The Effect of Illegal Views on the Vendor's Warranty Against Eviction

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Does the existence of undeclared illegal views emanating from a sold property constitute sufficient grounds for the resiliation of the sale or promise of sale? The problem is of significant practical importance if one judges by the abundant jurisprudence it has generated in the Quebec courts. More often than not, the plaintiff is the disillusioned or insolvent buyer who finds in the undeclared illegal view a convenient pretext to vacate his unwise purchase.

The plaintiff-purchaser will demand resiliation of the contract he has signed on the grounds that he has suffered a partial eviction caused by the existing views which he has discovered to be illegal. In a contract of sale, the vendor is obliged to warrant the purchaser against eviction.[1] If the purchaser suffers eviction of a part only of the thing, and that part is of such importance that he would not have bought without it, he may vacate the sale;[2] if it is not of such importance, however, he may only claim indemnity.[3] As well, a special provision (article 1519 C.C.) deals with property charged with an unapparent and undeclared servitude. Here, the resiliation of the sale is subject to the above criterion of importance; no actual eviction need take place, however, for the purchaser is entitled to bring his action as soon as he is informed of the existence of the servitude.

In the first place, it is relevant to ask whether the purchaser has really suffered a partial eviction at all. Since the views are apparent, should not the careful buyer be obliged to visit the Registry Office to discover whether a valid servitude exists in his favour?

The jurisprudence holds conclusively[4] that no such obligation exists on the part of the purchaser, but rather, that it is up to the vendor to inform him of the inexistence of these apparent, active servitudes.

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* Of the Junior Board of Editors.

1 Article 1506 C.C.

2 Article 1517 C.C.

3 Article 1518 C.C.

4 *Forget* v. *Gohier et Paquin* [1945] B.R. 437; *Legault* v. *Herschorn* (1924) 37 B.R. 26; *Collin* v. *Lemieux* [1957] C.S. 385; *Weinberg* v. *Styval Realty Corporation* [1962] C.S. 79; *Lecavalier* v. *Chaloux* [1965] C.S. 554.

The purchaser has the right to assume that what he sees has the legal right to be there.

Lafleur, J. in *Lecavalier* v. *Chaloux* declares:

> Il appartenait au vendeur d'informer son acheteur de l'inexistence d'une servitude active que des signes extérieurs rendaient apparente. Si l'article 1508 C.C. impose au vendeur l'obligation de déclarer les charges qui affectent l'immeuble, il lui impose aussi, d'après la jurisprudence, l'obligation de déclarer que ce qui affecte l'immeuble de façon apparente n'existe pas en fait et ne confère aucun titre.[5]

As well, paragraph 350 of *Baudry-Lacantinerie et Saignat* reads as follows:

> L'acheteur qui se trouve privé d'une servitude active sur laquelle il était en droit de compter d'après le contrat, n'obtient pas tout ce que le contrat devait lui procurer; il subit donc une éviction partielle.[6]

It may be stated, therefore, that the purchaser is entitled to a remedy. Since resiliation of the sale is his principal goal, however, it is important to determine whether the loss of these active servitudes may be brought under those articles of the Civil Code which allow him to vacate the sale.

Will the contract be more easily resiliated if it is merely one of promise of sale and not the deed of sale itself? The courts have answered [7] that the promise to buy is subordinated to the condition that the titles be clear and perfect where such a condition is specified in the promise. Furthermore, the eviction need not be imminent — the mere danger is sufficient to justify a demand for the annulment of the promise. The reasoning of the learned judges in these cases, however, seems to lie in the nature of the promise of sale itself as a preliminary guarantee to the purchaser, enabling him to withdraw from the sale if the object does not measure up to expectations.

> La nécessité d'une option ou promesse d'achat... est évidemment dans le but de permettre au promettant acheteur de s'assurer, avant de signer le contrat et dans le délai fixé par l'option, si les conditions et clauses prévues dans ladite promesse de vente sont exactes et réelles et, dans le présent cas, elles étaient clairement spécifiées: "titles to be good and clear." Or, les titres ne remplissent pas cette qualité lorsqu'il existe une servitude apparente qu'aucun titre ne couvre.[8]

Batshaw, J. in *Weinberg* [9] is of the opinion that articles 1517 and 1519 C.C. are not applicable in a promise of sale:

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[5] [1965] C.S. 554, at p. 559.

[6] *Traité de Droit Civil*, 3e éd., XIX (1908), p. 349.

[7] *Collin* v. *Lemieux*, *supra*, footnote 4; *Weinberg* v. *Styval Realty Corporation*, *supra*, footnote 4; *Fedorka* v. *Successors to Swift - Copland Building Ltd.* [1965] C.S. 490; *Desjardins* v. *Corbeil* (1930) 49 B.R. 162.

[8] Legault, J. in *Fedorka*, *supra*, footnote 7 at p. 493.

[9] [1962] C.S. 79, at p. 82.

> This article [1519 C.C.] as well as article 1517 C.C. ... deals with warranty against eviction after a sale has taken place, and it does not necessarily apply to the right of the buyer to execute the deed of sale in the absence of a good and clear title.

Thus, for the purchaser, time is relevant. If he is able to invoke the inexistence of the servitude before the deed of sale has been signed, he may well be able to avoid the execution of that deed.

After the completion of the deed of sale, the buyer, in order to vacate the sale, must come within the requirements laid down in either 1517 C.C. or 1519 C.C.

