1958
*Feb. 10, 11
Jun. 26

CANADIAN ACCEPTANCE CORPORATION LIMITED (*Plaintiff*) ..... APPELLANT;

AND

EUGENE W. FISHER, LIQUIDATOR OF CONTRACTORS SUPPLIES LIMITED (*Defendant*) ..... RESPONDENT.

On appeal from the Court of Appeal for Saskatchewan.

Conditional sales—Assignment of seller's interest—Remedies of assignee—Recourse against assignor—Failure of assignee to give notice of resale—The Conditional Sales Act, R.S.S. 1953, c. 358, s. 9(2)—Whether compliance with subsection waived.

C.S. Co. sold a road-building machine under a conditional sales contract dated April 10, 1953, which it subsequently assigned to the plaintiff company. In the assignment it undertook to repurchase "the paper" if the buyer made default extending over a stated period; and also unconditionally guaranteed the buyer's payments.

The buyer made no payments under his contract. On November 26, 1953, the plaintiff repossessed the machine, and on the following day it sent notice to the buyer and to C.S. Co. demanding payment of the balance due, and stating that unless payment was made within a stated time the machine would be sold and the plaintiff would look to the buyer and C.S. Co. for any deficiency. On December 2, 1953, the plaintiff wrote to C.S. Co. demanding payment.

In April 1954 the defendant was appointed liquidator of C.S. Co., and in the following month he held an auction sale of machinery, including the machine bought from C.S. Co. The plaintiff agreed to this inclusion but insisted that the machine be made subject to a reserve bid equal to the amount owing under the contract, plus a commission.

The machine was not sold at the sale and from that time on the defendant took the position that the plaintiff, by its conduct, had made the machine its own and relieved the defendant of any further liability, and that he was not concerned with any further dealings with the machine. The plaintiff, having received and rejected several offers of which it notified the defendant, sold the machine in April 1955 without notice to the defendant, and shortly afterwards commenced an action for the deficiency. The trial judge was unable to find that the sale was an improvident one.

Held (Rand and Fauteux JJ. dissenting): The action should be dismissed. The plaintiff's failure to give the defendant the notice expressly required by s. 9(2) of *The Conditional Sales Act* was fatal to its success. *Advance-Rumely Thresher Company v. Cotton* (1919), 12 Sask. L.R. 327 at 333-4; *The American Abell Engine and Threshing Company, Limited v. Weidenwilt et al.* (1911), 4 Sask. L.R. 388,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

approved. Nothing in the evidence justified a finding that the defendant had waived his right to receive notice of sale. Waiver must be based on fresh contract or estoppel. There could be no question of a fresh contract in this case, and there was no representation by the defendant of any matter of fact that would give rise to an estoppel by matter in pais. 8 Halsbury, 3rd ed., s. 299; 15 Halsbury, 3rd ed., s. 338, quoted with approval. *Charles Rickards Ld. v. Oppenhaim*, [1950] 1 K.B. 616 at 623; *Plasticmoda Societa v. Davidsons (Manchester), Ltd.*, [1952] 1 Lloyd, L.R. 527 at 539, distinguished.

Per Rand and Fauteux JJ., *dissenting*: It was clear in the circumstances of this case that the defendant's conduct constituted a waiver of notice of sale as a condition precedent to the plaintiff's right to claim against the defendant for a deficiency. In the circumstances, to give notice of the sale would have been wholly useless and the law would not compel the doing of a useless act. The defendant's language in conversation with the plaintiff's officers justified the plaintiff in proceeding as it did to dispose of the property without further reference by notice or otherwise to him, and this waiver was in no way affected by s. 22 of *The Conditional Sales Act*.

Statutes—Interpretation—Effect of re-enactment of statute after judicial interpretation—The Interpretation Act, R.S.S. 1953, c. 1, s. 24(4).

Per Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.: The effect of s. 24(4) of the Saskatchewan *Interpretation Act*, which provides that the Legislature shall not, by re-enacting a statute, be deemed to have adopted a construction placed upon the language by judicial decision or otherwise, is merely to remove the presumption that existed at common law. In a proper case, it will still be held that a legislature, in re-enacting a particular provision, did have in mind the construction that had already been placed upon it. *The Canadian Pacific Railway Company v. Albin* (1919), 59 S.C.R. 151; *Orpen v. Roberts et al.*, [1925] S.C.R. 364; *Studer et al. v. Cowper et al.*, [1951] S.C.R. 450 at 454, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Thomson J.[2] Appeal dismissed, Rand and Fauteux JJ. dissenting.

D. G. McLeod and *J. D. Johnstone*, for the plaintiff, appellant.

E. C. Leslie, Q.C., for the defendant, respondent.

W. R. Jackett, Q.C., and *H. A. Chalmers*, for the Attorney General of Canada, intervenant.

Roy S. Meldrum, Q.C., for the Attorney General for Saskatchewan, intervenant.

