CASE AND COMMENT

CIVIL LIABILITY FOR DOMESTIC ANIMALS STRAYING ON THE HIGHWAY — ONTARIO. — *Searle* v. *Wallbank* [1] has settled the law in England governing the liability of the owner of domestic animals which have strayed on a highway and been run into by a passing motorist.

The principle that there is no duty on the owner of lands abutting a highway to prevent his animals from straying on the highway was first enunciated in *Heath's Garage, Ltd.* v. *Hodges* [2] and that case was followed, but severely criticized, in *Hughes* v. *Williams.* [3] In *Brackenborough* v. *Spalding Urban District Council* [4] Lord Wright said that the rule was modern, and open to review.

In *Searle* v. *Wallbank* the question came squarely before the House of Lords. A horse escaped through a hole in a hedge during the night and ran in front of a passing motorcyclist with the inevitable result that the motorcyclist was badly injured. The trial judge found that the farmer was negligent and the House reviewed the law on that assumption, although they felt that the facts did not warrant that finding and came to the unanimous conclusion that no action lay.

Lords Maugham and DuParcq looked at the law from two points of view. Lord Maugham reviewed the history of English roads and pointed out that the great majority of English roads were necessarily laid out piecemeal, during long periods, on hitherto unenclosed lands. Even at the present time very long stretches of highway are alternately enclosed by fences or hedges on one side or both sides, or are quite unenclosed. Statutes dealing with the laying out of roads contained no provisions for the repair and maintenance of fences. No duty to prevent straying could possibly have existed before the advent of fast traffic on made-up roads and farmers did not become subject, at some uncertain date in our lifetime, to an onerous and undefined duty to cyclists, motorists and others which never previously existed. He therefore held:

(a) there was no *prima facie* legal obligation on the owner of a field abutting on the highway to users of the highway so to keep and maintain his hedges and gates as to prevent his animals from straying on the highway; and

[1] [1947] 1 All E.R. 12.
[2] [1916] 2 K.B. 370.
[3] [1943] 1 K.B. 574.
[4] [1942] A.C. 310.

(b) the owner was under no duty as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying on the highway.

Lord DuParcq said that a heedless or clumsy act by a horse, as in the present case, was not materially different from a vicious one. "It would be strange if the owner of a horse which strays on the highway were to be freed of liability if his horse kicked a passenger, but liable if the passenger were injured merely by the horse trotting along the highway in the natural manner." If an animal's owner knows that it has shown a tendency to run into cyclists, or other passengers on the highway, then he would be liable as having knowledge of the animal's dangerous disposition.

Apart from the liability based on the dangerous disposition of animals, an owner may be liable on the ground of negligence. But actions for negligence in respect of animals are subject to two qualifications:

(a) where there are no special circumstances, negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature; and

(b) even if the defendant's omission to control or secure his animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence.

The two points of view can be put another way:

(1) by Lord Maugham — An owner of domestic animals, not known to be dangerous, has the right at common law to allow them to stray on the highway;

(2) by Lord DuParcq — It is contrary to the ordinary nature of animals to stray in front of passing vehicles. An owner is not liable merely by reason of his ownership, unless he has knowledge of their vicious propensity to do so, and in actions for negligence (assuming a duty to take care): (a) he is not liable if he fails to provide against the possibility that they might do so, and (b) even if he is negligent in failing adequately to control his animals, still any damage caused by the animals straying in front of passing vehicles is not the direct result of such negligence.

What is the law in Ontario? The problem is complicated by legislation which requires us to consider the King's Highway and municipal roads separately. Moreover, the courts in Ontario have taken a different attitude towards the common law and, as pointed out by Riddell J.A. in *McMillan* v. *Wallace*,[5] the common law in Ontario is not necessarily the same as in England. He referred to *Jack* v. *Ontario Simcoe and Huron Railroad Union Co.*,[6] where he said it was taken for granted that it is "contrary to the common law" to allow animals to run at large on the highway. This case, however, should be read in conjunction with an earlier decision of the same judge, Chief Justice John Beverley Robinson. In *Renault* v. *G.W.R.*[7] Chief Justice Robinson said that the question whether or not animals were lawfully on the highway would depend on the use they were making of it. In this case cattle were travelling at their ordinary pace over a level crossing; they were committing no trespass or nuisance and, although they had no attendant, he could not see how it could be said that they were not lawfully there. In *Jack* v. *Ontario Simcoe and Huron Railroad Union Co.* a bull was loitering on a level crossing and he held that the bull had no right to be there. It should be pointed out by way of criticism of these two cases that it is not the animals surely which have the right to be on the road without an attendant, but the owner who has the right to let them be there and, if so, it does not matter what use they are making of the road, so long as it is within their ordinary nature.

That it was the custom of farmers in Ontario in those days to pasture their animals on the road is recognized in both cases. Further evidence of this practice is found in the title of 34 Geo. III, c. 8, "An Act to restrain the custom of permitting Horned Cattle, Horses, Sheep and Swine to run at large".

In the absence of any statutory provision requiring an owner to build and maintain fences or prohibiting the straying of animals, the reasoning applied by Lord Maugham would appear to apply equally as well to Ontario as it does to England.

