CASE AND COMMENT

CHEQUE — PAYMENT — EFFECT IN QUEBEC OF CHEQUE MARKED BY DEBTOR "IN FULL" AND CASHED BY CREDITOR— NOVATION.—In 1889 the English Court of Appeal in *Day* v. *McLea* decided that it is a question of fact, to be determined in each case as it arises, whether or not a creditor who cashes a cheque from his debtor marked "in full payment" has, by so doing, accepted the condition.[1] The law should have been settled in the same sense for the Province of Quebec in 1925 by the Supreme Court of Canada in *Brilliant Silk Manufacturing Co.* v. *Kaufman*.[2] But, while that decision has been followed by the lower courts of Quebec in some cases, the waters of our jurisprudence have been muddied by others, and these we shall examine. The result has been that this simple type of legal problem is surrounded in Quebec by confusion and misunderstanding, to the great perplexity of lawyers and litigants alike, as witness two recent decisions that have just been reported.[3]

There is no reported decision of the Quebec Court of Appeal on the subject, but a round dozen lower-court decisions have found their way into print. Of these, one can only say that some treat the question as one of fact following *Day* v. *McLea* and that others, while expressly or implicitly rejecting *Day* v. *McLea*, actually decide the case as one of fact. How indeed could it be otherwise when the circumstances may vary in so many different ways? The original debt which the cheque is sent to settle may be disputed or quite indisputable. The amount due may, or it may not, be liquidated. The debtor may have a counterclaim which itself may vary as the original debt. There may have been pourparlers between the parties leading up to the sending of the cheque, or it may be entirely *ex parte* on the part of the debtor. Upon receiving the cheque the creditor may simply cash it without further ado and sue for the balance; but he may also add a negative annotation of his own, or advise the debtor before cashing the cheque that it will be applied on account. We need not lengthen this list of possible and relevant complications, because it must be apparent that no one rule could possibly cover all cases. That is, you cannot say as a matter of law that a creditor who accepts a cheque from his

[1] 22 Q.B.D. 610.

[2] [1925] S.C.R. 249.

[3] *Deguise* v. *Goudreau*, [1948] S.C. 50, which approves and follows *Day* v. *McLea;* and *Gagnon* v. *Martel*, [1947] S.C. 475, which approves the conflicting decisions in the *Reinhart* and *Kopernick* cases, referred to later. See also Pelletier: Chèques et mentions sur chèque (1943), 3 R. de B. 285.

debtor marked "in full" is bound by that act and loses his right to recover any balance that may be due.

This negative proposition was endorsed by the Supreme Court, as we have said, in 1925 when it decided the *Brilliant* case. The court, speaking through Duff J., had this to say on the point:

> The rule laid down in *Day* v. *McLea* has been adopted and given effect to in the Province of Quebec, first in a decision of *La Compagnie Paquet* v. *Paquin*, and more recently in *Royal Trust* v. *White*, when such a condition is endorsed upon or inserted in the body of the cheque, it is a question of fact in each case whether the creditor has, by words or by conduct, agreed to that condition.[4]

There the matter should and would have ended had it not been for the views expressed by the late Judge Archambault who, at the time, was the senior judge of the old Circuit Court of Montreal, abolished in 1944.[5] In 1922 Judge Archambault, who enjoyed a well merited reputation as a jurist, had dismissed an action for the balance of a debt because the creditor had cashed the debtor's cheque for a smaller amount marked "paid in full to date".[6] His decision in that case may or may not have been perfectly sound on the facts. The point is that the learned judge seems to think that *Day* v. *McLea*, if it were binding on him, would require a judgment in favour of the plaintiff and he sets about refuting its authority in Quebec and its soundness in law, logic and morals. Of course, he was tilting against a windmill because the rule of *Day* v. *McLea* is simply that there is no rule.