The judgment of Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ. was delivered by

[1] (1957), 21 W.W.R. 385, 10 D.L.R. (2d) 247.
[2] (1956), 20 W.W.R. 119.

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CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Thomson J.[2] and dismissing the appellant's action.

On April 10, 1953, one Roger Stevenot signed a document headed "Conditional Sale Contract" whereby he agreed to purchase from Contractors Supplies Limited a "Model D Roadster Tournapull" and a "Carryall Scraper", hereinafter together referred to as "the machine", for $17,500. The unpaid balance plus a finance charge all of which Stevenot agreed to pay amounted to $12,741. At the same time Stevenot signed and delivered to Contractors Supplies Limited a document, which formed part of the sheet of paper on which the conditional sale contract was written but which was divided from that contract by a line of perforations and was referred to throughout the proceedings as a promissory note for $12,741. As a matter of convenience I will refer to this last-mentioned document as "the promissory note".

On April 15, 1953, Contractors Supplies Limited accepted the conditional sale contract, assigned it and the promissory note to the appellant for valuable consideration and guaranteed payment of the amount payable under the promissory note.

The appellant contends that, because of unfavourable credit reports on Stevenot, it required an undertaking from Contractors Supplies Limited to repurchase "the paper" (*i.e.*, the conditional sale contract and promissory note) in the event of default by Stevenot in making the deferred payments, continued for 61 days, pursuant to the provisions of para. 5 of an agreement between the appellant and Contractors Supplies Limited (the name of which was at that time Construction Equipment Limited), dated April 20, 1949.

Stevenot paid nothing under the conditional sale contract or the promissory note. On November 26, 1953, the appellant repossessed the machine. A notice was mailed to Stevenot and to Contractors Supplies Limited on November 27, 1953, demanding payment of the balance due on or before December 15, 1953, and stating that unless

[1] (1957), 21 W.W.R. 385, 10 D.L.R. (2d) 247.
[2] (1956), 20 W.W.R. 119.

payment was made within the time mentioned the machine would be sold either at private sale or at public auction and that the appellant intended to look to Stevenot and to Contractors Supplies Limited for any deficiency in the amount realized.

On December 2, 1953, the plaintiff wrote to Contractors Supplies Limited demanding payment of the amount owing and offering on receipt of payment to reassign "the original covering document".

On April 26, 1954, the respondent was appointed liquidator of Contractors Supplies Limited.

On May 21, 1954, the respondent held an auction sale of other machinery and with the concurrence of the appellant the machine in question was offered for sale, but, at the insistence of the appellant, it was made subject to a reserve bid of $10,680.79 (which was the amount then owing under the conditional sale agreement and promissory note) plus auctioneer's commission and the machine remained unsold.

From this point on the respondent took the position that the appellant, by repossessing the machine and insisting on its being made subject to a reserve bid when offered for sale at auction, had made the machine its own and had relieved the respondent from any further liability, and that what the appellant might see fit to do with the machine thereafter was no concern of the respondent.

In July 1954, the appellant advertised the machine, which was then in its possession, for sale in newspapers published in Regina, Calgary and Edmonton. It received some offers, but all of them were for much less than the balance remaining unpaid. From time to time as these offers were received the appellant notified the respondent, but, on each occasion, the latter repeated his contention that he was no longer concerned. In September 1954, the appellant wrote to the respondent demanding payment of the balance which it claimed and in November 1954, this demand was repeated by its solicitors but these demands were ignored.

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On April 22, 1955, the appellant sold the machine to one Wengert for $4,000. A few months later the machine was sold by Wengert for $9,000 but the learned trial judge was not satisfied that the sale to Wengert was an improvident one. There was no counterclaim for damages for breach of the obligation to effect a provident sale and Mr. Leslie referred to the evidence on this branch of the matter only for the purpose of emphasizing the desirability and importance of the requirement as to giving notice of sale contained in s. 9(2) of *The Conditional Sales Act*, R.S.S. 1953, c. 358.

It is common ground that the appellant did not give to the respondent any notice of the sale to Wengert as required by s. 9(2) mentioned above.

On January 12, 1956, the appellant commenced this action claiming $8,286.52, the balance remaining unpaid after crediting the proceeds of the sale to Wengert and taking account of some other items. No question arises as to the computation of this amount.

In the statement of claim the appellant stated three alternative grounds of action, (i) the guarantee of payment of all sums required to be paid by Stevenot contained in the assignment of the conditional sale contract by Contractors Supplies Limited, (ii) the endorsement of the promissory note and the guarantee of payment thereof signed by Contractors Supplies Limited, and (iii) the alleged agreement by Contractors Supplies Limited to repurchase the conditional sale contract pursuant to the agreement of April 20, 1949, and the demand made upon it thereunder.