The proposition that it is contrary to the ordinary nature of animals to stray in front of passing vehicles was rejected by the Ontario Court of Appeal in the *McMillan* case (*supra*), where it was held that an accident caused by calves running in front of a passing vehicle was the natural result of the negligence of the farmer in allowing the animals to stray. Riddell J.A., giving the judgment of the court, said: "Whatever may be the natural thing for English horses or sheep or hens, as to which I must plead

[5] (1929), 64 O.L.R. 4.
[6] (1857), 14 U.C.Q.B. 328.
[7] (1855), 12 U.C.Q.B. 408.

ignorance, it is the natural thing for Ontario calves to dodge across a road, appearing in unexpected as well as expected places; and it is the natural result of allowing them to run loose on the road that they will get in the way of travel". The argument whether or not an accident is the natural result of the negligence of an owner in allowing his animals to stray only arises if there is a breach of a duty to prevent straying. Can Mr. Justice Riddell's opinion be carried to its logical conclusion, to impart to every owner of domestic animals the knowledge of their vicious propensity to stray in front of vehicles? They would then be treated as dangerous animals and the owner would be liable without proof of negligence. This unreasonable proposition is countered by the rule that it is no longer open to the courts to change the old classifications of domestic and dangerous animals (*Goddard* v. *Dunn & Levack* [8]). It is submitted that an owner can be liable on this ground only if he has knowledge of his animals' extraordinary disposition to stray in front of vehicles.

As noted above, it is necessary to apply this basic law separately to the King's Highway and to municipal roads. In the case of the King's Highway, s. 74(3) of the Highway Improvement Act (R.S.O., 1937, c. 56) prohibits the straying of animals on the Highway and provides penalties. It was held in *Direct Transport* v. *Cornell* [9] that this section imposed an absolute duty on owners to prevent animals from straying on the highway, a breach of which duty created a cause of action without proof of actual negligence. The following year the legislature amended the section by adding a proviso that it would not create any civil liability. The situation must, therefore, be considered as if this statutory prohibition against straying did not exist. No provision of the Highway Improvement Act imposes a duty to fence and indeed s. 71 seems to imply that there is no duty. Therefore it is submitted that the common law rule as enunciated by Lord Maugham would apply.

As regards municipal roads, municipalities are empowered to pass by-laws prohibiting straying and most of them have done so. Where no by-law has been passed, the situation would be governed by the common law.

But new difficulties arise where there is a by-law. It was held in *Patterson* v. *Fanning* [10] that such a by-law imposed on an owner of animals the same liability as if he had allowed his animals to stray on the lands of his neighbour. This decision was followed in *McMillan* v. *Wallace* (*supra*). In both cases negligence was

[8] [1946] O.W.N. 809.
[9] [1938] O.R. 365.
[10] (1901), 2 O.L.R. 462.

found on the part of the owner, although negligence need not be proved in an action for cattle trespass. In *Wynant* v. *Welch* [11] it was argued that an owner was liable without proof of negligence, on the basis of the decision in *Direct Transport* v. *Cornell* (*supra*). It was held by the Court of Appeal that breach of such a by-law did not constitute statutory and actionable negligence. The legislature did not intend to empower the municipality to do more than regulate the permitting of animals to run at large on the highway. The by-law did not affect the common-law rights of individuals more than was necessary to give effect to its clearly expressed provisions. It was not for the benefit of a particular class, but the public at large. Therefore no new right of action was created.

Unfortunately the Court did not consider either *Patterson* v. *Fanning* or *McMillan* v. *Wallace*. If *Wynant* v. *Welch* is right, a municipal by-law does not impose a duty to prevent straying, any more than it gives a right of action for statutory negligence, and we come back to the propositions in *Searle* v. *Wallbank*.

Another possible ground of liability, that of nuisance, was mentioned by Lord DuParcq in *Searle* v. *Wallbank* and, in the circumstances, rejected. It is a nuisance at common law to hinder or prevent the public from passing freely, safely and conveniently along a highway, unless such prevention or hindrance is justifiable as an ordinary and reasonable exercise of the rights of a passenger or frontager thereon (Halsbury, vol. 16, p. 354). Whether an act constitutes a nuisance is a question of fact for the jury and depends on all the circumstances of the case. For example, if a man knowingly permitted a herd of cattle to stray on a busy highway, a jury might find that this constituted a public nuisance and an injured motorist could recover damages.

In conclusion the following propositions are submitted:

(a) An owner of lands abutting a highway is under no duty at common law to take reasonable care to prevent his domestic animals (not known to be dangerous) from straying on to the highway. This applies to both the King's Highway and municipal roads. Therefore no action will lie for negligence for failure to erect or maintain fences or otherwise to prevent straying.

(b) The Highway Improvement Act of Ontario, as it stands at present, and municipal by-laws do not affect the situation.

[11] [1942] O.R. 671.

(c) An owner may be liable if he knows that his animals have an extraordinary disposition to stray in front of passing vehicles.

(d) Particular circumstances may justify an action for nuisance.

