Recent Cases

INSURANCE — MATERIALITY OF MISREPRESENTATIONS — THE REASONABLE INSURER TEST — WHETHER EVIDENCE OF PRACTICES OF DEFENDANT INSURER SUFFICIENT. *Henwood* v. *Prudential Insurance Co. of America,* (1967), 64 D.L.R. (2d) 715.

In the contract of insurance, misrepresentation in the absence of fraud must be material in order to be a cause of nullity.[1] The question of what criteria are to be applied to determine this materiality has recently come before the Supreme Court of Canada in the case of *Henwood* v. *Prudential Insurance Co. of America.*[2]

Briefly, the facts of the case are as follows: the insured, a young lady who had made several visits to a psychiatrist and other physicians following a period of depression caused by a broken engagement, failed to disclose that she had been attended by a "physician or other practitioner within the past five years" in answer to a question to that effect in an application for a life insurance policy; as well she answered in the negative a question asking if she had been "treated for any nervous or mental disorder" in the same application. A little more than one year later, the insured was killed in a motor vehicle accident; it was not disputed that the answers she had given in the application had no bearing whatsoever on the circumstances of her death, but the insurance company attacked the policy's validity because of the non-disclosure which they claimed was material to the insurance in the sense of S. 149(1) of the *Insurance Act.*[3] The

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[1] Articles 2485 and 2487 C.C.; Fire Statutory Condition (1), *Insurance Act,* R.S.Q. 1964, c. 295, s. 240; *Insurance Act,* R.S.O. 1960, c. 190, s. 149(1).

[2] (1967), 64 D.L.R. (2d) 715 (S.C.C.). Although the case is governed by the law of Ontario, it is probable that the Quebec rules in this area of materiality are the same. The question is admittedly the subject of some debate ever since the decision of the Quebec Court of Appeal in *Alliance Insurance Co.* v. *Laurentian Colonies and Hotels Ltd.,* [1953] B.R. 241, where it was held (per S. McDougall, J., at p. 255) that the scope of materiality under Article 2487 C.C. is narrower than that of the common law. Other judgments prior to this date, however, both in the Court of Appeal and in the Supreme Court followed the common law rules (*Bertrand* v. *Compagnie Française du Phenix,* [1946] B.R. 82; *Gauvremont* v. *The Prudential Insurance Company of America,* [1941] S.C.R. 139). See also the criticism of the *Alliance* decision in S. Taviss, *A Re-examination of the Test of Materiality in Quebec Insurance Law,* (1955-56), 2 McGill L.J. 148; A.J. Campbell, *Claims under Fire Insurance Policies, The W.C.J. Meredith Memorial Lectures, 1963 Series,* (Montreal, 1963), 40 at p. 43.

[3] R.S.O. 1960, c. 190.

Supreme Court held (per Ritchie, J.; Cartwright, Martland and Judson, JJ., concurring) that these untrue answers respecting the medical advisers consulted by the insured were material to the risk, and that the policy was therefore void. Mr. Justice Spence dissented.

The question of materiality is one of fact in each case and the onus of establishing it rests upon the insurer.[4] What evidence, then, was available to the court to enable it to justify its conclusion that the medical condition of the insured was sufficiently serious so that non-disclosure thereof was material to the risk?

Of the medical advisors who actually treated the girl, Dr. Valadka, her family physician, testified that he

> had the impression she's like the normal average, teen-age girl at that age when they usually start to have some problems, discussions at home, arguments with parents, or especially father due to some disagreement about the dates and things like that, but nothing unusual.[5]

Dr. Murray, the psychiatrist,[6] stated in an answer to the trial judge's question that if things had been better with her boyfriend she would have recovered rapidly.[7]

The majority, however, seems to have paid more attention to the testimony of Dr. Roadhouse, the company doctor, who was not a psychiatrist and who had never examined the insured. Together with another officer of the company, Dr. Roadhouse testified that if they had had access to the information in question, the policy would not have contained any accidental death benefit provisions[8] — that is to say, that in the opinion of the respondent insurance company, knowledge of the insured's medical history would have affected the risk.

