RECENT DEVELOPMENTS IN CANADIAN LAW

CONTRACT *

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I. STATUTORY CONSIDERATIONS

A. *Recent Legislation Regarding Purchasers From Door to Door Salesmen*

The lament of the doorstep purchaser is not a new tune to our times. It has been heard since man conceived the idea of selling to the neighborhood families. It has many causes and the purchaser in any given case is more likely to attribute his disappointment to justifiable reasons; the merchandise may not be as described, or the salesman has misled him during the presentation. But the reason is often the purchaser's own inability to say "No" to a competent salesman who is well rehearsed in his presentation. Thus each year thousands of these purchasers find themselves having second thoughts regarding their purchases and contracts to purchase. It may or may not be that they have been induced to buy by a misrepresentation, fraudulent or otherwise, but they are still saddled with an item or service which in the lucid moments of afterthought, they have discovered they neither need nor want. The purchasers feel they must either discharge their part of the bargain or be subjected to a costly court action initiated by the vendor or his assignee of the conditional sales contract. Whether or not a particular purchaser is correct in his belief depends upon a number of factors, none of which can be expected to be within the knowledge of the average consumer.

The ranks of the itinerant salesmen have swelled. Today the seller utilizes sophisticated marketing research and motivation; he uses the mass advertising media which saturate a large market. It remains only for the salesman to memorize his presentation and patent replies to break down the reserves of the householder.

As the number of disgruntled buyers grew, so grew the demand for a protective shield to be placed around the buyers. Welfare agencies, consumer credit associations, and the populace at large began calling for protec-

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tion against the seller. Politicians began lobbying for legislation which would remedy the situation. As a result, statutes to protect the consumer from door-to-door salesmen were passed in Saskatchewan and Manitoba in the spring of 1965 and in Ontario in the summer of 1966. Alberta contemplates passing similar legislation. In general, the remedy adopted was to allow the consumer a period of time within which to rescind an otherwise binding contract.

In Saskatchewan, section 20(1)(a) of the Act Respecting Direct Sellers [1] provides that "a direct sales contract is rescinded where the purchaser serves a notice of rescission on the vendor within four days after the day on which the purchaser entered into the contract." Section 20(1)(b) further provides that the contract can be rescinded within one year of the contract date if the seller was not licenced under the act; the goods or services were not supplied within 120 days of the contract; or the vendor or his salesman has failed to comply with any of the terms, conditions or restrictions of the act. The Manitoba remedy is contained in the Act Respecting Consumer Credit. [2] Section 7(1) of this act provides a period of grace of two days in which the buyer may change his mind and rescind the contract.

Both acts require the seller upon receipt of the notice of rescission to return the money paid under the contract. The Saskatchewan act allows the retention by the vendor of a reasonable sum (not to exceed fifty dollars) for deterioration of the goods or services where perishable, or for consumption of the goods. This, however, applies only to those contracts where the consideration was less than 200 dollars.

That the acts will be successful in their purpose is evidenced by a recent report issued by Saskatchewan. [3] The report indicates that nearly 50,000 dollars have been returned by the doorstep purchasers in the first six months of the existence of the act. Further, during the period there were 69 complaints registered by purchasers against 19 companies. At first glance these figures may not be impressive. But over so vast and thinly settled a province as Saskatchewan, it takes time for news of a new law to get around. [4] Just how often the act's procedure will be invoked in the future is inestimable, but the important point is that the number will certainly increase as people become acquainted with the legislation. In Ontario where the larger and more commercially oriented population recently acquired similar legislation it is difficult to estimate what the exact effect of such legislation will be. But if Saskatchewan's experience is any indication, retail sales made directly at consumers' homes will undergo somewhat of an upheaval.

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[1] Sask. Stat. 1965 c. 71, § 20(1).

[2] Man. Stat. 1965 c. 15, § 7(1).

[3] The Ottawa Citizen, Feb. 19, 1966, p. 6, col. 4.

[4] *Id.* at col. 5.

In order to discuss the area of operation and the effect of these statutes, it must be pointed out that there already exists at common law the remedy of rescission and that the acts are but extensions of that remedy. The acts were necessary because so few people were aware of the course of rescission which was already available.

The common-law right to rescind a contract is restricted to certain circumstances. The right to terminate a contract can be affected by the contract itself containing what is called a "resolutive provision" or cancellation clause. Apart from any express power given in the contract, this right can arise from breach of the contract by the opposite party, mistake in the formation of the contract, or a prior misrepresentation by the opposite party, which induced the contract. [5] The misrepresentation can lead to repudiation whether it is fraudulent or innocent, [6] although where it is an innocent misrepresentation, rescission is not available in as many cases.

By thus excluding the areas of contract law where the termination of a contract is presently allowed, the purpose of the acts seems better delineated. The acts were designed to offer repudiation in those instances where both parties have contracted in good faith with the absence of any vitiating factors and no element present whereby the contract could be repudiated at common law.

All that is necessary for repudiation under the acts is a binding contract, the change of mind of the purchaser, and proper notice of the purchaser's intention to rescind being given to the vendor. There need not be any dissatisfaction on the part of the purchaser before he is entitled to rescind. This may be better illustrated by way of example. Suppose *V* approaches *P* on his farm (section 5(b) of the Saskatchewan act applies to any building or land appurtenant to the farm) and they agree that *V* will paint *P*'s barn for 250 dollars. *V* does so that day. Two days later *P* decides without cause that he really did not want his barn painted and sends a registered letter to *V*'s business address. Within ten days *V* must return the money paid under the contract.

The purposes and effects of both statutes are identical but they vary in detail and provisions to a large extent. Thus it happens that in any given case one statute might apply, whereas the other would not if the sale occurred within its jurisdiction. For example, the above hypothetical situation would not be covered in Manitoba because the act of that province does not provide for the rescission of a contract where the subject matter was the performance of a service. It only covers transactions which have as their subject matter the sale of goods.

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[5] Gordon, *Election to Repudiate a Contract*, 38 CAN. B. REV. 509 (1960).
[6] *Id.* at 513.

An important clause included in the Manitoba act but overlooked by the Saskatchewan act is section 12 which states :

> A person to whom a times sales agreement or other agreement or contract for the purchase and sale of goods is assigned has no greater rights than, and is subject to the same obligations, liabilities and duties of the assignor; and the provisions of this Act apply equally to such assignee.

Since at common law the assignee of a contract took subject to any equities existing between the original parties to the contract, this may not appear to be too important an omission in the Saskatchewan act. However, the practice of the direct sellers is usually to get the purchaser to pay a portion down and sign a conditional sales contract and then immediately assign that contract to a finance company. Previously the finance company was also affected by any fraud by the vendor upon the purchaser and its rights were restricted by that fraud. However, where there were no "legal" equities between the parties to the contract, the finance company could require the consumer to pay off the remainder of the sum owing regardless of the consumer's decision that he did not want the article for which he had signed a contract. With the Manitoba act, however, the finance company will be bound by the act and thus even where there are no equities which formerly would have limited its right to collect, it too must wait the two day period out. If the purchaser delivers notice on the vendor within two days, the contract is vitiated and the finance company cannot collect the balance owing under the contract. This result may not be the case in Saskatchewan. Until it has been tried in a court, the issue of whether an assignee is also bound by the terms of the Saskatchewan act is debatable.

One other oversight on the part of the Saskatchewan legislation was in not stipulating at what time notice is effected. Is it upon receipt of the notice by the vendor or upon posting by the purchaser? This question is posed merely as a possible stumbling block. Its answer will most likely be that the notice is effective upon posting. This is due to three factors. Firstly, in ordinary contract law an acceptance is effective upon posting by the acceptor, and since the rights and liabilities of the acceptor and the consumer hinge on the same question of time, the analogy should bear through. Secondly, since the act allows but four days for rescission, it must be taken to mean four days in which to post the notice. If it were to be otherwise the actual time allowed for termination would be substantially less since it requires at least a day and a half for delivery of a letter. Thirdly, and less important, is the fact that the Manitoba act has stipulated that the notice is effective upon posting by the consumer. [7]

One other difference between the two acts is the vendor's right of set-off against the money claimed by the consumer under the contract, allowed by

[7] Man. Stat. 1965 c. 15, § 8(1)(b).

section 20(5) of the Saskatchewan act. This set-off is confined to a maximum of fifty dollars and is applicable only to contracts where the consideration is less than 200 dollars. The Manitoba act lacks such a section. This is perhaps unfortunate because it could happen that a consumer will avail himself of the act in order to "legally" defraud an honest seller. Neither act requires that there be cause for the purchaser's rescission. Thus he may dissolve the contract at will and leave the seller to sustain a substantial and possibly deadly loss. This is especially so in the case of the Saskatchewan act since it provides for the repudiation of a contract of service.

An example should amplify this assertion. It is a common practice in small towns whose population does not warrant the establishing of a permanent painting (or other) business for a firm from a larger centre to canvass the town, arranging appointments for the vendor to paint houses. If the vendor can line up enough potential customers he will arrive in town with his crew and equipment and begin operations. Assuming that each contract calls for the payment to be in excess of 200 dollars it can be seen that if but a few of the customers choose to use the act's machinery to vitiate the contract they can have their houses painted for nothing and possibly force that painter into serious financial trouble.