In the statement of defence a number of matters were pleaded but I find it necessary to deal only with that contained in para. 16, which reads as follows:

> 16. The defendant says further that on or about the 13th day of April, A.D. 1955, the plaintiff sold the said Tournapull Scraper to one Wengert for the sum of $4,000 in cash, and the plaintiff failed to give to the defendant eight days notice of such intended sale, as required by The Conditional Sales Act, R.S.S. 1953, Chapter 358, Section 9, but gave it no notice thereof, and the defendant says that as a result thereof the plaintiff is not entitled to recover from the defendant the amount claimed in the amended Statement of Claim, or any part thereof.

The appellant delivered a reply paras. 2, 4 and 5 of which are as follows:

2. Alternatively, in so far as the claim of the Plaintiff based upon the Equipment Plan Retail Agreement [*i.e.*, the agreement dated April 20, 1949, referred to above] is concerned the Plaintiff was not obliged or required to give any notice to the Defendant and is not precluded by any failure to give notice.

* * *

4. In the further alternative the Defendant having on divers occasions advised the Plaintiff that the Defendant had no further interest in the Tournapull Scraper, the Defendant is now precluded from asserting that the Defendant was entitled to notice of sale and is estopped.

5. In the further alternative, the Defendant consented to the sale or waived any right which the Defendant might have had to receive notice of the intended sale.

The learned trial judge was of opinion that the appellant's failure to give notice to the respondent of the sale to Wengert would have been a complete answer to the appellant's action but held that the respondent had waived the right to receive notice, and gave judgment for the appellant.

The Court of Appeal were unanimous in holding that there had been no waiver by the respondent of his right to receive notice of the sale to Wengert and that the appellant's failure to give that notice was fatal to its success. They accordingly allowed the appeal and dismissed the action.

The guarantee of payment contained in the assignment of the conditional sale contract reads as follows:

In consideration of your purchase of the within contract, the undersigned hereby unconditionally guarantees, jointly and severally with the Purchaser, payment of all deferred payments as specified therein, and covenants in default of payment of any instalment or performance of any requirement thereof by Purchaser, to pay to Canadian Acceptance Corporation Limited, upon demand, the full amount remaining unpaid. The undersigned further specially represents and warrants that the title to the said property was at the time of the sale, and is now vested in the undersigned, free of all taxes, encumbrances, charges, privileges, pledges and liens, and that the undersigned has the right to assign such title, and further warrants that the full amount of the cash payment and/or trade-in as represented, has actually been made by the Purchaser. The liability of the undersigned shall not be affected by any settlement, extension of credit, or variation of terms of the within contract effected with the Purchaser or any other person interested, nor by any act or omission of Canadian Acceptance Corporation Limited in relation to any security held to secure this debt including the lien herein, or in making collections, insurance adjustments, repossession or resales, or in effecting filing or

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recording of the documents or any renewals thereof and the undersigned shall remain liable even if the security and/or right of action against the principal debtor has ceased to exist or be available. The undersigned agrees to be bound by each and every clause contained in the said contract as if it were recited at full length in this assignment.

The contract itself, by every clause of which the assignor agrees to be bound, contains terms which, on their face, appear to waive the notice of sale required by ss. 8 and 9 of *The Conditional Sales Act,* but, if that is their effect, those terms are rendered null and void by s. 22 of the Act which reads as follows:

> 22. Subject to subsection (2) of section 20 [which has no application in the case at bar], every agreement or bargain, verbal or written, express or implied, that this Act or any provision thereof shall not apply or that any benefit or remedy provided by it shall not be available, or which in any way limits, modifies or abrogates or in effect limits, modifies or abrogates any such benefit or remedy, shall be null and void.

It may also be observed that the contract itself provides:

> . . . it is understood and agreed that any provision of this contract prohibited by law of any Province shall, as to that Province, be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract.

Sections 7, 8, and 9 of *The Conditional Sales Act* read as follows:

> 7. If the seller or bailor or his assignee retakes possession of the goods, he shall retain the same in his possession for at least twenty days and the buyer, bailee or any one claiming by or through or under the buyer or bailee, may redeem the same upon payment of the amount actually due thereon and the actual necessary expenses of taking possession.
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> 8. The goods shall not be sold without eight days' notice of the intended sale being first given to the buyer or bailee or his successor in interest. The notice may be personally served or may, in the absence of such buyer, bailee or his successor in interest, be left at his residence or last place of abode or may be sent by registered letter deposited in the post office at least ten days before the time when the said eight days will elapse, addressed to the buyer or bailee or his successor in interest at his last known post office address in Canada. The said eight days or ten days may be part of the twenty days mentioned in section 7.
>
> 9. (1) Where the seller or bailor assigns his interest in the contract of sale or bailment and agrees with the assignee to be liable for any sums due under the contract in default of payment thereof by the buyer or bailee, and the assignee retakes possession of the goods, he shall, within forty-eight hours thereafter, give notice thereof to the assignor. The notice may be personally served or may, in the absence of the assignor, be left at his residence or last place of abode or may be sent by registered letter deposited in the post office within the said forty-eight hours addressed to the assignor at his last known post office address in Canada.