In weighing this evidence, the test of materiality which the Supreme Court applied was the generally accepted one of the reasonable insurer.[9] The majority found, however, that the respondent insurance company was acting as such an insurer on the basis of

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[4] *Ontario Metal Products Co.* v. *Mutual Life Insurance Co.*, [1924] S.C.R. 35 [1924] 1 D.L.R. 127; affirmed on appeal in the Judicial Committee, *sub. nom. Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.*, [1925] A.C. 344, [1925] 1 D.L.R. 583.

[5] At p. 724.

[6] One other psychiatrist had examined the girl, but he had died prior to the institution of proceedings.

[7] At p. 728.

[8] *Ibid.*, p. 719.

[9] *MacGillivray on Insurance Law*, 5th ed., by Denis Browne, vol. 1, (London, 1961), para. 827; *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.*, [1925] A.C. 344.

its particular practice alone.[10] There was no evidence of expert witnesses as to whether or not other insurance companies would have considered such a misrepresentation as material; officers of the respondent company testified that they had no knowledge of the policies of other companies in this regard. Once the insurer has established its own practice, the majority holds, the burden then shifts to the insured to prove that such a practice is unreasonable. In the words of Ritchie, J.:

> I do not think that when no evidence whatever has been adduced to suggest that the respondent's practice is anything but reasonable, it is seized with the burden of proving the practice of other insurers.[11]

Mr. Justice Spence, in his dissenting judgment, refuses to accept the evidence given by the officers of the company as a discharge of the insurer's onus under the reasonable insurer test. He points out that to hold as the majority does is tantamount to saying that the respondent insurer, in reciting *its* policy, automatically recites the policy of a reasonable insurer; any idiosyncracy of an individual company expressed in its policy, therefore, would bind the court to hold that non-disclosure of facts which were not in accordance with that idiosyncracy was automatically material.[12] He goes on to emphasize that the reasonable insurer test is only concerned with representations and that

> if a company wishes to take the position that any non-disclosure is material to it no matter what the view of reasonable insurers, then it should put the answers of the questionnaire by the insured in the position of conditions or warranties.[13]

The judgment of the Supreme Court in the *Henwood* case would appear to have severely emasculated the test of the reasonable insurer, if it has not completely destroyed it. For it would now appear relevant to ask only whether the misrepresentation would have influenced the particular insurer in the case at bar; the burden of showing that such a practice is unreasonable falls on the insured.

D.H.T.

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[10] One might raise the point, *en passant*, in the light of the actual medical history of the insured, that by concluding that the respondent insurer (for whom such a medical history would have affected the risk) was not acting unreasonably, the majority of the Supreme Court would appear to be regarding psychiatric treatment *per se* as indicative of emotional instability and mental illness.

[11] At pp. 720-721.

[12] *Ibid.*, p. 731.

[13] *Ibid.*

CONSTITUTIONAL LAW (United States) — FREEDOM OF SPEECH RIGHT OF LAW REVIEW TO REFUSE TO PUBLISH ARTICLE SUBMITTED — LAW REVIEW OF STATE UNIVERSITY AS PUBLIC INSTRUMENTALITY. *Avins* v. *Rutgers, State University of New Jersey,* (1967), 385 F. 2d 151.

The plaintiff brought suit in the District Court for the District of New Jersey against the defendant state-supported University, the publisher of the *Rutgers Law Review,* for declaratory and injunctive relief. He alleged that the editors of that *Review* had failed to publish an article which he had submitted because of a discriminatory policy they had adopted "of accepting only articles reflecting a 'liberal' jurisprudential outlook in constitutional law"; the article reviewed the legislative history of the *Civil Rights Act of 1875*[1] as it pertained to the question of school desegregation and concluded that, in the light of the Congressional debates, the Supreme Court of the United States had erred in the leading decision in the field, *Brown* v. *Board of Education.*[2] The plaintiff contended that his article, which admittedly espoused the conservative approach to the problem, was refused solely because of its tenor and that the rejection, on that account, violated his constitutional right to freedom of speech. In fact, the student articles editor had stated in his letter of rejection "that approaching the problem from the point of view of legislative history alone is insufficient." The District Court entered summary judgment for defendant and plaintiff appealed to the United States Court of Appeals, Third Circuit.

