the *acquisition* of the immoveable.

4. Time and Duration of Good Faith

When must good faith appear, and for what duration must it last in order to enable an acquirer to prescribe in ten years? Art. 2253 makes this point clear:

> It is sufficient that the good faith of subsequent purchasers existed at the time of the purchase, even when their effective possession only commenced later. (art. 2253 C.C. in part)

Thus good faith need only exist at the time of acquisition. It is not necessary that it subsist thereafter.

Art. 2269 of the French Code contains a similar provision, and nearly all modern writers, both French and Canadian, agree that there is no need for good faith to last past the moment of acquisition.[36] Beaubien, a pre-codification Quebec author, however, holds the isolated view that good faith is needed throughout prescription, and not only at the beginning. It is presumed to exist throughout.[37]

While Laurent agrees that the French Code does not demand good faith throughout the prescriptive period, he questions the logic and justice of this provision much in the same manner in which he objects to the lack of requirement of good faith in thirty-year prescriptions. He points out that under Canon Law, good faith was required throughout, and maintains that this is better law than that of the Code. Good faith is "l'âme de la prescription", and consequently to dispense with it after the moment of acquisition is arbitrary, contradictory, and incoherent. "C'est dire que la loi doit être plus indulgente que la morale."[38] But is not this precisely the case? Law, for the sake of social expediency, often must be more indulgent than morality. Yet Laurent goes so far as to say that here, in fact, the Code is favouring bad faith.

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[36]*French*: Mazeaud, *Leçons de Droit Civil*, v. 2, no. 1500: "Mala fides superveniens non impedit usucapionem." *Quebec*: Mignaulr, v. 9, p. 502; Challies, G., *Prescription by Subsequent Purchasers*, (1937-38) 16 R. de D. 464, at p. 468. See also: *Lépage v. Chartier* (1866) 11 L.C.J. 29, at p. 34; *Primeau v. Guérin* (1885) 30 L.C.J. 21; *Lamarre v. Côté*, *supra*.

[37]Beaubien, *Traité sur les Lois Civils du Bas-Canada*, v. 3, p. 288.

[38]Laurent, v. 32, no. 416.

I submit that this is an exaggeration. To favour social expediency is not necessarily equivalent to immoral favouring of bad faith.

In this connection it is interesting to note what the Quebec Codifiers in their Report stated regarding art. 2253 C.C. They maintain that the provision requiring good faith to exist only at the time of acquisition is not a change in the law. It is so "not only because the equity of such a protection had caused it to gain much ground under the old French jurisprudence, but also because such is the spirit and even the letter of our statutory law."[39] In what would seem to be a direct answer to Laurent's objection, the Codifiers add that since "bad faith in the legal sense is inferred from the knowledge of the right of another, there is no immorality nor injustice in enacting that the purchaser shall not suffer from a knowledge subsequently obtained."[40] Their reasoning in support of this view, moreover, is quite sound. The acquirer assumes his obligation of paying the price at the time of acquisition, and "at that moment he expects that ten-year possession will secure for him the discharge from the right which he has neither consented to nor has known; he ought not to be deceived in this expectation."[41]

In contrast to art. 2251 C.C., it is the essence of the good faith required in the accession of fruits (art. 412 C.C.) that here a possessor gains the fruits only as long as his possession is in good faith — until the "defects or the resolutory cause are made known to him." In other words, where one acquires an immoveable in good faith and sometime later becomes aware of defects in his title, he may keep only the fruits he had gained in the period between the acquisition and the moment he became aware of the vices in his title.

Thus again, one is faced with a basic difference between the good faith required in prescription and that needed for accession of fruits. Once more it may be pointed out that this difference is entirely consistent with the wording of art. 2251 C.C. and art. 412 C.C.: the one talking of good faith as regards the acquirer, the other in respect to the possessor. Finally, it should be noted that the Code in art. 2193 C.C. deals with the requirements of possession without specifically mentioning good faith. Since the chapter on possession containing art. 2193 C.C. is included in the title on prescription, it is only logical to assume that this definition applies to the ten-year possession needed to prescribe according to art. 2251 C.C. This lack of good faith in possession for the purpose of prescription is in accord with the provision of art. 2253 C.C., and underscores further the difference between the good faith required here, and that necessary for the accession of fruits.

