LATREILLE v. ISABEL[1]

Promise of sale — Seller retaining ownership — Buyer having immediate occupation — House rendered uninhabitable by fire during occupancy — Question of *res perit domino*

In a recent article, Professor LeDain[2] points out, "that the transfer of risk in Quebec civil law takes place, in the absence of agreement or usuage to the contrary, at the same time as the transfer of ownership." This is expressed by the maxim *res perit domino* which has often been held to prevail in our civil law. In a recent Superior Court case, however, Mr. Justice Challies has critically examined this maxim and has concluded that the risk is on the promising buyer who has possession of the immoveable, even though ownership has been reserved by the vendor. The judgement of the trial court was confirmed by the Court of Queen's Bench, recently, but on different grounds.

The facts of the case are as follows. In August, 1953, Isabel, the defendant, promised to sell a house and lot to Latreille for the price of $4500, of which $450 was paid in cash with the balance to be payable at the rate of $40 per month. The plaintiff, Latreille, took immediate possession of the house, but it was stipulated in the promise of sale that the defendant was to remain owner until at least half the price was paid. A notarial deed of sale was executed. It was also specifieally provided that if the plaintiff failed to make any of the required payments within sixty days of their due date, the vendor would have the right to claim payment of the balance of price or, alternatively, to set aside the promise of sale without any putting in default or legal proceedings. In November 1953 the house was destroyed by fire and the vendor received the insurance proceeds. The promising purchaser refused to make any more payments unless the vendor rebuilt the house. This the vendor refused to do and after sixty days had lapsed without receiving any payment, the promising vendor informed the promissee that the promise of sale was null and void and that he was keeping the amount paid as damages. The promissee instituted the present action to have the promise of sale annulled and his money returned.

The plaintiff based his action on the maxim — *res perit domino* — that risk always falls on the owner. Since, in this case, the vendor reserved ownership and he was the proprietor at the time of the fire, he must bear the loss. Consequently, either he should rebuild the house or else return the money to the plaintiff. Justice Challies disagreed with this contention. He held that the risk was on the promising purchaser, even though he was not the proprietor at the time of the fire: therefore, he must bear the loss.

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[1]Superior Court, District of Montreal (decision unreported, no. 362,954 April 24, 1956); appeal [1958] B. R. 431.

[2]Ledain, G. Transfer of Property, (1954) 1 M.L.J. 239.

In examining this rule of *res perit domino,* Challies J., quotes Mignault[3] who deals with the situation in which the parties have by express words postponed to a later date the transfer of ownership, and asks whether in such a case the purchaser would have to pay the price, since the thing was destroyed before delivery. He mentions that Mourlon is of the opinion that the purchaser does not have to pay the price because he is not the owner. However, in a footnote Mignault says, "On a contesté cette solution." He concludes that the purchaser would not be freed from his obligation to pay the price, and he states that he would apply the same solution where the thing was delivered to the purchaser under the stipulation that ownership would only be tranferred on payment of the price. Justice Challies concludes that the footnote contains Mignault's true view, and he bases his decision on this authority, together with certain French authors.

In order to appreciate the significance of this case, let us examine briefly the law concerning the transfer of risk in a contract of sale. Article 1025 C.C. says:

> A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made.

The article goes on to say that the risk of the thing before delivery is subject to the general rules contained in the chapters on obligations. In art. 1200 C.C. it is provided that when the certain specific thing which is the object of an obligation perishes, or the delivery of it becomes impossible from any other cause, without any act or fault of the debtor, and before he is in default, the obligation to deliver is extinguished. But as the commentators point out, the creditor is still obliged to pay the price. This is known as the principle of *res perit creditori* — the risk falls on the creditor of the obligation to deliver.

As we have seen, in the sale of a certain and determinate thing, the buyer becomes proprietor as soon as the contract is signed. The seller is then under the obligation to deliver the article to the buyer, who is the owner. If the article is destroyed before delivery by a fortuitous event or through no fault of the seller, the latter's obligation to deliver is extinguished, although the buyer is still obliged to pay the price. The risk is on the buyer: the obligation for him to pay the price, despite the fact that he will not receive physical possession of the property is the principle behind *res perit domino.* In this case, the latter notion is an application of the general principle of *res perit creditori.* The same result follows from the application of art. 1150 C.C. The Code tells us here that if the object of a sale is deteriorated before delivery without any fault on the part of the debtor or seller, his obligation to deliver is discharged by delivering the object in its deteriorated state. Thus we see that risk falls on the buyer or the creditor of the obligation to deliver. Consequently, in the sale of specific and determinate objects, both ownership and risk pass simultaneously

[3]Mignault, Droit Civil Canadien, (1906 ed.), Vol. 5, p. 402.

to the buyer by consent alone of the parties, although the thing sold be not then delivered.

