NOTICES

The Annual Meeting of The Canadian Bar Association will be held at the Royal Alexandra Hotel, Winnipeg, on the 28th, 29th and 30th days of August, 1946. The Executive Committee of the Association will meet on August 26th and the Council on August 27th.

The secretarial offices of the Association have been moved to temporary quarters at Room 601, 276 St. James St. W., Montreal 1, Quebec, where correspondence for the Secretary-Treasurer should be addressed until futher notice.

CASE AND COMMENT

AGREEMENT FOR SALE OF A NEW CAR WITH DELAYED DELIVERY—CREDIT GIVEN FOR USED CAR DELIVERED IN PART PAYMENT—JUDICIAL NATURE OF SUCH CREDIT—ARTICLES 1012, 1065, 1139, 1472 and 1598 OF QUEBEC CIVIL CODE:—In the last two issues of the Quebec Superior Court Reports for 1945 the reader will find four decisions relating to the same question, namely, demands for reimbursement of the amount of what the reporter terms "credit notes". Each of these credit notes had been given to the buyer by the vendor when entering into an agreement for the sale of a new automobile, still unidentified at the time of the contract, in consideration of a used automobile there and then delivered to the vendor by the buyer.

Litigation arising out of similar circumstances is likely to be common because of the great number of such agreements entered into since the end of the war, the slow-down in production due to strikes in automobile manufacturing plants and the refusal of priorities to many persons who had expected to obtain them. It has therefore seemed to me of some interest to make a brief review of the judgments referred to in an endeavour to ascertain the juridicial nature of such "credit notes" and the legal principles that should govern their disposal.

The facts in *Labonté* v. *Verdun Motors Ltd.*[1] were as follows. An agreement was made between the parties on December 18th, 1938, for the sale of a new car to be delivered by defendant on or about April 1st, 1939. At the time of the agreement a credit of

[1] [1945] S.C. 295.

$525 was given to the plaintiff (buyer) by the defendant (vendor) in consideration of the delivery by the former of a used car of which the latter was there and then put in possession. On August 11th, 1939, the defendant informed the plaintiff that it had received the new automobile and advised him to come and take delivery. Plaintiff remained silent, but in 1942 he took an action against his vendor, praying for cancellation of the original agreement and the reimbursement of the amount of the credit, the used car having been re-sold by the defendant in the interval.

Mr. Justice Salvas allowed the action on the ground that, while the plaintiff had been in default to take delivery of the new automobile, the defendant was in no better position to fulfil its obligations at the time of the action and, in consequence, each party had the right (under article 1065 of the Quebec Civil Code) to ask for the cancellation of the contract from which their obligations arose.

The defendant was condemned to pay the plaintiff the sum of $164.30, being the $525 credit, less $336.60 representing the loss of profit suffered by the defendant as a result of plaintiff's default and $24.10 for repairs effected by the defendant on plaintiff's used car before it was re-sold. As far as the quantum of the judgment was concerned, it should be noted that the plaintiff had waived his right to demand that any claim in damages by the defendant, arising out of the same set of circumstances, should be made by way of a cross-demand in accordance with the Code of Civil Procedure and it was agreed that any amount to which defendant might be found entitled should be deducted from the award to the plaintiff. For purposes of the present discussion, the important thing to remember is that in the *Labonté* case (a) the agreement was cancelled, (b) the vendor was declared entitled to recover the loss of profit incurred through the buyer's default and (c) as far as the credit note was concerned, the full amount thereof was ordered to be remitted to the buyer, less a small deduction for repairs.

In *Thivierge* v. *Langevin*[2] there was an agreement for the sale of a new truck, to be delivered at a later date, and a $400 credit for a used truck handed over to the vendor at the time of the contract, which was subsequently resold by the latter. The plaintiff, alleging that he had tried on numerous occasions unsuccessfully to obtain delivery of the new truck, prayed for the cancellation of the agreement and the reimbursement of the $400 credit.