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[39]Third Report, p. 433.

[40]*Ibid.*

[41]*Ibid.* For a similar statement see also: Beaudouin, P., *Prescription* (1895) 1 R.L.n.s. 143, at p. 147: "il n'y a ni immoralité ni injustice à ce que l'acquéreur ne souffre pas de cette connaissance survenue après coup."

5. The Presumption of Good Faith

Art. 2202 C.C. states that "Good faith is always presumed. He who alleges bad faith must prove it." This, as a statement of law, is clear and direct. It appears in the Title of Prescription in the Code, and therefore applies to the good faith required in art. 2251 C.C. But the generality of the statement arouses the question whether or not it is meant to apply to all instances where good faith is mentioned in the Code.

The Codifiers in their Report seem to indicate that this was their intention. Commenting on their amendment which resulted in our present day art. 2202 (the old article read: "Good faith is always presumed when possession accompanies title. He who alleges bad faith must prove it in all cases"[42]), they state that the new article declares "in a less doubtful form a simple and fair principle the *generalization whereof* will be found consonant with the whole of the new doctrine."[43]

Most authors hold that this presumption is in fact a general one and applies outside of prescription.[44] It is of course only a presumption *juris tantum* and may be rebutted by any mode of proof, including a contrary presumption.

Some exceptions, do, however, exist to this presumption. Where error of law serves as a basis of good faith rather than error of fact, the person claiming good faith must prove it.[45] A second exception exists in the case of putative marriage.[46] Here the consort claiming that he contracted the marriage in good faith, must prove this good faith.[47]

Finally, it is not unreasonable to point out that the generality of the presumption is entirely consistent with the Code as a whole. In the spirit of our law the general principle of good faith is of the essence, and much in the same way as in criminal law where every person is deemed innocent until found guilty, so too in civil law, every person is considered to be in good faith until proven otherwise. In practice, however, the presumption often does not mean a great deal since any slight proof of bad faith usually suffices to shift the burden upon the person claiming good faith to establish it. This comparative ease with which one may establish bad faith results from the strict requirements which the law demands before a person comes within the definition of legal good faith.

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[42]Third Report; p. 517.

[43]Third Report; p. 417. (underlining by author).

[44]See for example: Laurent, v. 6, p. 299; Mignault, v. 9, p. 381. Jurisprudence is in agreement with one exception (*Ellice v. Courtemanche* (1867) 17 L.C.R. 433). This decision was rendered after the Civil Code came out since it discusses articles of the Code. Yet Badgley J. held: "It may be observed that the objection of bad faith is not one requited to be proved by the land-owner, and that in principle the onus of proof is necessarily cast upon the squatter, the occupant, who is bound to prove his good faith." (at p. 439) It is submitted that perhaps the learned judge had not as yet had sufficient time to peruse the entire Code.

[45]Laurent, v. 32, no. 415.

[46]See below, Chapter IV.

[47]See: *Montmigny v. Lelievre* (1939) 67 K.B. 197, at p. 205; *Gauvin v. Rancourt* [1953] R.L. 517.

Chapter III

"INTELLECTUAL" GOOD FAITH AS AN ACTIVE ERRONEOUS JUDGMENT

1. The Relationship of Error and Good Faith

Error as a cause of nullity of contracts in our Code has a rather technical meaning and function. Where one of the contracting parties errs either as to the nature of the contract, or as to the substance of the object of the contract, or as to the principal consideration for making the contract, such error serves to annul the contract (art. 992 C.C.). Above it was pointed out that error results in good faith. Is that the same error which the Code mentions in art. 992 C.C.?

Basically, good faith is error in the technical sense of the Code, but from a different aspect. The technical sense of error nullifies more or less completely an act which — had the parties acted without this error — would have been valid. The "good faith" sense of error, on the other hand, does not nullify, but rather gives him who errs the advantages he would have had from his act had he not, in fact, erred.[48]

Thus error leading to nullity is more truly an objective manifestation, a defect leading to the vitiation of consent. Good faith, on the other hand, is the subjective error in our minds which led us to commit the objective error (defect) in the nature, substance, or consideration of the contract.