(2) The assignee shall not sell the goods without first having given eight days' notice of the intended sale to the assignor. The notice may be given in the same manner as the notice provided for by section 8 and the said eight days may be part of the twenty days mentioned in section 7.

I agree with the conclusion of the Court of Appeal that the action of the appellant in selling the machine without giving to the respondent the notice required by s. 9(2) destroyed the right of the former to recover from the latter the balance remaining unpaid under the terms of the contract. It was so held in the judgment of the Court of Appeal in *Advance Rumely Threshing Company v. Cotton*[1], which approved and followed the judgment of Lamont J. in *The American Abell Engine and Threshing Company, Limited v. Weidenwilt et al.*[2]. While these cases arose under s. 8 the reasoning on which they proceeded is equally applicable to s. 9(2). In my opinion, the law is accurately stated in the following passage from the reasons of Lamont J.A. in the *Advance-Rumely* case, concurred in by Haultain C.J.S. and Elwood J.A., which appears at pp. 333-4:

> The plaintiffs are suing for the balance of the price of the two machines which were purchased under two separate contracts. To be entitled to the purchase-price a vendor must, generally speaking be prepared to hand over the articles purchased on payment thereof. Here, the plaintiffs admit that they are not in a position to hand over to the defendants the machinery purchased, these being now the property of third persons. To be entitled to judgment for the balance of the purchase-money, therefore, the plaintiffs must show that, notwithstanding their inability to hand over the purchased articles, they are entitled to the purchase-price. This they can do by showing that the defendants agreed that under certain circumstances they could retake possession of the purchased machines and resell them, and that the defendants would be liable for the balance. If they establish such an agreement and the existence of the circumstances giving them the right to retain possession and to resell, and establish that the resale, which was in fact made, was the one they were empowered by the agreement to make, they would be entitled to recover the purchase-money still unpaid.
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> * * *
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> By failing to prove compliance with the Statute, the plaintiffs have failed to prove that they are entitled to the balance of the purchase-money.

Had I been doubtful of the correctness of these decisions I would have thought that we should follow them in view of the circumstances that they have for many years been treated as stating the law of Saskatchewan on this matter

[1] 12 Sask. L.R. 327, [1919] 2 W.W.R. 912, 47 D.L.R. 566.
[2] (1911), 4 Sask. L.R. 388, 1 W.W.R. 321, 19 W.L.R. 730.

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and that since they were decided s. 8 has been re-enacted without any material alteration in R.S.S. 1930, c. 243, R.S.S. 1940, c. 291, and R.S.S. 1953, c. 358. In this connection I have not overlooked s. 24(4) of *The Interpretation Act*, R.S.S. 1953, c. 1, which provides:

> (4) The Legislature shall not, by re-enacting an Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise been placed upon the language used in such Act or enactment or upon similar language.

The effect of this subsection was considered by Kerwin J., as he then was, in *Studer et al. v. Cowper et al.*[1] After referring to *The Canadian Pacific Railway Company v. Albin*[2] and *Orpen v. Roberts et al.*[3], he continued at p. 454:

> In view of these decisions, it must now be taken that subsection 4 of s. 24 of the Saskatchewan Interpretation Act, 1943, c. 2, which is the same as the ones referred to in the two cases mentioned, merely removes the presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it.

It has already been pointed out that the learned trial judge took the same view of the law on this point as did the Court of Appeal but differed from them as to whether the respondent had waived the right to receive notice.

I agree with the conclusions of the Court of Appeal that, on the facts disclosed in the evidence, there was no waiver by the respondent of his right to receive the notice of the sale to Wengert, and that consequently it is unnecessary to consider whether had there been such a waiver in fact its effect would have been nullified by s. 22 of *The Conditional Sales Act*.

Taking the view of the evidence most favourable to the appellant, it appears that on each occasion when the appellant communicated with the respondent with regard to the offers received in 1954 for the machine, the latter took the position that the former, by its conduct in repossessing the machine and insisting on its being made subject to a reserve bid when offered for sale, had made

[1] [1951] S.C.R. 450, [1951] 2 D.L.R. 81.
[2] 59 S.C.R. 151, 49 D.L.R. 618, [1919] 3 W.W.R. 873.
[3] [1925] S.C.R. 364, [1925] 1 D.L.R. 1101.

the machine its own and lost its right to recover the balance of the price from the respondent and that, consequently, the machine had become the appellant's "baby" and was no longer any concern of the respondent.

I agree with the statement in 8 Halsbury, 3rd ed. 1954, s. 299, p. 175, that waiver is based on fresh contract or estoppel and that compliance with a particular stipulation in a contract may be waived by agreement or conduct. In the case at bar there is no question of a fresh contract.