[2] [1945] S.C. 297.

Mr. Justice Loranger came to the conclusion that the defendant was in default under the agreement and maintained the action. However, the defendant was ordered to reimburse the sum of $200 only, that amount being what the learned judge decided was the value of the used truck at the time of the agreement:

> La note de crédit mentionne $400. Il est certain que, sur un éxchange de camion, le crédit accordé est généralement plus élevé que le montant qu'on payerait au comptant, pour le véhicule qu'on voudrait remplacer par un neuf.

It does not appear from the judgment that, in reducing the amount of the claim from $400 to $200, Mr. Justice Loranger relied on any particular clause of the agreement, since he made no reference to any such clause. I take it to have been the opinion of the court that, because of the special circumstances accompanying the giving of such credit notes, reimbursement should be ordered only to the extent of the proved value of the used vehicle at the time of the agreement, instead of the full amount of the credit given.

The agreement in *Normandeau* v. *Page & Son Ltd.*[3] was for the sale of a 1941 Lincoln Zephyr, again to be delivered at a later date. A used car was delivered to the vendor at the time of the agreement, as in the two previous cases, and the buyer given a credit of $400 "on the purchase price". The agreement stated that, in the event of it not being executed for any reason, the vendor should render an accounting for the price of the used car on re-sale. The plaintiff alleged that "the purchase of the automobile had never been carried out" and he asked for the cancellation of the agreement and an accounting from the company defendant on the re-sale of the used automobile, and failing an accounting, the payment of $399 (this sum was probably demanded, instead of the full amount of the $400 credit, in order to avoid incurring the costs of a second-class action in the event of the action being dismissed).

Mr. Justice Mackinnon came to the conclusion that the defendant was not in default under the agreement and that the "plaintiff had failed to show any reason why the contract should be set aside". He consequently dismissed the action and refused to order reimbursement.

McLean v. *Jarry Automobile Ltee.*[4] was an action for the recovery of a $450 credit given to the plaintiff at the time of the

[3] [1945] S.C. 314.
[4] [1945] S.C. 330.

signing of an agreement for the sale of a new automobile, this credit having been given in consideration of the delivery of a used car by the buyer. The action asked also for the cancellation of the agreement. Mr. Justice Salvas maintained the action and, relying on the special terms of the agreement, condemned the defendant to pay the plaintiff the sum of $382.50, being the amount realized on the re-sale of the used car, less a deduction of ten per cent as provided for in the contract.

There seems to be an essential and fundamental difference between the credits given by the vendor in each of the four cases mentioned and the well-known credit note ordinarily handed by a store to a customer when merchandise is returned, under which the customer is entitled to buy any merchandise in the vendor's place of business up to the amount of the note. The latter might well be considered as advance payment on an open account in the name of the customer. On the other hand, a credit of the kind discussed in the four cases is *essentially* related to a particular and determinate sale; of its nature it is not to be used in any other purchase by the buyer at the vendor's place of business, unless there is a further agreement between them. This statement is borne out by the fact that in each of the four cases it was deemed necessary to ask for the cancellation of the agreement in order to obtain reimbursement and that, in the one case where cancellation was refused, reimbursement was also refused.

It would appear that each of the "credit notes" involved in the four cases discussed represented a payment on account of the sale price of a new car, which was to be delivered according to the terms of the agreement. In law each of them can be considered as evidencing a partial payment in kind, in a mixed contract of sale and exchange; being governed in the latter respect by articles 1596 and following of the Civil Code under the title "Of Exchange" and, in the former, by articles 1472 and following relating to the contract of sale.

There is nothing in Quebec law to render such "mixed contracts" invalid, so long as they do not "contravene the laws of public order and good morals", in the words of article 13. A payment of this sort is clearly within the definition contained in article 1139 of the Civil Code:

> By payment is meant, not only the delivery of a sum of money in satisfaction of an obligation, but the performance of anything to which the parties are respectively obliged.