In its effect, technical error is destructive — all rights are lost. Good faith, however, in its effect is constructive; it mitigates the "destruction" in favour of the party who erred "sincerely".[49]

2. Excusability of Error

Gorphe maintains that every error in good faith merits protection whether the party in error be the victim of another, of circumstances, or of himself.[50] This would seem to include every type of error conceivable. Is this valid? Are there no limitations as to what type of error can serve as a basis for good faith? In other words are some errors not excusable and consequently not a valid foundation for good faith?

It would seem to be perfectly in order to allow every type of error whatsoever, where such error is attributable to the fault of the other party, or to the fault of a third person. The problem, however, arises with respect to error attributable to oneself.

In the first place, it must obviously be genuine error. One cannot claim good faith through error where such error is committed intentionally, or even where

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[48]Millet, J. E., *De l'Erreur et de la Bonne Foi*, p. 92.

[49]Lyon-Caen, M. G., *De l'Evolution de la Notion de Bonne Foi*, (1946) 44 Rev. Trim. 75, at p. 99.

[50]Gorphe, F., *Le Principe de la Bonne Foi*, p. 115.

one had some doubts upon the validity of his act prior to acting. To admit of good faith in such cases would be to contradict directly the spirit of the notion of good faith.

On the other hand, where one acts wrongly, but under a genuine belief that he is acting in a correct manner, good faith is there to protect him and to allow him to benefit from his act. It is here that good faith comes to the aid of him who is morally right, but intellectually wrong.

There remains the question of negligence. If one commits error because of his own negligence, should such error serve as a basis for good faith? If such negligence is ordinary there seems to be no reason why the error here should not be excusable. Following the principle stated above, a person may be negligent and yet act morally. Negligence is a failing of his intellect and consequently he should be protected. There is some disagreement in the case of gross negligence. Where such negligence is clearly only that, and there is no evidence that the person was aware of his error or negligence, then it would seem that good faith should still come to his protection. Here there is only a difference in degree from ordinary negligence. But where such gross negligence amounts to intention, or where it harms innocent parties, such negligence cannot be considered as excusable error, and good faith cannot result.

It must always be remembered that while error is the basis of good faith, its function, nevertheless, is not there to encourage negligence or imprudence. It is a moral rule, and as such must always be construed so that its application will result in the greatest moral benefit possible for all concerned.

Chapter IV

PUTATIVE MARRIAGE

1. Introduction

It is in the field of persons that the active phase "intellectual" good faith plays its most important role. A genuine error on the part of either of the consorts in a marriage will benefit the erring consort with the full civil effects of the marriage even though the marriage has been annulled. This is the doctrine of putative marriage.

One is faced here with the classic example of the role that good faith plays in mitigating the effects of the nullity. "Nous sommes ici dans le domaine exclusif de l'équité qui transforme un acte nul en fait juridique générateur d'effets civils."

It is immaterial what error consists in. Good faith here extends to every cause of nullity no matter how serious — relative, absolute, "ou même d'une soi-disant inexistence".[51] If one of the consorts was genuinely in error, he receives all the benefits of a putative marriage. The error may be of fact or law.

[51]Baudouin, L., *Le Droit Civil de la Province de Québec*, p. 194.

2. Requirements for Good Faith

The *Ancien Droit* exacted three conditions for putative marriage. There had to be good faith. Secondly, some formality was necessary. Thirdly, the error had to be excusable.[52] To-day, however, both the French and Quebec Codes require only good faith. In point of fact, the latter two conditions are really part of good faith.[53]

As far as the excusability of error is concerned, there is really no doubt that this is included in good faith. The question here is rather exactly what is excusable error.[54] As was mentioned in the foregoing, practically every type of error is permitted as long as it is genuine error stemming from ignorance on part of the consorts. Thus where a wife knew of an impediment caused by a blood relationship between herself and her husband, but believed "sans aucun doute" that a dispensation which she received from a priest wiped out this impediment, her error in marrying was held to be excusable.[55]

On the question of the necessity of celebration formality in order to enable one to avail himself of good faith there exists a mild controversy.

While some authorities hold that the requirement of good faith presupposes that the marriage was solemnized with some formality,[56] the majority demand no such requirement.[57] Both the French and Quebec Codes speak of a marriage "contracted" in good faith, not "celebrated" in good faith. A contract (here the marriage itself, rather than the marriage contract proper) does not require a formality for its existence. Hence no formality of celebration is required as a prerequisite to good faith in putative marriage.