This oversight is not confined only to the Saskatchewan act. Under the Manitoba act it could also occur when the contract is for the sale of perishable goods. And here, as well as with the Saskatchewan act, the seller may suffer even if the customer is guiltless and is rescinding only because he realizes he acted indiscreetly in signing the contract. Once the contract is terminated and the seller returns the money, the customer must be willing to return the goods; but where those are perishable, their value to the seller is negligible, and he must bear the loss.

The Saskatchewan act made an attempt to solve this repercussion of the act, but it did not extend it far enough. The act should provide for a more equitable sharing of the loss. In cases where the consideration is more than 200 dollars the act should provide for a mode of arbitration to apportion the loss between the parties. In this way neither party suffers to a greater extent than the other.

The acts have one important, if subsidiary, function. While the common law provides machinery for a customer to rescind a contract, rescission is often time consuming and costly because the customer may be compelled to prove his claim in a court of law. He may now make use of these acts to attain the same ends as he would have sought in common-law procedure. The acts do not confine themselves to those situations which are not covered by presently existing rights, and it is to be assumed that they may be implemented where the consumer has suffered some fraud or misrepresentation at the hands of the seller, or where there was a breach of the contract by

the other party, that is, those instances where formerly the consumer had to rely on the rigid rules of repudiation at common law.

The recently passed Consumer Protection Act [8] of Ontario represents, in some ways, an improvement of the Manitoba and Saskatchewan statutes. The law, passed a year later than the Manitoba and Saskatchewan statutes, clarified some of the ambiguities already discussed, defined with greater clarity the situations in which it may apply, and, in its total effect, should provide a more adequate safeguard for the consumer. Perhaps the most significant feature of the Ontario arrangement is the simultaneous establishment of a Consumer Protection Bureau [9] to administer and enforce the law and to investigate complaints of its violation.

Under the act, a contract may be rescinded if the following conditions are present: First, the purchase price is in excess of fifty dollars excluding credit charges; [10] second, the contract was entered into at some place other than the seller's permanent place of business, [11] thus covering house-to-house sales; third, the contract is executory, [12] that is, the performance of the service or delivery of the goods or payment of the price is to occur at some future date after the making of the contract. [13]

If rescission is permissible under the act, the buyer must return all goods received by him under the contract and the seller is obliged to return all monies received by him "whether from the buyer or any other person." The act seems broad enough to include any finance company which may have discounted the conditional sales agreement. The act thus adopts a similar provision of the Manitoba statute.

Section 18 provides a period of two days within which a notice of rescission should be given; the notice may be effected by personal service or by registered mail. If notice is given by registered mail, the law, unlike the Saskatchewan act, specifically provides that delivery is deemed to have been effected at the time of mailing.

The act also takes cognizance of another frequent cause of consumer complaint — undisclosed excessive interest charges. It sets out certain requirements of, and disclosures to be made in, any conditional sales agreement.

The Ontario act, however, also neglects to include a workable formula for setting off the seller's loss against that of the imprudent buyer. Such a provision, although criticizable for its failure to extend it far enough, was

[8] Ont. Stat. 1966 c. 23.
[9] Ont. Stat. 1966 c. 24.
[10] Ont. Stat. 1966 c. 23, § 15.
[11] Ont. Stat. 1966 c. 23, § 18(1).
[12] Ont. Stat. 1966 c. 23, §§ 15, 19.
[13] Ont. Stat. 1966 c. 23, § 1(f).

included in the Saskatchewan act. This failure to provide for the equitable distribution of losses suffered can only be viewed with disappointment.

This analysis shows that while the acts achieve the purposes for which they were designed they have also led to an unjust pitfall wherein the innocent seller may find himself thrown by the consumers' exercise of their statutory rights.

B. *Amendments and Decisions Regarding Existing Legislation*

1. *Conditional Sales*

The following areas deserve attention: (a) registration of the conditional sales contract; (b) repossession on default; (c) notice of resale; (d) annexation of the chattels to real property.

(a) *Registration*

The purpose of registering conditional sales contracts is to provide some sort of uniform notice to the world that title to goods in the possession of *X* rests in *Y* until full payment is made. Thus, a subsequent purchaser or chattel mortgagee will be able to ascertain whether or not the possessor has full title sufficient to enable him to sell or mortgage the goods. Once registration has taken place notice is given to the world and subsequent purchasers are estopped from denying that they had notice; registration of conditional sales contracts is for the protection of subsequent purchasers and mortgagees for value without notice. [14]

Whereas the main purpose of registration is the protection of all who subsequently deal with the chattels, [15] the protection afforded the vendor is also of great importance; he retains his right in rem, regardless of the possessor, provided the contract is registered in the province into which the goods have found their way. A recent Alberta case dealt with this problem. [16] A car purchased under a conditional sale in Ontario was transferred to Alberta, the contract being registered in both provinces. The purchaser defaulted, and the car was seized and resold with a deficiency resulting. Under the Alberta act, [17] the vendor is precluded from suing for the deficiency but it was held that the Ontario act, which permits an action for the deficiency, should prevail. This result was based on the finding that the parties first contracted under the Ontario law and, therefore, intended to be governed by it.

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[14] Fetzer, *The Ontario Conditional Sales Act*, 17 CAN. B. REV. 583, at 589-91 (1939).
[15] Roblin Motors Ltd. v. Pringle, [1956] Ont. Weekly N. 153 (County Ct.).
[16] Trans-Canada Credit Co. v. Prince, 52 West. Weekly R. 446 (Alta. 1965).
[17] The Conditional Sales Act, ALTA. REV. STAT. c. 54, § 19 (1955).

Registration is of utmost importance when several creditors claim the goods to satisfy debts owed to them by the purchaser. For this reason, the courts insist on strict compliance with the statute to give effect to registration. Non-compliance with the act will not cause the vendor to lose his interest in the goods, but he will only lose his right to have his debt satisfied first, although in most provinces he will be able to sue the purchaser for the deficiency on the contract or accompanying promissory note. The contract in *Swanson v. Ackland & Son* [18] was not registered properly. The court insisted that courts should not hesitate to demand strict compliance with registration sections even though the penalty was severe in that the vendor or assignee of the contract will be deprived of all property rights in the chattel sold. However, the action in this case was brought by an ordinary creditor and not by a subsequent purchaser or mortgagee. The vendor and creditor each had a valid claim against the chattels on a pro rata basis. As against a subsequent purchaser, the vendor will lose all his property rights in the goods. [19] Even a mistake in the serial number of a car in the contract filed amounts to non-compliance with the statute, and it cannot be classed as a mere clerical error which could be cured. But language used in the contract is not decisive to registration. Thus a recent Alberta case [20] held that regardless of the native language used in the contract, it could still be registered in Alberta under the Conditional Sales Act and be as effective as if it were in English.

In certain instances the vendor need not file a conditional sales contract at all if it pertains to manufactured goods and the name of the manufacturer or seller is affixed to the goods. In a recent Ontario case [21] a decal bearing the name and address of the seller affixed to the rear of a car sold under a conditional sale was held sufficient to give the seller priority over a subsequent registered chattel mortgage under section 2(5) of the Ontario Conditional Sales Act. [22] Minor discrepancies between the printed name on the goods and the registered name of the seller will not remove the transaction from the protection of the act, and will permit the seller to retain his priority of interest. [23]

For the subsequent purchaser to escape the claim by the vendor against the goods it must be through either non-compliance with the statute with regard to registration, or through the fact that the conditional purchase was made by a dealer in that type of goods, sufficient to allow the property to pass to a subsequent purchaser, notwithstanding that the requirement of the act has been complied with. However, the nature of the goods must not be

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[18] 42 West. Weekly R. 50 (Alta. Dist. Ct. 1963).
[19] Ostler v. Industrial Acceptance Co., 45 West. Weekly R. 673 (B.C. Sup. Ct. 1963).
[20] General Motors Acceptance Co. v. Perozni, 52 West. Weekly R. 32 (Alta. Dist. Ct. 1965).
[21] Harris v. Community Finance Co., [1962] Ont. 1013, 35 D.L.R.2d 90 (High Ct.).
[22] ONT. REV. STAT. c. 61, § 2(5) (1960).
[23] *Re* Seizures Act, 31 West. Weekly R. 193 (Alta. Dist. Ct. 1960).

altered by the conditional purchaser; rather, they must be sold substantially as they were delivered to him. In a case,[24] certain cloth sold was manufactured into garments, and it was held that the cloth was sold, not for resale as cloth, but for the manufacture into clothes and thus did not come under sections 2(e) and (4) of the Ontario statute to allow the subsequent purchaser to escape the claim of the original conditional sale vendor.

