Supreme Court of Canada
Gagnon v. Lemay, (1918) 56 S.C.R. 365
Date: 1918-03-11

Charles Gagnon (Defendant) Appellant;

and

Victor Lemay (Plaintiff) Respondent.

1917: November 2; 1918: March 11.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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

Sale—Contract—Nullity— Rescission — Payment — Default — Mise en demeure.

Where in a deed of sale or promise of sale, it is stated that such deed would become null and void *ipso facto without mise en demeure* if the buyer failed to make any payment in capital or interest at the specified dates, such stipulation is exclusively in the interest of the seller, who has the right to choose between the rescission of the contract or its execution, the obligation of the buyer remaining absolute and without alternative.

APPEAL from the judgment of the Court of King's Bench, appeal side[1], confirming the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action with costs.

On the 14th of June, 1910, a deed comprising promise of sale was passed between the parties, by which the appellant leased to the respondent for a term of ten years from the first of May, 1911, a certain lot of land. As a condition of said deed, the respondent reserved to himself the faculty to buy and the appellant bound himself to sell that lot for the price of $1,000 per acre, payable $5,000 on the date of the deed of sale to be passed and the balance $2,000 per year.

On the 2nd July, 1914, a deed of transfer was passed between the parties by which the respondent retroceded to the appellant all his rights belonging to him in virtue of the above deed of promise of sale,

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in consideration of the payment of a sum of $60,000. This sum was payable $2,000 cash, $13,000 on the 17th of July, 1914, $5,000 on the 2nd of July, 1915, and $5,000 per year, with interest of 6% per annum.

The appellant paid to the respondent $2,000 cash and the payment of $13,000 due on the 17th of July, 1914; but failed to pay the instalment of $5,000 due on the 2nd of July, 1915, and $2,700 for interest.

The deed of transfer contained the following covenant:

[1] Q.R. 27 K.B. 59.

"Si M. Gagnon faillissait à faire le premier paiement de treize mille piastres ou tout autre paiement d'intérêt et de capital, le present transport sera nul *ipso facto,* sans mise en demeure, et la promesse de vente revivra en faveur de Mr. Lemay, dans toute sa vigueur. M. Lemay gardera le paiement de deux mille piastres ci-dessus dit fait comptant, ainsi que tout paiement subséquent, dans le cas où M. Gagnon se laisserait arriérer plus de trente jours dans aucune échéance de capital ou intérêt, et ce, sans mise en demeure."

Antonio Perrault K.C. and *J. W. Jalbert* for the appellant argued that, the above clause having put an end to the contract, the appellant was no more indebted toward the respondent.

Robert Tascherean K.C. for the respondent cited *Picard* v. *Renaud*[2]*; Peloquin* v. *Cohen*[3]*; Halcro* v. *Gray*[4]*,* and *Pépin* v. *Savignac*[5]*.*

Antonio Perrault K.C. and J. W. Jalbert for the appellant

Robert Tascherean K.C. for the respondent

THE CHIEF JUSTICE.—In this case, the appellant, in June, 1910, leased to the respondent a piece of property for ten years with a promise of sale; the purchase price was fixed at $30,000. In July, 1914,

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the same property was reconveyed by the respondent to the appellant for the sum of $60,000, payable $2,000 in cash and the balance in instalments, on account of which the respondent received $15,000. The appellant having failed to pay the difference of $45,000, this action was brought to recover a further instalment due on the purchase price.

The appellant denies all liability on the ground that the promise of sale sued on contains a stipulation in these words:—

> Si M. Gagnon faillissait à faire le premier paiement de treize mille piastres ou tout autre paiement d'intérêt et de capital, le présent transport sera nul *ipso facto,* sans mise en demeure et la promesse de vente revivra en faveur de M. Lemay, dans toute sa vigueur. M. Lemay gardera le paiement de $2,000 ci-dessus dit fait comptant, ainsi que tout paiement subséquent, dans le cas ou M. Gagnon se laisserait arriérer plus de trente jours dans aucune échéance de capital ou intérêt, et ce, sans mise en demeure.