The basic argument advanced by the plaintiff in appeal, that a law review published by a state-supported university was "a public instrumentality in the columns of which all must be allowed to present their ideas, the editors being without discretion to reject an article because in their judgment its nature or ideological approach is not suitable for publication" was not accepted by the court. Maris, J., speaking for the court, noted that the plaintiff did not assert that the *modus operandi* of the editors or the nature of their work differed in any way from that generally followed by privately-run law reviews and the court appeared to be content to treat both publicly and privately produced student law reviews in the same fashion. The court cited with approval the following statement of the trial judge:

> (T)he Editorial Board must be selective in what it publishes, and a selective process requires the exercise of opinion as to what particular subject

[1] March 1, 1875, c. 114, 18 Stat. 335.
[2] (1954), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

> matter of the law will at a given time be of educational value, not only to the student body, but also to the subscribers.[3]

The court found that the article was one "which it would not be unreasonable for any editorial review board of a law review to reject" and they refused to allow the judgment of the author as to the acceptability of the article for publication to intrude upon that of the board.

Although there was no case on all fours with this one, the court had little trouble in disposing of the contention that the decision of the editors had involved a violation of the protection accorded to freedom of speech by the First and Fourteenth Amendments. The validity of restraints upon freedom of speech depends, in each instance, upon the particular circumstances.[4] The right to freedom of speech does not open *every* avenue to any person desiring to use that particular outlet.[5] Nor, it has been held, does "freedom of speech . . . comprehend the right to speak on any subject at any time."[6]

> True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum.[7]

Or, as Mr. Justice Frankfurter stated in *National Broadcasting Co.* v. *United States*:[8]

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all.

The Federal Court of Appeals in the *Avins* case wholly subscribed to this point of view:

> (The author) does not have the right, constitutional or otherwise, to commandeer the press and columns of the *Rutgers Law Review* for the publication of his article, at the expense of the subscribers to the *Review* and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication.[9]

The court held the other contention of the plaintiff, that the student editors had been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate the article objectively, to be so frivolous as not to require any discussion.

R.I.C.

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[3] At p. 153.

[4] *Speiser* v. *Randall,* (1958), 357 U.S. 513 at p. 521, 78 S. Ct. 1332, 2 L. Ed. 2d 1460.

[5] *Joseph Burstyn, Inc.* v. *Wilson,* (1952), 343 U.S. 495 at pp. 502-503, 72 S. Ct. 777, 96 L. Ed. 1098.

[6] *American Communications Assn.* v. *Douds,* (1950), 339 U.S. 382 at p. 394, 70 S. Ct. 674, 94 L. Ed. 925 at p. 941.

[7] *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia,* (1945), 151 F. 2d 597 (3d Cir.).

[8] (1943), 319 U.S. 190 at p. 226, 87 L. Ed. 1344 at p. 1368.

[9] At p. 153.

LEASE AND HIRE OF SERVICES — LENGTH OF DISMISSAL NOTICE REQUIRED — TEST OF "REASONABLENESS" — APPLICABILITY OF THE PROVISIONS OF ARTICLE 1668(3) C.C. — *Columbia Builders Supplies Co.* v. *Bartlett,* [1967] B.R. 111.

Appellant company hired respondent in a managerial capacity (sales and production organization) at $12,000 *per annum* for an indeterminate period of time. Four months later Bartlett was fired without cause and with little or no notice given to him. The important question in this appeal concerned the length of notice, or the amount of payment in lieu thereof, to which he was entitled. Was it one week, as appellant contended, the three months which respondent claimed or some entirely different alternative?

