HUMPHREY MOTORS LIMITED (PLAINTIFF) ..... APPELLANT; 1935 * Feb. 25,26. * April 15.

AND

JOSEPH ELLS (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Conditional sale—Default in payment—Repossession and resale by vendor—Question of vendor's right to sue for deficiency—Conditional Sales Act, R.S.N.B., 1927, c. 152, s. 10.

Appellant sold to respondent a motor truck on a conditional sale agreement, and took as collateral a promissory note for the amount of the deferred payments. The agreement provided that the title to the truck was to remain in the vendor's name until payment in full of the purchase price and interest. The agreement did not expressly provide for the purchaser to have possession nor for the vendor to retake possession and resell, or to recover deficiency on resale. At the time of the agreement possession was delivered to respondent. On subsequent default in payment, appellant retook possession (apparently with respondent's expressed or implied consent) and resold the truck (after fulfilling the procedure required by s. 10 of the *Conditional Sales Act* of New Brunswick), realizing an amount less than that owing on the note, and sued on the note for the deficiency.

Held: Appellant's resale of the truck had the effect of rescinding or terminating the contract, and of relieving respondent from further obligation as to the price (*McEntire* v. *Crossley*, 64 L.J.P.C. 129; *Sawyer* v. *Pringle*, 18 Ont. A.R. 218), and appellant could not recover.

Sec. 10 of the *Conditional Sales Act*, R.S.N.B., 1927, c. 152, does not create by implication a right in the seller to look to the buyer for a deficiency; s. 10 (3) merely limits and regulates the exercise of such a right where the right exists independently of the statute. The Act must not be regarded as a complete code; nor construed as repealing the common law as to the effect of a resale in a case such as the present one. Nor did the terms of the agreement in question justify the application of the "mortgage theory" (by regarding the conditional sale as in effect a legal mortgage and governed by the law relating to mortgages) so as to give a right to resell and look to the buyer for any deficiency (*C. C. Motor Sales Ltd.* v. *Chan* [1926] Can. S.C.R. 485, distinguished).

The court could not treat the action as one for damages for breach by respondent of his contract to purchase; and could not, therefore, regard the amount of the deficiency as the measure of damages which appellant might have obtained had he sued on that ground. The promissory note, on which the action was brought, being collateral to the agreement, was rescinded as between the parties by the rescission of the agreement.

Judgment of the Supreme Court of New Brunswick, Appeal Division (8 M.P.R. 57), affirmed.

* PRESENT:—Duff C.J. and Lamont, Cannon, Davis JJ. and Dysart J. (*ad hoc*).

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APPEAL by the plaintiff (by special leave) from a judgment of the Supreme Court of New Brunswick, Appeal Division, which (1) had allowed an appeal by defendant from an order of the Judge of the Westmorland County Court in favour of the plaintiff in an action for the balance claimed on a certain promissory note (made by defendant as collateral to a certain conditional sale agreement for sale by plaintiff to defendant of a motor truck). The material facts of the case and questions in issue are sufficiently stated in the judgment now reported (except that it may be further mentioned that before reselling the truck in question the plaintiff fulfilled the procedure required by s. 10 of the *Conditional Sales Act* of New Brunswick) and are indicated in the above headnote. The appeal was dismissed with costs.

J. L. Ralston K.C. and *J. E. Friel* for the appellant.

G. F. G. Bridges for the respondent.

The judgment of the Court was delivered by

DYSART J. (*ad hoc*)—This is an appeal from the Supreme Court of New Brunswick, Appeal Division, reversing a judgment of the County Court of Westmorland in favour of the appellant (plaintiff) in an action for the balance of the sale price of a motor truck. The appeal involves the interpretation and effect of a conditional sale agreement, and of the *Conditional Sales Act,* R.S.N.B. 1927, cap. 152.

