CONDITIONAL SALES—ACCELERATION CLAUSES—ELECTION—LOSS OF RIGHT TO SUE

The case of *General Motors Acceptance Corporation of Canada Limited Hiebert*[1] is a recent example of the difficulties which may arise where mere difference in words is relied upon without reference to the principle behind them. The Defendant was in default in respect of instalment payments due under a conditional-sale agreement covering the purchase by him of a motor vehicle from a corporation which had assigned its rights to the Plaintiff. The Plaintiff relied on the so-called "acceleration clause" in the agreement to sue for the full balance owing on the purchase price. The Defendant denied liability on the ground that the Plaintiff had not given him notice of its election to declare the whole of the unpaid balance due, and relied on the wording of the acceleration clause, which read in part as follows:

> "In the event Purchaser defaults on any payment due on the contract . . . . the Seller shall have the right, *at his or its election to declare* the unpaid balance, together with any other amount for which the Purchaser shall have become obligated hereunder, to be immediately due and payable . . . ."

The Plaintiff asserted that the Statement of Claim was a sufficient declaration. Two cases were cited by the learned trial judge. In *Gill v. Yorkshire Insurance Company*,[2] where the acceleration clause read ". . . if default in payment is made . . . *they have full power to declare* it and all other notes made by me in their favor due and payable at any time . . .", Galt J., of the Manitoba Court of King's Bench held for the Defendant on the ground that it was necessary for the Plaintiffs to "declare" on the notes before bringing action. In *Child & Gowen Piano Co. Ltd.* v. *Gambrel*,[3] where the clause read, ". . . in case of default in payment of any of the payments . . . the then unpaid balance of the purchase price . . . shall *at the option of the company* forthwith become due and payable . . ." the Saskatchewan Court of Appeal held that by making default the Defendant enabled the Plaintiff to bring an action for the whole of the unpaid balance without notice to the Defendant. After reviewing these two cases, the learned trial judge held that "Accepting this (*the Gambrel case*) as correct, I still think that I should follow the *Gill* case, because of the difference in the wording of the contracts." He then went on to say that "This is not a barren technicality. Acceleration clauses . . . are of a penal nature and should be strictly construed."

With all due respect, if the learned trial judge is prepared to accept both cases solely on the difference in wording, it is difficult to conceive of a more "barren technicality". In both cases there is an option to be exercised by the Seller, and the declaration is the notice to the purchaser of the exercise of the option. There is no reason in common sense and, it is submitted, in law, why the purchaser in one case should be entitled to notice of the exercise of the option by a declaration prior to the commencement of an action, and in the other case notice comes in the from of a writ or a statement of claim.

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[1] [1955] 3 D.L.R. 857; 15 W.W.R. (N.S.) 703.

[2] (1913), IV W.W.R. 692; 24 W.W.R. 389; 23 Man. R. 368.

[3] [1933] 2 W.W.R. 273.

A review of the few reported Canadian cases, most of which come from Western Canada, shows the difficulties which may arise when a mere "difference in the wording" is alone relied upon.

Harman v. *Gray-Campbell Limited*[4] in the Saskatchewan Court of Appeal supports the present case and the *Gill* case in the view that the word "declared" places a condition precedent to the bringing of the action, while *Colwill* v. *Waddell*[5] in the former Supreme Court of the North-West Territories takes the opposite view.[6] A similar conflict appears in the use of the words "at the option." The *Gambrel* case is supported by the decision of the Supreme Court of Alberta *en banc* in *Price* v. *Parsons*,[7] but Dysart J. in the Manitoba Court of King's Bench, held the opposite view in *Meincke et al.* v. *City Dairy (No. 2.)*.[8] One wording which the courts agree will not imply a notice to the Purchaser is "shall immediately (or forthwith) become due and payable."[9]. If the purchaser is in default under the agreement, the vendor may *ipso facto* exercise his remedy under the acceleration clause.

A morning spent in District Court Chambers will show the increasing importance of these "acceleration clauses,' and it is not of mere academic interest to determine the proper method to be followed in exercising the Seller's rights. It is submitted that the courts in looking to differences in wording have overlooked an important principle of the law of contracts. In certain contracts, a *promise* by one of the parties may be conditional upon the happening of a *particular event*. When knowledge of the happening of the particular event is within the peculiar knowledge of the opposite party, he must give notice to the promisor of the happening of the particular event before he can sue for failure to perform in accordance with the promise.'[10]

In a conditional sale agreement, the *promise* is the obligtion of the purchaser under the acceleration clause. If the acceleration clause says, "at the option" of the Seller", or "the Seller may declare", the *particular event* is the exercising of the option or the making of the declaration. This particular event "lies within the peculiar knowledge" of the Seller, and, it is submitted,

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[4] [1925] 1 W.W.R. 1134.

[5] (1920), VII Terr. L.R. 139.

[6] Wetmore, J's, statment on this opint is *obiter dicta*, but the learned trail judge expressed a definite opinion on the point.

[7] (1913), V W.W.R. 190.

[8] [1932] 2 W.W.R. 398.

[9] For example:
Industrial Acceptance Corporation v. *Doughen et. al.* [1932] 1 W.W.R. 619 (Sask. C.A.).
Gaar Scott Co. v. *Ottoson* (1911) 19 W.L.R. 472; 21 Man. R. 462 (C.A.).
B.C. Independent Undertaker's Ltd. v. *Maritime Motor Car Co., Ltd.* [1917] 3 W.W.R. 22; 35 D.L.R. 551 (B.C. C.A.).

[10] The rule was laid down in the Court of Exchequer by Lord Abinger, C.B., in the following words:
"Where a party stipulates to do a certain think in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." *Vyse* v. *Wakefield* (1840) 6 M. & W. 442 at 452; 151 E.R. 485 affirmed without written reasons by the Court of Exchequer Chamber, 7 M. & W. 126. Compare *Halsbury* (3 ed.), vol. 8, p. 197, para. 332.

the buver is entitled to notice in such cases as a condition precedent to the right to bring the action. The *Gambrel, Colwill* v. *Waddell*, and *Price* v. *Parsons* cases would therefore appear to be wrong in holding that the Seller's cause of action has matured before notice of the exercise of the option has been given or the declaration has been made.

On the other hand, in cases where the clause read "shall immediately (or forthwith) become due and payable", the *particular event* is the default of the buyer, and there is nothing peculiar to either party about the knowledge of that event. The seller's right of action has immediately matured, as the causes (supra) have properly held.

As in most aspects of the law of contracts, "preventive law" is available in this situation, and there are two courses which the practitioner might follow:

(1) In all cases where there is an option to the seller, to send a notice or a declaration to the buyer, although the contract does not specifically state that notice is a condition precedent to commencement of an action.

(2) Check his precedents and stock of printed forms to ensure that they use the "immediately due and payable" clause.

If the foregoing be correct, it is submitted that in all cases in which the seller's rights under the acceleration clause depend upon his exercising the option under that clause, notice must be given to the buyer as a condition precedent to the bringing of an action. Where the buyer's default gives rise to the seller's right, there is no event of which the seller need give notice. If the courts keep this distinction in mind, certainty of principle will return, and mere differences of words with the barren technicalities that follow, will vanish.

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