In 1933 a similar case came before the same judge and again, perhaps with perfect justice, the creditor's action was dismissed.[7] It would appear from the report of this decision that the plaintiff's attorneys cited the *Brilliant* case to the effect that the rule in *Day* v. *McLea* was the law in Quebec and no doubt, as lawyers do, cited that decision as an authority on the facts, although they were by no means identical. This was flying in the face of the *Reinhart* case and the learned judge devotes part of a lengthy judgment to demonstrating that he was right in 1922 and the Supreme Court was wrong when it said that *Day* v. *McLea* had been adopted and given effect to in the Province of Quebec, first, in *La Compagnie Paquet* v. *Paquin*[8] and then in

[4] At. p. 259.
[5] It had jurisdiction up to $100.
[6] *Reinhart* v. *Regent Children's Dress Mfg. Co.* (1922), 28 R. de J. 208.
[7] *Allan's Beverages Limited* v. *Kopernick* (1934), 72 S.C. 29.
[8] (1911), 39 S.C. 58.

Royal Trust v. *White*.[9] Having proved to his own satisfaction that *Day* v. *McLea* had never been adopted in Quebec the learned judge goes on to repeat and elaborate the critical views of that decision he had already expressed in 1922.

It is well to note, however, that he does not say and was much too good a judge to entertain the notion that as a matter of law a creditor is always bound by the annotations on his debtor's cheque if he cashes it. But just because his judgments were treated with great respect and because he expends so much learning in proving that he is not bound by the *Brilliant* case or by *Day* v. *McLea*, he succeeds in giving the impression that otherwise his judgment would have gone for the plaintiff. In reading the judgment one is led to ask why he is worrying so much about *Day* v. *McLea* unless he believes that it laid down a rule of law in the matter with which he does not agree. Certainly that has been the effect of his judgment in later cases; it has been cited frequently and sometimes accepted as establishing the existence of a rule that a cheque bearing an indication of final payment binds the creditor who cashes it in all circumstances.[10]

Furthermore, the judgment in the *Kopernick* case contains strictures on the morality of the decision in *Day* v. *McLea* and an exposition of legal principles which are not sufficiently qualified and which, in conjunction with the criticism of the *Brilliant* case, to which we have referred, deepen the impression that the learned judge is laying down rules of general application and not simply deciding that on the facts of the case at bar the plaintiff should lose.

The decision of the old Court of Review in the *Paquet* case seems to be *fons et origo mali*. Duff J. in the *Brilliant* case says it adopted *Day* v. *McLea;* Archambault J. says the Supreme Court was completely mistaken and that the Court of Review expressly rejected *Day* v. *McLea*. The conflict is easily resolved. Paquin was the trade debtor of a commercial house and owed it some $400 for goods sold and delivered. He offered this creditor a composition of fifty cents on the dollar and was refused. Nevertheless, he had his solicitor send La Compagnie Paquet a cheque for half the debt marked "According to compromise at 50c. re Paquin in full". The creditor cashed the cheque, applied the payment on account and immediately wrote the debtor for

[9] (1916), 50 S.C. 277.

[10] *H. C. Downham Nursery Co. Ltd.* v. *Pigeon*, [1945] R.L. 246; *Gagnon* v. *Martel*, [1947] S.C. 475; *Rankin* v. *Blick Time Recorders of Canada Ltd.* (1938), 76 S.C. 199.

the balance. In the course of further discussions the debtor apparently acknowledged that he still owed the balance. It is therefore not surprising that the creditor's action for the balance was maintained and the defence of accord and satisfaction dismissed in the trial court and confirmed in review. Nor is it surprising that the reporter should have taken the decision of the Court of Review as authority for the proposition which appears in the headnote as follows (translation):

> a presumption of final payment of an account created by the creditor's acceptance of his debtor's cheque marked 'in full' may be rebutted by positive proof that this acceptance was made only under reserve of his right to the balance.