(b) *Repossession and the Vendor's Remedies*

Seizure of the goods by the vendor or his assignee will occur shortly after a breach of a condition occurs, usually for a default of payment. The provinces are divided into two camps by their legislation on this aspect of conditional sales. Ontario allows the purchaser twenty days within which to redeem the seized goods on payment of the arrears and costs, during which time the seller can do nothing to prejudice the buyer's right to redeem;[25] the Alberta statute gives no indication that the purchaser has any right whatsoever to tender the money after seizure has taken place, and redeem them. More important are the different remedies allowed the vendor upon the default. In Ontario, upon giving notice to the purchaser, the vendor may resell the goods and sue the purchaser for the deficiency arising from the difference between the purchase price and the resale price, presumably crediting the purchaser if there is an excess on resale.[26] One criticism of the Ontario act (also applicable to the New Brunswick act[27] which is similar on this point) was noted in *Industrial Acceptance Co. v. Paul.*[28] In the event that the vendor repossesses and does not, or cannot resell it, he has no means to recover the cost of repossession, depreciation or loss of other possible sales while the goods were in the hands of the defaulter. Also, should the vendor not wish to repossess he has no remedy under the act to recover the contract price, although the common practice is to sue on the contract or accompanying promissory note. On the other hand, under the Alberta statute if the vendor repossesses, he is precluded from suing on the contract or promissory note for a deficiency; the debt is deemed to be extinguished. Under a 1965 amendment if he sues on the contract and is awarded judgment, the judgment is deemed to be fully paid and satisfied if he seizes the goods and resells them.[29] While this amendment is couched in language different from that used in the statute of 1955, it is a moot point whether it extends or modifies the scope of the seller's remedies. A comparison of the two sections seems to show that the law is not changed. If so, *Skogstad Construction Ltd. v. Stan Reynolds Ltd.*[30] is still good law

[24] *Re* M. Steiner & Sons, *Ex. parte* Daefler, [1961] Ont. Weekly N. 250 (High Ct.).
[25] S. & R. Motors Ltd. v. Ritchie, [1960] Ont. Weekly N. 37.
[26] Won Wah Low Co. v. Wong, [1962] Ont. Weekly N. 1965 (High Ct.).
[27] The Conditional Sales Act, N.B. REV. STAT. c. 34, § 14 (1952).
[28] D.L.R.2d 397 (N.B. 1961).
[29] An Act to Amend the Conditional Sales Act, Alta. Stat. 1965 c. 15, § 19.
[30] 34 West. Weekly R. 325 (Alta. 1961).

in so far as it allows the conditional seller a third choice of remedies in addition to those of seizing the goods or suing for the purchase price and getting an execution order against the goods. The court felt in this case that the seller could sue on the contract. If awarded a judgment and execution order, he could seize goods of the purchaser which were not the subject matter of the conditional sales contract to make up any additional security that might be necessary should there be a deficiency on the resale of goods. Unless this rule is modified by the dictum that section 19 of the Alberta act did nothing more than to limit the remedies of the seller in respect of the chattel mortgage to the chattels so mortgaged,[31] the vendor's remedies seem to have been extended. Seizure of goods under an execution order pursuant to a judgment is not an action in respect of the conditional sales contract; rather, it is a judgment deciding the rights and liabilities of the parties under the contract.

A final word could have been said in a recent Alberta Supreme Court decision[32] rendered four months after the amendment, but the court chose to ignore it. While recognizing the choice allowed by section 19, it held that an election to sue on the contract for the purchase price does not result in a loss or waiver of the lien, and an unsatisfied judgment does not destroy the vendor's position as a secured creditor on the debtor's bankruptcy. This indicates that the vendor can demand full payment of the judgment from the trustee upon liquidation, and he is not limited to the proceeds of a sale of the conditionally sold chattel. Should he not be able to realize the amount of his lien in the resale, he can turn elsewhere for the deficiency and section 19 will not restrict him.

The Limitation of Civil Rights Act[33] and Conditional Sales Act[34] of Saskatchewan (which closely parallels that of Ontario in relation to vendor's remedies) were considered recently in *Arrow Service v. Wedge.*[35] The vendor was allowed, upon seizure of the goods, to realize his lien solely on the repossessed goods which had the effect of totally extinguishing the purchaser's debt. This possibility was prepared for by the 1965 amendment to the Alberta Conditional Sales Act which went one step further and stated that if the goods were either seized or voluntarily surrendered, the seller's debt would be extinguished. This result nullifies the rule in *Litzgus v. Zerk*[36] and the more recent case of *R. Angus Ltd. v. Traders Finance,*[37] decided two months before the amendment was passed, which held that if the goods were voluntarily returned to the seller, the protection of section 19

[31] Krook v. Yewchuck, [1962] Sup. Ct. 535, at 544.
[32] Butler v. Traders Finance Co., 49 West. Weekly R. 480 (Alta. Sup. Ct. in Bankruptcy 1964).
[33] SASK. REV. STAT. c. 95 (1953).
[34] SASK. REV. STAT. c. 358 (1953).
[35] 49 West. Weekly R. 65 (Sask. Sup. Ct. 1964).
[36] 31 West. Weekly R. 671 (Alta. Sup. Ct. 1959).
[37] 51 West. Weekly R. 568 (Alta. Sup. Ct. 1965).

pertaining to seizure would not prevail and the purchaser would still be liable for the deficiency.

(c) *Notice of Resale*

Under most provincial conditional sales acts, Alberta's being an exception, the seller may repossess the goods and resell them subsequent to giving notice to the purchaser of his intention to do so. The necessary steps are outlined in the statute and the courts demand precise compliance with them.

The most contentious item required in the notice is the itemized statement of the balance due and the costs of taking and keeping possession up to the time of the notice. In a recent Ontario case [38] a notice which merely stated the original purchase price and the balance due was held as sufficient compliance with the statute. Since there had been no payments made and no expenses incurred in repossession, the notice contained all the particulars required. But in a British Columbia case, [39] (the Ontario and the corresponding British Columbia sections are similar) the vendor failed in his action for the deficiency. It was held that the amount found due and demanded must be correct and not merely substantially accurate; any refund due to the purchaser on his insurance premiums or finance charges should be worked out to the date set for redemption and the necessary credit given, otherwise the amount due will not be correct. However, a later case [40] disagreed with this rule; it concluded that the vendor need not credit the purchaser with a rebate of the insurance premiums. The policy is entirely within the control of the purchaser and it would be extremely difficult for the vendor to give credit for either the insurance premiums or finance charges since he would have to estimate the term of the unexpired premiums and charges; a substantially accurate approximation of the amount due would suffice and minor discrepancies would not serve to nullify the notice.

(d) *Annexation of Chattels to Real Property*

Whether or not a chattel has become so affixed to the realty as to make it a part thereof has always been a source of dispute. The law on this issue is based on a question of fact in each case and the general principles pertaining to degree and purpose of annexation develop problems only in their application to those facts. The question of annexation raises, however, a problem of priorities in relation to subsequent purchasers and mortgagees of the land, which goes beyond a mere question of fact.

As against an unpaid seller, chattels affixed to realty pass to the owner or mortgagee of the land unless he has notice of the seller's interest; the vendor thus receives a priority of claim to the goods if he has registered

[38] Trans-Canada Credit Co. v. Gagnon, [1965] 1 Ont. 257.
[39] Speedway Motors Ltd. v. Davies, 39 West. Weekly R. 649 (B.C. County Ct. 1962).
[40] Industrial Acceptance Co. v. Smith, 41 West. Weekly R. 632 (B.C. Sup. Ct. 1962).

his conditional sales contract. [41] Nearly all of the provincial acts allow the vendor to keep his interest in the goods as though they had not been affixed; they also give to the owner or mortgagee the right to retain the goods on payment of the balance due.

In *Canadian Ice Machines v. Minister of Finance,* [42] refrigeration equipment was built into an ice rink. It was held that the degree and purpose of the annexation was such as to enhance the property and increase its value and not for the enjoyment of the goods alone; just because they were installed under a conditional sales agreement does not make them any less permanent. The vendor lost his right of possession, but retained his lien on the goods; he can sue on the contract and get a judgment against the land to which they were annexed. However, *Canadian Propane Consol. Ltd. v. Hill,* [43] where a furnace was installed under a conditional sales agreement, held that property in the chattel will not pass until the purchase price is fully paid and the intention with which the goods are affixed must govern. Thus chattels which are affixed to realty in such a way that they would, in ordinary circumstances, become part of the realty, nevertheless remain chattels in law and the vendor retains his lien unless a mortgagee or purchaser takes possession without notice of the vendor's claim. The distinction between the *Canadian Ice* and *Canadian Propane* cases pertains to the extent of the vendor's remedies to recover the purchase price. It should be noted that even if a vendor loses his rights of repossession, he is still in a better position than before since he can get a judgment against the land to recover the full amount of his lien which will not be diminished by the cost of seizure, or the expense of restoring the premises to their condition prior to annexation.

2. *Statute of Frauds*

Probably the most significant case [44] during the survey period concerning the Statute of Frauds [45] and the related problem of parol evidence is *Fleetwood Co. v. Imperial Investment Co.* [46] This case concerned a guarantee by the appellant finance company on the purchase price of some musical instruments sold to a retailer by the respondent manufacturer. It was undis-

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[41] Fetzer, *op. cit. supra* note 14, at 589-91.

[42] 51 West. Weekly R. 238 (B.C. Sup. Ct. 1965).

[43] 52 West. Weekly R. 184 (Alta. Sup. Ct. 1965).

[44] Cases decided during the survey period were: Fleetwood Co. v. Imperial Investment Co., 51 D.L.R.2d 654 (B.C. 1965); High School Bd. v. Bd. of Educ., [1965] 1 Ont. 129 (Sup. Ct.), *aff'd* [1965] 2 Ont. 51; Gutheil v. Municipality, 50 West. Weekly R. 278 (Sask. Sup. Ct. 1964); Sanders v. Sanders, [1965] 1 Ont. 275 (Sup. Ct.).

The *High School Bd., Atkinson,* and *Guthell* cases serve only to illustrate the general rule as to what is required by way of a memorandum to satisfy the Statute of Frauds in particular fact situations. *Sanders* affirms the basic rule that part performance must be unequivocal, thus following the leading case of Maddison v. Alderson, 8 App. Cas. 467 (1883). *Fleetwood* raises some important questions and is thus discussed in detail.