Thus, in the final analysis, whether or not one adopts the three conditions as the elements necessary for putative marriage makes very little difference. For all intents and purposes it is good faith, and good faith alone, which transforms a null marriage into a putative one.

Good faith exacted in putative marriage presents us with what is the classical example of the subjectivism of the "intellectual" notion of good faith. As in all other cases where a judge must rule on good faith, his discretion and careful consideration of the facts and circumstances are of prime importance. In marriage, moreover, this factor is of even greater significance. The Code does not define good faith in connection with putative marriage as it does in the case of property. It is true that in property the definition of good faith in art. 2251 C.C. is also not given, but the definition of art. 412 C.C. does provide at least a help in understanding the good faith of prescription even if one is not

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[52]Fuzier-Herman, *Répertoire*, v. 2, no. 583.

[53]Toullier, *Droit Civil Français*, v. 1, nos. 655-6.

[54]See above, *Excusability of Error.*

[55]*Gilbert v. Gilbert*, (1929) 35 R.L. n.s. 289, at p. 294.

[56]Dalloz, *Code Annoté*, v. 1, no. 436.

[57]Demolombe, *Mariage*, v. 3, p. 554; Trudel, v. 1, p. 464, Baudouin, L., p. 194.

willing to use the definition of art. 412 C.C. interchangeably. There is, after all, much in common between the possession for the purpose of prescribing an immoveable and that required for accession of fruits.

It is, however, much more difficult to apply this definition to the good faith of art. 163 C.C., and 164 C.C. Here there is a question of persons, and the strict legal requirements of good faith in fruits often do not exist in marriage.

It is because of this that the notion of good faith is here much more subjective than it is in property. The judge must take into consideration the social position, the degree of intelligence and instruction, and all the other circumstances before he can decide whether or not good faith exists. Thus, for example, it was pointed out in *Berthiaume v. Dastous*[58] that the error in law on the part of the wife was excusable because she was very young and consequently "quite ignorant of the law".[59]

3. Duration and Presumption of Good Faith

A marriage will produce its civil effects "if contracted in good faith". The provision is similar in the French Code. From the plain meaning of the article, it is clear then that the good faith need exist only at the beginning of the marriage — at the time of contracting. A marriage once putative is always putative.[60]

Putative marriage is the one big exception to the generality of the presumption of good faith contained in art. 2202 C.C. Once the marriage is annulled, the consort who wishes to benefit from its civil effects must prove that he was in good faith.[61]

Chapter V

"INTENTIONAL" GOOD FAITH

1. Introduction

In the preceding pages the role and importance of morality in the law were pointed out, and it was emphasized that of all the juridical notions good faith was, perhaps, the principal vehicle which served to carry ethical-moral notions into the positive law. Out of all the various aspects of good faith, it is in the "intentional" notion of good faith that one is most aware of this function. It is one of the most basic and fundamental concepts in the field of obligations in our law.

The "intellectual" notion of good faith was divided into two phases on the basis of two seemingly different senses or forms of good faith — a passive

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[58][1930] A.C. 79.

[59]*Ibid.*, at p. 87.

[60]Gallardo, R., *L'Institution du Mariage Putatif*, p. 184. Trudel, v. 1, p. 463.

[61]See cases cited under presumption of art. 2202 C.C.; *supra*, note 47.

sense, and an active sense. "Intentional" good faith may also be subdivided. Here, however, the distinction lies in the function and role which good faith plays rather than in its form. To put it simply, good faith here can best be characterized as an absence of malicious intention; or, positively, as the intention to act honourably and loyally. This one sense or form of good faith, however, plays three different roles: in the execution of contracts; in the exercise of rights; and in the interpretation of contracts.

Chapter VI

EXECUTION OF CONTRACTS — PAULIAN ACTION

The classic example in the Code of the "intentional" good faith required in the execution of contracts is the provisions for Paulian action contained in arts. 1032-1040 C.C. Of special relevance to our topic is art. 1033: "A contract cannot be avoided unless it is made by the debtor with intent to defraud, and will have the effect of injuring the creditor". In order to impeach the acts of his debtor, the creditor must prove intent to defraud on part of the former. In other words, he must show lack of "intentional" good faith.

