1937
* Oct. 21.
* Mar. 18.

LA COMPAGNIE D'ASSURANCE SUR LA VIE "LA SAUVEGARDE" (PLAINTIFF) ..... APPELLANT;

AND

WILLIAM HARRY AYERS (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Right of redemption—Option to take back the property or to claim the price—Pactum displicentiae—Third party in possession—Irrevocable sale—Incompatible clause—Petitory action—Articles 1025, 1549 C.C.

A deed of sale, passed on the 28th of May, 1931, stipulated that the vendor obliged himself to redeem the property on the 27th of May, 1934, reserving his right to redeem it before such date and the contract added further that the purchaser (creditor) would have the alternative right of demanding repayment of the purchase price and accessories or of assuming complete title to the property (*pactum displicentiae*) in case the vendor failed to redeem the property. The trial judge and the appellate court held that it could not be said that the parties intended that there should be an irrevocable sale once the purchase price was not reimbursed within the stipulated delay; and that the instrument was not in its true character an alienation subject to the right of redemption but a pledge of immovables.

Held, that the judgment of the appellate court (Q.R. 63 K.B. 291) should be affirmed. The fact that a lender is making use of the *vente à réméré* in order the better to secure himself is not necessarily in itself incompatible with the validity of the transaction as such a sale; and the contract may also contain stipulations for the protection of the creditor so long as they are not inconsistent with the essential nature of this particular type of contract (*Salvas* v. *Vassal*, 27 S.C.R. 68 and *The Queen* v. *Montminy* 484); but it is essential that there be alienation and that the title of the alienee be, by the true intendment of the transaction, to be absolute if the price is not reimbursed within the time stipulated therefor; and, from the instrument itself in this case, the parties to the deed had no intention of so stipulating.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, McDougall J., and dismissing the appellant's action.

The facts of the case are the following: On the 9th of November, 1930, one Gauthier sold certain immovables to the respondent under a notarial deed, which was not regis-

* PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

(1) (1937) Q.R. 63 K.B. 291.

tered until the 8th of May, 1933. On the 28th of May, 1931, Gauthier, by another notarial deed, sold the same property to the appellant, which deed was registered on the 1st of June, 1931, this being a sale containing a clause giving the vendor the right to exercise the *faculté de réméré*. The right to exercise this faculty was to expire on the 7th of May, 1934. The respondent took possession of the property on the 8th of May, 1933, and thereupon proceeded to collect rents. In April, 1935, the appellant took the present action to be declared the owner of the property. The question to be determined in this case is what was intended by the parties and what they in fact did. The principal clause of the deed to be interpreted is the following:—

Et, à défaut par monsieur Gauthier d'opérer son rachat de la manière convenue, notamment de rembourser à échéance la susdite somme de trois mille dollars; ou de payer au moins dans les trente jours de leur échéance respective l'un ou l'autre de ses versements d'intérêts semi-annuels; ou d'acquitter avant le premier janvier de chaque année toutes taxes quelconques pouvant affecter les susdits immeubles; ou de prendre et de toujours maintenir en force les assurances-feu dont il est question plus haut, avec production de polices d'assurance et d'un reçu de leur renouvellement au moins dans les quinze jours de leur échéance respective entre les mains de La Sauvegarde; ou de faire radier dans les trente jours de leur enregistrement tout privilège de fournisseurs de matériaux, entrepreneurs, etc., qui pourrait être enregistré sur les propriétés plus haut décrites; ou de maintenir toujours ses propriétés en bon état de réparation, tel que convenu plus haut; alors dans chacun de ces cas, La Sauvegarde pourra soit exiger de suite de monsieur Gauthier le payement de tous deniers qui pourront lui être dus pour quelque raison quelconque, soit en remboursement de la somme de trois mille dollars dont il est question ci-dessus soit pour le service de ses intérêts, le remboursement de taxes, le payement de primes d'assurance, etc., ou à son choix, garder et conserver comme propre, avec droit d'en jouir et d'en disposer comme bon lui semblera, les deux propriétés sus mentionnées, desquelles propriétés elle *sera dès lors* propriétaire incommutable, avec toutes additions et améliorations, sans retour ni indemnité, tout en ayant le droit de garder tous deniers reçus pour quelque fin quelconque, le tout devant lui appartenir comme loyer et à titre de dommages intérêts liquidés à l'avance, sans procédure ni mise en demeure.

Arthur Vallée K.C. and *A. R. Gagné* for the appellant.

J. A. Mann K.C. and *E. H. Brown* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The question in substance which we are called upon to decide is whether or not the deed of the 28th of May, 1931, was in reality a sale "sous la faculté de réméré." The learned trial judge and the majority of

1937

LA COMPAGNIE D'ASSURANCE SUR LA VIE "LA SAUVEGARDE" v. AYERS.

Duff C.J.

the Court of King's Bench have held that this instrument is not in its true character an alienation subject to the right of redemption but a pledge of immovables. That question, to quote the words of Strong, C.J., in *Salvas* v. *Vassal* (1)

> must in every case depend upon the interpretation of the deeds passed between the parties and a proper appreciation of the evidence.

In a passage, to which the appellant in his factum refers, Mr. Justice Girouard in the same case put the question in this form:

> Les parties n'entendaient-elles pas faire une vente irrévocable, si le prix n'était pas remboursé?

I do not find it necessary to refer to any extraneous facts. The transaction is described in the deed as a "vente sous la faculté de réméré ci-après réservée." But I find it impossible to reconcile with the terms of the deed an intention to effect an irrevocable sale if the price should not be reimbursed. On the contrary, the parties have made it very clear that, in default of reimbursement by the borrower at the date fixed, an option is vested in the appellants either to require payment of the sum lent or, at their choice, to retain the property in question as their own with full liberty to enjoy and dispose of it.

It was argued that in all material respects the deed before us does not differ from the deed in *The Queen* v. *Montminy* (2); but, as Mr. Justice Letourneau points out, there is this essential distinction: the instrument which this Court had to consider on that appeal was an instrument by which the parties in the most explicit terms provided that in the event of the failure of the borrower to repay the price on the date fixed, the right of redemption should cease to operate, and that the lender should remain "propriétaire incommutable" of the property in question.

The judgments in *Salvas* v. *Vassal* (1) and in *The Queen* v. *Montminy* (2) delivered by Mr. Justice Girouard, in each case speaking for the majority of the court, make it clear that the circumstance that a lender is making use of the *vente à réméré* in order the better to secure himself is not necessarily in itself incompatible with the validity of the transaction as such a sale. In *The Queen* v. *Montminy* (2) (p. 490) he says:

(1) (1896) 27 Can. S.C.R. 68, at 77.

(2) (1899) 29 Can. S.C.R. 484.

Il est évident que dans l'espèce qui nous occupe, comme presque toujours d'ailleurs le créancier n'a eu recours à la vente à réméré que pour éviter les longueurs et les frais d'une vente judiciaire et mieux assurer ses avances d'argent; mais, comme nous le disions dans *Salvas* v. *Vassall* (1), il n'y a aucune ici qui prohibe ces conventions.

And he observes also that the contract may contain stipulations for the protection of the creditor so long as they are not inconsistent with the essential nature of this particular type of contract.

But I agree with the majority of the Court of King's Bench that it is essential that there be alienation and that the title of the alienee is by the true intendment of the transaction, to be absolute if the price is not reimbursed within the time stipulated therefor. It is plain, from the instrument itself, that the parties to the deed before us had no intention of so stipulating.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gagné & Nadon.*

Solicitors for the respondent: *Mann, Lafleur & Brown.*