[45] ONT. REV. STAT. c. 381, § 4 (1960) reads: "No action shall be brought... unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

[46] 51 D.L.R.2d 654 (B.C. 1965).

puted that before the written guarantee, [47] a manager of the appellant's branch office verbally agreed to guarantee the price in the transaction. The trial judge found that there was a sufficient written guarantee. The finance company appealed on the grounds that it was not a guarantee because there was no "express" guarantee, and even if it was a guarantee, there was no sufficient memorandum to satisfy the Statute of Frauds. [48]

The British Columbia Court of Appeal dismissed the appeal, finding that the instrument was a guarantee and that there was a memorandum sufficient to satisfy the Statute of Frauds. The case is valuable in that it clarifies the law regarding written guarantees; a guarantee does not require the word "guarantee" to be expressed; and a memorandum is sufficient if the purchase order described the subject matter of the contract and it was signed by the person to be charged or his authorized agent.

Mr. Justice Davey, in his dissent, believed that there was no sufficient memorandum to satisfy the statute and that the appellant's signature was meaningless. He proceeded from the general principle [49] that extrinsic evidence is always admissible to prove what the parties really had in mind, but not to contradict or vary the contract. Extrinsic evidence of every material fact which will enable the court to ascertain the nature and quality of the subject matter or to identify persons and things must be received. [50] Davey then qualifies this statement by quoting the following words of Mr. Justice Williams in *Holmes v. Mitchell:* [51]

> The letter, if read by itself without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That ... would be an unreasonable construction ... it evidently refers to previous conversations in which these particulars were supplied... therefore the whole promise is not in writing as the statute requires....

He further remarked that "parol evidence may supply the consideration, but it cannot explain the promise."

In the *Holmes* case, however, there was nothing written save the short letter by the defendant. In the *Fleetwood* case the appellant's words were written on the purchase order.

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[47] *Id.* at 656. The alleged agreement was in the following terms: The manager of the finance company wrote at the top of the purchase order: "to be paid Jan. 19/60," and at the bottom he wrote: "Imperial Investment Corp. Ltd. per D. S. Frazer."

[48] Another ground of appeal not in issue for the purpose of the survey was whether the agent was unauthorized to sign such an instrument.

[49] Bank of New Zealand v. Simpson, [1900] A.C. 182 (P.C.).

[50] *Id.* at 187-88 citing 2 TAYLOR, EVIDENCE, § 1194 (8th ed. 1887). In the *Simpson* case the appellant was allowed to adduce evidence extrinsic to the written agreement to show the total cost of works and land purchased for a railroad and the amount of the respondent's fee to be included in the calculation.

[51] 141 Eng. Rep. 856, at 859 (C.A. 1856). This case dealt with a letter to the effect that: "I will take any responsibility myself respecting it, should there be any." *Id.* at 857.

Davey uses the *Holmes* case to state that the instrument in question could not be a guarantee because one cannot introduce parol evidence to show that it was a guarantee. He says that "to hold otherwise would defeat the purpose of the statute which was to protect parties against parol guarantees." One can disagree with this assertion. The purpose of the statute was not to protect people against parol guarantees but to protect people from fraudulent agreements when the fraud could not be ascertained because there was no written agreement to which the parties and the court could refer.

Davey goes on also to say : "It is either a guarantee or the acceptance of the transaction as one which the company would finance by a loan. Each one is equally plausible." But by pointing this out he has brought himself around to saying that the document is ambiguous. If that is the case, parol evidence is admissible to ascertain the true intention of the parties. [52]

There is no reason to doubt the decision of the majority in the *Fleetwood* case that the instrument was a guarantee and that there was a memorandum sufficient to satisfy the Statute of Frauds.

C. *Third-Party Rights in Contracts*

In the case of *Bill Boivin Plumbing & Heating Ltd. v. Flatt,* [53] the Ontario Court of Appeal delivered a severe blow to any development of a Canadian doctrine of third-party rights. The ratio of the decision is that such an agreement (a waiver of a lien right) can confer no rights or benefits upon anyone except the parties to it. The court relied upon the recent House of Lords decision in *Scruttons Ltd. v. Midland Silicones Ltd.,* [54] wherein Viscount Simonds quoted with approval Lord Haldane's famous pronouncement on third-party rights in the case of *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [55]

A brief summary of the contractual rights of third parties is necessary before any conclusions are attempted. [56]

(a) *The Rule at Common Law*

The case of *Dutton v. Poole* [57] is an example of the older English decisions that recognized the rights of third parties to a contract. With the later *Tweedle v. Atkinson* decision, [58] the tide of English jurisprudence turned

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[52] *Supra* note 49; see also 1 CHITTY, CONTRACTS 617, at § 614 (22d ed. 1961) where it is stated : "So, in the case of a guarantee, if the party who gives it uses ambiguous language, such ambiguity will be taken more strongly against himself."

[53] [1965] 2 Ont. 649, 51 D.L.R.2d 574.

[54] [1962] A.C. 446.

[55] [1915] A.C. 847.

[56] For an excellent historical and comparative treatment of third-party contracts generally, see Starke, *Contracts for the Benefit of Third Parties,* 21 Austl. L.J. 382, 422, 455 (1947); 22 *Id.* 67 (1948).

[57] 2 Lev. 210, 83 Eng. Rep. 523 (Q.B. 1678).

[58] 1 B. & S. 393, 121 Eng. Rep. 762 (Q.B. 1861).

and the direction was settled in the *Selfridge* case. The *Selfridge* rule remained despite the efforts of Lord Denning [59] and was emphatically reiterated in the *Scruttons* case.

As a number of writers have indicated, [60] some of the United States jurisdictions have abandoned the above rule and the English courts have relaxed the rigidity, notably in the trust situation.

The text writers themselves have shown a diversity of opinion on the status of the third party. [61]

(b) *Statutory Considerations*

In 1937 the English Law Review Committee recommended legislation to provide for third-party rights and in so doing attempted to supply a general formula of recovery. [62] To date there has been no English legislation embodying a general formula and the law is the common-law rule.

It is worthwhile noting Myres's view on a general formula of recovery. He said :

> Third party rights have of course been the subject of legislation in particular cases, for example, motor car insurance, workman's compensation, and life insurance policies for the benefit of spouses and children. The satisfactory results of this type of legislation is at least some evidence in support of the view that it is only possible to determine when rights should be given to third parties by reference to particular cases and that a statute embodying a general formula is likely to be more harmful than beneficial. [63]

Various jurisdictions in the United States have legislation in this field. In a note in the *Columbia Law Review* [64] it was stated that all of the states except Massachusetts would allow recovery where the third party was specifically named — either because of legislation or because the English rule had been dropped. The note also deals with some of the problems of a general formula.

(c) *Justification*

Both Starke [65] and Hamson [66] have, it is suggested, correctly stated that the present denial of recovery rests upon the narrow technical ground of lack

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[59] See Drive-Yourself Hire Co. v. Strutt, [1954] 1 Q.B. 250.

[60] See Starke, *op. cit. supra* note 56; Myres, *Third Party Contracts*, 27 AUSTL. L.J. 175 (1953); Corbin, *Contracts for the Benefit of Third Persons*, 46 L.Q.R. 12 (1930); Dowrick, *A Jus Quæstitum Tertio By Way of Contract in English Law*, 19 MODERN L. REV. 374 (1956).

[61] See Starke, *op. cit. supra* note 56; Myres, *op. cit. supra* note 60; Corbin, *op. cit. supra* note 60; MacIntyre, *Third Party Rights in Canadian and English Law*, 2 U.B.C.L. REV. 103 (1965).

[62] ENGLISH LAW REVISION COMMITTEE, SIXTH INTERIM REPORT (1937).

[63] Myres, *op. cit. supra* note 60, at 179.

[64] *The Third Party Beneficiary Concept : A Proposal*, 57 COLUM. L. REV. 406 n.9 (1957).

[65] Starke, *op. cit. supra* note 56.

[66] Comment, CAMB. L. J. 150 (1959).

of consideration moving from the third party. Starke went so far as to say that the only practical justification for the rule is to keep litigation to a minimum.

(d) *Canadian position*

The law in Ontario and most likely Canada [67] is settled by the *Boivin* case to the effect that the courts will not recognize that a third party to a contract can enforce his purported rights under that contract even if he is specifically named. The third party may be able to enforce his rights if he can convince the court that his case is one wherein it might properly find a trust in his favour. This is true whether one agrees with MacIntyre, Myres, Starke or Corbin. Any change in the law in Canada will have to come as a result of legislation, either of a specific or of a general nature.

Our courts are sophisticated enough to deal with the problems that surround third-party contracts. The doctrine of consideration is hardly a sufficient excuse for injustice. The volume of litigation will not increase to such a degree that the present stand may be justified. At present the rigidity of the rule does not deter the third party who will litigate in any case in an attempt to get within the trust tent.

There should be a general formula of recovery. If the legislation is competent the judiciary will have little trouble in implementing that legislation to alleviate the evils of the present situation. [68]

The *Boivin* case involved a contest between a number of subcontractors. Those who had not signed a waiver of mechanics lien contended that those who had were not entitled to share in the statutory holdback that had been paid into court by the owner of the property in question. [69]

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[67] The law of Quebec is somewhat different and so the above conclusion refers only to common-law jurisdictions of Canada. For a review of the Quebec position see Irving, *Stipulation for a Third Party*, 9 McGILL L.J. 337 (1963).