A specific and corporeal thing can be just as much of a "payment" (or partial payment) as the remittance of a sum of money. Nor

is there anything in the title "Of Exchange" that prevents the exchange of a thing of a lesser value for one of a greater value, with a provision for the payment of the difference in money.

In my view, what has been characterized as a "credit note" in the four cases constitutes juridically a receipt evidencing the amount that the parties have agreed represents the value of the used car given in partial payment for a new one.

If the vendor lives up to the agreement and makes delivery of the new car, the buyer must pay the difference between the amount of the credit allowed him and the full price of the new car.

Most contracts of this nature provide for the situation that will arise where the vendor does not make delivery of the new car, and, where it does, reference must be had to the terms of the agreement as the law between the parties. Thus, most contracts provide that in the event of cancellation because of non-delivery the buyer will be entitled to recover possession of the used car already delivered by him. Even in the absence of a specific understanding, possession might in my opinion be recovered by analogy from article 1598 of the Civil Code:

> The party who is evicted of the thing he has received in exchange has the option of demanding damages *or of recovering the thing given by him.*

Where the used car has already been re-sold by the vendor, the contract usually provides that the amount of the re-sale price shall be reimbursed, less the expenses incurred by the vendor in putting the car in good working order and, usually, a commission on the sale.

Where the used car has been re-sold and the contract does not provide for reimbursement in the event that the new car is not delivered, the buyer in my opinion is entitled to the full amount specified in the so-called "credit note". Not only is there a presumption that the amount mentioned in the note is the value of the used car, but the parties are mutually bound by the amount mentioned, having both agreed in attributing that value to the car. I submit therefore that the so-called "real value" of the used car given in partial payment is irrelevant in determining the amount of the reimbursement.

In *Thivierge* v. *Langevin*[5] the learned judge based his decision upon the assumption that, where the down payment has been made in the form of a used car, the value of the used car has usually been increased for purposes of the particular transaction and it

[5] [1945] S.C. 297.

would be unfair consequently that judgment should be given for the whole amount of the note. With respect, I believe this to be erroneous. As a matter of fact, the sale price mentioned in the agreement is usually *the list price of the new car* and, if no down payment is made by means of an exchange, the buyer will be required to pay the list price in full. Why should the terms of the agreement as to price be enforced in this case, but departed from where it comes to reimbursement of the value of the used car given in part payment—It seems safe to say that any amount to be deducted from the sale price as the result of the delivery of a used car would represent normally the *real value* of the car in the opinion of both parties or, at least, its "worth to the vendor". In any event, the situation is covered by article 1012 of the Civil Code:

> Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.

I feel that the judgment in *Labonté* v. *Verdun Motors Ltd.*[6] is more in keeping with sound legal principles. In that case the full amount of the credit, namely $525, was ordered returned to the buyer, less however the sum of $24.10 for repairs. The fact that the plaintiff did not actually get the credit less the repairs was of course due to the fact that he was himself in default and damages were awarded against him. (As a matter of fact, the judgment contains no very clear justification for the deduction of the cost of repairs. No reference is made to any clause in the agreement providing for a reduction in case repairs were required to the used car before re-sale. Failing such a clause, the fact that the vendor had seen fit to make repairs for the benefit of a new customer should not have affected the "value" of the car as agreed upon by the parties.)

G. F.

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CONSTITUTIONAL LAW—ROYAL ASSENT—WITHHOLDING OF ASSENT TO A BILL, FOLLOWED BY ASSENT BETWEEN SESSIYNS.—On gratefully rare occasions the ordinary practitioner's hazy recollections of constitutional law are forced into sharper focus by the necessity of offering some reasonable, or at least palatable, appeasement to the public's curiosity and concern over some unusual government action. And the ordinary embarrassment of the man of law is not lessened by the usual faculty of the lay

[6] [1945] S.C. 295.

mind to ignore as inconsequential any point of legal difficulty at variance with the clear precepts of British Government as laid down in the seventh grade by Meiklejohn's History of England. Why indeed should the lay mind concern itself with the proposition that the non-exercise of a prerogative, only tolerable while unexercised, may amount to a convention nullifying the prerogative; or with the notion that Sovereign complaisance might vary with the season?

