LATOUCHE v. LAHOUILLIER

VENTE DE MAISON — DÉFAUTS — MISE EN DEMEURE DE LES RÉPARER — ACQUIESCEMENT DU VENDEUR — RÉPARATIONS COMMENCÉES — DÉFENSE — NOUVEAUX RAPPORTS CONTRACTUELS — ACTION RÉDHIBITOIRE — ACTION EN DOMMAGES-INTÉRÊTS OU EN DIMINUTION DE PRIX — DÉLAI — DILIGENCE — ARTICLES 1522, 1526, 1527 ET 1530 C.C.

BOUTIN v. PARE

RESPONSABILITÉ — VENTE D'UN ANIMAL ATTEINT DE BRUCELLOSE — CONTAMINATION D'UN TROUPEAU — FAUTE RECONNUE PAR CONFESSION DE JUGEMENT PARTIELLE — DOL — DOMMAGES DIRECTS ET IMMÉDIATS — TARDIVITÉ DE L'ACTION NON PLAIDÉ — ARTICLES 993, 1053, 1065, 1075, 1527 ET 1530 C.C.

In two recent cases, *Latouche v. Lahouillier*,[1] and *Boutin v. Paré*,[2] redhibitory actions were undertaken by the plaintiffs in accordance with the provisions of art. 1530 C.C., which states:

> The redhibitory action, resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made.
>
> In the case of an animal stricken with tuberculosis, the redhibitory action shall be deemed to be brought within a reasonable delay, if so brought within ninety days of the delivery, and in such case, the burden of proof that the animal was not so stricken at the time of delivery shall lie on the vendor.

In both cases the defense of lack of reasonable diligence was not expressly pleaded by the vendor. The *Latouche* case held that such a plea was not necessary, whilst the *Boutin* case concluded that it was, both decisions emanating within a few months of each other.

In the *Latouche* case the defendant in the Superior Court appealed against a decision maintaining a redhibitory action annulling his sale of a house. On appeal it was contended that plaintiff-respondent's original action was "tardive", and was not exercised with the reasonable diligence demanded of such actions by art. 1530 C.C. The respondent replied that such defense must be expressly pleaded, and was not so done, and thus could not be admitted.

In upholding the appellant and reversing the judgement of the Superior Court, St. Jacques J., speaking for the court, reasoned that the absence of an express plea of lack of reasonable diligence does not prevent it from being raised.

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[1] [1959] Q.B. 26.

[2] [1959] Q.B. 459.

He explained[3] that the court should appreciate the circumstances and decide if there was diligence according to art. 1530 C.C. This decision, then, coincides with the jurisprudence which maintains that the diligence outlined in this article does not have to be expressly pleaded and can be raised by the court *suo motu*.

The contrary was held in *Boutin v. Paré*. Here the plaintiff purchased a milk cow from the defendant. After its addition to the herd, it was found to be infected with an animal disease called "brucellose", causing considerable damage to the purchaser's other animals. The purchaser sued under art. 1530 C.C., and appealed to obtain increased damages.

Speaking for the court, Bissonnette J.[4] repeated the contention of the trial judge that what is reasonable diligence is a question of fact and not of law. He noted that the right of action does not fail under art. 1530 C.C. simply because it is not entered into with diligence. For this to occur the defendant "devait plaider ce moyen en l'appuyant de la nature de vice et des usages généralement connus et admis en pareille matière".

Why such judicial discord? Simply because the courts are applying the "reasonable diligence" under discussion, in the light of art. 2188 C.C., which states:

> The court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied.

This article was originally a replica of art. 2223 C.N. but was later amended by adding the final words "except in cases where the right of action is denied".[5] Thus, those decisions which hold that the "reasonable diligence" of art. 1530 C.C. must be pleaded and cannot be raised by the court *suo motu* do not hold that this prescription is one of the excepted cases of art. 2188 C.C. On the other hand, if the court believes it is one of these exceptions, it can bring up the matter itself. Is art. 1530 C.C. such an exception?