Article 1517 begins with the words, "If the buyer suffer eviction of a part only of the thing"; the question arises: what constitutes partial eviction? According to *Colin and Capitant:*

> Le recours en garantie peut être exercé par l'acheteur, lorsqu'il y a un trouble, c'est-à-dire prétention menaçante d'un tiers.[10]

Although actual juridical proceedings by the neighbour are not necessary, some threat must be evident. In the case of illegal views, it seems unlikely that the owner of the neighboring property, who has tolerated these inroads on his privacy while the vendor was owner, would force the new owner to close or mask the illegal views. In the case of *Tourangeau* v. *Leclerc,*[11] where views were discovered to be illegal the neighbor even went so far as to guarantee the new owners that he would not trouble their possession. In the words of Taschereau, J.:

> Je viens donc à la conclusion que la demanderesse n'est pas encore troublée, qu'elle ne le sera peut-être jamais, et qu'il n'y a pas lieu, dès lors, d'annuler les deux actes de vente par le seul motif que le terrain acquis par la demanderesse a des vues [illégales].[12]

Unless there is an actual threat, then, the purchaser is unable to avail himself of the provisions of article 1517 C.C.

Article 1519, on the other hand, contains no such stipulation; it provides that the purchaser may bring his action as soon as he is informed of the existence of the servitude. This article is a special text relating to servitudes. It is interesting to note that under the old French law, the responsibility for undeclared charges was considered as part of the warranty against latent defects; the Code Napoléon brought it under the hypothesis of partial eviction.[13]

The text of article 1519 C.C. refers only to unapparent servitudes. There has been some debate in the Quebec courts as to whether this

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[10] *Cours Elémentaire de Droit Civil Français,* 3e éd., II (1921), p. 461.
[11] [1963] B.R. 760.
[12] *Ibid.,* p. 765.
[13] Colin and Capitant, *op. cit.,* p. 465.

article may be broadly interpreted so as to include apparent non-servitudes.

In favour of extending the scope of the article is Lafleur, J. in *Lecavalier* v. *Chaloux*, who invokes Mignault:

> Si le vendeur a déclaré que le fonds jouissait de telle servitude active, la fausseté de cette déclaration donne lieu aux mêmes résultats que la découverte d'une servitude passive.[14]

Also, Faribault states:

> La règle posée par notre article [1519 C.C.] reçoit son application si le vendeur d'un immeuble ne déclare pas à son acheteur qu'une servitude apparente n'a pas d'existence réelle ou qu'il existe, en réalité, une servitude active ou passive qui n'est pas apparente.[15]

Finally, there is Baudry-Lacantinerie's comment on the equivalent article in the French Code:

> L'article 1638 ne s'occupe que des servitudes passives grevant l'immeuble vendu; mais sa disposition doit être appliquée aussi dans le cas où, le vendeur ayant déclaré l'existence de servitudes actives appartenant à l'immeuble vendu, ces servitudes n'existeraient pas.[16]

Against this contention are Brossard, J. in *Collin* v. *Lemieux* and Batshaw, J. in *Weinberg;* the latter judge states:

> Defendant's contention that by analogy the rule of article 1519 C.C. should be applied in both instances is not based on any persuasive authority and cannot be accepted by the court.[17]

They also invoke Mignault in support of their hypothesis.[18] With respect, it is submitted that the honorable judges interpreted Mignault wrongly in claiming that he only deals with passive servitudes in his comments on article 1519 C.C.; they refer only to page 103 of volume seven of the *Droit Civil Canadien,* whereas the passage already quoted, taken from the judgment of Lafleur, J. in *Lecavalier,* is from the following page of the work, and, it is submitted, is a more accurate summation of Mignault's attitude towards the scope of Article 1519.

One further significant condition applies to both articles 1517 and 1519 C.C.: the cause of the eviction must be of such importance that the purchaser would not have bought had he known of it. The case of *Lecavalier* v. *Chaloux,*[19] where a servitude of passage, discovered to be inexistent, rendering the property *enclavé,* provides a

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[14] [1965] C.S. 554 at p. 560.
[15] *Ibid.,* p. 561.
[16] *Ibid.,* p. 560.
[17] *Weinberg* v. *Styval Realty Corporation* [1962] C.S. 79, at p. 83.
[18] *Loc. cit.*
[19] [1965] C.S. 554.

good example of a case where this condition was met. It strains the imagination, however, to conceive a fact situation whereby the existence of illegal views would provide the necessary importance to allow the purchaser to vacate the sale (although one might suggest the sale of a greenhouse as one such possibility). In *Dame Tourangeau* v. *Leclerc*,[20] where plaintiff asked for the resiliation of the deed of sale on the grounds that the views from the three windows and two ventilators on the property were illegal, it was held that the worst that could happen was that the neighbor would force the openings and windows to be closed.

> Or, la preuve ne fait pas voir que la perte de jouissance des trois fenêtres et des deux soupiraux... soit une partie de la chose vendue de telle conséquence relativement au tout que la demanderesse n'eut point acheté sans cette partie. La demanderesse n'aurait donc pas droit à la rescision de la vente.[21]

In conclusion, then, it may be stated as a general rule, which admits of exception only in extreme factual situations, that the existence of undeclared illegal views alone does not constitute sufficient grounds for the resiliation of the deed of sale.

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[20] [1963] B.R. 760.
[21] *Ibid.*, (Tremblay, C.J.), p. 766.