[68] The 1937 proposal of the English Law Revision Committee would be legislation supported. It reads as follows :

> 1. Where a contract by its express terms (not by implication) purports to confer a benefit directly on a third party, that third party shall be entitled to enforce it in his own name, provided that :
>
> (a) the promissor shall be entitled to raise as against the third party any defence that would have been valid against the promisee; and
>
> (b) the right of the third party shall be subject to cancellation of the contract by mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.
>
> 2. Life, endowment, and education policies, in which a particular beneficiary is named, shall be regarded as creating a trust for that beneficiary.

[69] The waiver, part of the contract with the contractor, read as follows :

> The Sub-Contractor hereby, for the consideration hereinafter named, waives and releases all privilege or right of privilege and all lien or right of lien now existing or that may hereafter exist for work done or labour performed or material furnished under this contract, upon the building on which the work herein contracted for is being or has been executed and upon the land on which the same is situated and upon any money or monies due or to become due from any person or persons to said Contractor, and agrees to furnish a good and sufficient waiver

The court held that the express agreement referred to in section 5(1) of the Mechanics Lien Act [70] contemplated an express agreement between the lien claimant and the person who claims the benefit thereof. It is submitted that the section contemplates nothing of the sort unless one is predisposed to the common-law rule discussed earlier. A reading of section 5(1) reveals nothing to support the view of the court and the only section dealing with the rights of third parties and a waiver of lien, section 4(3), [71] merely says that one cannot be deprived of the right to a lien unless one is a party to such a waiver.

The case was unique in certain respects. It was not dealing with the express stipulation in a simple contract that *A* should confer a benefit upon *B* from that contract with *C;* nor did it deal with an exemption clause; nor with anything that might resemble a trust. Rather, the stipulation waived a statutory right under the Mechanics Lien Act of Ontario. In particular, the right being waived was an interest in land.

The purpose of the enactment has been said to be that the land which received the benefit should bear the burden [72] and courts have held that the enforcement of the lien was a proceeding in rem. [73] It is intended to be transferable [74] and section 5(2) of the act lends support to this conclusion.

Canadian courts have laid out certain rules regarding the waiver of lien rights. The waiver must be in writing [75] and clearly indicate that the

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of privilege and lien on said premises, land and monies from every person or persons to said corporation or corporations furnishing labor or material under the Sub-Contract. *Supra* note 53, at 649-50.

[70] ONT. REV. STAT. c. 233, § 5(1) (1960) reads as follows:

Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them for any owner, contractor, or subcontractor, by virtue thereof has a lien for the price of the work, service or materials upon the estate or interest of the owner in the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

[71] ONT. REV. STAT. c. 233, § 4(3) (1960) reads as follows:

(3) No agreement deprives any person otherwise entitled to a lien under this Act who is not a party to the agreement, of the benefit of the lien, but it attaches, notwithstanding such agreement.

[72] Scratch v. Anderson, [1917] 1 West. Weekly R. 1340, 33 D.L.R. 620 (Alta. Sup. Ct.).

[73] Pankka v. Butchart, [1956] Ont. 837, 4 D.L.R.2d 345; Nobbs v. Canadian Pacific Ry., 6 West. Weekly R. 759 (Sask. Dist. Ct. 1913); REV. STAT. ONT. c. 233, § 5(2) (1960).

[74] See MACKLEM & BRISTOW, MECHANICS LIENS IN CANADA (1962).

[75] County of Lambton v. Canadian Comstock Co., [1960] Sup. Ct. 86, 21 D.L.R.2d 689.

party has renounced the application of the act and the remedy under it.[76] Finally, the waiver must be absolute.[77]

From the facts it appears that all of those conditions were met by the waiver in question and that the only remaining question was whether the owner or anyone else could have availed himself of the waiver. The court gave a negative answer but this would seem to be contrary to the decision in the *Comstock* case.[78] In that case the Supreme Court of Canada held that letters from the subcontractor to the contractor to the effect that all of the work under the subcontract had been completed did not constitute waivers. It is implicit in the judgment that if the court had held the letters were waivers, then the owner, not a party to the waiver, would have been entitled to rely upon them. This would have been despite the fact that at the time of the writing there was no consideration even from the contractor.

However, the *Boivin* case was the first that actually had to decide the issue of third-party rights under such a waiver. Numerous cases deciding questions of priorities and the results of subsequent sales are not within the ambit of the principles involved in the *Boivin* case.

If the *Boivin* case is followed, and there is no reason why it will not be, a subcontractor or contractor may sign waiver clauses secure in the knowledge that no one whose signature is not affixed to the waiver can set it up against him. It may even be that there must be consideration from a signer before it will be enforceable by him.

Certain jurisdictions in the United States recognize the right of a third party to set up such a waiver in some circumstances.[79]

There are at least two valid reasons for excluding this type of case from the rigid rule of no third-party rights.

The mechanics lien is a statutory right given to a person in addition to the common-law remedies that are available to him. It is given so that as a practical matter his interests may be better protected by allowing him to proceed against the real estate. So, while the person who is deprived of his statutory remedy by virtue of his having signed a waiver has less chance of recovery, he is not entirely deprived of the possibility of getting paid for his work.

The lien, once established, attaches to the rem or at worst several rems. There is no reason why a waiver of that right should not also be considered as accruing to the land itself. Then, like the convenant running

[76] Lambton v. Comstock, *supra* note 75; Jorgenson v. Sitar, 2 West. Weekly R. 251, [1937] 3 D.L.R. 196 (Man. Q.B.).

[77] Cloutier v. Weitzel, 1 West. Weekly R. 385, [1950] 2 D.L.R. 270 (Man.).

[78] *Supra* note 75.

[79] 57 C.J.S. *Mechanics Lien* § 228 (1955).

with the land, it would have removed a fetter on the title (or a future fetter) and be open to anyone who had or should acquire an interest in that particular piece of real estate.

Even if we do not get legislation by way of a general formula of recovery, we at least should give blessing to the third party to a waiver of mechanics lien. [80]

II. Developments at Common Law

A. *Contracts in Restraint of Trade*

The law on restraint of trade is founded on public policy; changing views of what is desirable in the public interest have influenced the attitude of the courts towards contracts in restraint of trade. [81] Sometimes the change of views is so great that it seems to challenge the very core of the law; at other times the changes are slight and can be appreciated only by inference. It is in the latter context that three recent Canadian decisions [82] on restraint of trade should be examined.

Before *Mitchell v. Reynolds,* [83] restraints of trade were considered invalid for fear that they would create monopolies. This view has been gradually modified. Lord Macclesfield stated another view in the *Mitchell* case as follows :

> Wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, but with this constant diversity — namely where the restraint is general (not to exercise a trade throughout the kingdom), and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party and only oppressive. [84]

This view continued until the end of the nineteenth century. Another forward step was made in 1894 in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.,* [85] which held valid a general covenant in a contract of sale. The court said that a contract in general restraint of trade was only prima facie void; it was to be valid if it was reasonable in the interests of

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[80] It is recommended that a subsection be added to § 5 of Rev. Stat. Ont. c. 233 (1960) to read as follows :

> (4) Where such an agreement to the contrary is signed, such agreement shall be enforceable by any person, whose interest, in the estate either present or subsequent, is beneficially affected thereby, notwithstanding that such person was not a party to the original agreement, provided that the party ordinarily entitled to the lien shall be entitled to raise as against any person claiming a benefit under such an agreement — any defence that would have been valid against the party or parties to such an agreement.

[81] Attwood v. Lamont, [1920] 3 K.B. 571, at 581 (C.A.).

[82] McAllister v. Cardinal, [1965] 1 Ont. 221 (High Ct.); Furlong v. Burns & Co., [1964] 2 Ont. 3, 43 D.L.R.2d 689 (High Ct.); Ryder v. Lightfoot, 51 D.L.R.2d 83 (N.S. Sup. Ct. 1965).

[83] 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711).

[84] *Id.* at 348.

[85] [1894] A.C. 535.

the parties and the public. Lord MacNaughten carried the development further when he held that partial covenants were also prima facie void; these covenants had been originally considered valid until proven to be unreasonable. But MacNaughten's view was isolated until the House of Lords approved it in *Mason v. Provident Clothing & Supply Co.* [86] Also, to their Lordships, it would be easier to impose a restraint on a vendor of a business than a servant because there is an advantage to be gained by the vendor in covenanting that he will not compete with the purchaser who has bought his goodwill. The sale will be facilitated. The servant, on the other hand, is not his master's equal in the bargaining stages of employment. For this reason, a rule exists that a servant is not at liberty to deprive himself of his talents.

The present law can be stated briefly. [87] Every restraint is contrary to public policy and is prima facie void. The presumption of invalidity is rebutted by proof that the restraint is reasonable; it is to be understood that a restraint upon a servant is never reasonable unless some proprietary interest of the master is to be protected; the only proprietary interests considered are trade secrets and business connections. The presumption of invalidity can be easily rebutted between vendor and purchaser, but protection of some proprietary interest must still be shown. Only the actual business sold is entitled to protection; thus it is valid only if it is no wider than necessary for the adequate protection of the proprietary interest required by the purchaser. The restraint must be reasonable in the interests of both the contracting parties and also in the interests of the public. A restraint to be reasonable between the parties must be no wider than is reasonably necessary to protect the convenantee's interest. The existence of some proprietary interest must be proved, and it must be shown to the satisfaction of the court that the restraint (as regards its area and time of operation and the trades against which it is directed) is not excessive.