Certainly the court treated the question as a pure question of fact, admitted, discussed and weighed all the relevant evidence and came to the conclusion that, in the circumstances, there had been no consent to a composition and that the debtor had admitted as much. The *Day* and other cases cited in the judgment are not discussed by the court, obviously because they turned on different facts. Quite properly, there is no discussion at all of law or precedents in the judgment, which, far from rejecting *Day* v. *McLea*, follows the rule there laid down, and Duff J. was quite right when he said it gave effect to *Day* v. *McLea*.

When we say the judgment contains no law, an explanation is necessary because of certain remarks by Lemieux J. in the opening paragraph of his judgment. This is the passage upon which Archambault J. bases his argument that the Court of Review clearly refused to follow and approve *Day* v. *McLea*. Translated, the passage is as follows:

> We will say immediately that the Court from the hearing of the case has entirely shared the defendant's point of view with regard to the interpretation to be given to the acceptance of a cheque indicating payment of a debt under conditions marked on the cheque and we by no means intend to derogate from the well-known rule of daily and useful application among businessmen, to wit, that a cheque bearing an indication of final payment, or of conditional payment, binds the party who accepts it and constitutes for the debtor a release and discharge. The difficulty is to know whether such a rule can be followed in the present case.[11]

In these obiter remarks the learned judge, it is true, speaks of a rule that the acceptance of a cheque marked "in full" binds the creditor, but it is not clear whether he is speaking of a rule of law or a business custom. In either event, it is immaterial

[11] *La Compagnie Paquet* v. *Paquin* (1911), 39 S.C. 58, at p. 59.

because there was no authority for the former and certainly no proof of the latter. The clue to the judge's meaning is in the last sentence where he questions whether such a rule could have any application to the case before him. Quite obviously, he decided it had none because we hear no more of the rule and, after an examination of the facts, the creditor's action is maintained. The rule the learned judge had in mind applied only to cases where the debt was disputed and not to the case before him where there was no possible dispute about the existence or amount of the original debt and the debtor had no suggestion of a counterclaim.

It is possible to speak somewhat loosely of a rule in these cases if one takes simple and extreme examples. In one case, let us say, the existence and amount of the debt is disputed, as in a claim for damages in delict, and in another the original debt is acknowledged and its amount determined. Now, if there is no evidence in either case beyond the fact that the creditor cashed the debtor's cheque marked "in full", the first creditor will be bound and the second will not if the cheque was for less than the original debt. *Allan's Beverages* was a case of the first type, inasmuch as the debtor had a disputed counterclaim against the creditor and some pourparlers of settlement had taken place before the cheque was sent.[12] This is the important fact in the case and renders the judgment intelligible. *In these circumstances,* let us emphasize it, the annotation on the back may be regarded as an offer by the debtor to enter into a contract of transaction on the terms mentioned.[13] The creditor's acceptance of this offer may be express or tacit and once it is communicated to the debtor the contract of transaction is complete. By sending the cheque in advance the debtor indicates to the creditor a convenient method of tacit acceptance which guarantees the payment of the agreed amount, *viz.*, the cashing of the cheque. In such a case, the negotiation of the cheque can have no other meaning than the acceptance of the debtor's offer to transact and, of course, it would be unconscionable if the debtor could keep the money and repudiate his acceptance. Archambault J. was therefore justified in dismissing plaintiff's action in the *Kopernick* case. But again we must repeat, that his reasoning is not sufficiently related to the facts. Thus, at page 33 of the report, the learned judge

[12] (1934), 72 S.C. 29.

[13] Article 1918 of the Civil Code defines transaction as "a contract by which the parties terminate a lawsuit already begun or prevent future litigation by means of concessions or reservations made by one or both of them".

speaks of his theory, which we have just summarized, as being in contradiction to another theory and it is evident that he means *Day* v. *McLea* and the *Brilliant* case.[14] He then launches into the demonstration, which we have already discussed, that he is not bound by these decisions. But again and of course those cases put forward no theory and the courts that decided them would probably have decided the *Kopernick* case in exactly the same way.