The general rule as to estoppel by matter in pais is satisfactorily stated in 15 Halsbury, 3rd ed. 1956, s. 338, p. 169, as follows:

> Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

The conduct of the respondent relied on as creating an estoppel did not amount to a representation of any matter of fact. It was an assertion of the opinion of the respondent that the legal result flowing from the undisputed facts known to both parties was that the respondent was released from further liability under the contract in question. I incline to the view that the respondent's opinion was erroneous and it is clear that the appellant so regarded it. There seems to be no ground for the suggestion that the appellant was misled.

For the appellant reliance was placed on the following statement of Denning L.J., as he then was, in *Charles Rickards Ld. v. Oppenhaim*[1]:

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

[1] [1950] 1 K.B. 616 at 623, [1950] 1 All E.R. 420.

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In *Plasticmoda Societa per Azioni v. Davidsons (Manchester), Ltd.*[1], the same learned lord justice said:

> If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.

It may be, as suggested in 15 Halsbury at p. 175, that the doctrine set out in these passages has been too widely stated; but if it is applied as stated to the facts of the case at bar it does not appear to me to assist the appellant. I can find nothing in the evidence to indicate that the respondent gave any promise or assurance or made any representation to the appellant that he, the respondent, would regard himself as continuing to be bound by the term of the contract requiring him to pay the balance of the purchase-price remaining unpaid after credit had been given for the proceeds of a sale of the repossessed machine even if the appellant should make a sale without giving the notice required by the statute. The respondent made it clear to the appellant that he was taking the position that any obligation which would otherwise have rested upon him to pay that balance had been brought to an end by the appellant's conduct. The appellant rejected this view and continued to assert its right to be paid any balance remaining unpaid after a sale. If it wished to maintain this position it was, in my opinion, bound to fulfil the statutory condition precedent of giving notice.

It was suggested during the argument that to hold that the appellant was bound to give the statutory notice would be contrary to the principle which is stated in the following terms in Williston on Contracts, rev. ed. (1936), vol. 3, s. 698A, pp. 2008-9:

> It is an old maxim of the law that it compels no man to do a useless act, and this principle was applied in the time of Coke, if not before, to the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition and the promisor becomes liable without such performance. So if before the time for the performance of a condition by a promisee, the promisor leads the promisee to stop performance by himself manifesting an intention not to perform on his part, even though the condition is complied with, "it is not necessary for the first to go further and do the nugatory act."

[1] [1952] 1 Lloyd, L.R. 527 at 539.

In my opinion the passage cited does not assist the appellant in the circumstances of the case at bar. When the respondent made default in payment of the purchase-price the appellant no doubt became entitled to treat the respondent as having broken the contract and to pursue the remedies to which it was entitled thereunder. One of these was to repossess and sell the machine and, having done so, to enforce payment by the respondent of the balance of the price remaining unpaid. It was upon the exercise of this particular remedy, the right to which could arise only after breach of the contract by the respondent, that the statute imposed the duty of giving notice. I cannot assent to the proposition that the definite repudiation of a contract by one party enables the other not merely to proceed immediately to enforce the remedies to which he becomes entitled upon breach, but also to disregard in the pursuit of those remedies the conditions which the law imposes on their exercise. I have proceeded throughout on the assumption that the right to notice might be waived by the respondent, but, for the reasons I have endeavoured to state above, I am of opinion that his statements did not amount to a waiver of notice. While the analogy may not be complete, it would, I think, be a surprising doctrine that the unequivocal refusal by a mortgagor to pay the mortgage moneys should transform a power of sale with notice contained in the mortgage into a power of sale without notice.

In so far as the appellant's claim is based on the promissory note, it is clear that it took the note with full knowledge of the terms of the contract in pursuance of which it was given and that, as between the parties, the appellant having by its conduct lost its right to sue for the balance of the price under the contract is in no higher position by reason of holding the note. Indeed during the argument it was conceded that, in the circumstances of this case, the promissory note was bound up with the other dealings between the parties in regard to the machine. For these reasons it becomes unnecessary to decide whether the document to which I have referred throughout these reasons as "the promissory note" was indeed a promissory note, and the questions as to the interpretation and constitutionality of *The Limitation of Civil Rights Act*, R.S.S. 1953, c. 95,

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which counsel for the Attorney General of Canada and the Attorney General for Saskatchewan were prepared to argue do not require decision.

The term of the agreement of April 20, 1949, upon which the appellant relies reads as follows:

> 5. As to the paper which you [*i.e.*, the appellant] purchase from us [*i.e.*, Contractors Supplies Limited] on the basis of our agreeing to repurchase in event of default by the obligor, our obligation shall be to repurchase any such paper on your request made at any time after default by the obligor in the payment of any instalment continuing uncured for 61 days or more or if we breach any warranty herein or in the paper, assignment, endorsement, or any provision of any other agreement as to such paper, and we will pay you an amount equal to your original investment plus uncollected accrued interest and any expenses of collection incurred by you after default by us, less all payments received by you on said paper on account of principal.