Hamilton, Ont. F. S. WEATHERSTON

* * *

PATENT LAW — ANTICIPATION — LACK OF SUBJECT MATTER — RIGHT OF LICENSEE TO SUE — INJUNCTION.— The judgment of the Judicial Committee of the Privy Council in the case of *Fiberglas Canada Limited and others* v. *Spun Rock Wools Limited and another*, on appeal from the decision of the Supreme Court of Canada,[1] is a welcome one to those interested in the proper functioning of the patent system. The patent system was developed to reward and protect those who have made meritorious technological advances in the arts, but this purpose has been nullified to a certain extent in recent years by the tendency of our courts to set an unduly high standard of invention. Although the present case is decided strictly on the facts and no new principle is enunciated, nevertheless, in reversing the majority decision of the Supreme Court of Canada and upholding the admirable dissenting judgment of Mr. Justice Rand, and the decision of the trial judge, the Privy Council has, in this writer's opinion, administered a wholesome corrective to the current trend of judicial decision and once more justified its existence as the final court of appeal for Canada.

Upon reading the decision of the Supreme Court of Canada this writer was impressed by the careful and logical reasoning of Mr. Justice Rand in his dissenting opinion and it is gratifying to note that the Lords of the Judicial Committee have not only adopted Mr. Justice Rand's conclusions but to a large extent his reasoning and the actual language used in expressing his opinion.

The judgments of Mr. Justice Rand and the Privy Council in this case may well serve as models for the future, in their careful segregation of the question of novelty or anticipation and of subject matter, invention or patentability.

In considering the question of patentability of an invention, the first question is whether it is novel, *i.e.* whether it is anticipated by what has been done before. By careful analysis of the question of novelty, the ground is laid for the further consideration of the

[1] [1943] S.C.R. 547. The judgment of the Privy Council is as yet unreported.

question of subject matter, assuming that novelty is established. Of course, if there is no novelty there is no invention. Assuming that the invention is novel, the next question is whether it involves what is variously called subject matter, patentability or invention, which is the more difficult problem. It is very easy by a process of *ex post facto* analysis to reach the conclusion that the article, apparatus or process covered by the patent was a logical development of the art which did not rise to the dignity of invention. However, what is frequently overlooked is the fact that most developments in any art are gradual, one inventor building on the work of previous inventors. Even famous inventors like Edison relied heavily on the work of their predecessors. Invention is a step-by-step process, some of the steps being extremely short but the sum of all of them frequently resulting in spectacular advances in the art over a period of time.

The disclosure of these continuous advances in the art in the patent literature forms one of the most valuable sources of technical information used by science and industry in the process of research and development. If patents are to be denied inventors of small but important improvements which are often the result of long and costly experimental work, not only will the incentive to improve be lost but the source of information with regard to technological improvements will not be available in the future.

In the case under consideration, there was evidence that in 1923 the development of the art was narrated by A. B. Savorsky in an article in the Journal of the American Ceramic Society. The patent in question in the case relates to the production of glass fibers for insulating purposes. In Savorsky's article, according to the judgment, every known method of manufacture of glass wool is described and commented on but no suggestion is made of the process which is the subject of the patent in suit, and Savorsky stated that during the 1914-1918 war when Germany's supply of insulating material was cut off, "All thinkable possibilities were tried". Nevertheless, as pointed out in the judgment, the patentee's process was not thought of. Had the patent laws not provided the patentee with the incentive to disclose his process in a patent, this valuable process might have been lost for ever and the development of the art accordingly retarded.

The judgment is of interest in upholding the right of a licensee to sue for infringement of a patent under which it is licensed. Section 55 of The Patent Act, 1935, provides as follows:

> 55. (1) Any person who infringes a patent shall be liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or any such person, by reason of such infringement.
>
> (2) Unless otherwise expressly provided, the patentee shall be or be made a party to any action for the recovery of damages.

The words "and to all persons claiming under him" were presumably added to the section in the 1935 revision of the Patent Act with the express purpose of giving licensees a right to obtain damages, in view of the decision in *Electric Chain Company of Canada, Limited* v. *Art Metal Works Inc. and Dominion Art Metal Works Limited.*[2] However, there was considerable doubt as to whether the intention was achieved. The phraseology was not happy. The decision in the *Fibreglas* case, in the result, is satisfactory and would appear to be final on the point.

The decision is also of interest in the holding that a licensee is entitled to an injunction, which seems to be a still more doubtful question. On this point their Lordships held:

> The appellants as licensees were therefore entitled to sue for damages under Section 55. If so, it is clear that the Court could also grant an injunction restraining infringement, if it thought fit to do so. An attempt was made to limit the rights of a licensee at least to damages. There appears to their Lordships to be no reason why in an appropriate case the remedy of injunction should not be granted under Section 57 of the Act and this appears to them to be such a case.