The facts are simple. On October 15, 1932, the respondent purchased a motor truck from the appellant upon the terms and conditions set forth in a conditional sale agreement which was styled "Retail Buyers' Order and Agreement." The price of the truck, $815, was made payable, as to part in the equivalent of cash, and as to the balance, namely, $565, in consecutive monthly instalments of $25 each with interest. A promissory note payable in one

(1) 8 M.P.R. 57; [1934] 3 D.L.R. 140. The formal judgment of the Appeal Division merely reversed an order in the County Court allowing plaintiff to sign summary judgment, and permitted defendant to defend. On proceedings taken subsequently to this judgment (and for the purpose of enabling plaintiff to prosecute an appeal from a final judgment), final judgment was entered in the County Court in favour of the defendant, from which plaintiff appealed to the Appeal Division of the Supreme Court of New Brunswick, and it was from the dismissal of this latter appeal that the present appeal was, in form, brought.

month, but renewable monthly on payment of the instalments provided for in the agreement, was also given by the buyer as collateral to the agreement. Among the "terms and conditions" of the contract is the following:

> It is expressly understood and agreed that the title to the motor vehicle is to remain in Vendor's name until the full amount of purchase price and interest and other charges have been paid.

The truck was immediately given into the possession of the buyer, a feature of the transaction not provided for by the written contract. A few months later, the buyer being then in default in his payments, the seller retook possession of the truck, resold it for less than the amount owing on the note, and then, in an action on the note, obtained judgment for the deficiency, about $300. This judgment was reversed on appeal, and from that reversal the present appeal is taken.

The case is of importance not because of the amount involved, but because it is in the nature of a test case.

The sole issue is whether or not the seller, having repossessed and resold the truck with the acquiescence of the buyer, has the right to sue for the deficiency on the resale. The answer to that question depends upon the interpretation and effect of the contract which the parties entered into. No such right is conferred by the written contract, certainly not in express terms. Apart from the provision already quoted, wherein the title is reserved to the seller until full payment of the price, the agreement contains only one provision which has been thought capable of conferring such right. The provision is:—

> I agree to pay the balance due and accept the motor vehicle mentioned in this order and agreement within forty-eight hours after I have been notified that it is ready for delivery. Failure on my part to comply, forfeits my deposit as liquidated damages for your expense and efforts, and permits you to otherwise dispose of the motor vehicle without any liability to me whatsoever.

This provision, like some others in the document, is not applicable to the sale which the parties here intended, but is designed to cover a case where the buyer orders a motor vehicle which the seller has not then on hand or at least not then ready for delivery, and which he is therefore to deliver or tender for delivery at some then future date. In the sale as arranged in the present case, the truck was on hand at the time the bargain was entered into, and was immediately delivered to the buyer. The presence of

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the provision in the contract is due to the evident fact that the contract was drawn up on a general "form" designed to cover different kinds of sales with apt provisions for all of them.

Apart from that clause there is not a word in the contract expressly giving the seller the right, whether on default of payment or other breach of condition by the buyer, to retake possession or to resell or to recover any deficiency on a resale. There is not even a provision that possession should pass to the buyer while title remains with the seller, and consequently, there was no need to provide for the seller's retaking of possession.

The act of retaking possession was evidently acquiesced in or consented to by the buyer and so the seller's right to repossess was never questioned nor determined. It is important, however, that the right, if any, be now ascertained and declared because, as we shall presently see, if possession was retaken under the provisions of the contract, then section 10 of the *Conditional Sales Act* will apply to it, whereas if possession was not retaken under the contract, but under some other right, the section will not apply.

When the buyer defaulted in his payments, the seller retook possession as a matter of fact, but the default itself did not authorize such repossession. According to the contract, the seller's only protection or security for the price was to hold the title until payment was made. In these circumstances, the retaking of possession was a tortious act on the part of the seller unless the retaking was effected with the consent expressed or implied of the buyer, as it apparently was. Once the seller had thus resumed possession, and there being no provision in the contract entitling the buyer to have possession, the seller was entitled to hold it as an incident of ownership of the truck. The situation then was that the seller, having both title and possession, and the buyer being under an obligation to pay the price by instalments, the agreement was an ordinary executory contract for future sale, and the seller had no right to recover the price unless he delivered or was ready and willing to deliver the truck. The resale of the truck had the effect of rescinding or terminating the contract, and of relieving the buyer from further obligation in regard to

the price. *McEntire* v. *Crossley*, a decision of the House of Lords (1); *Sawyer* v. *Pringle* (2). There are other decisions in some of our provincial courts to the same effect.

