1958

*Jun. 17
Nov. 19

LEO PERRAULT LIMITEE (*Defendant*) ..APPELLANT;

AND

GEORGES TESSIER (*Plaintiff*) .....RESPONDENT.

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

Sale—Determined quantity of lumber—Refusal to pay for goods received—Apprehension of breach of contract—Subsequent deliveries accepted—Art. 1496, 1532 of the Civil Code.

The plaintiff agreed to sell to the defendant a determined quantity of lumber. The lumber was to be measured by the purchaser on delivery and was to be paid on the 15th and 30th of each month. The defendant, after receiving notice from the plaintiff that he had no more wood available, continued to accept subsequent deliveries but refused to pay for them in an attempt to protect his anticipated claim in damages for breach of contract.

In his action, the vendor claimed payment for the lumber delivered and asked for the cancellation of the contract for the balance of the lumber remaining to be delivered. The purchaser made a cross-demand in which he claimed damages for breach of contract and pleaded compensation. The action was maintained and the cross-demand dismissed by the trial judge and by the Court of Appeal.

Held: The appeal should be dismissed.

The letter written by the vendor cannot be interpreted as a refusal to deliver the balance of the lumber called for by the contract, particularly in the light of the subsequent conduct of both parties. As the buyer was in breach of his obligation to pay the price, the vendor was entitled at his option to treat that breach as terminating the contract for the balance, to take action for the amount owing and to ask that the contract be dissolved.

The law is well settled in Quebec that in a synallagmatic contract the party to such contract who is himself in default cannot claim damages from the other party for breach of the contract.

*PRESENT: Taschereau, Rand, Fauteux, Abbott and Judson JJ.

1958

LEO PERRAULT LTÉE. v. TESSIER

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Côté J. Appeal dismissed.

H. Aronovitch, for the defendant, appellant.

R. Bergeron, Q.C., for the plaintiff, respondent.

The judgment of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

ABBOTT J.:—This is an appeal from a judgment of the Court of Queen's Bench[1] unanimously affirming a judgment of the Superior Court rendered March 19, 1956, which had maintained respondent's action to the extent of $5,582.93 for lumber sold and delivered to appellant and had dismissed the latter's cross-demand claiming damages in the amount of $12,000 for breach of contract.

The facts are as follows. On November 26, 1949, the parties entered into a contract in writing for the sale of 1,000,000 feet of lumber, the contract reading as follows:

LEO PERRAULT Ltée

Manufacturiers, Bois de sciage

MONTREAL, 26 Nov. 1949.

ACHETE DE GEORGES TESSIER ST-FELICIEN
EXPEDIER A LEO PERRAULT LTEE
QUAND courant de l'anée 1950 sur demande
F.O.B. St. Felicien
1,000,000 pieds Epinette & Cyprès
qualité 5e Meilleur
Longueur 8 à 14 pieds
Largeur 100/3 200/4 300/5 200/6 100/7 50/8 30/9
20/10
scié 2" faible 1⅞ mesuré 1¾ $45.00
La 6e qualité $37.00
Deux largeurs peuvent être inclus dans le même char.
TERMES Payable le 15 et le 30 du mois.

Fret comptant. Nous ne sommes pas responsables en cas de feu, grève, délai ou toute autre cause hors de notre contrôle. Réclamations devront être faites dans les dix jours après la réception des marchandises.
ACCEPTEE—

(signé) L. PERRAULT Acheteur (signé) GEORGES TESSIER Vendeur.

Subsequently, by mutual consent, it was agreed that the delivery point would be changed to Montreal and that the lumber would be measured by the purchaser on arrival there, for the purpose of determining the price of each shipment.

[1] [1958] Que. Q.B. 420.

1958

LEO PERRAULT LTÉE. v. TESSIER

Abbott J.

At the request of appellant, deliveries commenced at the beginning of June 1950, and they continued until October 11 when something in excess of 600,000 feet had been delivered. Respondent testified that his reason for stopping further deliveries was the appellant's failure to pay for the five cars unloaded at Montreal on various dates from September 18 to October 11, payment for which fell due on September 30 and October 15 respectively. At the trial, the president of appellant company attempted to justify its failure to pay for the lumber delivered upon an apprehension that respondent would fail to deliver the balance of the lumber contracted for and in order to protect a possible claim in damages for breach of contract. He based this apprehension on a letter from respondent dated September 16, 1950, which read as follows:

LES CHANTIERS TESSIER, LTEE
Marchands de Bois de Construction
Moulin à scie—Préparation du bois et Contracteur

ST-FELICIEN, Qué., 16 sept, 1950
Cté Lac St-Jean, P.Q.

Léo Perreault Ltée.
Montréal

Monsieur:—

Il me reste à vous expédier 2 ou 3 chars, bois acheté de Armand Bouchard. Comme je vous l'ai dit lors de mon passage à Montréal il ne me reste plus de bois. Je vous ai tout envoyé la production de l'hiver dernier. Aussitôt que j'aurai de grands chars je vous l'expédierai.