Modifications, and perhaps reversions to older lines of thought, are appearing in Canada and elsewhere. Two areas are the hotbeds of these changes.

First is the area of public interest, a breach of which renders a covenant void. [88] The idea that the covenant must coincide with public interest may be used to perpetrate a fraud against the covenantee by the covenantor. The onus of proving the reasonableness between the parties and as to public interest rests upon the covenantee, and might prove difficult to rebutt.

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[86] [1913] A.C. 724.

[87] See CHESHIRE & FIFOOT, CONTRACT 283 (6th ed. 1964).

[88] *Id.* at 337. Cheshire hints at this when he says: "It has been affirmed that a restraint is void if the covenantor establishes that it is inconsistent with the interests of the public. This line of attack can seldom succeed as it is difficult to imagine circumstances which can render a covenant injurious to the public if it is reasonable between the parties."

Mr. Justice Stewart has followed this rule in the recent Ontario case of *McAllister v. Cardinal,* [89] but he feels compelled to voice his dissatisfaction with it:

> Unfortunately Cardinal is not estopped either by receipt of adequate consideration or by his acquiescence in the terms of the agreement from denying its validity. This would appear to stem from the early concept that all contracts in restraint of trade were void as being against public policy and even though the law has been relaxed, as indicated in the *Nordenfelt* case ... they still must be construed strictly...; and the onus of proving the restrictive covenant to be good lies upon the person supporting it. [90]

Again, in *Gordon v. Ferguson,* [91] although dissatisfaction is not expressly stated, Mr. Justice MacDonald does not seem to give any weight to public policy. MacDonald says that the clause is to be presumed void as contrary to public policy but will be upheld if found to be reasonable having regard to the legitimate interests of the parties and the public. Mentioning public interest appears to be a formality, he gives no more consideration to it; he proceeds to consider the restraint as between the parties only.

Perhaps the disenchantment voiced by Stewart in the *Cardinal* case should apply today especially when one looks at (a) covenants by which a parting employee agrees not to compete with his employer by setting up a business in the vicinity or by serving a competitor; and (b) covenants by which the vendor of a business agrees not to set up a competing business in areas under the vendor's control. In these two areas, this exclusion of consideration of public interest may be beneficial. Its inclusion is probably not only superfluous but could lead to hardship on the covenantee. Lord Parker in the *Adelaide* case [92] said that "their Lordships are not aware of any case in which a restraint [of trade] though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public."

If public policy were excluded from these two types of covenants, the restraining covenant would have to be considered prima facie valid. This view is acceptable if one accepts that public policy fluctuates. Previously it was necessary to protect the covenantor from the covenantee, especially in employer-employee relationships where the employee was at a disadvantage intellectually and at the bargaining table. This is no longer true.

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[89] McAllister v. Cardinal, *supra* note 82. The facts briefly were these: a restrictive covenant against competition was exacted, for consideration, by the buyer of a business from the seller for the protection of the business.

[90] *Id.* at 225.

[91] 30 D.L.R.2d 420 (N.S. Sup. Ct. 1961). The facts briefly were these: the appellant had employed the respondent in his practice as a physician and surgeon. The respondent had covenanted not to engage in a similar practice in the same vicinity, "within the town... and a radius of twenty miles from the boundary thereof" for a period of five years from the time his employment ceased. The appellant terminated the contract in accordance with its terms and the respondent subsequently commenced practice within the town. An action was brought to restrain the practice.

[92] Australia v. Adelaide Steamship Co., [1913] A.C. 781, at 795 (P.C.).

If Stewart's view in the *Cardinal* case were accepted as law there would still be ample control over these restraints of trade by saying that the restraint must be reasonable in the interests of the contracting parties, and no wider than reasonably necessary to protect the covenantee's interest; and the existence of some proprietary interest must be proved.

The second major area of development, which perhaps indicates a reversion of thought, is that of severability of illegal covenants or part of the illegal covenant from the contract. Before 1930 the principle of severability was uncertain; courts in most common-law jurisdictions rejected severability. Lord Moulton in *Mason v. Provident Clothing & Supply Co.*,[93] said it would be wrong if, when an employer had exacted an unreasonably wide covenant, "the Courts were to come to his assistance and, by applying their ingenuity ... carve out of this void covenant the minimum of what he might have validly required." The same feelings are indicated in American jurisdictions.[94]

Initially, the trend towards allowing severability extended only to covenants which were separate from the other conditions in the contract. English courts later developed severability in thought; so much of a particular covenant as was felt to be unreasonable restraint of trade would be struck out. The result was to leave the remainder of the covenant and the contract valid and enforceable. If that part of a covenant to be struck out went to the principal purpose of the contract, the whole covenant would have to be invalidated.[95] This attitude still persists in the English courts.[96] This proposition was followed in 1964 by the Ontario High Court in *Furlong v. Burns & Co.*,[97] in which Mr. Justice Hughes held that if the invalid provision formed only part of the consideration, it was severable from the rest of the contract as substantial consideration had been left to support the rest of the promise. Also, in the more recent case of *Ryder v. Lightfoot*,[98] Chief Justice Ilsley stated that a judge could grant an injunction in terms narrower than those of the covenant. Thus it can be safely stated that the doctrine

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[93] *Supra* note 86, at 745.

[94] Lewis v. Jackson, 86 F. Supp. 354 (W.D. Ark. 1949).

[95] British Reinforced Concrete Eng'r Co. v. Schelff, [1921] 2 Ch. 563, L.J. Ch. 114.

[96] Bennett v. Bennett, [1952] 1 K.B. 249 (C.A.); Goodinson v. Goodinson, [1954] 2 Q.B. 118 (C.A.).

[97] Furlong v. Burns & Co., [1964] 2 Ont. 3, 43 D.L.R.2d 689 (High Ct.). The facts briefly were these: a well paid, long service employee was persuaded to resign his position, for certain reasons relied on by his employer, in pursuance of an agreement to pay him a stated monthly sum to pensionable age or death and to continue to carry him on the contributory pension plan. The terms of the agreement which had been discussed orally were embodied in a letter sent to the employee which included as para. 3 the provision that "allowance to be continued at the discretion of the company subject to your attitude and conduct not being... detrimental to the company or its personnel."

[98] Ryder v. Lightfoot, 51 D.L.R 2d 83 (N.S. Sup. Ct. 1965). The facts briefly were these: there was a restrictive covenant against competition given by a vendor to the purchaser on the sale of the goodwill of a business. The covenant against competition was for three years in the City of Halifax and the Province of Nova Scotia; the sale involved a hearing aid business.

of severability is on solid ground in Canada. The strongest challenge to the doctrine is found in earlier cases, [99] with the possible exception of the *Cardinal* case. In *Gordon,* Mr. Justice MacDonald stated: "We think that it is improper in construing the agreement ... to add or subtract from the plain language used .... The question is not whether the covenantee could make a valid agreement but whether the agreement actually made is valid, and if the covenant is invalid in part, the entire covenant fails." [100]

A reasonable inference to the same effect may be drawn from the *Cardinal* case. Mr. Justice Stewart held that a contract restraining trade in a wider area than is necessary to protect the interest of the parties could not be validated by the subsequent acquisition of other similar businesses in the unreasonably extended areas. Inversely, Stewart would also hold that the scope of the covenant could not be cut down to a reasonable area to validate the contract.

These isolated rumors of dissatisfaction will not shake the grounds of severability. Indeed, one can see a justifiable use of this doctrine where goodwill of a business has been sold; it is necessary to protect the purchaser of a business. Where the covenant has been deemed too wide in scope, a rectification of the covenant should be made. If this were not so, this area of contract would lend itself to fraud and misrepresentation by the purchaser. The purchaser would naturally seek to impose as wide a covenant as possible knowing that it would be voided by the court. The matter is not so simple in covenants between employer and employee; the equities between the employer's business interests and the employee's freedom to work must be balanced. The question of public interest thus arises. This is the area that *Gordon* was attacking.

If there is to be a change in the doctrine of severability it will probably extend only to this area of employer-employee covenants and no further. The inference made from the dicta in the *Cardinal* case would extend the doctrine of severability to covenants in contracts for the sale of goodwill. There is no authority for this proposition.

B. *Mistake*

In the field of mistake little has happened to upset prevailing views but two appellate cases merit consideration. One relates to the doctrine of rectification of written documents [101] and the other to the problems arising out of a common mistake. [102]

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[99] R.C. Young Ins. Ltd. v. Bricknell, [1955] 5 D.L.R. 487, at 491 (Ont.); Gordon v. Ferguson, *supra* note 91.

[100] *Supra* note 91, at 429.

[101] R.M. Ballantyne Co. v. Olympic Knit Sportswear Ltd., [1965] 2 Ont. 356, 50 D.L.R.2d 583.

[102] Regina v. Ont. Flue-Cured Tobacco Growers Marketing Bd., [1965] 2 Ont. 411.