According to art. 1478 C.C. although a simple promise of sale is not equivalent to a sale, a promise of sale with tradition and actual possession is. Both ownership and risk will pass to the buyer as soon as he takes possession of the immoveable. Let us suppose, as occurred in the decision under review, that the vendor witholds the transfer of ownership until some future date, and meanwhile the promissee occupies the immoveable. Who bears the risk in the interim? Should we maintain that risk is dependant on ownership? Since the vendor reserves ownership, he automatically prevents risk from passing to the buyer. Consequently, the risk would be on the vendor. Or, should we argue that risk and ownership are two separate conceptions, and the fact that the vendor reserves ownership in no way affects the transfer of risk? The risk would then pass to the buyer, although he was not the owner.

In order to clarify this problem, we must look at the logic and reasons underlying the theory of risk in a contract of sale. As we have seen, in the sale of a determinate thing, both ownership and risk pass to the buyer by the consent alone of the parties, although the thing sold be still in the hands of the vendor. If risk and ownership are independant and separate conceptions, then one could argue that it is only logical and fair that the risk be on the individual who has the control and possession of the object. Although ownership passes to the buyer by consent alone, risk should remain with the vendor until he has delivered the object. The Codifiers, however, did not adopt this view; rather they maintained that both risk and ownership pass simultaneously to the buyer. They argue that ownership and risk are not seperate and independant, but rather that the risk attending a thing is a natural attribute of the right of ownership. The object itself, all benefits which may attach to it, and the risk of all loss or deterioration are transferred simultaneously. As Mignault[4] points out, an individual, by nature, does not want to bear the risk for something which is not in his patrimony. Applying this latter reasoning to our case, it would follow that since ownership was reserved by the vendor, he must bear the risks even though the object is in possession of the buyer.

Those who argue that risk and ownership are separate and independent, base their contention primarily on the fact that the transfer of risk and ownership are treated separately in the code: the former in articles 1025 and 1472 C.C. and the latter under the general maxim of *res perit creditori* found in articles 1200 and 1150 C.C. They argue that only in the usual case where ownership passes to the buyer by consent alone will the maxim of *res perit domino* be true; for here, the buyer, the proprietor and the creditor of the obligation to deliver are one and the same person. Hence, the maxim of *res perit domino* is only a disguised name for the principle of *res perit creditori*. However, where ownership is reserved, risk will still pass to the buyer who is the creditor of the

[4] *Ibid.*, p. 401.

obligation to deliver. *Res perit domino* will not apply. The Codifiers discussed this argument when they dealt with article 1474 C.C. In a sale of an indeterminate object, ownership does not pass to the buyer until the object has been identified. Before this, the vendor is under an obligation to deliver and the buyer is the creditor of this obligation. Hence the buyer should bear the risk — *res perit creditori.* Yet in commenting on article 1585 C.N., the Codifiers dismissed the contention of those French commentators who argued that in the sale of an indeterminate object, ownership passes to the buyer while risk remains with the vendor until the object is specified. Rather, they agreed with those who argued that neither ownership nor risk is transfered to the buyer until the object is identified. They adopted the maxim of *res perit domino* and not that of *res perit creditori.* Mignault points this out explicitly. In the case where A buys a 100 bshls. of wheat out of a pile at a certain price, ownership and risk do not pass to the buyer until the goods are identified. Where the whole pile of wheat is destroyed, some argue that the risk is on the buyer since it is certain that the wheat that was sold to him was destroyed. Mignault disagrees:[5]

> Cependant, je crois qu'il y a à appliquer ici, comme dans tous les cas analogues la règle *res perit domino* si l'auteur n'est pas devenu propriétaire, il n'encourt pas les risques de la chose.

Mignault points out that in the normal case ownership and risk pass by the consent alone of the parties. Yet he says[6] that where there is a clause:

> qui porte que la chose ne deviendra la propriété de l'acheteur que lorsqu'il en aura payé le prix; la perte de la chose par force majeure, tombe sur le vendeur. Enfin, lorsque l'acheteur devient propriétaire, les risques de la chose vendue sont à sa charge. On disait en droit romain: *res perit domino* — art. 1025, 1200.