The recent occasion of local interest resulted upon the action of the Lieutenant-Governor of Prince Edward Island in according the Royal Assent, in the interim between sessions of the Legislative Assembly, to a bill of enactment from which such Assent had been withheld at the termination of the last preceding session, and upon the prompt action of the Government in giving administrative effect to the bill.[1]

The fact that the bill was a mildly relaxing amendment to the Prohibition Act accounted for the measure of popular interest, but its mildness prevented even the Bar from according it by recent habit the sanctity due all emergency measures. Nor could the fact that the assenting Lieutenant-Governor was the successor in office to the original withholder be of theoretical interest to the legal mind, however greatly it contributed in practical effect to the reversal of Royal regard. The only theory of this prerogative of office which is compatible with our concept of representative government is that it purports to be used to convey the will of the Crown, for the benefit of the people, and the possibility that such will could be stepped up or restrained by any peculiarity of internal resistance of the conductor should be theoretically inconceivable.

As to the withholding of assent, no question of non-usage could be raised. In 1924 the United Church of Canada Act was passed by the Legislature but was refused assent by the then occupant of Government House, a grandchild of the Isles and pillar of the Kirk, who had little difficulty in perceiving the impropriety of hitching the cart to the studbook by enacting a statute ancillary to the Dominion statute of incorporation which might not be enacted for some few days.

Lay and learned discussions were therefore confined to the question of whether or not the Royal Assent could be given out of session in any event, and particularly in the circumstances here

[1] An Act to Amend the Prohibition Act, 9 Geo. VI, 1945, c. 26; assented to on September 28th, 1945, by Proclamation in the Royal Gazette of September 29th, 1946.

existing. Or in better sequence, did anything having vitality survive the withholding and, if so, could it be vitalized in informal season and surroundings?

If we should hold that the passage of a bill by the legislature gave it life and effect dependent only on the approval of the Crown, and that the disapproval of the Crown removed such life, we might perhaps follow the more practical view and approve the resulting implication that the Crown acts as a monitor only, to discern unfavoured legislation and to kill it. But however exactly this accords with realism, it is contrary to the basic though distant theory of our constitution of government, of which theory our present insistence on the formality of Royal Assent is a survival. And that survival should only be interpreted in light of the original theory, whereby it must be assumed that if assenting power has any virtue its effect must be to give original life to the enactment.

And if the assent be the vitalizing factor, nothing can be held to have died by its withholding, whether by disallowance or reservation, and the bill should seem to lie dormant as does an early-planted seed awaiting germination by the kindly warmth of an unseasonably beclouded sun.

It should follow logically that the life-giving agency could act at any time if invoked in due and proper order. The Legislative Assembly had fully discharged its law-making function and expressed the will of the people in due constitutional form. It would be derogatory to argue that in consequence of the failure of assent it should again convene and again express its will. Admittedly, the Royal Assent has over the course of many years been granted only during the legislative session. But that practice cannot be indicative of the lessening of Sovereign rights or authorities outside the session, as history and theory indicate quite the contrary. Nor should it be regarded as a compelling convention of usage to restrict the growth of democratic powers, as constitutional conventions tend otherwise.

But probably the whole difficulty might better be resolved by the simple proposition that the present status of democratic maturity allows only the barest possible attention to any limitation of form or precedent. If the will of the people is expressed by the representatives of the people with assumed regard for the public benefit, surely any indication of Royal approval should be sufficient.