The question to be decided is: What is the legal effect of this stipulation? There can, I think, be no doubt that of the whole contract it may be said:—

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[2] Q.R. 17 S.C. 353.
[3] Q.R. 28 S.C. 193.
[4] Q.R. 50 S.C. 350.
[5] Q.R. 51 S.C. 207.

> Les parties ont stipulé expressément qu'elles entendent faire un contrat de location, mais le rapport de droit, tel qu'il résulte objectivement des clauses de l'acte, correspond au contrat de vente, dont l'élement spécifique, transfert de propriété, se trouve réalisé.

S. 1888, 1, 87; D. 96, 1, 57; D. 91, 1, 271.

The appellant contends that the stipulation in question is a resolutive condition which, when accomplished, effects of right the dissolution of the contract; and that the words used evidence the intention that it was to operate for the benefit of both parties. On the other hand, the respondent submits that this is a special stipulation to the effect that the deed of sale is voidable but only at his, the vendor's, option, if the purchase price or any portion of it is not paid at the dates fixed, that is the *lex commissoria* of the Roman law.

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I am inclined to hold that the peculiar form in which the stipulation is expressed reveals an intention on the part of both the contracting parties to make a special agreement, the effect of which would be in case the purchaser failed in his engagements to put both parties back in the position in which they were at the date of the contract, the appellant purchaser forfeiting, however, all payments made on account up to the date of the breach.

The differences between the Quebec Civil Code and the Code Napoléon must be borne in mind when considering the effect of this contract. (Compare articles 1536 C.C., 1088 C.C., 1065 C.C., with 1184 C.N. and 1654 C.N.) Under the Quebec law the seller of an immovable cannot demand a dissolution of the sale of the immovable by reason of the failure of the buyer to pay the purchase price, unless there is a stipulation to that effect. A *lex commissoria* is never presumed. The rule of the French law is to the contrary.

It must also be borne in mind that, according to Pothier, Vente, vol. 3, No. 459, a *lex commissoria* does not entitle the vendor; in the absence of express stipulation, to rescind *ipso jure.* He can only bring an action to have the contract declared void and, until judgment is given in such action, the buyer may still save his position by tendering the money, notwithstanding that the term fixed for payment has elapsed. In a word, if the condition fails through the money not being paid by the date fixed, the contract does not become *ipso facto* void, but the vendor has the option of rescinding it. The reason why the vendor has the option of rescinding or adopting the contract is obvious. If the contract became *ipso facto* void on non-payment of the purchase money, it would always be in the power of the purchaser by withholding it to

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rescind the sale from the moment of its conclusion and so to throw on the vendor the loss which would result from accidental destruction or damage occurring after delivery. If the condition is resolutive, the purchaser becomes owner of the property by delivery. He has all the ordinary rights of an owner and the loss falls on him if the property perishes before the condition is fulfilled. And in either case, whether the stipulation in question is a *lex commissoria* or a resolutive condition, in the absence of special agreement to the contrary, the avoidance of the contract entitles the purchaser to recover back any portion of the purchase money if it has been paid, subject always to claims for damages, revenues, etc. But here the contract does not say that the sale is voidable at the purchaser's option, the stipulation is that if the respondent fails to make any of his payments "le présent transfert sera nul *ipso facto,"* the sale ceases to exist on the happening of the condition and then it provides against loss by the vendor. The promise of sale in his favour revives and the purchaser Gagnon forfeits all payments made on account of his purchase, $15,000.00.

I must confess that the language of the stipulation conveys to my mind the impression that the parties must have intended to make a special agreement to meet the very special conditions under which this agreement was entered into and producing results entirely different from those which would follow from a *lex commissoria. Vide* Beudant, "Effets de la Vente," pp. 196 and 197.

But as all the judges below and my colleagues here have reached a different conclusion, I submit to their better judgment.

Vide Pothier, vol. 3, No. 473.

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DAVIES J.—I would dismiss this appeal with costs.

IDINGTON J.—The intention of the parties so far as can be gathered from the contracts in question must govern. And the neat, though by no means simple, point raised herein is whether or not the nullification of the last contract between the parties as therein provided was intended to be dependent on the will of the vendor alone or on the will of either seeking to terminate it.