The provisions in the French Code regarding Paulian action are much less specific than those of our Code. As against eight articles in the Civil Code, the Code Napoléon contains barely one general article (1167 C.N.). The French jurisprudence, nevertheless, has evolved a doctrine on this action almost identical to that of Quebec. Hence we may safely examine French authorities on this subject.

1. Theory

The action is primarily meant for the protection of a creditor. It enables him to void a transaction carried out by his debtor with a third person in fraud of the rights of the creditor and to his prejudice. If the creditor is successful in his action, the object of the transaction returns to the patrimony of the debtor, and the creditor is then in a position to seize it in payment of his debt once such debt becomes exigible.

Originally, in Roman times, the action was principally a delictual one. Today, it still carries some of this delictual characteristic with it.[62]

Basically, this is a social law. The action "met un frein à la liberté individuelle, quand, par son exercice et ses manifestations celle-ci fausse la balance de la justice."[63] It is a manifestation wherein good faith acts to restrain individual liberty for the sake of social liberty and order.

Moreover, it is an action based on equity not only because of social considerations, but also because it is "éminemment moralistarice".[64] As

[62]Ripert, *La Règle Morale*, p. 291.

[63]Trudel, v. 7, p. 437.

[64]Grouber, *L'Action Paulienne en Droit Civil Français Contemporain*, p. 654.

Ripert points out, in the final analysis it is the moral rule that governs the Paulian action and decides between conflicting interests of the creditor — representing personal credit and the conservation of patrimony — on the one hand; and the acquirers — representing real credit and free circulation of property — on the other hand.[65]

2. Intent to Defraud

It is the requirement for proof of intention to defraud on part of the debtor that interests us most in relation to the notion of good faith. For such proof necessarily indicates an absence of "intentional" good faith.

Disposition of patrimony by a debtor, even if he is insolvent, is not sufficient grounds for Paulian action. There must be intent to defraud the creditor. What comports such intent? What is regarded as bad faith or fraud?

Marcadé considers fraud as "la connaissance qu'a le débiteur de son insolvabilité".[66] Fraud for Toullier means much the same thing. Where the debtor knows of his insolvency and when despite this knowledge he alienates his property, he is acting with an intent to defraud, even if in so doing he has no actual intention of defrauding any particular person.[67] In other words, knowledge of insolvency plus alienation equals fraud. We are faced here, in fact, with a presumption of bad faith which is created by proof of this particular knowledge plus the act of alienation.

Mignault seems to shy away from this presumption when he states that fraud here consists of knowledge that one is going to cause a prejudice to his creditor.[68] Simple knowledge of his insolvency is not sufficient. Rather, actual intent to cause prejudice — *i.e.* to defraud — must be shown. Trudel seems to be more or less in agreement with Mignault, but his requirement for knowledge is more general than that of the latter: "C'est la connaissance de cette répercussion de son acte sur son patrimoine qui détermine chez le débiteur cette intention de frauder."[69] Conceivably knowledge of the *répercussion* includes knowledge by the debtor of his insolvency as well as of the prejudice which his alienation will cause to the creditor. Moreover, Trudel adds, to exonerate himself, the debtor must prove not only that he was ignorant of his affairs, but also that he did not know of his creditor, a rather stringent requirement.

A debtor is committing an act with intent to defraud when he enters into a transaction favouring one creditor to the disadvantage of another and knowing that he has not the money to pay the other. It was held in a recent Court of Appeal decision that this was the definition of fraudulent intention.[70]

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[65]Ripert, p. 293.

[66]Marcadé, v. 4, p. 403.

[67]Toullier, v. 6, p. 379.

[68]Mignault, v. 5, p. 289.

[69]Trudel, v. 7, p. 458.

[70]*In re Normandin: Imre v. Dominion Structural Steel* [1959] Q.B. 14.