K. M. MARTIN

Charlottetown

MUNICIPAL CORPORATION—ACTION BY RATEPAYER WITHOUT JOINING ATTORNEY-GENERAL—CONTRACTUAL POWERS OF A COMMON-LAW CORPORATION.—The recent decision of Harrison J. in *S.M.T. (Eastern) Limited et al.* v. *The City of St. John*,[1] deals with the competency of a ratepayer of a municipality to bring an action on behalf of himself and all other ratepayers to restrain interference by the municipality with a public right, and also with the application of the doctrine of ultra vires to the contractual power of a municipal corporation incorporated by Royal Charter.

The City of St. John had entered into a contract with the New Brunswick Power Company purporting to grant it a licence to operate a bus service. By a clause in the agreement the City undertook to indemnify the Power Company for any capital loss sustained by it in respect to assets acquired for the purpose of carrying out the agreement, if such loss were due to any action of the City, for example in granting a similar franchise to others. The plaintiff company was seeking a franchise to provide the same type of service.

The plaintiff brought action as a ratepayer of the City of St. John, on behalf of itself and all other ratepayers, contending that the agreement in question was ultra vires the defendant in that the Motor Carierr Board had not granted a licence to the New Brunswick Power Company to operate a bus service within the Province as required by The Motor Carrier Act, 1937;[2] that the operation of buses without such authority was prohibited by the act;[3] and that no by-law had been made by the Council of the City of St. John with the approval of the Lieutenant-Governor in Council as required by the act.[4] The plaintiff contended further that the purported agreement was ultra vires the defendant and that the defendant had no power to enter into a contract of indemnity. On the ground therefore that the agreement contemplated the performance of an unlawful act (and one opposed to public policy), the plaintiff sought an injunction to restrain the defendant from executing the agreement.

The defendant took a preliminary objection on the ground that the plaintiff, neither by itself nor in its representative capacity on behalf of the ratepayers of St. John, was competent to bring the action, since the Attorney-General was a necessary party in an action to restrain interference with a public right.

[1] (1946), 18 M.P.R. 374.
[2] 1 Geo. VI, 1937, c. 43, s. 4.
[3] *Ibid.*, s. 11.
[4] *Ibid.*, s. 13.

The law is well settled that an individual is not competent to maintain an action restraining a wrongful violation of a public right unless he has been exceptionally prejudiced by the wrongful act over and above the damage suffered by the general public, or unless the interference with the public right is at the same time an interference with some private right.[5] The authorities cited by Harrison J. in his decision lead to the further conclusion that "a violation of a law by a municipality not involving payments out of municipal funds and affecting all inhabitants of the city is an interference with public rights and interests, and any action against the municipality because of such illegal action must be taken by the Attorney-General".[6] Thus the ratepayers of a municipality have no right against it for a violation of some general law, unless the violation results in the expenditure of municipal moneys or creates a present liability to pay municipal moneys, the payment of which might lead to increased rates.

Harrison J. was of the opinion that the indemnity clause in the contract did not create such a liability, because the City might never be called upon to pay out municipal funds under the clause. He concluded therefore that the plaintiff had no right of action either on behalf of all the ratepayers or in its own right; it held no franchise to run buses in the City of St. John and thus had no property right that could be affected by the contract. In view of this conclusion he did not find it necessary to deal with the question whether the contract was illegal as being in violation of The Motor Carrier Act.

On the question whether the contract was ultra vires the City of St. John, the learned judge held that the defendant was a common-law corporation, incorporated by Royal Charter, and as such had all the powers of a natural person.

An appeal is pending from this judgment.

REUBEN COHEN

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[5] HALSBURY'S LAWS OF ENGLAND, 2nd ed., Vol. 26, p. 43.
[6] (1946), 18 M.P.R. 374, at p. 383.
[7] *Bonanza Creek Gold Mining Company Limited* v. *The King*, [1916] 1 A.C. 566.