I cannot by elaboration help any one for the case as presented in the judgments below and in argument here has been considered from every point of view.

I need only say that if the appellant had in truth the rather improbable purpose in view of procuring the unusual right of a vendee to terminate the contract after he had paid one-fourth of the price, he would have been well advised in having had it expressed in less ambiguous language.

The point made by Mr. Justice Cross that the obvious right of the respondent to sue, within the thirty days specified for the vendee to save his rights, after default, is rather a formidable barrier in the way of construing the contract as appellant desires.

I admit the suggestions made in the appellant's factum in reply thereto are very plausible and worthy the consideration I have given them, but do not carry the question far enough or indeed beyond the region of ambiguity which stands in appellant's way.

It is not a case where authority can help us much for the meaning of one contract is rarely helped by a decision upon another though only varying slightly from the one which has been decided. In truth it is not the law but the fact which troubles us herein.

I think the appeal should be dismissed with costs.

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DUFF J.—I think the appeal should be dismissed with costs.

ANGLIN J.—I am of the opinion that this appeal should be dismissed for the reasons assigned by the Chief Justice of the Court of King's Bench[6]. The fact, as pointed out by that learned judge, that art. 1536 of the Civil Code of Quebec makes a provision directly contrary to that of art. 1654 of the Code Napoléon, materially lessens, if it does not destroy, the value in Quebec of the French authorities cited in his very able argument and factum by M. Perrault. A construction of the clause on which the purchaser (appellant) relies that would enable him to terminate his contractual obligations by making default in fulfilling them could be justified only by terms admitting of no other interpretation.

[6] Q.R. 27 K.B. 59.

The clause in question, if we omit from it the terms *"ipso facto, sans mise en demeure"* is the ordinary *"pacte commissoire"* of the French law, of which Casault J. in *Price* v. *Tessier*[7], said, at pp. 218-19:

> "Le pacte commissoire," disent Aubry & Rau, vol. *4,* par. 302, p. 82, "est la clause par laquelle les parties conviennent que le contrat sera résolu, si l'une ou l'autre d'entr'elles ne satisfait pas aux obligations qu'il lui impose."
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> La simple stipulation dans la vente, de sa résolution, faute de paiement, n'est, dans notre droit, qu'un pacte commissoire, auquel il manque la perfection de celui du droit romain, qui en faisait résulter la nullité de la vente; tandis que, avec nous, il ne comporte que le droit d'en demander la résolution en justice. Le Code Civil, article 1536, fait de ce pacte une condition de la demande en résolution de la vente des immeubles.
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> Dans notre ancien droit, cette condition de resolution était tacite et la résolution, qu'elle permettait d'obtenir, devait être demandée en justice. Elle existe encore dans la vente des meubles. Mais, pour celle des immeubles, le Code Civil a mis fin à la résolution tacite, et la fait dépendre, faute de paiement, d'une stipulation spéciale qui est, comme je viens de le dire, le pacte commissoire. Ce dernier laisse subsister la vente jusqu'à ce que, sur poursuite, le jugement ait prononcé sa résolution, qui ne peut être demandée que par le vendeur.

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The law as thus stated has been recognized in *Brisson* v. *Phurde*[8], by the Court of King's Bench; in *Picard* v. *Renaud*[9], by the Court of Review (Taschereau, Cimon and Archibald JJ.); in the judgment of Demers J., in *Halcro* v. *Gray*[10], affirmed by the Court of Review; and in *Pepin* v. *Savignac*[11]. It may perhaps be noted that in the two latter cases the term *sans mise en demeure* occurred in the condition, but not the term *ipso facto.*

Under such a stipulation containing neither of these terms, where, as here, the contract is silent as to the place of payment, the debt is *"quérable"* and not *"portable"* (art. 1152 C.C.) it is necessary that the debtor should be put in default (*mise en demeure)* by a demand of payment at his abode, and the right of rescission can only be asserted by judicial proceedings. The clause is regarded merely as an expression (rendered necessary by art. 1536 C.C. in the case of contracts for the sale of immoveables) of a condition implied in other contracts by art. 1065 C.C., and as having the like effect[12]. The seller alone can invoke it. It is a privilege or right of which he is at liberty to take advantage or not; and, until

