

The Court of Appeal allowed all three appeals, and reduced Gaudry's sentence to one year and sentenced Stevenson and Stokes to one year each in gaol. Guy J. A. delivered the Judgment of the Court, with which Schultz J. A. & Freedman J. A. concurred as follows:

"The offence in all three cases involved gross indecency with juvenile males, under largely similar circumstances in each case. In considering the propriety of the sentences imposed, there are two factors which should be borne in mind:

"The first is that these were offences of gross indecency of a particular revolting kind committed by the accused with juvenile boys. The second is that as far as possible, and having regard to the equality of other circumstances, similar offences should receive similar penalties."

LEO McGRADY\*

### REDEMPTION AND ACCELERATION IN CONDITIONAL SALES

We are now in an era where the great majority of the populace buys goods on instalment plans. In a typical situation a buyer of durable goods such as an automobile or a refrigerator, enters into a conditional sales contract with the vendor and executes a promissory note payable to him. The vendor will then generally assign his interest under the contract, and endorse the promissory note to a finance company. If all goes well, the dealer realizes a profit on the transaction (a mark up on the price); the finance company realizes a profit (the excess of the instalment payments, over the company's costs); and the purchaser has the advantage of being able to use the goods while he is paying for them. Such financing plays an important role in our economy.

The typical conditional sales contract reserves title in the goods to the vendor until full payment is made by the purchaser. The relationship is one of bailment wherein the bailee, the conditional purchaser, acquires the goods without acquiring ownership thereof. By the act of assignment, the purchaser agrees that the assignee will take all the rights of the seller.

One of these rights is the right to repossess the goods upon default in an instalment payment or other breach of condition. It is usual that a statutory provision prohibits the bailor from dealing with the goods in any way for a period of twenty days<sup>1</sup> and affords the bailee the right to redeem the goods upon payment of the amount then in arrears, together with the interest, and expenses incurred by the bailor by the repossession.<sup>2</sup>

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1. If during the statutory period the bailor converts the repossessed goods to his use or mortgages them, or disposes of them in any way, he may become liable in conversion. (Mellis v. Meyer 10 W.W.R. 241; Sawyer-Massey v. Bouchard 13 W.W.R. 394.)

2. In Manitoba the relevant provision is contained in section 3(1) of the Lien Notes Act R.S.M., 1954, c. 144.

Complications may arise with the addition to the contract of an acceleration clause. Such clauses provide (among other things) that if the purchaser defaults on any payment due under the contract, the unpaid balance shall immediately become due. The inclusion of such provisions is standard in contemporary credit sales. Do such clauses affect the meaning and scope of such phrases as the "amount then in arrears"? Is such a phrase to connote the amount due by the effluxion of time, or is it to mean the amount owing by reason of the operation of the acceleration clause?

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Similar, indeed almost identical problems have been reviewed and resolved in the area of real property mortgages. In *National Trust v. Campbell*<sup>3</sup> there was entertained an action for foreclosure within the meaning of Rules 277 and 278 of the Kings Bench Act of Manitoba<sup>4</sup>. The mortgagor in this case relied on Rule 278 which provided that proceedings in a mortgage action may be stayed "upon payment into court of the amount then due for principal, interest and costs;" the amount then due said the mortgagor was the amount due according to the lapse of time. The late Chief Justice Mathers held that relief could not be granted to the mortgagor under that Rule, because, by virtue of the acceleration clause in the mortgage, the amount *then due* was the full amount of the principal debt.

"It is not possible to give relief upon payment of the overdue instalment only, unless it be held that the parties are not bound by the terms of the acceleration clause in the mortgage."<sup>5</sup>

As it was, the mortgagor did gain relief in this case upon payment of the overdue instalment only, by virtue of another statute, the Real Property Act.<sup>6</sup> It provided that in such a case,

". . . the mortgagor may, notwithstanding any provision to the contrary, and at a time prior to sale or foreclosure . . . pay such arrears as may be in default under the mortgage . . . and he shall thereupon be relieved from the consequences of nonpayment of so much of the mortgage money as may not then have become payable by reason of lapse of time."