Toronto G. E. MAYBEE

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CARRIERS — AIRCRAFT — LIMITATION OF LIABILITY IN AIR TRANSPORT CONTRACTS.—When in 1937 the writer of this note addressed the Canadian Bar Association on "The Canadian Law of Civil Aviation", referring to aircraft liability he said that "in Canada a carrier of passengers whether common or private can contract out of liability by apt words".[1] In continuing the discussion before the Association in 1941[2] the writer indicated that the decision of Sydney Smith J. at trial in *Ludditt* v. *Ginger Coote Airways Limited*[3] was calculated to change existing ideas, the trial judge having decided that by virtue of the provisions of the Transport Act,[4] and in view of the principle laid down in

[2] [1933] S.C.R. 581.
[1] Proceedings of the Canadian Bar Association, 1937, p. 140.
[2] (1941), 19 Can. Bar Rev. 576.
[3] [1941] 2 W.W.R. 397.
[4] Statutes of Canada, 2 Geo. VI, 1938, c. 53.

Clarke v. *West Ham Corporation*,[5] attempts to limit or relieve from liability are invalid at least in the case of passengers carried by air on scheduled air routes and at rates fixed by statutory regulation. In a comprehensive judgment on appeal[6] McDonald J.A. (later Chief Justice for British Columbia) reached the conclusion that the *Clarke* v. *West Ham Corporation* decision was bad law, that a common carrier had a right to contract out of liability and that this right was an ancient one which required intervention of legislation to set it aside. Sloan J.A. agreed with the result, while McQuarrie J.A. dissented on the ground that the release was not binding on the plaintiffs, having regard to the implied warranty that the aircraft was reasonably fit to encounter the ordinary perils of the flight, which it was not.

On appeal to the Supreme Court of Canada,[7] that court, affirming the judgment appealed from (Kerwin and Taschereau J.J. dissenting), held that the plaintiffs' action was barred by the terms of the special contract contained in the ticket and therefore the respondent was relieved of any liability towards the plaintiffs; that the defendant company (it being immaterial whether it should be regarded as a common carrier) was a "carrier" within the definition contained in the interpretation section of the Transport Act; that its licence was issued by the Board of Transport Commissioners and the charge asked from and paid by each of the plaintiffs was made in accordance with the special tariff duly filed with the Board; and that it must be held that the Company had complied with the provisions of the act and with the orders and regulations made under it. The terms and conditions of the ticket were made part of the special tariff and schedules and were valid and binding under the Transport Act and the orders and regulations.

The case then went by special leave to the Privy Council, whose judgment was delivered on February 5th, 1947 (not yet reported). There it received the consideration of five members of the Judicial Committee whose judgment was delivered by Lord Wright. The sole question before the Judicial Committee was whether the express condition contained in the ticket issued to each of the appellants, which condition exempted the respondent from liability, was valid so as to exonerate the company from obligation to compensate the appellants for their injuries. It was not suggested that the appellants and each of them had not sufficient notice of the condition and the condition itself

[5] [1909] 2 K.B. 858.
[6] [1942] 2 D.L.R. 29.
[7] [1942] S.C.R. 406.

was found clear and unambiguous. Their Lordships agreed with the majority decisions of the judges in the provincial Court of Appeal and the Supreme Court of Canada that the condition was valid and binding. In doing so they set out, first, the general law on the subject and pointed out that the liability of a common carrier of passengers was settled in 1860 by the decision of the Exchequer Court in *Readhead* v. *Midland Railway Company*,[8] where it was held that the liability of a general or public or common carrier of passengers is more limited than that of a common carrier of goods. By the custom of the realm a common carrier of goods was at common law "bound to answer for the goods at all events . . . . . The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the king".[9] The carrier of passengers is not subjected to a duty so stringent. His obligation at common law, as was held in the leading case just cited, is to carry "with due care". The common carrier of goods was, nevertheless, at common law free to limit his stringent obligations by special contract. He still remained a common carrier and was bound to carry for all according to his profession, but he could all the same insist on making his own terms and refuse to carry except on those terms.[10]

Their Lordships then considered the effect in the case before them of such statutory restrictions as existed, namely the provisions of the Transport Act and the regulations and orders made under it, and referred to the elaborate analysis of them by the Chief Justice of Canada. The fare paid by each of the appellants was that prescribed by the special passenger tariff and some question arose as to whether the fare was a special or standard fare within the tariff filed. Special tariffs are defined as those specifying a toll or tolls lower than the standard tolls, but there was no evidence that any other toll than the amount paid for the journey had been filed or that it had been approved by the Board. Their Lordships, in any event, said that if it was a special tariff no approval was required and they agreed with the conclusions of the majority judgment of the Supreme Court that there was no ground for holding that the provisions of the act were not satisfied and, in particular, no ground for holding that the fare charged and the terms of the contract, which were either actually or by sufficient reference before the

[8] (1869), L.R. 4 Q.B. 379.
[9] Holt C.J. in *Coggs* v. *Bernard*, 1 Sm. L.C. (5th. Ed.) 171.
[10] See *Peek* v. *North Staffordshire Railway Company* (1863), 10 H.L.C. 473.

Board, were not duly approved. There was thus no reason to hold that statutory restrictions had been infringed and no reason under the statute to set aside or refuse to give effect to a specific contract which the law authorizes. Their Lordships added that "such a contract cannot be pronounced unreasonable, invalid or illegal by a Court of Justice".