The rectification of written documents is an equitable remedy to correct documents where there is an inaccurate expression of the true agreement. [103] It is not a remedy which may be lightly won, for the court in granting it takes a drastic step. Rectification means that the court has to open up a solemn, sealed instrument, vary the terms on which the parties have outwardly agreed, and re-seal the document giving it the effect it was intended to have. *R. M. Ballantyne Co. v. Olympic Knit & Sportswear* [104] is an illustration of a continuing reluctance to apply the doctrine of rectification in the absence of an ability to satisfy established rules. The finality with which he must establish his case places the greatest burden on the party seeking the remedy. Writing for the Ontario Court of Appeal, Mr. Justice McLennan said that "the burden on a party seeking rectification of a written instrument on the ground of mutual mistake is a heavy one." [105] The test which was applied was drawn from the judgment of Mr. Justice Duff of the Supreme Court of Canada in *Hart v. Boutelier* where he demanded that before rectification would be allowed the court must be "satisfied by evidence which leaves no 'fair and reasonable doubt' that the deed impeached does not embody the final intention of the parties." [106] In describing the onus on the applicant, McLennan [107] also referred to the old Ontario case of *Clarke v. Joselin* which stated that the onus to show that the document does not embody the true agreement must be proved "beyond a reasonable doubt." [108] What it therefore seems to amount to is something far exceeding the normal onus in civil actions and perhaps being as great as the criminal onus. The two questions which arise are whether such a heavy burden is justifiable and whether the test was properly applied in the *Ballantyne* case.

Regarding the first question there would seem to be no doubt that the party seeking rectification must firmly establish that the written document does not embody the true agreement made between the parties. The mutual mistake which purportedly results in the incorrect expression of intention must be shown beyond a reasonable doubt by "irrefragable evidence." [109] It does not follow, however, that the degree of proof is similar to that required in criminal cases. As Mr. Justice Russell in *Hart v. Boutelier* pointed out:

> It may or may not be correct to say that the mutual mistake must be proved as in a criminal case beyond any reasonable doubt. However that may be, I think the concensus of authority is to the effect that something more is required than such a mere preponderance of evidence as would

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[103] For a general introduction to the doctrine of rectification, see ANSON, CONTRACT 268-70 (21st ed. 1959); CHESHIRE & FIFOOT, CONTRACT 200-02 (6th ed. 1964).

[104] *Supra* note 101.

[105] *Id.* at 363.

[106] 56 D.L.R. 620, at 630 (Sup. Ct. 1916).

[107] *Supra* note 101, at 363.

[108] 16 Ont. 68, at 78 (Sup. Ct. 1888).

[109] CHESHIRE & FIFOOT, *op. cit. supra* note 103, at 202.

> suffice if it were not sought to impose upon the defendant a contract different from that which he on his part declared he intended to make, and which is found in the document solemnly signed ... so the concluded act of the parties. [110]

This seems to be the best general statement of the onus and it would perhaps have been more satisfactory if it had been so stated by McLennan. The criminal onus stated in *Ballantyne* may become unreasonably burdensome if the explanation and qualification in the *Hart* case is not referred to.

Whether the test has been properly applied in *Ballantyne* is dependent upon the facts which gave rise to the application for rectification. The parties, a landlord and tenant, signed a lease in 1955, in which 247 feet, 7 inches of certain premises were demised. Under this lease, the tenant was to have the use of machines which were in the portion of the building leased to him for a term of fifteen years. A new lease was signed in 1957 which cited the length of the demised portion of the building as 207 feet, 7 inches, a difference of forty feet. The other material changes were set out in the judgment: "The term of the new lease was for a period of one year ... with the right to the tenant to renew for a period of one year only. The old lease expired in 1970. Although the rent was the same in both leases, the landlord was required to heat the premises under the new lease." [111] The contention of the landlord was that both parties intended that the terms of the 1957 lease with respect to the amount of the building demised be the same as those in the 1955 lease. There is some evidence to support this contention; for example, at the trial, and prior to the time the 1955 lease was produced, counsel for the landlord had stated that he had always understood that the descriptions in the two leases were identical. Counsel for the tenant further submitted that, in the circumstances of the same corporate tenant continuing on in the same business using the same machinery under both leases and the necessity of the additional forty feet for the business purposes of the tenant, that the inference is strong that the change in description in the new lease was an error which neither party intended and that therefore rectification ought to be granted. [112]

This was a compelling argument, but there was other evidence which was inconsistent with the conclusion which might otherwise have been reached. This evidence was to the effect that because the landlord undertook to heat the premises, he required the change so as to have access to the heating plant. [113] This evidence was sufficient for the court to say that they had not been presented with evidence which left no "fair and reasonable doubt" that the 1957 lease did not embody the final intention of the parties. It must be appreciated that ordinary caution is aggravated by an absence

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[110] 50 N.S. 211, at 222-23, 28 D.L.R. 791, at 792 (N.S. Sup. Ct. 1916).
[111] *Supra* note 101, at 358.
[112] *Id.* at 362.
[113] *Id.* at 363.

of any documentary evidence [114] and in this case it appears as though the court had to rely wholly on the oral evidence presented to it. Indeed one might suggest that the court would not have been satisfied even if the onus had been the balance of probabilities. It would appear that the court arrived at the proper decision and that the doctrine of rectification has been and will continue to be applied with scrupulous care and caution. But in reading the *Ballantyne* case one should also refer to the explanation and qualification set out in the *Hart* case which was later affirmed by the Supreme Court of Canada. [115]

It might be noted that the landlord was granted an amendment to his statement of claim in order to seek rectification in the Court of Appeal. This may represent a significant change from the rule that rectification must be specifically asked for in the pleadings. [116]

Regarding mistake in *Regina v. Flue-Cured Tobacco Growers Marketing Board,* [117] the Ontario Court of Appeal appeared to apply the House of Lords decision of *Bell v. Lever Brothers Ltd.* [118] Although it might be of interest and assistance to examine the interpretation given *Bell v. Lever Brothers Ltd.* with respect to the facts before the Court of Appeal, it might first be considered whether all of the observations on this point are obiter dicta.

The Flue-Cured Tobacco Growers Marketing Board under the legislation which brought it into existence [119] was given power to effect the transfer of tobacco growing rights from one person to another. [120] A valid exercise of this power depended on a transfer of title of the tobacco farm. In the application heard before the Court of Appeal, the applicant, Grigg, sought an order which would permit him to sell tobacco grown by him under rights which he contended the board had no right to take away during the growing season of 1963.

The Court of Appeal held that the agreement of purchase and sale upon which the board acted in transferring growing rights was not a transfer of title. The court thought that it is obvious that under the general law such an agreement would have to be under seal, which would not appear to be the case in the agreement of May. In the absence of special provisions at common law there was no transfer of title until the purchase money was paid. [121] In view of this holding, the Court of Appeal decided:

> At no time during the transfer of tobacco growing rights in connection

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[114] Pattillo, *Rectification,* in LAW SOC'Y UPPER CAN. SPECIAL LECTURES 211, at 225 (1961).
[115] *Supra* note 106.
[116] 26 HALSBURY, LAWS OF ENGLAND 915 (3d ed. 1959).
[117] *Supra* note 102.
[118] [1932] A.C. 161.
[119] Farm Products Marketing Act, ONT. REV. STAT. c. 137 (1960).
[120] *Supra* note 102, at 413.
[121] *Id.* at 424.

> with the Houghton farm had there been any effective transfer of title from Grigg to Bota and in acting as they did they were acting completely outside the regulations they themselves set up. Their rule related to the transfer of ownership. The contract at the time they transferred the growing rights to Bota, under which they acted, did not in fact transfer Grigg's title to Bota. [122]

The determination with respect to the ultra vires act of the board would appear to have been sufficient to resolve the issue. By this determination the court was able to grant the relief prayed for. If this be the proper analysis, it would seem that anything else raised and considered by the court would necessarily be obiter dicta. It does not appear that the finding that the contract was void ab initio related to the decision that the board acted ultra vires.

Whether the observations of the court regarding the effect of common mistake are obiter dicta or not, they deserve consideration in assessing the present position of *Bell v. Lever Brothers Ltd.* in Canadian jurisprudence. The main difficulty in achieving this goal is not in examining the application of *Bell v. Lever Brothers Ltd.*, but in discovering the present attitude of the courts toward the varying interpretations given to this case.

The interpretation given to the speeches in *Bell v. Lever Brothers Ltd.* range from narrow and conservative views to a broad view of the effect of common mistake. At one extreme it has been argued that a common mistake will only avoid a contract in cases of *res extincta* and *res sua.* [123] Another view is that the contract may be avoided where it is found that both parties have acted on a false and fundamental assumption. [124] The most liberal interpretation would appear to be that the contract is avoided only "if some term can be implied in both offer and acceptance which prevents the contract from coming into existence." [125] This is a very general view but coming within it are cases in which the mistake is as to the substance of the thing contracted for. [126] Relying on this latter subclass in general, the Court of Appeal held that the contract was void ab initio.

The board had notified Grigg on May 10, 1963 that he had been alloted a basic tobacco growing acreage of thirty-one acres but in view of the possibility of overproduction he was to be allowed to grow only on twenty-one acres. This figure related not only to the land which later became the subject of an agreement of purchase and sale but to another parcel of land owned by Grigg. On or about May 21, 1963 Bota offered to purchase what the court thereafter referred to as the Houghton farm. In the subsequent

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[122] *Ibid.*
[123] CHESHIRE & FIFOOT, CONTRACT 195 (6th ed. 1964).
[124] *Id.* at 194; ANSON, CONTRACT 251 (21st ed. 1959).
[125] ANSON, *op. cit. supra* note 124, at 244.
[126] *Id.* at 248.

agreement the following clause was inserted: "It is expressly understood that this offer to purchase and acceptance thereof includes 14 acres of tobacco growing quota." [127] Mr. Justice Wells noted that this was "the most substantial condition of the contract." [128] Mr. Linton, who was acting for both vendor and purchaser, pushed Grigg to allow a survey by the board, a necessary step to the transfer of growing rights which Bota wanted to obtain before June 3. Grigg permitted the measurement to take place at a time which he places as the first part of June.