In a unanimous decision, the Court of Queen's Bench confirmed the judgment of first instance [1] and awarded Bartlett three months' notice. Mr. Justice Rinfret, who wrote the principal notes for the majority,[2] placed particular emphasis on article 1668(3) C.C. to state that this new legislation [3] created a fresh basis for calculating the length of notice in the case where a contract for the lease of personal services is terminated. After citing the text of the article, Rinfret, J., concluded that, from now on, "la base du calcul est... la durée de l'engagement" and that length of the contract is the basis not only for the specific classes of persons named by the Code (domestics, servants, journeymen and labourers) but "également pour toutes les autres".[4]

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[1] C.S.M. 617,201 (unreported), Mr. Justice F. R. Hannen.

[2] Hyde, Taschereau and Montgomery, JJ., concurred in the judgment. Owen, J., also concurring, wrote separate notes.

[3] Paragraph 3 of art. 1668, enacted in 1949 (13 Geo. VI, S.Q. 1949, c. 69, s. 3), reads as follows:

> In the case of a domestic, servant, journeyman or labourer hired by the week, the month or the year, but for an indefinite period of time, his contract may be terminated by a notice given by one of the parties to the other, of a week, if the contract is by the week; of two weeks if the contract is by the month; of a month if the contract is by the year.

[4] At pp. 118-119. Rinfret, J., disagrees with the opinion of L. Faribault on the interpretation to be given to the legislation passed in 1949; he stated, in 1951, that:

> Comme cet alinéa de notre article ne concerne que certaines classes de salariés, les règles posées jusque-là par nos tribunaux quant au délai de l'avis de congé doivent continuer à recevoir leur application dans tous les autres cas, au moins jusqu'à nouvel ordre, car je crois bien qu'avant longtemps, cette nouvelle règle de l'article 1668 sera appliquée à tous les avis de congé requis pour mettre fin à un louage de services d'une durée indéterminée. (*Traité de droit civil du Québec,* (Montréal, 1951), t. 12, p. 321).

The second important criterion in the determination of the length of notice to be given to the employee is laid down by Rinfret, J., whose argument is based on the statement of Planiol and Ripert that those who hold more important positions in the employment hierarchy are normally entitled to longer notice. He concluded, largely for the reason that it would be inconceivable to award a month's notice to a labourer and only one week to someone in a managerial capacity when both are hired by the year,[6] that Mr. Bartlett should have received three months' notice that his services were no longer required.

Summing up the new standard of the length/duration of the contract and the reasoning of Planiol and Ripert, Rinfret, J., stated:

> Dans cette nouvelle perspective, je ne crois pas qu'il soit hors d'ordre pour les tribunaux ayant à décider de cas "de ceux qui occupent un rang dans la hiérarchie des employés" de considérer les circonstances de l'engagement, la nature et l'importance du travail, le fait que l'employé a quitté un emploi certain et rémunérateur, l'intention des parties, la difficulté pour l'une et l'autre des parties de trouver soit un remplaçant satisfaisant, soit une autre position d'égale importance et, au regard de ces considérations, de fixer pour l'avis de congé un délai raisonnable.[7]

The Court of Queen's Bench has thus taken a firm position on the long-standing controversy as to which criteria should be adopted in determining the length of cancellation notice in employment contracts, opting for the test of "reasonableness" rather than either that of the "pay period" or the "rate of pay".[8] In reaching his conclusion Mr. Justice Rinfret referred with approval to the Superior Court jugment in *Dubois* v. *J.-René Ouimet Ltée*,[9] where Caron, J., held that three months' notice was not unreasonable in the circumstances of the case. The plaintiif, Dubois, had been hired as a sales manager at $8,500 *per annum*, his salary being payable weekly. Approximately six months later, Dubois, who had left a good job

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[5] *Traité pratique de droit civil français*, 2e éd., (Paris, 1951), t. 11, pp. 103-104.

[6] One week had been the length of notice allowed to a truckdriver paid by the week in *Concrete Column Clamps Ltd.* v. *Pépin*, [1949] B.R. 838, cited by Mr. Justice Rinfret at p. 118.

[7] At pp. 119-120.