The evidence as to whether this agreement of April 20, 1949 was made applicable to the purchase by the appellant of the conditional sale contract and promissory note with which we are concerned is conflicting. On the assumption that it was made applicable, it does not appear to me to assist the appellant. I agree with the view of Procter J.A., that the appellant's right of action on the failure of the respondent to perform this agreement would have been for specific performance or damages in lieu thereof, that the appellant as a condition of its right of recovery would have had to show that it was in a position to assign "paper" evidencing some valid and enforceable right and that as the appellant had parted with the machine and, as a result of its own acts, no longer had any enforceable rights under the contract against either Stevenot or the respondent it ceased to have any "paper", within the meaning of the agreement, to assign.

I would dismiss the appeal with costs. There should be no order as to costs for or against the intervenants.

The judgment of Rand and Fauteux JJ. was delivered by

RAND J. (*dissenting*):—The facts in this appeal have been stated by my brother Cartwright. On the guarantee of payments under the lien note agreement, I find the respondent liable subject to the point of waiver of the notice of sale on which I differ from his conclusion, and it becomes necessary to examine the law applicable to that matter in some detail.

Repudiation by one party to a contract is a declaration that he will not thereafter perform any part of what he has promised to do. That promise may include not only substantive acts which make up the material consideration of the bargain but also what may be called "procedural" acts such as provision for arbitration or the giving of a notice as in the present case, and the question may arise of what has or has not been repudiated. A repudiation may be accepted and the promisee may elect any one of three courses of action. He may, for example, rescind the agreement, that is, declare it dissolved *ab initio* and if in that situation there is a basis for a claim on a *quantum meruit* that action lies; or he may elect to treat the contract as terminated or determined as to all further performance and bring action at once for damages; or he may await the time for fulfilment and claim damages as for default of actual performance. In the last case the repudiation in turn furnishes to the promisee an excuse for not proceeding with his performance while the repudiation continues and this applies to any part of a performance, whether a condition precedent to or concurrent with performance by the promisor. In this the distinction must be taken between furnishing such an excuse and creating a cause of action against the repudiating promisor. The excuse from performance may be related to the duty of the innocent party to mitigate damages, immediate or prospective; if the promisee should proceed with his performance he would, in many if not most cases, violate that rule. But situations might occur when an immediate stoppage in performance would, on the other hand, augment damages and in that case the completion of what was undertaken may be called for.

That an individual intended to be benefited by a notice or other procedural act can waive it is affirmed by *Great Eastern Railway Company v. Goldsmid et al.*[1], in which at pp. 936-7 the Earl of Selborne L.C. states the principle thus:

> It [a royal grant] is a jus introductum for the particular benefit of the city of London, and it falls within the general principle of law, "Unusquisque potest renunciare juri pro se introducto;" a principle not only of ancient but also of modern application, applicable even where Acts of Parliament have been passed of a much more public character. In such cases, when the rights given have been only private rights, unless there

[1] (1884), 9 App. Cas. 927.

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has been also in the Act of Parliament a clause excluding a power of contract, it has been held that by contract or by voluntary renunciation such rights, as far as they are personal rights, may be parted with and renounced.

In *Selwyn v. Garfit*[1], Bowen L.J. at pp. 284-5 deals with "waiver":

> What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shewn that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered.

In *The City of Toronto v. Russell*[2], the Judicial Committee dealt with the failure to give notice to the owner of the sale of land for taxes as required by *The Assessment Act* and at p. 500 it is dealt with:

> But the notice, by warning the owner of what is about to take place, can only serve the purpose of enabling him either (1.) to oppose the sale as illegal or improper; or (2.) to attend the sale and bid at it, and see that it is regularly conducted; or (3.) to redeem his land by payment of the taxes due. These being things entirely for his own benefit, he can undoubtedly waive the notice: *Great Eastern Ry. Co. v. Goldsmid* (1884), 9 App. Cas. 927, at p. 936. The question is, Has he waived it? In other words, is there evidence from which it may fairly be inferred that he consented to dispense with the notice?

Following this he adds the language of Bowen L.J. which I have quoted.

The ground for this legal precept is the futility, in the circumstances, of requiring performance. In the face of repudiation it would be a useless act and the Courts have universally accepted the dictate of common sense that an act that will have no consequence or significance is not to be required of any person.

The distinction between the waiver of a condition precedent and the giving rise to a cause of action is strikingly exemplified in *Ripley v. M'Clure*[3]. The plaintiff, a merchant of Liverpool, agreed to sell to the defendant, a merchant in Belfast, who agreed to buy, on arrival, a one-third interest in a cargo of tea. Before its arrival the defendant repudiated and in the result the tea was not tendered at Belfast. It was held that an anticipatory repudiation was not a breach of contract but that, unretracted, it evidenced a continuing refusal, which

[1] (1888), 38 Ch. D. 273. [2] [1908] A.C. 493.