It is the "mental attitude of the debtor that should be considered" in all cases involving a Paulian action.[71]

Intention to defraud is presumed in a Paulian action because it is usually difficult to prove, but not every act by the debtor can lead to such a presumption. Thus, for example, an installment sale by an insolvent without mention being made of his insolvency, does not necessarily presume his intent to defraud.[72]

Whether presumed or not, it is the intention to defraud or to cause prejudice which is exacted by most authors before creditors can avail themselves of the Paulian action. Where such intention exists, good faith is absent and a prejudiced creditor has full right to exploit the action. Where, on the other hand, the debtor is able to prove lack of such intention (usually by showing both lack of knowledge of his insolvency and of the fact that he intended to cause prejudice to the creditor), his good faith will serve to protect him and the creditor will be unable to annul the transaction between the debtor and a third party. This holds regardless of whether the transaction is an onerous one or gratuitous one, and regardless of how much prejudice the creditor may suffer.[73]

This seems, indeed, to be a high degree of protection, and may even appear to be directly opposed to the purpose and *raison d'être* of the Paulian action. If so, it is again an indication of the high value that our law places on moral intention as against social expediency. One, however, should keep in mind that from a practical point of view, it is indeed difficult for an insolvent debtor who performs a transaction with a third party to prove that he was aware of his insolvency and intended to prejudice his creditor.

Chapter VII

EXERCISE OF RIGHTS — THE ABUSE OF RIGHTS

1. Introduction

Up to this point Part III has dealt with the function of "intentional" good faith in the execution of contracts. This particular notion of good faith, however, plays a second role. It is an extremely important concept in the exercise of rights by the individual.

The notion of good faith in the exercise of rights leads us into the examination of the field of what is known today as abuse of rights. It is this field which is primarily concerned with the absence or presence of good faith in the exercise of rights.

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[71]*Cadville v. Fraser* 9 R.L. n.s. 246.

[72]*Convey v. Renouf* [1879] Q.L.R. 224, at p. 225.

[73]Contrast this with the good faith protecting third parties in their transactions with the debtor. Here they will be protected only when the act is onerous. 1038 C.C.

There is little agreement as to the exact definition of abuse of rights. It is not the object of this paper, moreover, to examine this subject in detail. Rather we are concerned here only with the role and the effect that good faith has in this particular field of law.

Before discussing the theory of abuse of rights, however, it should be pointed out that the discussion here will necessarily be based on the assumption that abuse of rights is not merely another illustration of the general theory of fault. If it is so, as some maintain, then good or bad faith is immaterial, and one need only be concerned whether or not fault has been committed. On the other hand, if we consider abuse of rights another illustration of the notion of "intentional" good faith, then one must examine whether a person has exercised his right in good or bad faith. If he has exercised it in good faith, he will be exonerated; if in bad faith (*i.e.* if his intention is malicious), he will be responsible in damages.

Thus, for example, where one prosecutes another for the simple reason of causing him annoyance, his intention is malicious, and hence, not being in good faith, he will be held liable in damages. Strictly speaking, the prosecuting party has not contravened any positive provision of law. It is simply that he has misused or abused such a provision. This final point must be kept firmly in mind in discussing abuse of rights.

Abuse of rights comes into the picture only when one is exercising a right which the law has granted him, but exercising it with the prime intention of causing prejudice to another. Benefit to himself is only a secondary consideration. In the case, however, where one causes prejudice to another through a breach of an obligation — whether a contractual or delictual — abuse of rights plays no part whatsoever. This is rather a straightforward case of civil responsibility and fault.

2. Theory

The theory behind the concept of abuse of rights is perhaps the most forceful example of the manner in which good faith injects morality into the law. We have here a conflict between the positive provision of the law on one side, and the moral notion that one must act with good intentions on the other. The test for morality is the good or bad faith of the intention. It is the result of this test that will prevail, to the extent that an adherence to the provision of the law will not exonerate one who exercises that provision in bad faith.

We are thus faced with the fact that to follow strictly the letter of the law is not sufficient in order to derive the full protection and benefits from the law. The manner in which one follows the law is of as great importance. Morality forces us to give up some of the absoluteness which is attached to our rights. The right of ownership is absolute, but. . . And the "but" is always in favour of the social well-being. We have, then, morality, leading us to a social end.

In the definition of Gorphe, abuse of rights consists in using a right with intention to injure; of using a right in an anti-social, immoral manner, and not according to proper and normal use.[74]

Bad faith, or malicious intention, results here in a temporary transformation of the right that is abused into a "non-right". It ceases to be a right. "Celui qui commet un dol n'use pas son droit, car il n'y a pas de droit contre la morale, et la morale à laquelle nous croyons défend de nuire intentionnellement à autrui".[75]

This notion, in fact, is an advance over the old formula of objectivity where only appearance and exterior elements were taken into account.[76] Here, rather, we have a much more sophisticated and developed concept of a search into man's intention and a subsequent judgment based on morality as well as on positive law.