[8] The "pay period" school had seemed to be the one gaining favour in the jurisprudence around 1950. See, for example, *Concrete Column Clamps Ltd.* v. *Pépin*, [1949] B.R. 838 and *Leclerc* v. *Cartier Construction Ltd.*, [1952] C.S. 103 (Batshaw, J.). *Contra: Dorion* v. *Commissaires du Havre de Québec*, (1937), 62 B.R. 92 and the opinion of Walter S. Johnson in *Note*, (1950), 28 Can. Bar Rev. 465, supporting the "rate of pay" theory. For an exposition of both points of view, see Donald J. Johnston, *Dismissal Notice in Employment Contracts*, (1963), 9 McGill L.J. 138; note that Johnston, at p. 149, predicted that "'reasonable' notice will emerge as the simple answer to an equally simple problem".

[9] [1959] C.S. 573.

to join respondent company, was dismissed without cause and given the equivalent of five weeks' salary. Mr. Justice Caron, after holding that the contract was one for an indeterminate period of time, made the following statement regarding the length of cancellation notice:

> Ni la compagnie ni le demandeur n'avaient l'intention de faire un contrat auquel l'une des parties aurait pu mettre fin à une semaine d'avis. La nature du travail et l'importance de l'emploi s'y opposent de même qu'on ne peut supposer qu'un gérant laisserait une compagnie renommée pour laquelle il travaille depuis des années et avec laquelle tout va bien pour s'engager ailleurs pour une semaine. On ne peut imaginer non plus qu'un gérant général des ventes payé à plus de $8,000 par année puisse, une fois congédié, se trouver un emploi semblable avec une semaine d'avis.[10]

On the basis of the foregoing two passages from the *Bartlett* and *Dubois* decisions, one might conclude that the courts will henceforth ask what a reasonable length of notice would be according to the circumstances of each case. In doing so they will pay attention to such factors as: 1) the circumstances under which the contract was entered into, including the type of employment previously enjoyed by the proposed employee and the general intention of the parties in effecting this particular agreement; 2) the nature and importance of the work; and 3) the degree of difficulty which an employer would have to find another man for the position left vacant and which the employee would have in finding comparable employment.

These conclusions follow from both cases but in each there is another criterion set forth. *Dubois* relies on article 1657 C.C., which relates essentially to contracts of the lease and hire of things, as setting out "une règle qui peut servir de guide".[11] The criterion, the authority for which is found by Caron, J., in the Supreme Court decision in *Asbestos Corporation Limited* v. *Cook*,[12] is abandoned by Rinfret, J., in *Bartlett* as unnecessary since the 1949 amendment; one need no longer speculate as to whether the "rate of pay" school was right in relying on a literal interpretation of arts. 1642 and 1657 C.C. or whether the "pay period" people were correct in using article 1657 as a guide. The legislator has specifically stated that employment contracts are to be regulated, regarding termination, according to "la durée de l'engagement".

The test of art. 1668(3) C.C. has rarely been used in relation to employees other than those specifically mentioned in that provision

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[10] *Ibid.*, at p. 576, quoted by Rinfret, J., at p. 120 of *Bartlett.*
[11] *Ibid.*, at p. 577.
[12] [1933] S.C.R. 86.

of law.[13] Presumably it is used by Rinfret, J., as a means of localizing a basic legislative attitude towards termination notices, namely, that their length depends upon the duration of the employment contract. Once it is admitted or proved that the contract is of indeterminate duration one need only ask which period of notice would appropriately correspond, in the circumstances, to this particular lease of services which, although of undefined length, is, for example, "by the year".

