DUCHESNEAU v. COOK[1]

CIVIL LAW — SALE WITH RIGHT OF REDEMPTION — RE-ALIENATION BY BUYER TO SELLER — SELLER'S RIGHT *pendente conditione*, WHETHER *in re* OR *ad rem* — *Sirois* v. *Carrier* NOT OVERRULED.

A number of interesting points of law came up for discussion by the courts in this case, but it is here intended only to consider one of them: the position of the seller *pendente conditione* in a sale with right of redemption.

The facts are as follows. De. Duchesneau was separate as to property and was living apart from her husband. Having at her disposal $2,500. of the nature of personal earnings and savings, she borrowed a further $500. from her father and with the whole sum purchased three immoveable properties (one of them hypotheeated), the seller reserving a right of redemption. Subsequently the seller brought an action for the annulment of the sale on the grounds of De. Duchesneau's general incapacity (as a married woman), which was allowed by Marquis J. in the Superior Court. De. Duchesneau appealed and the Court of Queen's Bench affirmed the judgement of the court below[2] (Marchand and Gagné JJ. diss.), but on a further appeal the Supreme Court reversed the previous decisions by a unanimous judgement.

As the purchase price consisted only partly of "biens réservés", governed by Article 1425a[3] of the Civil Code, one of the main points at issue was the interpretation of Article 1422.[4] It was held by the majority in the Court of Queen's Bench that the possible future exercise of the right of redemption by the seller and the accompanying retrocession by the buyer to the seller would amount to an alienation of the immoveables and would thus fall under the express prohibition of Article 1422 C.C.. This being so the contract of sale should be annulled.

In reversing this decision, the Supreme Court held unanimously that the exercise of the right of redemption by the seller did not involve the buyer

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[1][1955] S.C.R. 207.

[2][1954] Q.B. 337.

[3]Article 1425a C.C.: Under all the systems, and subject to the penalty of nullity of any covenant to the contrary, the proceeds of the personal work of the wife, the economies therefrom and the moveable or immoveable property acquired by her by investing same are reserved to the entire administration of the wife. The wife may, without authorization, demand even before the courts, the property so reserved and may alienate same by onerous title. Such property shall not include the earnings from work jointly carried on by the consorts.

[4]Article 1422 C.C.: When the consorts have stipulated by their marriage contract that they shall be separate as to property, the wife retains the entire administration of her property moveable and immoveable, the free enjoyment of her revenues and the right to alienate, without authorization, her moveable property. She cannot, without authorization, alienate her immoveables, or accept a gift of immoveables.

in an alienation, that such exercise must be considered as the operation of a condition resolving the contract *ab initio* and not as a new alienation. Will this decision bring about any change in the position of the seller in the Province of Quebec who reserves to himself a faculty of redemption?

Up to now the position of the seller with right of redemption was held to be governed by the decision of the Court of King's Bench in *Sirois* v. *Carrier*,[5] which is generally accepted as having laid down the rule that, *pendente conditione*, the seller retains only a personal right *ad rem* in the object sold, and not a right *in re*.[6] One re-reading the judgement of Blanchet J. in *Sirois* v. *Carrier* some doubt appears as to whether or not in actual fact the case is authoritative on this point,[7] but it has been cited so many times[8] that by now the issue must be taken to be finally settled. As Professor Louis Baudouin writes:[9] "La jurisprudence Québecoise décide que . . . le vendeur à réméré se dépouille de tous ses droits de propriété; il ne conserve qu'un simple *jus ad rem* dans la chose vendue . . . "

This is also the doctrine of the old law,[10] as expounded by Pothier.[11] However, in none of the cases which follow the *Sirois* v. *Carrier* decision were the courts called upon to decide the precise question as to whether or not the exercise of the right of redemption actually involved a new alienation on the part of the buyer; and the measure of the change brought about by the decision in *Duchesneau* v. *Cook* will depend on how far one can say that there is a direct relationship between the nature of the right which the seller retains in the object sold, and the buyer being held not to re-alienate when the redemption right is exercised.

At first glance it does not appear too difficult to establish this relationship. If the seller is held *not* to retain a right *in re*, but merely a personal right *ad rem*, it would seem to follow that in order for him to redeem the real right

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[5](1904), 13 K.B. 242.

[6]The seller's right to hypothecate an immoveable property *pendente conditione* was upheld by the court of King's Bench in the case of *Edwards* v. *Royal Bank* (1925), 38 K.B. 136, but this decision can be regarded as creating an exception to the general rule.

[7]The learned judge said, at p. 248: " . . . il ne paraît pas nécessaire de formuler une opinion définitive à ce sujet . . . "

[8]In *Lepage* v. *Letourneau* (1911), 20 K.B. 266; *Edwards* v. *Royal Bank* (1925) 38 K.B. 136; *Levasseur* v. *Pelletier* (1911), 40 S.C. 490; *Martec* v. *Perras* (1924), 62 S.C. 152; *Turgeon* v. *Barras* (1935), 73 S.C. 537 and in *Robitaille* v. *La Cie d'Assurances de Stanstead* [1948] S.C. 443.