The Privy Council also rejected the argument of the appellants that, if the passenger is not given an option either to retain his full rights against the carrier at the higher fare or to waive them in whole or in part at the lower, the specific contract must be valid.

Finally their Lordships observed that they did not regard the decision of the Court of Appeal in *Clarke* v. *West Ham Corporation* (*supra*) as giving any real help or guidance in the decision of the present appeal. While they did not think it necessary to give an opinion on the correctness of much that was said in that case or of the actual decision, they did point out that the judgment of at least the majority in the Court of Appeal turned largely on the construction of the statutes regulating the tramways operated by the Corporation for the carriage of passengers. Such statutory provisions were substantially different from those in question in this appeal.

Until there is statutory change this decision settles the law of Canada on the point. As was mentioned in my address of 1937 (*supra*), the law of the United States would appear to be directly contrary.

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Winnipeg

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BILLS OF EXCHANGE — CHEQUES — QUEBEC — APPLICABILITY OF CIVIL AND COMMON LAW — CAUSE OR CONSIDERATION — GIFT *Inter Vivos* — The recent judgment of Mr. Justice E. Fabre Surveyer in *Lamothe* v. *Mason and others* [1] raises at least three very knotty questions in the Quebec civil law in its application to bills of exchange, cheques and promissory notes. Briefly, the facts were that Miss Theresa Gorman signed two cheques on the Montreal City and District Savings Bank to the order of the plaintiff, one on May 16th, 1943, for $9,000 and one on May 24th, 1943, for $5,000. Approximately ten months later, on March 23rd, 1944, Miss Gorman died. The plaintiff thereupon instituted the present action against her testamentary executors for $14,000,

[1] [1946] S.C. 418.

the amount of the two cheques. Surveyer J. has maintained the action for the full amount.

Certain preliminary questions can be disposed of at once. Among other things the defendants pleaded that the plaintiff had been an inmate of deceased's house, had suggested and dictated the two cheques and had enforced their signature. As to this the learned judge held that there was no proof of undue influence. Then the defendants invoked at the trial the deceased's lack of capacity. To this Surveyer J. answered that capacity is the rule and that the burden of proof rests on the party alleging incapacity; the burden of proof had not been discharged. Finally, it was held that the delivery of the cheques in the circumstances of this case did not constitute a gift in contemplation of death (*donatio mortis causa*) and hence was not void under article 758 of the Civil Code of Lower Canada. The learned judge's conclusions on these questions, depending largely as they do on his appreciation of the facts after hearing the evidence, need not detain us here.

But the judgment raises, at least by implication, three questions which are in an altogether different category:

> (1) in Quebec is the right of a payee to recover the amount of cheques from the executors of a deceased drawer to be decided under the Quebec civil law or the English common law?
>
> (2) assuming the civil law to be the law applicable to *Lamothe* v. *Mason*, was there a cause or consideration sufficient to constitute a valid onerous contract between the payee and the drawer?
>
> (3) if under the civil law there was no such cause or consideration, did the delivery of the cheques by the drawer to the payee constitute a valid gift *inter vivos*?

If the answer to either question (2) or question (3) is in the affirmative, the action against the executors of the drawer was properly maintained; if the case should have been decided on common-law principles, or if the answers to questions (2) and (3) are in the negative, then the action should probably have been dismissed. All three questions raise problems as difficult and complicated as any in the law of Quebec. Neither the jurisprudence nor the doctrine has been satisfying and, with great respect, *Lamothe* v. *Mason* does not advance our understanding of them much further.

Section 10 of the Bills of Exchange Act provides:

> 10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express pro-

visions of this Act, shall apply to bills of exchange, promissory notes and cheques.

I have had occasion elsewhere to consider the effect of this section in its application to the prescription [2] and novation [3] of bills of exchange. It is accepted that the section cannot be interpreted as meaning that the common law of England, except to the extent that it is inconsistent with the express provisions of the act, shall apply in Quebec to all questions in which bills, cheques and notes are involved, however remotely. With some important exceptions, it is also accepted that the effect of the section is to introduce the common law of England into Quebec only where the question is properly speaking one of bills of exchange, cheques or promissory notes, or, in other words, only within the law of bills and notes in a strict sense. In the silence of the Bills of Exchange Act, the common law will ordinarily be applied in Quebec to the solution of problems affecting the form, issue, negotiation and discharge of bills and notes, but not the consequences of the contracts entered into by the parties to the instrument.

In Quebec should one look to the common law or the civil law in deciding whether a cheque has been given for value and whether the delivery of a cheque can be a valid gift *inter vivos*? In *Lamothe* v. *Mason* Surveyer J. assumes, without expressly saying it, that the applicable law on both questions is the Quebec civil law, and this has usually been the assumption of the jurisprudence.

The two questions must be kept separate if only because consideration is dealt with expressly in the Bills of Exchange Act while gifts *inter vivos* are not. Section 53 of the act provides:

> 53. Valuable consideration for a bill may be constituted by
>
> (a) any consideration sufficient to support a simple contract;
>
> (b) an antecedent debt or liability.
>
> 2. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

Article 984 of the Civil Code lays down as one of four requirements of a valid contract "a lawful cause or consideration". Without attempting to discuss within the scope of a note the vexed question as to what constitutes a lawful cause or consideration for a contract in the civil law, it can at least be said that any consideration sufficient to support a simple contract in the common law would

[2] The Bills of Exchange Act and Prescription in the Province of Quebec (1937), 15 La Revue du Droit 396, and subsequent numbers.