Mignault[6] denies that it is, and in his reasoning alludes to art. 2267 C.C. which states:

> In all the cases mentioned in articles 2250, 2260, 2261, 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.

He states that these cases are examples of the denial of the right of action. However, this was new law, and so it was necessary to add the final phrase to art. 2188 C.C. to ensure that the court could *suo motu* raise the defense of prescription in the cases mentioned in art. 2267 C.C. Without such phrase these defenses would have had to be expressly pleaded. There are, of course,

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[3][1959] Q.B. 26, at p. 36.
[4][1959] Q.B. 459, at p. 463.
[5]29 Vict., c. 41.
[6]Mignault, P.B., *Droit Civil Canadien*, Vol. 9, p. 348.

other examples of the denial of such right. Mignault[7] cites art. 1040 C.C., and particular laws outside of the Code itself, e.g., municipal charters. Witold Rodys cites art. 1138 C.C. as another such example.[8] But nowhere is the reasonable diligence of art. 1530 C.C. mentioned as an exception to art. 2188 C.C. In fact the interesting feature of all these exceptions is that in each case a specific time limit — one, two, or five years — is applied. Here the Code prohibits the right of action in an absolute manner after a certain given time, which, with the exception of animals stricken with tuberculosis, the Code does not do in art. 1530. Belanger J., in *Danis v. Taillefer*,[9] stated categorically that such prohibition is the only exception to the general principle that the plea of prescription is never presumed, and must be specially pleaded. Mignault agrees with this contention, stating that the prescription of art. 1530 C.C. "doit être plaidée par le vendeur."[10] Rodys emphasizes the fact that the reasonable diligence we are discussing is not an exception to the rule in art. 2188 C.C., but is what he refers to as a "prescription spéciale organisée en dehors de notre titre",[11] to which the rule applies.

It seems only logical to conclude, as Bissonnette J. did in *Boutin v. Paré*, that "reasonable diligence" is a question of fact. The subject matter with which this article can be confronted is seemingly infinite, and the codifiers realized this when they said that the "period should be left to local usage and the discretion of the courts".[12] Thus this is a relative matter, depending on the circumstances of each particular case. For instance, the delay for bringing an action on a defective pen would be somewhat shorter than the delay on a house with latent defects. If this is so, and it is apparent from the wording of the article that it is, then the alleged lack of reasonable diligence should be expressly pleaded in order that the details pertinent to such a plea would be brought out. Facts concerning the nature of the defect, the time of its discovery, the substance and length of negotiations between the vendor and the vendee could then be applied by the court to the question of reasonable diligence. But, as we have seen above, St. Jacques J., in *Latouche v. Lahouillier*, felt that the lack of such an express plea did not prevent the court from appreciating the circumstances to determine if there was diligence. This is apparently at loggerheads with our discussion above concerning art. 2188 C.C. So is the judgement of Lajoie J. in *Jacob v. Lamothe*,[13] where the learned judge concluded not only that the delay of art. 1530 C.C. was a question of law, but that it was "imperatif", and so must always be examined by the court *suo motu*.

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[7]Mignault, *op. cit.*, p. 349.

[8]Rodys, Witold, *Traité de Droit Civil du Québec*, Vol. 15, pp. 59-60.

[9](1873), 5 R.L. 404.

[10]Mignault, *op. cit.*, Vol. 7, p. 120.

[11]Rodys, *op. cit.*, p. 59.

[12]Codifiers' 4th Report, p. 14.

[13][1956] S.C. 410.

As we have seen, there is a wealth of conflicting opinions on the point under discussion, yet it is far from a minor issue. In the last case cited, Lajoie J. noted that if it were not for the lack of reasonable diligence which the court itself had raised the plaintiff's action would have been quite successful. Now that the Court of Appeal has spoken on the issue, like Janus, with two heads, it is to be hoped that in the near future the Supreme Court will have an opportunity to provide a definitive answer.

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