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[13] The only clear case of this which the writer has found is the decision of the Magistrates' Court in *Monette* v. *Sambo Curb Service Inc.*, [1955] R.L. 284, where Dupuis, J., applied article 1668 to the case of a night manager without explaining why he chose this as a test for length of notice. *Monette* v. *Sambo Curb Service Inc.* is referred to as an authority in *MacKean* v. *Preston*, [1958] C.S. 355 at p. 358, but it is not apparent whether the judgment of Collins, J., is based on the "rate of pay" theory or on article 1668, particularly since the learned Justice also refers to the opinion of Faribault (see footnote 4, *supra*) which is unequivocal on this point. In *Cooney* v. *Drew*, [1956] R.L. 96 (C.S.) (Marchand, J.) the article was invoked to apply to a "serveuse de comptoir" and in *Beaumont* v. *Weiser Ltd.*, [1961] R.L. 551 (C.S.) (Trépanier, J.) art. 1668 was held applicable to a "commis de magasin", although Justice Trépanier acknowledged that there was contrary opinion to the effect that 1668 does not cover such employees (at p. 552, referring to Faribault, *op. cit.*, t. 12, at p. 321).

It is noteworthy that Mr. Justice Hannen, in the trial judgment of the *Bartlett* case, did not refer to article 1668 but expressly decided the issue on the basis of art. 1657. He stated: "I follow the decision of my brother Caron in *Dubois* v. *J.-René Ouimet Ltée*... who referred to court's discretion based on C.C. 1657."

PRESCRIPTION — WHETHER INTERRUPTED BY BANKRUPTCY — *In re Côté: Marmette* v. *Derouin,* [1967] B.R. 833. ADMISSIBILITY OF PAROLE EVIDENCE TO PROVE PARTIAL PAYMENTS WHICH INTERRUPT PRESCRIPTION. *La Compagnie Légaré Ltée.* v. *Fafard,* [1967] R.P. 315 (C.S.).

Two aspects of the law relating to the interruption of prescription have recently been interpreted by Quebec courts.

In *In Re Côté: Marmette* v. *Derouin,*[1] the Court of Appeal was faced with the question of whether an assignment in bankruptcy *ipso facto* interrupts or at least suspends prescription. In other words, can a creditor, by the mere fact that his debtor has gone into bankruptcy, enjoy the benefit of an interruption or suspension of prescription without presenting his claim or doing some other positive act? Those who would answer in the negative[2] argue that, since a creditor must be absolutely incapable of acting in order to stop the running of prescription,[3] bankruptcy does not by itself put the creditor into such a position. Although section 40(1) of the *Bankruptcy Act*[4] may well produce this incapacity in law, they continue, the word "acting" or "agir" means more than the mere taking of an action; for there are many other types of activity, such as the presentation of a claim, for example, which the creditor can undertake, the effect of which will be to interrupt or suspend prescription.[5] The jurisprudence[6] in this province taken as a whole, however, by implicitly interpreting the word "acting" to be synonomous with "taking an action" has regarded as decisive the rule of the

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[1] [1967] B.R. 833.

[2] Rodys, *Traité de droit civil du Québec,* t. 15, (Montréal, 1958) pp. 165 *et seq.;* Gagné, *La faillite et la prescription extinctive,* (1942), 2 R. du B. 55; Lacroix, J., in *Banque Canadienne Nationale* v. *Tanguay,* [1962] C.S. 379 at p. 381.

[3] Art. 2232 C.C. and the maxim *Contra non valentem agere nulla currit praescriptio.* See Rodys, *op. cit.,* pp. 190 *et seq.*

[4] "Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim proveable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim proveable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose." R.S.C. 1952, c. 14.

[5] Gagné, *loc. cit.,* p. 59.

[6] See, for example, *Péloquin* v. *Brodeur* et *Bigras,* (1936), 17 C.B.R. 236; *Massé* v. *Bonnier* et *Banque Canadienne Nationale,* (1937-38), 19 C.B.R. 173; *Houle* v. *Emery* et *Fortin,* (1941), 44 R.P. 137; *Provincial Bank of Canada* v. *Friedman,* (1937), 75 C.S. 515.

