C. C. MOTOR SALES LTD. (DEFENDANT) . . APPELLANT;

AND

SOLOMON CHAN (PLAINTIFF) . . . . . RESPONDENT

1926

*May 5.

*May 31.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Conditional sale—Default in payment—Repossession and resale—Seller realizing an excess on resale—Buyer's right to excess—B.C. Conditional Sales Act, R.S.B.C., 1924, c. 44.

On the buyer's default under a conditional sale agreement the seller repossessed and resold the chattel, realizing a sum in excess of the unpaid instalments.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Newcombe and Rinfret JJ.

(1) [1912] 21 Can. Cr. C., at pp. 1-6.

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Held that, in view of the terms of the agreement and the wording of its clauses, the relationship of the parties did not differ essentially from that of mortgagor and mortgagee, with an obligation for payment by the former, and therefore the surplus proceeds of the resale belonged to the buyer; that there was nothing in the B.C. *Conditional Sales Act,* R.S.B.C., 1924, c. 44, which had the effect of depriving the buyer of his right thereto. *Sawyer* v. *Pringle* (18 Ont. A.R. 218) distinguished.

Judgment of the Court of Appeal for British Columbia ([1926] 1 W.W.R. 508) aff.

APPEAL, by special leave of the Court of Appeal, from the judgment of the Court of Appeal for British Columbia (1), affirming, by a majority, a judgment of the County Court of Vancouver, adjudging that the plaintiff do recover against the defendant the sum of $532.78 and costs.

The defendant sold an automobile to the plaintiff under a conditional sale agreement dated April 1, 1924, the material parts of which are set out or described in the judgment. The plaintiff made default in payment of some of the instalments of the purchase money and the defendant took possession of the automobile and resold it. The proceeds of the resale exceeded the balance unpaid by the plaintiff and the action was to recover the excess from the defendant

C. W. Craig K.C. for the appellant.

D. Donaghy for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff agreed for the purchase of an automobile from the defendant upon terms of cash and credit, as set out in a written agreement between the parties. He made default in payment of some of the instalments of the purchase money, and the defendant took possession of the vehicle and sold it under provisions of the agreement, realizing a sum in excess of the unpaid instalments. The plaintiff thereupon brought this action in the County Court to recover the excess. The County Court judge gave judgment for the plaintiff, and the defendant company appealed to the Court of Appeal, contending that the excess belonged to it, and not to the plaintiff. The amount, $532.78, is not in dispute. The appeal was dis-

(1) [1926] 1 W.W.R. 508.

missed, but Martin J. A. and M. A. MacDonald J. A. dissented. The case comes before this court by special leave of the Court of Appeal.

The question depends upon the interpretation and effect of the agreement of sale between the parties. It is dated 1st April, 1924. The vendor (the appellant) agrees to sell, and the purchaser (the respondent) agrees to purchase, the automobile upon the terms and conditions therein set forth, and the purchaser acknowledges receipt of the automobile in good order and condition. The price is $3,103.60, of which $950 was paid at the time of executing the agreement, and it was stipulated that the balance should be paid in twelve monthly instalments of varying amounts. The instalments were to bear interest at 8 per cent, and the purchaser gave to the vendor his promissory note for each of the instalments. Then "the terms and conditions of this contract of conditional sale" are enumerated and set out; there is a description of the automobile "together with the conditions surrounding the purchase of the same". By these it is provided that the vendor has and shall continue to have the absolute property "until after full and complete payment of the purchase price therefor"; that "on full payment of said promissory notes (or renewals), principal and interest, according to their terms, the titles of said property shall vest in said purchaser"; it is declared that the automobile is to be used as a taxicab, and that, while it is in possession of the purchaser, he shall have the right to use it for that purpose; that he shall take proper care of it, and that, if it be injured or require repairs, the purchaser shall immediately have it repaired at his own expense, and that the purchaser shall not sell or dispose of it, or remove it from British Columbia, except upon the written permission of the vendor. I quote in full the 9th, 10th, 11th and 12th enumerations:—

9. The purchaser covenants that the automobile covered by this agreement will not be used for the transportation of liquor or drugs or any unlawful purpose during the life of this agreement, and in case of any such contingency, the entire debt hereby secured shall, at the vendor's option, become immediately due and payable, and the vendor shall have the same right of seizure and sale as if default had been made in payment of principal or interest.

10. If by reason of failure of the purchaser to pay an instalment of principal or interest or any part of the same or to observe any of the covenants, provisos or conditions herein contained, the vendor shall deem

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it advisable to take any proceedings either judicial or extra judicial to protect itself or enforce the security, all costs and expenses incurred by the vendor of or incidental to such proceedings shall be payable by the purchaser and shall be deemed to be a payment of principal due and in arrears hereunder, and shall bear interest at the rate herein above set forth.

11. That time shall be material and of the essence hereof, and that if default be made in the payment of said principal sum or interest, or any part thereof, at the time the same shall become due, or if default be made by said purchaser in any other respect hereunder, or if said purchaser fails to make payment for any labour, repairs, improvement or equipment placed upon said automobile by authority of said purchaser (in which case said vendor may, at its option, make such payment), then the said principal sum and all accrued interest, including expenses (if any) and including such payment (if any) made by said vendor thereon, shall thereupon immediately become wholly due and payable at the option of said vendor (notice of said option being hereby waived), the said vendor may at once take possession of said automobile and said parts, devices, tools, and equipment wherever the same may be, and sell said automobile and said parts, devices, tools and equipment and the whole thereof, as provided by law.

12. The purchaser agrees to pay any deficiency that may remain after the application of the proceeds of any sale hereunder to the payment of said indebtedness or any judgment obtained thereon.