3. The Intention to Harm

Proof of intent to harm is a *sine qua non* to the proof of abuse of rights. Its absence indicates good faith and hence absolution from responsibility. Its presence signifies bad faith and resultant liability. It is the intention which renders the act an abuse — *l'esprit de malfaisance.*

As was pointed out in the introduction, a person must actually be exercising a right given to him by law before the doctrine of abuse of rights comes into play. If he exercises such right with the principal aim of causing harm to another, he is abusing it.

We are then employing a highly subjective and psychological criterion in order to determine the presence or absence of good faith. It is the criterion which is employed throughout the notion of "intentional" good faith: the intention to cause harm.

The judge, however, at his best is not a mind reader. How then is he to discover this intention? To solve this, an objective measuring stick has been adopted by most authors and judges.

Ripert maintains that the test for malicious intention consists in ascertaining whether or not the person accused of an abuse has profited by the exercise of his right. If he has, then he has not abused his right regardless of how much prejudice it has caused another.[77] This is to say, in fact, that where there is clear profit or utility in the action, the judge must not search further into the psychological motives of the actor. While this test provides a relatively simple and objective means of determining the presence of bad faith, it is not wholly consistent with the theory of abuse of rights.

There seems to be something morally amiss in a test whose criterion for good faith is the presence of self-profit. If abuse of rights claims to search into

[74]Gorphe; p. 102.

[75]Ripert, p. 172.

[76]*Ibid.*

[77]Ripert, p. 166.

man's motives in order to determine good faith, it does so rather superficially if it stops once it has ascertained that a person has profited by his actions.

A person may quite well exercise a right with the intention to create harm to another, and yet because such exercise has incidentally produced profit for him, he will be held — according to Ripert — to exercise his right in good faith. Would it not be far more consistent with the doctrine and with the notion of intentional good faith if the test were to be carried a step further, to the point where the judge would decide if such profit was the prime goal of the exercise of the right, or whether intention to harm was the principal motive, and profit only incidental to it? While, admittedly, this is a less objective test, it is consistent with the subjective-psychological basis of the doctrine of abuse of rights and "intentional" good faith.

4. Illustrations of Abuse of Rights

The classic example of abuse of rights is in the field of property ownership. It deals with the abuse of the absolute right of ownership. Thus it has been held that an owner of a field adjoining an airfield cannot erect high poles on his field with the intention of preventing aircraft from flying low over his field.[78] Such owner has the right to build on his land for "un but de revenu légitime ou pour les habiter personnellement, et non dans le but malicieux de nuire au commerce de la demanderesse".[79] A fence built on one's land with "malice et mauvaise foi" is an abuse of right if the aim of such construction was to "se venger et de nuire au demandeur".[80]

With the tremendous modern increase of the power and scope of administrative bodies, the doctrine of abuse of rights has become very useful in the protection of the individual against excesses by public officers. Such officers enjoy wide rights and discretion but these must be exercised in good faith, and with no malicious intention.[81]

Other examples of abuse of rights are: malicious prosecution; absolute power to dissolve a contract; and the refusal of a landlord to allow assignment of a lease by a tenant who is no longer able to pay the rent.

CONCLUSION

There remains now the task of finding a unifying link which will bind these two basic divisions of the notion of good faith into a unified concept. In other words, we must ask ourselves the question: what, if any, is the basic common element between the notion of "intellectual" good faith and that of "intentional" good faith?

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[78] *Air-Rimouski Ltée. v. Gagnon* [1952] S.C. 149.

[79] *Ibid.*, at p. 152.

[80] *Blais v. Giroux* [1958] S.C. 569, at p. 570. See also a similar decision in *Laperrière v. Lemieux* [1958] R.L. n.s. 229.

[81] *Caron v. Caron* (1931) 34 Q.P.R. 385; *Berubé v. Brulé* (1932) 35 Q.P.R. 414.

Unlike Rome which recognized both *bona fide* and *stricte iure* contracts, in our law all contracts are *bona fide*. The judge must interpret every contract, every obligation, and every legal relation or conflict which is brought before him in the light of equity. The needle which the judge uses to inject this equity into the interpretation of the law is the notion of good faith.