Turning now to the *Conditional Sales Act*. Section 2 (*b*) defines a conditional sale in terms which clearly include the transaction in this case as it stood immediately prior to the default. It reads in part as follows:

2. (*b*) "Conditional sale" means (*a*) any contract for the sale of goods under which possession is or is to be delivered to the buyer and the property in the goods is to vest in him at a subsequent time upon payment of the whole or part of the price or the performance of any other condition;

Section 10 of the Act will have to be set out more fully.

10. (1) Where the seller retakes possession of the goods pursuant to any condition in the contract, he shall retain them for twenty days, and the buyer may redeem the same within that period by paying or tendering to the seller the balance of the contract price, together with the actual costs and expenses of taking and keeping possession, or by performance or tender of performance of the condition upon which the property in the goods is to vest in the buyer and payment of such costs and expenses; and thereupon the seller shall deliver up to the buyer possession of the goods so redeemed.

(2) When the goods are not redeemed within the period of twenty days, and subject to the giving of the notice of sale prescribed by this section, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period.

(3) If the price of the goods exceeds thirty dollars and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer.

[(4), (5) and (6) relate to the notice, its contents, and when it may be given.]

(7). This section shall apply notwithstanding any agreement of the contrary.

This section is in the same terms as the corresponding section in the British Columbia Act. The corresponding provisions in the Ontario Act do not include the right of resale expressed by subsection (2) and refer to cases where possession is retaken for "breach of condition" instead of "pursuant to any condition in the contract."

It is argued by the appellant that this Act is a code, and should, therefore, be interpreted in a liberal, comprehensive way as though it were replacing common law, and stating anew the entire body of law relating to conditional sales. This argument follows that of the late Mr. Justice Orde in the Ontario Court of Appeal in the case of *Harris*

(1) (1895) 64 L.J.P.C. 129. (2) (1891) 18 Ont. A.R. 218.

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v. *Tong* (1). On the other hand, the respondent urges that the Act was designed to correct certain defects in the common law and to prevent frauds on the public, growing out of transactions in which possession and apparent ownership of a chattel are committed to one person while the title and real ownership remain in another; and that, having corrected these evils, the Act leaves the rest of the law untouched.

The latter view commends itself to us as quite sound and consistent with the text of the Act. The first few sections of the Act are designed evidently to protect the public against the evils mentioned; sections 9 and 10 are designed to protect the buyer and to give certain rights to the seller. The Act does not pretend to apply to all conditional sales and impliedly excludes many; subject to the imperative terms and conditions imposed upon conditional sales, the Act leaves the parties free to insert in their contract any mutually protective terms and conditions they may desire.

Subsections (1) and (2) of section 10 give the buyer the right to redeem within twenty days and the seller the right to resell after twenty days, in all cases where the chattel has been repossessed "pursuant to any condition in the contract." The Act does not expressly confer such rights except where possession has been retaken pursuant to some term in the contract. Subsection (3) of the same section apparently relates to goods repossessed as mentioned in subsections (1) and (2) and provides procedure to be followed by the seller if he "intends to look to the buyer for any deficiency on a resale." This subsection is restricted to goods in excess of $30 in price; it does not apply to goods of a lesser value nor when repossession is not based on the contract. The subsection does not create a right in the seller to look to the buyer for a deficiency; it merely limits and regulates the exercise of the right in all cases where the right exists independently of the statute.

No other provision in the Act has been invoked as conferring on the seller the right to claim a deficiency.