Bien à vous
(signé) GEORGES TESSIER

Obviously appellant paid no atention to this letter at the time and continued to accept deliveries in September and October. Moreover, appellant did not answer the said letter although, on September 23, it wrote to respondent acknowledging receipt of the two cars which it had received on September 18 and 19 and, as I have said, it continued to receive and accept further shipments up to October 11, 1950, although it failed to report to respondent the result of the measurement of the lumber in the last three cars shipped or to pay for them. Appellant continued to maintain this discreet silence until November 24, 1950,

when following the receipt of telegrams demanding payment of the amounts due for the five carloads of lumber delivered, it wrote to respondent in the following terms:

24 novembre 1950

Mr. Georges Tessier,
St-Félicien,
Cher monsieur,

Comme nous manquons de beaucoup de bois dans le moment, nous vous demandons de bien vouloir remplir la balance de notre contrat d'ici la fin de l'année.

Nous avons attendu ce bois au tout début de l'automne, et comme vous n'expédiez plus, ceci nous cause un grand dérangement. Votre coopération sera hautement appréciée.

Bien à vous,

Léo Perrault Ltée
Par: D. L. Jacques.

In a subsequent letter, dated December 10, 1950, appellant made the following reference to its indebtedness:

si tout le bois était entré il nous ferait plaisir de faire un règlement final et de contracter de nouveau pour votre coupe 1951.

On January 22, 1951, in reply to a further demand for payment from La Banque Canadienne Nationale to which the account had been assigned, appellant wrote the Bank as follows:

Que monsieur Tessier nous envoie le bois qu'il a contracté avec nous et il nous fera plaisir de vous faire parvenir sans retard le chèque que vous nous demandez.

On March 2, 1951, respondent instituted the present action to recover the price of the lumber delivered in September and October 1950 and asked that the contract be cancelled and annulled for the balance of the lumber remaining to be delivered under the said contract. In its defence, dated September 26, 1951, appellant pleaded in substance, that it had fulfilled all its obligations under the contract and justified its refusal to pay for the lumber already delivered upon the alleged refusal of the respondent to deliver the balance of the lumber called for by the contract. At the same time it filed a cross-demand claiming from respondent damages of $12,000 for breach of contract and asked that any amount found due to respondent be declared to be compensated.

In my opionion the appeal should be dismissed. I am in agreement with the reasons of Bissonnette and Hyde JJ. in the Court of Queen's Bench[1] and there is little that I

[1] [1958] Que. Q.B. 420.

1958

LEO PERRAULT LTÉE. v. TESSIER

Abbott J.

can usefully add to them. I cannot interpret the letter of September 16, 1950, as a refusal by respondent to deliver the balance of the lumber called for by the contract, particularly in the light of the subsequent conduct of both parties, to which I have referred. The principal obligation of a buyer is to pay the price (C.C. 1532), appellant was in breach of this obligation from September 30 and October 15 respectively, and its default continued up to the time respondent's action was instituted. At any time prior to that date, respondent was entitled at his option to treat that breach as terminating the contract for the balance, to take action for the amount owing and to ask in the conclusions of his action that it be dissolved: *Caplette et al v. Beaudoin*[1].

As to the cross-demand, the law is well settled in Quebec that in a synallagmatic contract the party to such contract who is himself in default cannot claim damages from the other party for breach of the contract. As Taschereau J. (speaking for himself, Locke, Fauteux and Abbott JJ.) has pointed out in *Lebel v. Commissaires d'Ecoles de Montmorency*[2]:

C'est la doctrine de NON ADIMPLETI CONTRACTUS qui veut que chaque contractant soit autorisé à considérer qu'il doit, comme une garantie de ce qui lui est dû, et tant que l'une des parties refuse d'exécuter son obligation, l'autre partie peut agir de même.

Planiol (Traité Elémentaire de Droit Civil Vol. 2, p. 329, N° 949) s'exprime ainsi:—

"Malgré le silence de nos textes, nous pouvons donc formuler cette règle: Dans tout rapport synallagmatique, chacune des deux parties ne peut exiger la prestation qui lui est due *que si elle offre elle-même d'exécuter son obligation . . . Les contrats synallagmatiques doivent donc, dans la rigueur du droit, être exécutés selon notre expression populaire 'donnant, donnant'."*

The appeal should be dismissed with costs.

RAND J.:—The reasons of my brother Abbott in which the majority of the Court concur assume that the letter of September 16 is not to be interpreted as a definitive notice that the vendor will not deliver any more lumber after the remaining three shipments in the letter mentioned; on that finding of fact the legal conclusion is drawn. I am inclined to view the letter as a positive repudiation of subsequent deliveries which would call for

[1] (1926), 41 Que. K.B. 398 at 405. [2] [1955] S.C.R. 298 at 305.

the consideration of important principles; but in the circumstances I defer to the interpretation of the majority and join in the dismissal of the appeal.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Chait & Aronovitch, Montreal.

Attorneys for the plaintiff, respondent: Bergeron & Bergeron, Montreal.