[9]In "Critique des Arrêts", 1955 Revue du Barreau 383, in which the other points raised by the Supreme Court judgement are discussed. Professor Baudouin's view of the authority of *Sirois* v. *Carrier* is confirmed by Mignault, *Droit Civil Canadien*, vol. 7, p. 154. See also Professor Roger Comtois, "Case and Comment", 33 Can. Bar Review, 1074.

[10]Codification did not change the law. See Codifiers' Fourth Report, at p. 16.

[11]*Traité de Vente*, no. 387.

of ownership from the buyer, the latter must re-alienate that ownership to him.[12]

Although it is not expressly so stated, this is the argument implicit in the judgement of the majority in the Court of Queen's Bench, in which *Sirois* v. *Carrier* is cited as authoritative. For example, McDougall J. said:[13] "It . . . becomes necessary to determine whether, in the case of a sale with right of redemption, upon the exercise of the right there is a transfer of property from the buyer back to the seller. This court dealt with the problem in *Sirois* v. *Carrier*. . . . This judgement was followed in *Lepage* v. *Letourneau* . . . If these cases are to be followed — and in my opinion they should be — defendant, in the present case, obliged herself by the redemption clause to reconvey — conditionally if you like — property to the plaintiff . . . a reconveyance by the defendant should amount to an alienation by her . . . "

It should be emphasized again that the cases cited in the above passage are not precisely authority for the proposition that the buyer does not re-alienate, but rather for the proposition that he seller retains merely a right *ad rem*.

If the argument implicit in the judgement of the majority of the Queen's Bench is correct then its converse would also presumably be true, viz: if the Supreme Court holds (as it did) that there is *no* new alienation upon the exercise of the redemption right, it would then appear that the seller has preserved a right *in re* from the time of the original sale. In other words, the decision of the Supreme Court would, on this view, have the effect of reversing the rule laid down by *Sirois* v. *Carrier*.

It is, however, suggested that this conclusion is wrong and that the Supreme Court should not be held to have reversed *Sirois* v. *Carrier*.

In the first place, while there are grounds for disagreement as to the nature of the right retained by the seller, it appears incontestable that there is no re-alienation to him when the redemption right is exercised. Sale with right of redemption is sale under a resolutive condition, the operation of which depends upon the will of the seller. According to Article 1088 of the Civil Code: "A resolutive condition . . . replaces things in the same state as if the contract had not existed . . . " On the exercise of the faculty of redemption the seller does not acquire ownership from the buyer, and the buyer does not re-alienate to him, since the seller is regarded as having always been owner.

In the second place it is contended that it does not follow from this resoluble nature of sale with right of redemption that the seller must necessarily retain a *jus in re*. As was suggested above, it is not necessary to postulate a real right retained by the seller in order to explain his resumption of ownership — he resumes his *original* right of ownership which was suspended until he exercised the faculty of redemption.

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[12]Miss Gertrude Wasserman, of the Montreal Bar, commenting on the Queen's Bench decision in 32 Can. Bar Review 666, took this view (see p. 669).

[13][1954] Q.B. 337, at p. 338.

Moreover it is suggested that this suspended right of ownership retained by the seller does not necessarily confer upon him, *pendente conditione,* a real right in the object sold.

In volume 7 of his *Droit Civil Canadien,* Mignault wrote:[14] " . . . l'acheteur est propriétaire sous condition résolutoire et le vendeur sous condition suspensive. C'est dire que le vendeur à réméré conserve, malgré la vente, un droit réel dans la chose, un *jus in re* et non pas seulement un *jus ad rem.*"

Given that the seller who reserves a faculty of redemption is owner of the object under a suspensive condition,[15] does this suspended right of ownership necessarily give the seller, *pendente conditione,* a right *in re*?

Mignault himself observed:[16] "La condition suspensive est celle qui suspend l'existence même de l'obligation." What is true of an obligation is here also true of a right, in this instance the right of ownership. The condition suspends the very existence of the right. Mignault employed the commonly accepted meaning of the verb "suspendre", viz: "To render temporarily non-existent."

In the case in point the seller's right of ownership is suspended, i.e. temporarily non-existent, until such time as he redeems it. Until that time his suspended right is replaced by another right, entirely distinct from the suspended one, a right which is not necessarily a right *in re,* but which could be either real or personal.

According to the provisions of the Quebec Civil Code and the principles of the old French law on which they are based,[17] the right retained by the seller under redemption right contains elements of a real as well as a personal character, but it is plain that the personal element predominates. Pothier placed the action available to the redemption seller in the category of "actions mixtes" which are, "principalement et par leur nature, actions personnelles."[18] And in the *Traité de Vente*[19] he wrote that the seller's right was, " . . . proprement *jus ad rem* plutôt que *jus in re.*" In the Civil Code the element of

[14]At p. 154.