The reasoning in *Day* v. *McLea* differs from that of the *Kopernick* case precisely because the relations between the debtor and the creditor were different. In the *Day* case it is true the action was for damages for breach of contract, but one gathers, and the judgment would not otherwise make sense, that the damages were undisputed and liquidated. Upon receiving a cheque for a lesser amount marked "in full" the creditor applied it on account and sued for the balance. The Court of Appeal was able to maintain the plaintiff's action and dismiss the plea of accord and satisfaction by applying to that situation elementary principles of the common law of contract.

The same result is obtained in the civil law by parallel reasoning, which goes like this: The original debt, being undisputed, can be extinguished only by payment in full or by some other recognized mode of extinguishing obligations. By relying on the cheque the debtor is pleading that the original debt was extinguished by a new agreement to take less; that is, he pleads novation.[15] But novation is never presumed. The intention to effect it must be evident.[16] Therefore the debtor to succeed must affirmatively establish that his creditor agreed to take less. The mere fact that he cashed the cheque does not create even a presumption of assent on his part to the debtor's proposal.[17] So no new agreement is established. If such an agreement were presumed to exist it would be null for lack of consideration. In either case the debtor is entitled to his money back as having been paid without cause or under a void agreement. But he owes the creditor more than the amount of the cheque and as

[14] At p. 33: "Il y a cependant à notre manière de voir une objection formidable, si tant est qu'elle n'est pas invincible".

[15] Article 1169 C.C.

[16] Article 1171 C.C.

[17] The presumption is rather the other way: that the creditor is not releasing a solvent debtor from his debt. Besides he may not have seen the notation on the cheque, or it may have been endorsed and cashed by an employee without authority to do more. If you send me $10.00 in full payment of a $1,000 debt, am I presumed to have made you a gift of $900 because I cashed the cheque? Do you own the house for which I ask $25,000 because you send me a cheque for $10,000 as the price and I cash it? It becomes absurd.

both debts are equally due and liquidated, legal compensation takes place *pro tanto*, the cheque is applied in reduction of the original debt, and the creditor is still the creditor for the balance.

This reasoning, be it noted, holds good in the civil law and in the common law only if there is no evidence of the creditor's acceptance beyond the mere cashing of the cheque. But it is a matter of evidence and not of law and there might be evidence which would require a different judgment in any particular case, just as in the *Kopernick* type of case there might be evidence, *e.g.*, of error, to offset the suggestion of tacit acceptance.

There is one more remark to make about the *Kopernick* case. Archambault J. joins with MacLaren in criticizing, as he thinks MacLaren is criticizing, the morality of the decision in *Day* v. *McLea*[18] and he cites the following short passage taken out of its context:

> this shocks the moral sense, especially if the creditor should cash the cheque before the debtor has an opportunity to countermand its payment, should he so desire.[19]

The complete citation follows:

> The *Day Case* has been sometimes interpreted as laying it down as law that where a debtor has sent a cheque payable to the order of his creditor on the express condition that if accepted it must be taken in full of the claim, the creditor might endorse the cheque, and get it cashed, and then sue for the balance and recover, if he could prove for a larger amount.
>
> This shocks the moral sense. . . .

Quite evidently MacLaren is not shocked by the actual decision in the *Day* case, but by the interpretation that regards it as establishing a rule of law in favour of the creditor. That is exactly the error into which Archambault J. has fallen and, presumably, MacLaren would be just as shocked by the interpretation sometimes placed on the *Kopernick* case. The irony of the situation is that Archambault J., by slaying the imaginary dragon of the *Day* case, has himself been taken to advocate a rule of law in favour of the debtor. As we have seen, the *Day* case cannot possibly be regarded as laying down a rule of law and neither, we submit, does the *Kopernick* case. If it does it is clearly wrong and we conclude that in Quebec, as elsewhere, the question we have been discussing is still and always one of fact.[20]

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[18] Read MacLaren for Chalmers at p. 32 of the report.
[19] MacLaren's Bills, Notes & Cheques (6th ed.), at p. 285.
[20] MacLaren would appear to be wrong when he says *Day* v. *McLea*