Bankruptcy Act that no action may be taken against a bankrupt.[7] The Court of Appeal in *Côté* has chosen to follow the jurisprudence, dismissing the only decision to the contrary, *Banque Canadienne Nationale* v. *Tanguay*,[8] as "une opinion isolée".[9] Tremblay, C.J., quoting with approval the previous Court of Appeal decision in *Pants Limited* v. *Jarjour*,[10] says that "l'arrêt énonce clairement que c'est la cession et non la production de la réclamation qui suspend le cours de la prescription".[11] It would therefore, appear to be settled that prescription ceases to run from the time of the assignment or the receiving order in bankruptcy. It should be pointed out that there is an interesting related question which the Court of Appeal raised but found unnecessary to answer in *Côté*,[12] namely, whether bankruptcy interrupts or merely suspends prescription.[13]

A second decision, *La Compagnie Légaré Ltée* v. *Fafard*,[14] is concerned with the question of the type of proof required for partial payments which, because they are acknowledgments which the debtor makes of the right of the person against whom the prescription runs,[15] interrupt prescription.[16] It would seem at first glance that, in commercial matters over fifty dollars, if he is to prove that the partial payment was ever made, the creditor is required by article 1235(1) C.C. to produce a writing signed by the debtor, a rather difficult task since receipts inevitably remain in the hands of the debtor.[17] The issue then is whether a partial payment is an "acknowledgment" or "promise" within the meaning of article 1235(1) C.C. Although there has been much comment on this question,[18] there can be little doubt that the great weight of authority, especially in the case law, supports the view that article 1235(1) is not applicable and that these payments can be proved by testimony;

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[7] S. 40(1).
[8] [1962] C.S. 379.
[9] At p. 836, footnote 7.
[10] [1947] B.R. 630.
[11] At p. 836.
[12] *Ibid.*
[13] See *Gagné, loc. cit.*, at pp. 55 *et seq.*
[14] [1967] R.P. 315.
[15] Nolan, *Testimony in Commercial Matters*, (1957), 17 R. du B. 445 at p. 460.
[16] Art. 2227 C.C.
[17] Weber, *Interruption of Prescription and Proof of Partial Payments*, (1965), 25 R. du B. 369 at p. 374.
[18] An excellent review of the authorities can be found in Weber, *loc. cit.* See also Nolan, *loc. cit.*, at pp. 459 *et seq.*; Crestohl, *On the Admissibility of Parole Testimony of Partial Payments in Commercial Matters for the Purpose of Interrupting Prescription*, (1931-32), 10 R. du D. 227.

after a thorough review of the cases on this point in his article, Weber finds only one judgment[19] which does not follow what he regards as the leading case on the subject, the decision of the Court of Appeal in *Bouthillier* v. *Sabourin*,[20] which allowed the parole evidence.[21] Mr. Justice Crète in the *Légaré* case, however, refused to allow testimony to prove the payments on account. He gives no authority for this view, but merely states that:[22]

> Dans l'opinion du tribunal l'article 1235(1) C.C. reçoit ici son application et la preuve testimoniale offerte par la demanderesse ou la créancière, est inadmissible, puisqu'elle tend à établir une "reconnaissance à l'effet de soustraire une dette aux dispositions de la loi relatives à la prescription des actions".[23]

The decision in *Légaré*, together with the one in *Banque Canadienne Nationale* v. *Tanguay*,[24] which also runs contrary to a large number of cases including a judgment of the Court of Appeal,[25] emphasizes the confused state of this area of the law.

D.H.T.

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[19] *Banque Canadienne Nationale* v. *Tanguay*, [1962] C.S. 379. Tremblay, C.J.'s reference to this case as "une opinion isolée" (see *supra*) was only with respect to the other point in the case.

[20] (1927), 42 B.R. 18.

[21] Weber, *loc. cit.*, at p. 374.

[22] At p. 316.

[23] I.e. the text of 1235 C.C.

[24] [1962] C.S. 379.

[25] *Bouthillier* v. *Sabourin*, (1927), 42 B.R. 18; followed in *Hébert* v. *Auger*, (1940), 46 R.L. n.s. 400 (C.S.); *Lefebvre* v. *South*, (1943) C.S. 172; *Doyon* v. *La Cie de téléphone de St-Louis-de-Gonzague*, [1947] C.S. 424; *Royal Bank of Canada* v. *Woocock* [1953] R.P. 275 (C.S.).