[3] (1849), 4 Exch. 345, 154 E.R. 1245.

waived the condition precedent of delivery and created a liability in the defendant for damages. The judgment was delivered in 1849 which was prior to the rule now accepted that an anticipatory repudiation may be treated as an immediate breach, but that fact serves to emphasize the distinction here made between that and a waiver. At pp. 359-60 Parke B. uses this language:

> By an express refusal to comply with the conditions of the contract of purchase, the defendant must be understood to have said to the plaintiff, "You need not take the trouble to deliver the cargo to me, when it arrives at Belfast, *as purchaser,* for I never will become such;" and this would be a waiver, *at that time,* of the delivery, and, if unretracted, would dispense with the actual delivery after arrival.

Repudiation giving rise to the analogous suspension of performance by the promisee is illustrated in *Cort and Gee v. The Ambergate, Nottingham and Boston and Eastern Junction Railway Company*[1]. The contract was for the manufacture and supply of goods from time to time to be delivered, and the purchaser, having accepted and paid for a portion of them, gave notice to the vendor not to manufacture any more as he would not accept them; the vendor, without manufacturing and tendering, was held entitled to maintain proceedings for damages. On the allegation that the vendor was at all times ready and willing to perform his part, Lord Campbell at pp. 143-4 had the following to say:

> The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract . . . We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants.

And on the extent of the repudiation:

> If they had said, "make no more for us for we will have nothing to do with them," was not that refusing to accept or receive even according to the contract?

The same rule was applied in *Braithwaite v. Foreign Hardwood Company*[2]. There the purchasers of rosewood to be delivered in two lots repudiated and declared their refusal to accept delivery. Tender of both lots was later

[1] (1851), 17 Q.B. 127, 117 E.R. 1229.
[2] [1905] 2 K.B. 543.

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made and refused. Subsequently it appeared that the first lot was in part of defective material, which would have justified a rejection. At trial Kennedy J. made an allowance in the damages for this deficiency in quality but held the repudiation to have dispensed with the condition of quality otherwise attaching to the tender, and this conclusion was affirmed on appeal. At pp. 551-2 Collins M.R. observes:

> In the present case, after there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment; but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract and refused to be bound by it. In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleadings, it would have been a good replication by the plaintiff to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any instalment if tendered to them.

In *Jureidini v. National British and Irish Millers Insurance Company, Limited*[1], an insurance company repudiated a fire policy *in toto* on the ground of fraud and arson, and it was held that the denunciation of the claim "on a ground going to the root of the contract" precluded the company from pleading an arbitration clause expressly made a condition precedent to any right of action on the policy. Viscount Haldane L.C. expressed himself at p. 505 in these words:

> Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

Lord Dunedin, at p. 507, qualified his reasons:

> Personally I should rather like to reserve my opinion as to what would have been the effect if the respondents, instead of pleading as they did, had pled in this way: "We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not," and had gone on to say, "but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration". I should like to reserve my opinion on whether they might have said so with effect.

[1] [1915] A.C. 499.

Lord Atkinson considered the arbitration clause, which went only to the amount of loss sustained, as not having application when a repudiation was made on the grounds taken. Lord Parker of Waddington concurred without reasons and Lord Parmoor, on the point that the respondents had raised an issue on which, if they had succeeded, the claimants would have forfeited all benefit under the policy.

This decision, with two others, was considered in *Heyman et al. v. Darwins Limited*[1], in which also an arbitration clause was involved. Its terms were, however, wider than in *Jureidini* and were held to include the dispute which had arisen. The various reasons dealt with questions of the extent generally of repudiation, whether it went merely to substantive performance or whether it embraced every promise to which the promisor had bound himself. In the latter case, with such a clause as was then being considered, the special characteristic is that we have the only specific performance of a contract enforced at law as distinguished from equity; that is, the plaintiff, in the discretion of the Court, will have his action suspended pending his resort to arbitration for a precedent determination. But such a remedy is obviously inapplicable to a provision for notice and the judgment does not in any manner or degree affect the waiver of a condition precedent other than that of an arbitration clause. The distinction between the *Heyman* case and that of *Jureidini* lies in the fact, pointed out by Viscount Simon, that there was no such repudiation as in the latter case, that repudiation was denied. If the denunciation embraces the entirety of the contract it is difficult to see on what ground the defendants can, in any event, insist on the arbitration clause; the innocent party would be entitled to have it enforced in his favour, but why, after the acceptance of a repudiation including the arbitration clause, a defendant can, after action brought, revoke it as to that clause but not others would seem to call for more justification than the dicta in the case furnish.

The rule of excuse from performance by repudiation is further illustrated by *British and Benningtons, Limited v. North Western Cachar Tea Company, Limited et al.*[2];

[1] [1942] A.C. 356, [1942] 1 All E.R. 337. [2] [1923] A.C. 48.