[15]This proposition has not gone unchallenged. In a note appended to a report of a decision of the Court of Cassation (Ch. Req. 23 Août 1871, D.P. 73. 1. 321), B. Cazalens wrote: " . . . nous contestons absolument la prétendue corrélation en vertu de laquelle la condition apposée à un contrat translatif de propriété jouerait tout à la fois le rôle de condition résolutoire à l'égard d'une partie et de condition suspensive à l'égard de l'autre; nous tenons, au contraire, que la condition est toujours suspensive ou résolutoire vis-à-vis des deux parties indistinctement, selon que la convention a été contractée sous une condition suspensive ou une condition résolutoire. La condition suspensive a pour but et pour résultat de créer des droits nouveaux; c'est la condition résolutoire seule qui fait revivre des droits anciens, temporairement anéantis." Actually Cazalens' argument is of little use to determine the precise nature of the right retained by the seller with right of redemption chiefly because it is difficult to see any difference between rights which are suspended and those which are "temporairement anéantis."

[16]*Droit Civil Canadien,* vol. 5, p. 433.

[17]See footnote 10.

[18]*Introduction Générale aux Coutumes,* no. 122.

[19]No. 387.

realty in the seller's right is introduced by Article 1552, when the object of the sale is an immoveable.[20]

The doctrine in France has generally upheld the view put forward by Mignault, but among the modern authorities Colin et Capitant maintain that the seller retains a *jus ad rem*.[21] There is a long line of French jurisprudence. to the same effect,[22] including an interesting decision in 1885 in which the Cour de Cassation held that the buyer had a real action against a third party in possession of the immoveable which was the object of the sale, but only a personal one against the original buyer,[23] and an earlier one[24] which succinctly denied that the resolubility of the sale involved a retention by the seller of a right *in re*.

There is thus a considerable weight of authority to support the principle which was laid down by the Court of King's Bench in *Sirois* v. *Carrier*, and it is contended both that the seller who reserves a faculty of redemption preserves merely a *jus ad rem* in the object sold, and also that there is no re-alienation to him by the buyer when the faculty is exercised. This is the opinion of Colin et Capitant, Pothier and the French jurisprudence.[25] This view is in opposition to that put forward by the majority of the Court of Queen's Bench in *Duchesneau* v. *Cook*, in which it was implied that the preservation by the seller of a mere right *ad rem* must of necessity result, upon redemption, in a re-alienation to him by the buyer.

In the Supreme Court, however, Fauteux J. denied the validity of this line of reasoning. He said,[26] "S'appuyant sur ces décisions déclarant que, dans une vente à réméré et *pendente conditione*, l'acheteur a un *jus in re* et le vendeur un *jus ad rem* sur la chose faisant objet du contrat, on en déduit que, lorsque la faculté de réméré est exercée, l'acheteur réaliène au vendeur l'objet de la vente. . . . cette conclusion ne découle pas de la prémisse sur laquelle elle s'appuie, . . . "

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[20]Article 1552 of the Quebec Civil Code: "The seller of immoveable property may exercise his right of redemption against a second buyer, although the right be not declared in the second sale."

[21]Tenth edition, 1948, vol. 2, p. 639, no. 969.

[22]Notably Cour de Cassation Ch. Req. 21 Dec. 1825 (De Villeneuve et Carette, *Recueil Général des Lois et des Arrêts*, vol. 8, Jurisprudence de la Cour de Cassation p. 243) confirming two decisions of the Court of Besançon, and Cour de Cassation Ch. Req. 23 Août 1871 (see note 15), which contains a list of the jurisprudence and doctrine on the question up to that date. Both the above decisions are cited in Dalloz, *Code Annoté*, 1905, vol. 4, sub Article 1659, no. 40; Dalloz, *Répertoire Pratique*, vol. 12, p. 736, "Vente", no. 1860; and also in Fuzier-Herman, *Code Civil Annoté*, 1940, vol. 5, p. 590, sub Article 1666, n. 2.

[23]Cour de Cassation, Cr. Req., 17 Feb. 1885, (S. 1885. 1. 311.)

[24]Cour de Cassation, Ch. Req., 21 Dec. 1825 (see note 23).

[25]*Locs. Cits.*

[26][1955] S.C.R. 207, at p. 218.

If the reasoning of the learned judge is correct, one can infer that a decision holding that there is no new alienation by the buyer when the redemption right is exercised does not establish the rule that the right of the seller *pendente conditione* is a right *in re*. It is submitted that this is actually the case and, in spite of appearances to the contrary, the decision of the Supreme Court in *Duchesneau* v. *Cook* does not have the effect of overruling the principle laid down by the Court of King's Bench in *Sirois* v. *Carrier*.

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