It is argued, however, that the section confers the right by implication. This argument is based upon the assumption that the Act is a code and is to be construed as embracing all conditional sales. As already pointed out, we do

(1) (1930) 65 Ont. L.R. 133, at 137.

not regard the Act as a complete code. If the *Conditional Sales Act* seeks only to remedy certain evils inherent in or incidental to conditional sales, it ought to be interpreted as amending and not as repealing the common law on the subject; if, on the other hand, it is a general Act, it "must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter" (*per* Channell J. in *The King* v. *Bishop of Salisbury* (1). To interpret section 10 as appellant suggests, would be to import into the section something which is not there and which, if there, would have the effect of repealing the common law. We are therefore unable to accept the conclusions based upon the argument.

It is also urged that all conditional sales are in effect legal mortgages, and should, therefore, be governed by the law relating to mortgages. On this basis, the right of a mortgagee to resell his security and look to the mortgagor for any deficiency on the resale is thought to be applicable to a vendor under a conditional sale where he resells the chattel. This theory was propounded by Maclennan J.A., in his dissenting judgment in the case of *Sawyer* v. *Pringle* (2); was adopted by Newcombe J., in delivering the unanimous opinion of this court in *C. C. Motor Sales Ltd.* v. *Chan* (3); and was later elaborated by Orde J.A. in the Ontario Court of Appeal in the case of *Harris* v. *Tong* (4). An examination of the agreements in each of these three cases discloses a wide difference in terms. In the two Ontario cases, the theory was rejected or at least was not adopted by a majority of the judges, and, in any event, the decision turned upon the interpretation of the agreement then before the courts. In the *Chan* case (3), Newcombe J., in expressing the opinion that the agreement was in effect a legal mortgage, emphasized the fact that "by the express provisions of three of the clauses" the agreement was intended to "operate as a security to the vendor for the principal and interest of the debt." The agreement with which we have to deal is noticeably different in that there is a complete absence of any reference directly or indirectly to security.

(1) [1901] 1 Q.B. 573, at 579.
(2) (1891) 18 O.A.R. 218.
(3) [1926] Can. S.C.R. 485.
(4) (1930) 65 Ont. A.R. 133.

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Moreover, Newcombe J. in the *Chan* case (1) supported the mortgage theory on the additional ground that the agreement in that case had certain elements of absoluteness in which it differed from the agreement in *Sawyer* v. *Pringle* (2) which was thought to be more uncertain. On this point the agreement with which we are dealing contains the following clause: "It is expressly agreed that if for any reason purchase of motor vehicle is not consummated," certain consequences are specified to follow as in a case of rescission. This lack of absoluteness, coupled with a paucity of protective or remedial provisions, sharply distinguishes this agreement from that in the *Chan* case (1) as well as from mortgages generally. Whatever may be thought of the applicability of the mortgage theory to some conditional sale agreements, the theory does not apply to all such agreements, certainly not to this one. Each contract must stand on its own footing and be interpreted in the light of its own terms and conditions. This principle was adopted in the *Chan* case (1) where Newcombe J. at page 487 said: "The question depends upon the interpretation and effect of the agreement of sale between the parties."

In disposing of this appeal, we are not at liberty to treat the action as one for damages for breach by the buyer of his contract to purchase, and may not, therefore, regard the amount of the deficiency as the measure of the damages which the seller might have obtained had he sued on that ground and for which he had a right to sue; *Harold Wood Brick Co.* v. *Ferris* (3). The action as brought was on the promissory note for the balance owing on it after the net proceeds of the resale had been credited, but, because the note was collateral to the written contract, it was rescinded as between the parties by the rescission of the agreement. We have seen that a right to sue for a deficiency after the resale was not provided for by the contract nor conferred by the *Conditional Sales Act,* and so there is no ground on which the seller's action can be maintained.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Friel & Friel.*

Solicitor for the respondent: *G. F. G. Bridges.*

(1) [1926] Can. S.C.R. 485. (2) (1891) 18 Ont. A.R. 218.
(3) [1935] W.N. 21.