In the case of *Drummond-Hay v. Birchard*<sup>7</sup> Robson J. A. interpreted the word "arrears" as contained in s. 11 of the Mortgage Act<sup>8</sup> to mean arrears owing by the passage of time. But in this case as in the *Campbell* case there was clear statutory wording enabling the Court to do this, wording different from that contained in section 3(1) of the Lien Notes Act. The particular section reads as follows:

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3. (1908) 17 M.R. 587.

4. R.S.M. 1902 c. 40.

5. *National Trust v. Campbell*, *supra*. footnote 3, Chief Justice Mathers at p. 591.

6. P.S.M. 1907 c. 148 s. 117.

7. (1941) 49 M.R. 185.

8. R.S.M. 1940 c. 140.

"Where the bailor retakes possession of the chattel for breach of condition . . . , he shall retain them for twenty days in the same condition as they are at the time he retakes possession; and the bailee or his successor in interest may redeem them within that period on payment of *the amount then in arrear* together with interest, . . . and the actual expenses of taking and keeping possession."

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The only case I have been able to find interpreting such a clause, prior to 1966, is *B.C. Independent Undertakers Ltd. v. Maritime Motor Car Co.*<sup>9</sup> It is a decision of the British Columbia Court of Appeal that has stood for forty-nine years. This case referred to section 32 of the Sale of Goods Act<sup>10</sup> which is almost the same as sec. 3(1) of the Manitoba Lien Notes Act. The relevant words of the section are ". . . and the bailee or his successor in interest may redeem the same within such period on payment of *the full amount then in arrear* . . ."

The plaintiff had tendered an overdue instalment within the prescribed statutory period in order that he could redeem a hearse which had been seized from him. The defendant refused to release the vehicle without payment of the full balance with acceleration. The Court held that the defendant could rely on the acceleration clause. At page 23, Macdonald C.J. B.C. stated:

"The language is plain and read in its ordinary sense is quite unambiguous. . . . There is nothing in the context to indicate an intention that the words 'the full amount then in arrear' should be restricted by adding thereto the further words 'by effluxion of time'."

A recent Manitoba case, *Peresluka v. General Motors Acceptance Corporation of Canada Ltd.*<sup>11</sup> has altered this situation, at least in Manitoba. In this case, the plaintiff bought a car under a conditional sales contract which the seller assigned to the defendant. He made a substantial down payment but failed to make the first instalment payment due under the contract. The defendant thereupon seized the car and refused to deliver it back to the plaintiff in spite of the latter's tender of all arrears of the instalments. The defendants relied on an acceleration clause. Mr. Justice Hall of the Manitoba Queens Bench held that the conditional sales contract was governed by the provisions of the Manitoba Lien Notes Act and that the plaintiff was entitled to redeem the car upon payment of the amount then in arrears, together with interest and costs of the seizure. The words "then in arrears" as they appear in section 3(1) of that act, mean the amount due by passage of time and not the amount payable under the acceleration clause in the contract.

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9. (1917) 3 W.W.R. 22.

10. R.S.B.C. 1911 c. 203.

11. (1966) 56 W.W.R. 90.

The learned judge interpreted section 3(1) as conferring a right which if exercised would operate, necessarily, to restore the respective parties to their positions under the contract; . . . that is it must operate to effect a resumption of the bailor-bailee relationship. Given this interpretation "the amount then in arrears" could not be said to include the accelerated balance; if such was included in the "amount then in arrears," then, with the payment of that amount the conditional purchaser would become the owner in possession; his right to be restored to the position of bailee would be meaningless; it would in effect be destroyed by the operation of the acceleration clause. And, said Hall J., the acceleration clause cannot operate so as to destroy the right of redemption afforded by the statute.