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and it is well summed up in Salmond & Winfield, Law of Contracts, 1927, at p. 273:

> The meaning of a repudiation is: "I do not intend to perform my part of the contract and therefore I do not require you to perform your part either, even though performance of your part is a condition precedent to my obligation to perform mine."

The same result would follow in the case of notice under the *Bills of Exchange Act*. In Chalmers' Bills of Exchange, 12th ed. 1952, at p. 156, among the examples given is this:

> (2) The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice.

The authority given is *Brett v. Levett*[1], where evidence was admitted to show an intimation by the drawer that the bill would not be paid at maturity, even though the waiver took place after an act of bankruptcy had been committed.

The question has been given its fullest examination by Professor Williston in his work on Contracts. In vol. 3, rev. ed. 1936, s. 698A, pp. 2008-9, he gives the general statement:

> It is an old maxim of the law that it compels no man to do a useless act, and this principle was applied in the time of Coke, if not before, to the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition and the promisor becomes liable without such performance. So if before the time for the performance of a condition by a promisee, the promisor leads the promisee to stop performance by himself manifesting an intention not to perform on his part, even though the condition is complied with, "it is not necessary for the first to go further and do the nugatory act". The principle finds application in a great variety of contracts. It applies to conditions, the performance of which is not the real exchange for the thing promised. For instance, if an insurance company indicates that it is not going to pay an insurance loss in any event, the insured is excused from compliance with a condition requiring proofs of loss or arbitration or other preliminary acts.

He proceeds to deal with the excuse for continuance of performance of substantive matter and in the course of a number of sections touches upon many aspects of waiver, excuse from performance, breach of contract and other analogous matters exhibited in a multiplicity of cases in the American Courts. The statement is supported by the overwhelming weight of judicial opinion in them to the degree that makes it unnecessary to cite particular authorities.

What, then, was the extent of the repudiation here? That, to me, is established beyond any doubt by the evidence of the respondent:

[1] (1811), 13 East 213 at 214, 104 E.R. 351.

A. I told him, after he said the machine could be repaired, he had the information that the machine could be repaired for $3,000 and sold for $2,000 more than they had against it, I told him I thought it was very good business to do that, that it would be much better for us to be quarrelling over $1,000 than over $10,600.

Q. Yes, and did you go further than that and say—was there any discussion about who would pay for the repairs? A. Well, I think he may have asked me to pay for these repairs but I said . . .

Q. You refused? A. I said the machine was "your baby", that is the words I used.

Q. And I would take it, Mr. Fisher, that a fair interpretation of the words "it is your baby" is that as far as you were concerned you had nothing further to do with that machine? A. It was out of my possession then, I had nothing to do with it, no.

Q. Well, that was the stand you were taking? A. That is right.

Q. You were taking the position that you had nothing more to do with the Stevenot machine or the Stevenot account?

BY THE COURT: Q. What is your answer to that question? A. Yes. I had nothing more to do with it; I wanted nothing more to do with it.

BY MR. MCLEOD: Q. And you made it perfectly clear to Mr. Hillis . . . A. Yes.

* * *

Q. And then Mr. Hillis in July got in touch with you again and you again told him you weren't interested in any way? A. That is right, July or August, in there some time.

* * *

Q. And you took again the same position as you had previously taken? A. That is right.

Q. That is to say, that you weren't in any way concerned about the matter at all? A. That is right.

* * *

Q. And what did they do with it, do you know? A. I don't know.

Q. Well, did you have anything more to do with this piece of equipment? A. I have never seen the equipment again.

Q. But that isn't what I asked you. A. No, I had nothing more to do with it. I might inject this: At one time Mr. Hillis phoned me subsequent to that July conversation that he had a bid of $7,000 on the machine. I told him, "Well, it is your baby; do what you like."

Q. What did you mean by that? A. Well, he owned it.

Q. And he could do with it as he pleased? A. Yes.

Q. That was your stand on that? A. Yes, that was my stand.

Q. In any event, can you answer this question: Did the fact that there was a $4,500 bid come to your attention at that time? A. I heard of that, yes.

Q. What did you do about that? A. I didn't do anything.

I cannot agree that a waiver in its widest sense is not declared by these statements, language which justified the appellant in proceeding as it did to dispose of the property without further reference, by notice or otherwise, to the respondent; and the waiver was in no way affected by s. 22 of *The Conditional Sales Act,* R.S.S. 1953, c. 358. What that section prohibits is, by agreement, excluding

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or purporting to exclude any provision of the Act from application to the contract; there was no such agreement here; waiver is not, in that sense, agreement; it is unilateral renunciation made by the party protected by the statute.

I would, therefore, allow the appeal and restore the trial judgment with costs in the Court of Appeal and in this Court.

Appeal dismissed with costs, RAND *and* FAUTEUX JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Pedersen, Norman & McLeod, Regina.

Solicitors for the defendant, respondent: MacPherson, Leslie & Tyerman, Regina.