But while the needle is always that of good faith, it may inject different serums. The judge cannot simply apply an abstract notion of good faith in interpreting contracts. He must depend on a concrete standard or criterion. Once the judge has derogated from the strict law, he must substitute another criterion for it. He must pick and choose the serum (criterion) which the good faith needle will inject into the law so that such injection will result in a more equitable solution of a legal issue.

The two most effective serums which can produce such a result are morality, and social expediency and order. It is these two criteria which the judge employs when he resolves a legal question in the light of good faith. This is so, whether the issue concerns the rights of a possessor as against the true owner of the land, or whether the judge is asked to set aside a contract entered into by a debtor in fraud of his creditors. Morality and social expediency, then, are the two common elements which unify "intellectual" good faith and "intentional" good faith into one general juridical notion.

The judge, moreover, must strike a satisfactory balance between these two elements. Often, as in the case of abuse of rights, for example, a social consideration is also a moral one. Sometimes, however, a conflict arises between the two, and the judge must decide which criterion shall prevail. In no circumstances, however, must a social interpretation lead to immoral results. In the field of property, social considerations are often given priority over moral ones, while in the law of persons, the reverse is almost always true. When patrimonies are the main object of the contract or obligation, social expediency primarily rules. Where people and their interrelations are concerned, morality in the main governs.

So, in fact, we are faced with the central proposition with which I began: equity is the sum total of morality and justice plus social expediency and order. The juridical translation of this equity is the general notion of good faith.

To emphasize the importance of the notion at this stage would be redundant as well as superfluous. Suffice it to say that no legal system such as ours, based as it is on Judeo-Christian ethical principles and on Roman logic and order, could function without a notion of good faith. In the final analysis, we see in it the triumph of the psychological, flexible, and internal principles of law over the rigid objectivism and formalism that is characteristic of the exteriorization theory of law.

La règle même de toute rencontre humaine est inclus dans ces mots: bonne foi, mauvaise foi.

AN HISTORICAL SURVEY OF INTERNATIONAL AIR LAW BEFORE THE SECOND WORLD WAR*

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EDITOR'S NOTE: *This article is the first of a two-part series dealing with the development of international air law from its very beginnings until the present time. The second and concluding article, which will be an historical survey of international air and space law between the end of World War II and recent times, is under preparation and will appear in a subsequent issue of the Journal.*

INTRODUCTION

The aim of this article is to present an historical outline of the more interesting and important aspects of air law from its beginning to the year 1944. There is a vast amount of literature dealing with aviation and it may be convenient to interested readers to have some of the more important events relating to the development of air law compressed into a comparatively short treatise. In doing this, however, the authors realize that features which are deemed important by some jurists may have been omitted.

Chapter I

AIR LAW PRIOR TO 1919

Air law has been described as the "last born of juridical notions."[1] Its very origin, however, can be traced back to classical Roman Law[2] when the basic problem of rights in the airspace was first noted. The maxim "Cuius est solum, eius est usque ad coelum" (who owns the land, owns even to the skies) has provoked legal discussion ever since, in the fields of both municipal and international law:—from the case of *Bury v. Pope* (1586, Cro. Eliz. 118) in the Common Law to the codes of the Civil Law adopted in the 19th and 20th century;[3] from Grotius's "De iure belli ac pacis"[4] and Danck's "De iure principis

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[1]Le Goff, Marcel, *The Present State of Air Law*, The Hague (Nijhoff 1950) 24.

[2]Pampaloni, Muzio, *Sulla condizione giuridica dello spazio aereo e del sottosuolo nel diritto romano e odierno, Archivio Giuridico* 48 (1892), 35; Lardone, Francesco, *Airspace Rights in Roman Law*, Air Law Review 2 (1931), 455; Cooper, J. C., *Roman Law and the Maxim "Cuius est solum" in International Air Law*, Montreal, (McGill, 1952.)

[3]See French Civil Code (1804), art. 552; Austrian Civil Code (1811), section 297; Italian Civil Code (1866), art. 440; Quebec Civil Code (1866), art. 414; German Civil Code (1900), section 905; Swiss Civil Code (1907), art. 667.

[4](1625); see Book II, Chapter 2, Sec. 3(1).