11, 1939

IN THE PRIVY COUNCIL No. 45 of 1938

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

B E T W E E N

MRS. Ww. PAUL J. J. GUERARD
(Suppliant) Appellant

- and -

THE COLONIAL GOVERNMENT OF MAURITIUS
(Defendant) Respondent

TRANSLATION OF EXTRACTS FROM JUDGMENT OF HIS HONOUR LOUIS LE CONTE, JUDGE DELIVERED ON SEPTEMBER 14th, 1937, commencing at page 18 of Record of Proceedings.

(Record: page 23)

WHEREAS, according to the terms of Article 7 of the Statutes of Colonial Banks annexed to the law of June 24th 1874, the transfer of Shares in the Banque de la Guadeloupe should be carried out, in the colony, at the offices of the bank, by means of a transfer declaration signed by the owner or his attorney and witnessed by a director in a special register maintained for this purpose: - WHEREAS the order which has been challenged, in a masterly appreciation of the facts of the case and of the intention of the parties, has stated that the bank had, at la Pointe-à-Pitre recorded on its registers the transfer of the shares which are the subject of the litigation and belonging to Defresnay, without conforming to the prescriptions of Article 7, and on the mere declaration by Tandon, who had received no authority to allow the transfer; WHEREAS it was noted in this same Order that this infringement by the bank of its Statutes and constituting

an error had opened the door to fraud and dishonesty on the part of Tandon and had afforded him facility for the embezzlement of the said shares; WHEREAS by its statements establishing both the error committed by the Banque de la Guadeloupe and the damage caused thereby to Defresnay, the Court has given a juridical basis to its decision and has justified the allocation of damages given by it against the said bank in favour of Defresnay; IT FOLLOWS that, far from violating the Articles cited in the application, the order which has been challenged does, in fact, apply them justly. Rejecting therefore, etc.

May 3, 1882 Chambre des Requêtes.

x x x x x

(Record: page 25)

The "levissima culpa" or "faute aquilienne", sometimes termed the "faute delictuelle" is never to be found in contractual relations. The obligation to repair the damage resulting from any error whatsoever is only to be found in the case of misdemeanours and quasi-misdemeanours.

It should, in fact, be stated that the person proceeding to any operation whatsoever, by virtue of an agreement authorising him to do so, cannot incur the same responsibility as he who has proceeded to the same operation without being authorised to this effect. Whatever precautions may be taken by the latter he will be held, in case of accident, to be liable for damages. The same would be the case, for example, of a man who, finding a clock stopped in the house of another man, wished to start it without being authorised to do so by any person. In spite of his adopting all the necessary precautions, and though he may neglect no single one of them, he will be responsible in the case of accident.

He had in fact nothing to do except to abstain from action; he has of his own will exceeded his obligations.

On the other hand, on the same hypothesis, a man who acted in execution of a contract and who desired to start the clock because he had been authorised to do so, would incur no responsibility in the event of an accident if he had taken all the precautions which the circumstances required.

Again in the same work, Vol.18 No.424:

The decision would no longer be the same if it were the case of a contractual error. The distinction between the "faute delictuelle" and the "faute contractuelle" cannot seriously be contested. The Court of Appeal proclaims that the rule by which any error whatsoever obliges the author of it to repair the damage resulting, only applies in the case of misdemeanours or quasi-misdemeanours and is not concerned with errors which may have been committed in the execution of an agreement (D. 91.1. 380). It is certain that between the domain of contract and of misdemeanour there is a complete separation, and that the existence of a contract between the author and the victim of any damage excludes the application of article 1382. This is a point which we have already laid down (Vol. 7, No.95, above).
..... When the parties where bound by a contract, the damage sustained in the course of the operation of the contract and in connection with this operation, appears either in a failure to execute the contract itself or in an insufficient execution; the victim of the damage has only to provide proof of the material fact as the result of which failure to execute or insufficient execution has arisen, and the error of the other party is thus established (article 1147).

x x x x x

(Record: page 27).

It is only in the case of a misdemeanour or of a quasi-misdemeanour that any error whatsoever obliges its author to make good the damage; articles 1382 et seq. of the Civil Code do not apply when the error was committed in the execution of an obligation arising from a contract; in this case the debtor is only answering for an error which a good father of a family would not have committed.

The differences between the "faute contractuelle" and the "faute delictuelle" are clearly set out in Baudry-Lacantinerie, vol. xii, No.356:

10. The applicant for damages has not to prove the contractual offence;

20. A demand in due form of law is required to obtain damages due by reason of a contractual error. Articles 1139 and 1146. On the other hand a person who is sought by reason of a "faute delictuelle" is by virtue of this fact considered to be duly summoned. Argument taken from Articles 1382 et seq.

30. Article 1150 does not receive its application to the "faute delictuelle". In fact the decision which is given in this text is based on the presumed intention of the contracting parties; but here there are no contracting parties;

40. The author of a misdemeanour or of a quasi-misdemeanour is answerable for even a very slight offence; this is not the case with an individual coming under contractual responsibility: he is only answerable for the culpa levis in abstracto.

x x x x x

(Record: page 29).

The law on this matter appears to me to be accurately stated in the following excerpt from a note of Professor Josserand to be found in D.P. 1927.1.108:

"Contractual" and "delictual" responsibilities have distinct fields of application; it cannot be conceived that they should coincide, co-operate or accumulate to form the same juridical situation and in any similar given connection; for a man cannot be at the same time a third party and a contracting party: a man is either the one or the other, not the one and the other; within the limits in which its action is felt and which have been laid down in unconstrained agreement between the parties, the agreement tramples upon the law, in conformity with the law itself".

IN THE PRIVY COUNCIL.

No.45 of 1938.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

BETWEEN

MRS. Ww. PAUL J. J. GUERARD
(Suppliant) Appellant

- and -

THE COLONIAL GOVERNMENT OF MAURITIUS
(Defendant) Respondent

T R A N S L A T I O N

- of -

Extracts from Judgment of His Honour Louis Le Conte, Judge, delivered on September 14th, 1937.

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