As regards the *B. C. Independent Undertakers case* the learned Judge stated:<sup>12</sup>

"It seems to me that the case is distinguished on the word 'full'<sup>13</sup> as used in the B.C. statute but regardless of that point, I decline to follow the majority decision which is not binding on me.<sup>14</sup> So to do would not be in keeping with contemporary credit sales practices. The right of redemption would in most cases be rendered meaningless. Invoking a clause in the nature of a penalty as regards a redemption provision is repugnant and unacceptable."

It is interesting to note that in the *B. C. Independent Undertakers case*, none of the Judges refers to the word "full" as of any significance in describing the amount to be paid. It seems likely that this case would not have been followed by Hall J. even had the words of the B. C. statute been identical to those of section 3(1) of the Lien Notes Act.

This decision is of interest for three reasons. First, as noted earlier most of the cases on acceleration clauses have arisen in connection with agreements for sale of land or mortgage of land. In such situations there has existed a statutory right of redemption. And, the courts have consistently<sup>15</sup> held in such cases that "the amount due" or "the amount in arrears" was the accelerated balance due under the contract, unless these words had been restricted by the addition thereto of the words "by effluxion of time." The wording of section 3(1) of the Lien Notes Act offers no such precision. Second, a decision of a Canadian Court of Appeal which had stood for forty-nine years was not followed. Third, this decision provides fresh evidence of a growing trend of judicial activism in the field of

12. *Ibid.* at p. 94.

13. The B.C. statute reads . . . "the 'full' amount in arrears;" the word "full" is not contained in sec. 3(1) of the Manitoba Lien Notes Act.

14. The italics are mine.

15. *National Trust v. Campbell* (1908) 17 M.R. 587, *Vosper v. Aubert* (1908) M.R. 17, *Drummond-Hay v. Birchard* (1941) M.R. 185.

contract law, and in particular in the area of conditional sale contracts. The current feeling that the consumer must be protected because he is not in an equal bargaining position with the large and powerful financiers, is being reflected in the decisions of the Courts.<sup>16</sup>

Decisions which are outdated and not in harmony with the economic and social structure ought not to be followed. For this reason the decision in the *Peresluka* case is to be welcomed. Mr. Justice Hall might well have used the words of Denning L. J. in the case of *Landom Trust Ltd. v. Hurrell*<sup>17</sup>, wherein he declined to follow earlier hire-purchase agreements saying:

"In the present year 1955 I must, I think approach the matter afresh in the light of the different circumstances which now exist from those existing when those earlier decisions were given."

Peter Hart\*

### COMPUTERIZATION OF STATUTE LAW

The growing complexity of statute law produced by the ever increasing number of amendments to existing legislation and the continuous introduction of new legislation, coupled with the lack of adequate indexing, has made the process of determining the statute law on a particular point more and more difficult. It is often hard to be sure that all relevant statutes have been referred to, and on the present trends it would seem a stage must be reached where, under existing conditions, the task will become impossible.

In November, 1966, I began a project at the University of Manitoba Computer Centre to apply the powers of science to this problem, using the Centre's big I.B.M. Computer. Initial progress was slow owing to lack of funds, but in April I received a research grant of \$11,160.00 from the Canada Council which has enabled me to employ a full time programmer.

We began by putting the Criminal Code onto Magnetic tape, a task which is now almost complete.<sup>1</sup> Although this in itself has presented some problems we are now moving into the far more

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16. For instance in *Federal Discount Corp. Ltd. v. St. Pierre* (1962) O.R. 310, Mr. Justice Kelly of the Ontario Court of Appeal lifted the veil of fiction to subject the relationship between the dealer and the finance company, to scrutiny; he concluded that this relationship precluded the finance company from taking a promissory note, attached to the conditional sales contract, as a holder in due course. In doing so he contaminated the purity of a long line of cases beginning with *Killoran v. Monticello State Bank* (1921) S.C.R. 528, which had refused to consider a relationship in deciding the finance company's claim to be a holder in due course.

17. (1955) 1 All E.R. 839.

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1. We chose the Code as a starting point because it applied to the whole of Canada and because it is badly in need of overall revision.