[3] The Bills of Exchange Act and Novation in the Province of Quebec (1938), 16 Can. Bar Rev. 602, 706.

be a sufficient cause or consideration in the civil law, though the contrary proposition is by no means true. The civil law recognizes many things as amounting to a cause or consideration (*e.g.* a natural or moral obligation) which would not be recognized in the common law.

One could argue that, since the Bills of Exchange Act deals in section 53 with valuable consideration, or value, consideration should be treated as a question of bills of exchange, cheques and promissory notes properly speaking, in other words within the law of bills and notes in the strict sense, and hence under section 10 of the act to be governed by the common law of England, except in so far as it is inconsistent with the express provisions of the act. Support for this argument can be found in the fact that in certain other cases where it was desired to make a special exception for Quebec the exception is expressly stated in the Bills of Exchange Act (ss. 43(b), 113 and 114). Again the phrases "valuable consideration" and "simple contract", which appear in section 53, are technical terms of the common law unknown to the civil law. "An antecedent debt or liability" means presumably an antecedent debt or liability recognized as such by the appropriate provincial law, but a natural or moral obligation could hardly be considered an antecedent debt or liability, even in the civil law, without stretching the ordinary meaning of the terms.

Admittedly the weight of Quebec jurisprudence is to the effect that the Quebec law of cause or consideration applies to bills and notes as well as to other contracts.[4] It may be late in the day to question this conclusion and it may be reasonable that the Quebec law *should* apply. But, under any of the ordinarily accepted canons of legal interpretation, *does* it apply? It has been suggested that because section 53 says that "valuable consideration for a bill *may* be constituted by. . ." the application of the law of a particular province as to what amounts to consideration might not be excluded.[5] This is perhaps the strongest

[4] *Stephen* v. *Perrault* (1919), 56 S.C. 54 (C. of R.); *In re Ross, Hutchison* v. *Royal Institution for the Advancement of Learning* (1931), 50 K.B. 107, Bond J. dissenting, confirmed [1932] S.C.R. 57; *Morin* v. *Chambre de Commerce de St. Hyacinthe* (1934), 72 S.C. 323, confirmed without express reference to this point by (1936), 61 K.B. 244; *Pesant* v. *Pesant et al.*, [1934] S.C.R. 249, judgment of Cannon J.

Previous cases had applied the civil law without considering the basic question whether it was the applicable law: *Lockerby* v. *O'Hara* (1890), M.L.R. 7 S.C. 35; *Bédard* v. *Chaput* (1899), 15 S.C. 572 (C. of R.); *Brulé* v. *Brulé* (1904), 26 S.C. 77; *Legris* v. *Chené* (1914), 23 K.B. 571.

See also Antonio Perrault: Traité de Droit Commercial, Vol. III (1940), pp. 283 *et seq.*, and Maclaren's Bills, Notes and Cheques (6th ed. by Frederick Read), p. 123.

[5] See Falconbridge: Banking and Bills of Exchange (5th. ed.), p. 652, and the authorities to which he refers.

argument in support of the conclusion of the jurisprudence; I can only say that I find it hard to believe that it expresses the intention of Parliament or that the phraseology of section 53, when read against the background of the act as a whole, really admits of it.

It is impossible to discover from the judgment itself whether the decision in *Lamothe* v. *Mason* was based on the existence of a cause or consideration sufficient in Quebec law to support an onerous contract or on the fact that the delivery of the cheques constituted a gift *inter vivos*. One can only assume from incidental references and from the nature of the authorities cited that the learned judge felt his conclusion could be supported on either ground. If this be correct, he must have found sufficient cause or consideration in the facts stated in the following passage from his judgment:

> I have been struck by the fairness of plaintiff's answers. He might have, without fear of being contradicted, exalted such services as he may have rendered to the deceased during the last ten years of her life. He said nothing of the kind. But, as a matter of fact, he lived with her, and his presence in the house was a comfort to her. He was, after her sister's death, almost her nearest relative. Her other relations were so indifferent to her that in her will of September 28, 1938, she orders and directs that in the event of her estate being insufficient to meet all of her special legacies, the charitable bequests be paid in full to the exclusion of her relatives and friends, and, as I said before, she names as her residuary legatees her late sister's estate.

The general rule in Quebec is that deeds containing gifts *inter vivos* must under pain of nullity be executed in notarial form. As an exception, but only as an exception, article 776 of the Civil Code declares valid a gift of moveable property, accompanied by delivery, which has been made and accepted by a private writing or a verbal agreement. This exceptional mode of making a gift *inter vivos* is commonly known as a *don manuel*. If the cheques in *Lamothe* v. *Mason* were a gift *inter vivos* it must be on the ground that their delivery constituted a *don manuel*.