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[7] 15 Q.L.R. 216.
[8] I Rev. de Jur. 95.
[9] Q.R. 17 S.C. 353.
[10] Q.R. 50 S.C. 350.
[11] Q.R. 51 S.C. 207.
[12] 7 R. L. (N.S.) 471 et seq.

dissolution of the contract has been judicially declared, the debtor may avoid that consequence by fulfilling his obligation. Art. 1538 C.C. What then is the purpose and effect of inserting the terms *"ipso facto"* and *"sans mise en demeure?"* In my opinion the latter term is merely designed to dispense with the necessity for demanding payment at the debtor's domicile. It does not alter the nature of the stipulation or render it any the less a *"pacte commissoire."* Such was the view maintained in *Halcro* v. *Gray*[10], and *Pepin* v. *Savignac*[11].

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The purpose of the term *"ipso facto"* is to enable the creditor to assert the dissolution of the contract without being obliged to resort to the courts, and either immediately upon default, or upon the expiry of any stipulated period of grace, to deprive the debtor of the right to purge his default by payment under art. 1538 C.C. Requisite for these purposes, in accomplishing them these provisions are given operation and effect—the operation and effect which I think the parties must have intended. It is quite unnecessary, and, in my opinion, unwarranted, to attribute them to the extraordinary purpose of enabling the purchaser to relieve himself of his contractual obligations by making default in fulfilling them. They do not sufficiently, or indeed at all, express such an intention. They, therefore, do not change the nature of the facultative (potestative) condition in which they are found and make of it an absolute resolutive condition having the effect stated by "art. 1088 C.C. It remains a provision inserted for the benefit of the vendor[13]. Indeed the presence of the term "*sans raise en demeure,"* because of its utter inapplicability to the case of a purchaser asserting that by his default he has put an end to the contract, affords an additional reason for taking this view of the stipulation under consideration.

In at least two instances the courts have so construed clauses so nearly identical in terms with that before us that no real distinction between them can be suggested. In *Peloquin* v. *Cohen*[14], Mr. Justice Tellier held that such a clause confers the right of rescission on the vendor alone, and in *La Compagnie Impériale*

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[10] Q.R. 50 S.C. 350.
[11] Q.R. 51 S.C. 207.
[13] 7 Mignault 137.
[14] Q.R. 28 S.C. 193.

d'Immeubles v. *Collerette,* not reported but quoted *in extenso* in the factum of the respondent, Mr. Justice Panneton was of the same opinion. As stated by the learned Chief Justice of Quebec,

> La jurisprudence de la Cour Supérieure est à peu près unanime sur la question.

It is, I think, reasonable to assume that in inserting the clause in question the parties to the contract now sued upon meant it to have the effect which had been thus given to similar clauses in the jurisprudence of the province. No doubt such clauses have been placed in many contracts of sale in the belief that they would be given operation and effect in accordance with these decisions. We have it on the authority of such an experienced judge as Mr. Justice Cross that

> In conveyancing practice clauses such as the one in question have for many years been treated as giving a right of rescission to the seller but as not opening any right in favour of the buyer.

The wisdom of not overruling judicial decisions of some years' standing, where numerous contracts must have been made and moneys paid on the footing of the law as established by them, and of not breaking away from previous decisions upon the construction of a well known document in constant use for a number of years, even in cases where, were the matter *res integra,* a different view might have prevailed, is fully recognized in the English system of jurisprudence. *Palmer* v. *Johnson*[15]; *Dunlop & Sons* v. *Balfour Williamson & Co.*[16]. I cannot think that anything so mischievous as unsettling the law in regard to matters affecting rights of property should be countenanced by courts administering the civil law. That would seem to have

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been the view of the learned judges of the Court of King's Bench in the present case.

Appeal dismissed with costs.

Solicitor for the appellant: J. W. Jalbert.

Solicitors for the respondent: Perron, Taschereau, Rinfret, Vallée & Genest.

[15] 13 Q.B.D. 351, at pages 354, 357, 358.
[16] (1892) 1 Q.B. 507, at page 518.