CIVIL RESPONSIBILITY — AUTHORITY OF COMMON-LAW PRECEDENTS IN QUEBEC — INVITEE, LICENSEE AND TRESPASSER.— It is remarkable how long-lived are some quite erroneous legal principles, a fact again demonstrated in the recent case of *Fiset* v. *La Cité de Québec*.[1] Here the trial judge based his decision, in a civil-law matter, on the distinction between invitees, licensees and trespassers made by common-law jurisprudence. In the course of his judgment he quoted a leading English case, *Robert Addie and Sons* v. *Dumbreck*, in which it is said that "in the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent — the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known — or ought to be known — to the occupier".[2]

It was unnecessary for the decision of the *Fiset* case to resort to any such theory as this. The trial judge held the City of Quebec liable in damages to the owner of a car, parked in a vacant lot adjoining a municipal building, which was damaged by the fall of a large quantity of snow. However, he also found the plaintiff equally at fault because, although the City had tolerated the practice of parking, he had left his car in a place where the danger was visible and apparent.

The essential point is that it is fault, however slight, which entails responsibility in Quebec law. What constitutes fault depends on the circumstances of each particular case. An owner must keep his property in such condition that it is unlikely to cause damage to another; when a person enters the property of another he is entitled to be protected against reasonably probable dangers.

It would seem that Quebec's highest court, the Court of King's Bench (in appeal), does not accept the "fine distinctions" between invitees, licensees and trespassers. In *Drapeau* v. *Gagné* the five judges were unanimous in rejecting the principle.[3] Mr. Justice Barclay quoted Mr. Justice Rinfret, the present Chief Justice of the Supreme Court, who in *Hallé* v. *Canadian Indemnity*

has not been followed in the United States, *op. cit.*, p. 285. According to Daniels, Negotiable Instruments (New York, 1913), Vol. 2, p. 1447, note 17, it depends on the nature of the debt, as we have pointed out.

[1] [1947] S.C. 468.

[2] [1929] A.C. 358, at p. 365.

[3] [1945] K.B. 303.

Company [4] had repeated with approval what was said in *Desrosiers* v. *The King*:[5]

> This case affords an excellent illustration of the danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law.

Again, this time in a dissenting judgment in the case of *Morin* v. *Néron,* Mr. Justice Barclay wrote, "With all deference to those holding the contrary view, I do not consider that the English jurisprudence and the common law relative to the theory of the invitee, licensee and trespasser apply to the decision of a case in this Province".[6]

We do not need a new Supreme Court decision to settle this question, because we have already their general pronouncement on a similar problem, which has just been quoted. Nor is the decision of the Privy Council in *Letang* v. *Ottawa Electric Ry. Co.*,[7] referred to in certain cases, authority for adopting the distinction in Quebec. The *Letang* case, while it originated in the Province of Quebec, was decided according to the laws of Ontario.

It is submitted that the distinction between invitees, licensees and trespassers, and the legal consequences of the distinction, do not obtain in the Province of Quebec. This is also the opinion of Mr. Antonio Perrault, K.C.[8] The contrary view does not contribute to the development of the civil law on the responsibility for damages. Even Salmond has said: "That this difference [between the invitee and licensee] exists is undoubted, but it is not possible *in the present confused state of the authorities* to state its precise nature with any definiteness or confidence".[9]

We should rely exclusively on the old rule of article 1053 of the Quebec Civil Code, which declares that "every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill". On the basis of the facts in each case, the court will then decide whether the occupier of property has been guilty of fault towards a person on his property.

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[4] [1937] S.C.R. 368, at p. 384.
[5] (1920), 60 S.C.R. 105, at p. 119.
[6] [1945] K.B. 625, at p. 636.
[7] [1926] A.C. 725; 41 K.B. 312.
[8] *La critique des arrêts,* [1945] R.du B. 491.
[9] Law of Torts (9th ed., 1936), p. 514 (the italics are mine).