No one will seriously question that the civil law rules governing the *don manuel* should be applied in deciding whether the delivery of the cheques in *Lamothe* v. *Mason* was a valid gift *inter vivos*. But a note of warning should be sounded here, which as it seems to me is the crux of the whole controversy. Two steps are involved in the decision: firstly, to decide the nature of a cheque under the Bills of Exchange Act and the common law of England and, secondly, to consider whether an instrument having the characteristics that the Bills of Exchange Act and the common law give to a cheque can be the object of a *don manuel* under the civil law.

The Quebec courts have pretty consistently held that a bill of exchange, including a cheque and a promissory note, is moveable property within the meaning of article 776 C.C. and that is delivery can constitute a gift *inter vivos*.[6] Various reasons have been advanced to support this conclusion; they are best summarized in the judgment of Rinfret J., as he then was, in *Pesant* v. *Pesant*, which is the chief authority upon which Surveyer J. relies in *Lamothe* v. *Mason:*

> La seule hésitation peut porter sur la question de savoir si le billet promissoire entre dans la catégorie des 'choses mobilières' qui peuvent faire l'objet d'une donation en la forme autorisée par ce paragraph [article 776 C.C.]. Par définition traditionnelle, il s'agit ici d'un objet dont la 'délivrance' peut s'opérer par transmission de la main à la main. De là, l'appellation de 'don manuel'. Mais la loi parle de donation. Il faut donc, de la part du donateur, l'intention de se dépouiller à titre gratuit, actuellement et irrévocablement, de la propriété de la chose et, de la part du donataire, il faut l'intention d'accepter dans le même esprit. Il est suffisant que les deux intentions se manifestent 'par convention verbale'; ce qui est essential, c'est que la tradition qui s'opère soit faite de telle façon qu'elle ait pour effet, par elle-même et sans plus, de transférer la propriété de la chose d'une façon complète et définitive. Ainsi comprises, les 'choses mobilières' qui peuvent faire l'objet d'un don manuel sont celles dont la 'délivrance' *est susceptible de transmettre effectivement la propriété*. Ce sont tout d'abord les *choses corporelles*, parce que leur 'possession vaut titre' (art. 2268 C.C.); mais ce sont également, et entre autres choses, les titres de créance dont la remise est effectuée de manière à conférer à celui qui les reçoit le droit de propriété dans le titre et dans la créance qu'il représente. Dans ce cas, 'la créance fait corps avec le titre, et sa nature incorporelle, ainsi matérialisée, cesse de créer un obstacle à une livraison de main à main' (Fuzier-Herman vo. Don Manuel no. 101). Alors, comme le font remarquer Baudry-Lacantinerie et Colin (vol. 10, p. 539, no. 1188), 'la possession de l'effet implique vraiment 'la qualité de bénéficiaire.' (Voir 32 Laurent, nos. 568 et 569).[7]
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> Par ailleurs, nous ne voyons pas qu'il y ait de distinction à faire, sous ce rapport, entre le don du billet d'un tiers et le don du billet du donateur. Du point de vue d'où se placent la doctrine et la jurispru-

[6] For a very full discussion of the question see Antonio Perrault, *op. cit.*, Vol. III, particularly pp. 590 *et seq.*

The following cases hold that a cheque can be the object of a *don manuel: Cardinal* v. *Landes* (1923), 61 S.C. 521; *Rochon* v. *Rochon* (1928), 45 K.B. 170. But see *Legris* v. *Chené* (1914), 23 K.B. 571.

Other cases have held the same thing with regard to a promissory note: *Darling* v. *Blakeley* (1895), 9. S.C. 517 (C. of R.); *Jacob* v. *Desaulniers* (1926), 64 S.C. 128; *Harvey* v. *Harvey* (1928), 35 R. L. 171; *Pesant* v. *Pesant et al.*, [1934] S.C.R. 249, the judgment of Rinfret J. But see *Boucher* v. *St. Germain* (1933), 54 K.B. 555; *Plasse* v. *Plasse* (1937), 75 S.C. 142, an unsatisfactory judgment however.

[7] *Pesant* v. *Pesant et al.*, [1934] S.C.R. 249, at pp. 264-265. It should be noted that this case concerned a promissory note, not a cheque, given to the appellant by her mother. The mother died and the daughter sued the mother's executors on the note.

dence, il n'y a pas de différence juridique entre les deux opérations. Dans le premier cas, le titre de créance (le billet du tiers) est déjà en circulation; dans le second cas, le donateur crée d'abord le titre, puis le met en circulation. On admet que le don manuel d'un chèque est valable. Le billet promissoire du donateur est sur le même plan légal. Dans la plupart des causes que nous avons citées, l'effet de commerce émanait du donateur lui-même, et l'on n'a pas songé à écarté le don pour cette raison.[8]