The above quotation from Mignault seems to contradict the one to which Mr. Justice Chaillies referred; and after a study of Miguault's treatment of sale, it is submitted that it expresses his true view on the subject. It seems from Mignault that ownership and risk pass simultaneously to the buyer, except in the case where the vendor has specifically retained risk by an express clause, although ownership passed to the buyer; or where, although ownership was retained by the vendor, the parties explicitly agreed that the buyer would bear the risk. In the decision under review, there was no such agreement. The vendor retained ownership, and due to the lack of a stipulation to the contrary, one must conclude that he assumed the risk.

Roger Comtois,[7] in a recent comment on the Superior Court decision of *Latreille v. Isabel* concludes:

> Les risques de la chose étaient donc à la charge du promettant-acquéreur. Le dernier, n'ayant pas prouvé que l'incendie constituait un cas fortuit, devait succomber dans sa demande.

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[5]Vol. 7, p. 22.

[6]*Ibid.*, p. 126.

[7]Comtois, R. 1958 R. du N. 344 (March).

This statement, it is respectfully submitted, shows a misunderstanding of Mr. Justice Challiess' view. It implies that had the plaintiff proven that the fire was caused by a fortuitous event, then the risk would have been on the seller; it implies that there is a presumption of liability on the part of the buyer, while the actual risk is on the seller. However, Challies J., maintained that the ultimate risk is on the buyer, and the seller, once he delivers the object sold, bears no more risk for the loss or deterioration of the object.

Marler[8] seems to adopt the maxim of *res perit domino* completely and unconditionally. He says that:

> a thing is *always* at its *owner's* risk.

French authorities also seem to agree with Marler as to the generality of this maxim. In Larombière's words:[9]

> Les risques ne sont pas en effet attachés à cette circonstance qu'on a été mis ou qu'on devait être mis en possession, mais bien à cette seule et unique circonstance qu'on est propriétaire.

Mazeaud,[10] the most recent French authority, says:

> Dans la vente les risques sont pour l'acheteur devenu propriétaire, chaque fois que le transfert de propriété se trouve retardé. C'est alors la règle générale *res perit debitori* qui joue: les risques demeurent à l'alienateur. Il en est aussi quand les parties ont décidé de retarder le transfert de propriété, par exemple, jusqu'à paiement complet de prix.

The case of *Beaudry v. James*[11] deals with a similar situation. The plaintiff sold a barge to the defendant giving him possession and immediate use of it, but he reserved ownership until a certain amount of the price was paid. In the interim the barge was destroyed by force majeure, without the fault of the defendant. The Court of Review applied the maxim of *res perit domino* and held that the loss fell on the owner. In the words of the judge:

> The Court finds that Beaudry was the owner of the barge when lost, and that it perished for him. *Res perit domino.*

In the present case, discarding of the maxim led to an unfortunate result. The promising vendor was not only entitled to keep the proceeds from the insurance policy, but was allowed to collect the price of sale or retain the amount paid as damages. Surely this was unjust enrichment at the buyer's expense. The decision was appealed to the Court of Queen's Bench. In discussing this question of *res perit domino,* Mr. Justice Montgomery said:

> Considerable authority has been submitted by both parties as to the applicability of this maxim in the case of a sale with reservation of ownership in favour of the vendor pending payment of price. I do not find it necessary to express an opinion on this point...[12]

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[8]Marler, Law of Real Property, no. 418.

[9]Larombière, Théorie et Pratique des Obligations, (1885), Vol. 1, p. 465, no. 26.

[10]Mazeaud, Leçons du droit civil, Vol. 2, p. 905, no. 1120.

[11]*Beaudry v. James,* (1870) 15 L.C.J. 118.

[12]At p. 432.

Mr. Justice Montgomery went on to confirm the decision of the lower court on the basis of article 1629 C.C. which creates the presumption that a fire is the fault of the lessee. He maintains that this presumption applies not only to the lessee but to any individual who occupies the property of another and who is bound to conserve it. Hence he argues that it applies, in the present case, to the intending purchaser: he must either rebut the presumption that it was due to his fault or else bear the loss. Should he rebut the presumption, the loss or risk would fall on the owner or vendor. Articles 1629 C.C. refers to the case where the loss is presumed to be the fault of the possessor but where the ultimate risk is on the owner. The fact that the Court of Queen's Bench applied this article implies that the risk is on the vendor or owner and not on the buyer. Thus the decision seems to affirm the general maxim *res perit domino* and is in agreement with the weight of authority.

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