There remains a clause by which the purchaser agrees to keep the automobile insured for an amount equal to or exceeding the principal sum payable under the agreement,

loss, if any, payable to vendor or assigns as interest may appear, and deliver the policy therefor to said vendor,

or that the vendor may procure insurance,

and all sums expended in so doing, with interest thereon at the rate of 8% per annum, shall be added to the purchase price, and shall be secured hereby.

It will be observed that, by the express provisions of three of the clauses to which I have referred, it is a term or condition of or "surrounding the purchase of" the automobile that the agreement shall operate as a security to the vendor for the principal and interest of the debt, and that, if and when any of the payments provided for shall become overdue, the vendor may take possession of the automobile and sell it, applying the proceeds of the sale to the payment of the indebtedness, from which it would seem to follow that the agreement is intended to operate as a legal mortgage, incident to which, of course, is the purchaser's right to redeem.

While the transaction may constitute a conditional sale within the definition of the *Conditional Sales Act*, R.S.B.C.

1924, c. 44, I do not find any provision in that Act which denies the respondent's right to the surplus proceeds of the sale.

It is enacted by section 10 that when the seller retakes possession of the goods pursuant to a condition in the contract, he shall retain them for twenty days, and that the buyer may redeem them within that period by paying the balance of the contract price with the actual costs and expenses of taking and keeping possession; that, if the price of the goods exceed $30, and the seller intend to look to the buyer for any deficiency upon resale, the goods shall not be resold until after notice in writing of the intended sale shall have been given to the buyer, which notice is to contain a description of the goods; a statement of the balance due and the actual costs and expenses; a demand of payment on or before the day mentioned, and a statement that, unless the amount be paid within the time mentioned, the goods will be sold. It is further provided that, when the goods are not redeemed within the twenty days, and subject to the giving of the notice of sale prescribed, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period (1). There is nothing in these provisions however to suggest an intention to diminish or to prejudice the rights which the purchaser has under the terms of the instrument, or which are by law incidental to the transaction; they are intended rather for the protection of the purchaser; the disposition of the proceeds of the sale is not expressly regulated by the statute, and remains subject to the provisions expressly or impliedly contracted.

The dissenting judges in the Court of Appeal relied principally upon the case of *Sawyer* v. *Pringle* (2). But it is to be observed that the provisions of the agreement in that case differed from those now under consideration, and the question involved was also different. There was a contract which is described as

(1) *Reporter's Note*:—The chattel in question was not resold until after the expiration of the twenty days. The notice (referred to in the judgment) required by the Act to be given if the seller intends to look to the buyer for any deficiency on a resale was not given in this case.

(2) 18 Ont. A.R. 218.

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an executory agreement of future sale on performance of certain named conditions by the defendant.

There are two clauses from the agreement extracted in the report, and from one of these it appears that the property in the machine which was the subject of the agreement was not to pass to the proposed purchaser until full payment of the price and any obligations given therefor, although he was to have the possession and right of use in the interval; but, upon any default in payment, the whole price or obligation was to become due and payable, and it was provided that the vendor might then resume possession. There was no provision for resale; but, upon default, the vendor did resume possession and resell for less than the price stipulated by the agreement, and it was held that the balance was not recoverable from the purchaser, because the vendor, by reselling the machine to another, had disabled himself from completing the sale for which he had previously agreed, and that the consideration for the payment of the price therefore failed. Such a question could not arise in this case because by the twelfth clause of the contract the purchaser explicitly agrees to pay any amount by which the proceeds of sale are deficient to meet the indebtedness.

Burton J. A., who was one of the majority of the court, said:—

> If I could bring myself to the conclusion arrived at by one of my learned brothers (MacLennan J.A.) that the relationship of mortgagor and mortgagee existed between these parties, I should probably have no difficulty in arriving at the same result as he has, but that, as it appears to me, is what they have studiously avoided. They have on the contrary refrained from making any absolute contract of sale, reserving possession merely till payment, but have entered into a peculiar contract under which no sale is to be considered as made until full payment of the price.

Osler, J. A. considered that the case must be looked at as if the possession had always remained with the vendor, and he said it

> is one where there is an express contract which governs the right of the parties, and in which the plaintiffs have been careful to exclude the possibility of the goods being treated for any purpose as the goods of the defendant, until the price shall have been paid.

On the other hand, Maclennan J. A. found that the relationship of mortgagor and mortgagee existed between the parties, and that their legal and equitable rights must be determined by the principles applicable to that relation.

While in the present case the contract does not amount to a bargain and sale of the automobile, and is executory in the sense that the property is not to pass to the purchaser until payment of the price, it is nevertheless a concluded agreement for sale by which the possession passes to the purchaser, and the property is also to pass upon compliance with the stipulated conditions, the vendor in the meantime, by the express provisions, retaining the property as security. The debt is secured upon the property, the legal ownership remaining with the creditor, but the equitable ownership being that of the debtor, subject to the security afforded to the creditor for the debt; the vendor is given the right to take possession and sell, if the purchaser fail to make payment; the proceeds of the sale are to be applied to the payment of the indebtedness, and the purchaser is to pay any deficiency which may remain; therefore the relationship between the parties does not differ essentially from that of mortgagor and mortgagee with an obligation for payment by the former; and if, as I conclude, that be the meaning and effect of the instrument, there can be no doubt that the surplus proceeds of the sale belong to the purchaser. It is true that the property was not transferred to the purchaser and reconveyed to the vendor in order to effect the security for the indebtedness which, by the stipulations of the agreement, the latter was to have; but equity looks to the intent of the transaction rather than to the form, and the intent is made clear by the terms of the instrument.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McLellan & White.*

Solicitor for the respondent: *F. A. Jackson.*