It would not be possible in the present note to do more than indicate the very real questions raised by these two passages. In the first, Rinfret J. says that the "moveable property" which can be the object of a *don manuel* is that the delivery of which is susceptible of transferring effectively the ownership. This is quite true so far as it goes, but the question still remains: the ownership of what? No one will deny that the ownership of a corporeal thing like a piece of paper can be transferred by *don manuel,* whether the paper is in the form of a magazine, a cheque or anything else. The passage continues that such moveable property also includes the title of a debt or right, the delivery of which is carried out in such a way as to confer on the person who receives it the right of ownership in the title and in the right it represents. Here too it is easy to follow the reasoning: the holder of a cheque payable to bearer or an endorser, for example, can transfer such rights as he has in the cheque by a *don manuel.* It is only necessary to add that these rights are also transferred by the ordinary operation of the law of negotiable instruments; one need not have recourse to the doctrine of the *don manuel.*

The reasoning in the second of the two quoted passages is more doubtful however. Is it correct that there is no juridicial difference between the gift of a note or cheque of a third person and the gift of the note or cheque of the donor? Ownership in what right is conferred on the payee by the delivery to him of a cheque by the drawer? What is the right or debt, the "créance", represented by the cheque?

Here, under the rule already laid down, we must turn to the Bills of Exchange Act and the common law to discover the nature of a cheque. Section 127 of the Bills of Exchange Act states generally that "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument". The view of the common law as to the nature of a cheque is set forth clearly and succinctly in the English case of *In re Swinburne, Sutton* v.

[8] *Idem.*, at p. 268.

Featherley, where the facts in this respect were on all fours with those in *Lamothe* v. *Mason:*

> In the first place, in order to make an effectual gift inter vivos there must be an actual transfer of the subject of the gift or of the indicia of title thereto. A cheque is not money. It is not the indicia of title to money. A cheque is nothing more than an order directed to the person who has the custody of money of the testatrix requiring him to pay so much to the person in whose favour the cheque is drawn. The statement of Lord Romilly in *Hewitt* v. *Kaye* [L.R. 6 Eq. 198, 209] is this, and it seems to me quite accurate: 'A cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the bankers or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it it is worth nothing'.[9]

To avoid any misunderstanding I emphasize that this passage from *In re Swinburne* is not quoted as authority for the proposition that in Quebec a cheque cannot be the object of a *don manuel* from the drawer to the payee; it is quoted as authority on the nature of a cheque. Surveyer J. admitted that if the question in *Lamothe* v. *Mason* were to be decided under English law the plaintiff's action would probably fail.[10] My point is that there are grounds for arguing that it should also have failed in Quebec. With respect, *Lamothe* v. *Mason* and the authorities upon which it is based appear to proceed on a misconception of the nature of a bill of exchange in Canada.

To return to the passages quoted from the judgment of Rinfret J., the right conferred on the payee by the delivery to him of a cheque by the drawer cannot be the right of ownership in the money represented by the cheque; section 127 of the Bills of Exchange Act states expressly that a bill does not of itself operate as an assignment of funds in the hands of the drawee available for payment. Nor can the right conferred be the drawer's right to withdraw his money from the bank; a cheque is merely an order directed to the bank requiring it to pay a specified sum to the person in whose favour the cheque is drawn.[11] Finally, the right conferred cannot be the right of ultimate recourse against the drawer; under section 39 of the Bills of

[9] [1926] Ch. 38, at p. 44; there is nothing inconsistent between this statement and the Bills of Exchange Act, except that under section 165 of the act a cheque must be drawn on a bank.

[10] Quoting Falconbridge: Banking and Bills of Exchange (5th ed.), p. 933.

[11] Incidentally, even if this statement is incorrect, the cheques in *Lamothe* v. *Mason* would not have operated as a transfer of the right after the drawer's death, in view of section 167 of the Bills of Exchange Act, which states that the duty and authority of the bank to pay a cheque are determined by notice of the customer's death.

Exchange Act there is no right of recourse against the drawer to confer until delivery has been completed. Section 39 provides that every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable until delivery of the instrument in order to give effect to it. You cannot by a *don manuel* transfer ownership in a right which is not yet in existence.

Lamothe v. *Mason* cannot be criticized on the ground that it is contrary to the weight of authority (though it might be criticized because it does not make clear on which of two grounds the judgment was based — an onerous contract for which there was a valid cause or consideration in Quebec law, or a *don manuel*). The purpose of this note is to suggest that in either case the law requires further consideration.

Cases like *Lamothe* v. *Mason* give rise to serious dangers from the point of view of social policy. The requirements of publicity in the case of gifts *inter vivos* are laid down in the interest of the heirs and the legatees of the donor, his creditors and all other interested persons. For this reason articles 804 and following of the Civil Code require the registration of all gifts *inter vivos*, whether of immoveables or moveables, the only exceptions being gifts of moveable property "when they are followed by actual delivery and *public possession* by the donee".[12] Obviously the holder of an uncashed cheque is not in public possession of the money represented by it. If *Lamothe* v. *Mason* is sound law, there is nothing to prevent a person receiving the gift of a cheque privately, retaining it without any publicity whatever and then suddenly suing the drawer or his heirs to the prejudice of creditors and other interested persons. It may be hard to dismiss such actions, but hard cases sometimes make bad law.

G. V. V. N.

[12] Article 808 C.C.; the italics are mine.

It is the duty of any democratic Government to take the people frankly into its confidence, however difficult the position of the country may be.— Rt. Hon. Clement R. Attlee.