> Apparently while Mr. Grigg's solicitor, whom he had named, considered himself at all pertinent times as Grigg's solicitor, he certainly did not act as such or fulfill his proper obligations to Grigg.... Mr. Linton then without any reference to or instruction from Grigg, registered the agreement of sale about which Grigg was refusing to see him, in the Registry Office and then assured Mr. Leathong, the assistant secretary of the Board..., that he was acting for both purchaser and vendor and that the documents were in order. [129]

The court later held that for the purposes of action by the board, the documents were not in order. On June 13, Grigg was permitted by Mr. Linton to sign the deed "and thereupon the solicitor advised them that when the tobacco board had surveyed the Houghton property they had discovered that there were not 14 acres of tobacco land on it...." [130] Bota demanded an abatement of the purchase price but Grigg refused. The court summed up the situation saying: "There had been between him (Grigg) and Mr. Bota an honest mistake as to the amount of land available for tobacco on the Houghton farm." [131]

The interesting question on the basis of these facts is whether the court could have found the contract void ab initio, using the narrow interpretation that a contract is only avoided in cases of common mistake resulting in situations of either *res extincta* or *res sua*. The contract may have been set aside by the court's exercise of its equitable jurisdiction, [132] but this was not a case of either *res extincta* or *res sua*. Indeed, the court properly recognized that contracts were not avoided in every case of a mistake as to the substance of the thing contracted for. Wells concluded:

> In the case at bar it would appear to me that the condition of the contract between Bota and Grigg was that the lands to be sold included "14 acres of tobacco growing quota." It was obvious after the surveys of the Board that this was not the case. Bota met this by arbitrarily trying to reduce the purchase money by $1,000 and this Grigg rejected. While this might be regarded as a breach on Bota's part, in my view the failure of the

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[127] *Supra* note 102, at 414.
[128] *Ibid.*
[129] *Supra* note 102, at 418.
[130] *Id.* at 416.
[131] *Ibid.*
[132] Although the common mistake did not avoid the contract, it was set aside by the exercise of the court's equitable jurisdiction in Solle v. Butcher, [1950] 1 K.B. 671, 2 All E.R. 1107 (C.A.).

> essential condition as to the 14 acres avoided the contract at that point of time. It became void *ab initio.* [133]

The very mention of common mistake might be questioned, but having been mentioned what is the effect of its application? It would seem that while the courts may purport not to disturb the decision in *Bell v. Lever Brothers Ltd.*, the application of any one of several interpretations of that case will achieve a substantially different result. In many ways this is laudable; the courts of common law achieve a flexibility which in many other situations is not available. That the Court of Appeal chose and applied a liberal interpretation of this case may or may not indicate a trend. What is important however, is that there is now Ontario precedent for the use of this interpretation. To go beyond this limited conclusion would be unfounded speculation.

C. *Restitution*

Since the case of *Deglman v. Guaranty Trust Co.* [134] the terms "unjust enrichment," "restitution," and "quasi-contract" have precipitated in Canada a flood of decisions and articles. The purpose of this section is to note several recent cases which the reader will fit into one of the niches [135] that have appeared since the *Deglman* case.

In *Webber v. Havill,* [136] the defendant, at the request of the plaintiff, agreed to construct a house. An agreement in writing was entered into on February 5, 1962; in June, 1962, the plaintiff notified the defendant that his services were no longer required. The plaintiff brought action seeking general damages for breach of contract. Plaintiff alleged that the defendant had committed approximately thirty deviations from the plan and thereby had repudiated the contract.

Mr. Justice MacQuarrie stated in his judgment that "the facts do not indicate at any stage a refusal on the part of Mr. Havill to perform the contract, but, on the contrary, they do indicate that he was anxious to get on with and complete the construction of the house under the contract." [137] Having decided that the defendant had not repudiated the contract, Mac-

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[133] *Supra* note 102, at 420.

[134] [1954] Sup. Ct. 725.

[135] Angus, *Restitution in Canada Since the Deglman Case,* 42 CAN. B. REV. 329, at 559-60 (1964). This article states that restitution (quasi contract or unjust enrichment) will be granted for benefits conferred under a contract rendered unenforceable by the Statute of Frauds; benefits conferred with the intention of receiving compensation or reward therefor, but not officiously; repairs effected without regard to liability to be determined later; benefits involuntarily conferred; legal services relating to an estate, from the estate, if the executor in his personal capacity refuses to make payment therefor; improvements to land under mistake; payments under legal compulsion of the debt of another primarily liable. Restitution probably will not be granted where a contract between the parties covers the situation; a benefit is conferred in anticipation of a contract; a benefit is conferred in reliance on a future relationship; a benefit is conferred without expectation of compensation; there was no basis for a belief that compensation would not be paid.

[136] 50-Mar. Pro. 172 (N.S. Sup. Ct. 1964).

[137] *Id.* at 181.

Quarrie then relied on *H. Dakin & Co. v. Lee* [138] to allow the defendant to recover under the contract. The *Dakin* case held that where a builder has supplied work and labour for the erection or repair of a building under a lump sum contract, but has in some ways departed from the terms of the contract, he is entitled to recover for his services unless the work done is entirely different from the work contracted for, or is of no benefit to the owner, or he has abandoned the work and left it unfinished.

The court found that the defendant had substantially performed the contract and was thus entitled to recover for the value of the house minus a sum for the defects yet uncorrected. The court set the value of the house at 5,000 dollars and allowed a deduction of 900 dollars for the uncompleted portion. Substantial performance is a question of fact but it seems that the court is being overly generous to the defendant when it held that a building eighteen per cent unfinished is substantially completed.

In a similar fact situation in *Clermont v. Mid-West Steel Products Ltd.*, [139] Mr. Justice Tucker quoted with approval the case of *H. Dakin & Co. v. Lee* [140] and *Webster v. McIntosh* [141] in reaching the decision that the plaintiff was entitled to recover when he has substantially performed his part of the contract and is prevented from completing it because of the default of the defendant.

The Supreme Court of Canada again has had the opportunity to apply the restitution theory which it introduced in 1954. [142] In *County of Carleton v. City of Ottawa*, [143] Ottawa annexed a portion of Carleton County. In this annexed portion, an indigent person had resided before being moved to neighboring Lanark County. Carleton County mistakenly continued to make payments to Lanark County for the maintenance of this indigent long after the relevant portion of Carleton County had been annexed to the City of Ottawa. Carleton County claims that the City of Ottawa had the responsibility of maintaining this indigent from the time of annexation and sought to recover the money expended.

The Supreme Court of Canada in a direct application of the *Deglman* case found that Carleton County was entitled to recover the money spent. The *Carleton County* case would appear to be one of the rare cases, if not the only case, that a municipality has recovered in an action based on restitution. [144]

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[138] [1916] 1 K.B. 566 (C.A. 1915).

[139] 51 D.L.R.2d 340 (Sask. Q.B. 1965).

[140] *Supra* note 138.

[141] 22 Sask. 7 (1927).

[142] *Supra* note 34.

[143] [1965] Sup. Ct. 663, 52 D.L.R.2d 220.

[144] Angus, *op. cit. supra* note 135, places this case in the class of cases where restitution is granted for payments under legal compulsion of the debt of another primarily liable. But he did not point out the novelty of granting restitution to a municipality.

The familiar problem of a close family relative feeling inadequately compensated by a testator's will recently arose on two fronts. In *Re Burgess* [145] the deceased's granddaughter had begun looking after the deceased in his home in 1947, stopped for a short period, and resumed her duties in 1951. From 1951 to 1962, the granddaughter maintained her own home. During this period she went into a joint business venture with her grandfather. After the grandfather died, the granddaughter made a claim for housekeeping services.

The court found that there never was an express promise or agreement by the deceased to pay his granddaughter for her services, that no such agreement could be implied, and the fact that the granddaughter did work for which she wasn't compensated is not sufficient per se to entitle her to recover on a quantum meruit basis or on the doctrine of unjust enrichment.

The law dealing with such situations was clearly stated by Chief Justice Meredith in *Mooney v. Grout* : [146]

> Where services are performed between strangers without any agreement as to compensation, the law implies that a reasonable compensation is to be paid, from the fact of the services having been rendered at the request of the person for whom they have been so rendered. But where the parties are in such relationship to one another as were these two sisters, the law is that no such presumption arises, and the duty rests upon the person who seeks pay for services rendered under those circumstances to prove a contract express or implied.

Chief Justice Ilsley in delivering the majority judgment applied this reasoning together with the reasoning of Chief Justice Armour in *Walker v. Boughner* [147] who stated that if a party renders services without any contract, express or implied, in the hope of benefitting under a will and consequently is overlooked in the will, no action lies. Thus this case is merely further authority for the proposition that restitution will be denied where a benefit is conferred without expectation of reward or compensation.

A somewhat different problem arose in *Sanders v. Sanders.* [148] The disappointed children of the testator brought action against the estate based on alleged promises to devise certain property to the plaintiffs. The plaintiffs also alleged that certain acts of part performance supported their contention.

Mr. Justice Hughes found that the evidence in the case was insufficient to rebut the presumption of gratuitous service rendered by children to their father. This is a straight application of the *Walker v. Boughner* principle and adds little to the law on this point. As to the alleged acts of part performance Hughes found that the acts were equivocal and did not support the plaintiffs' claim.

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[145] 52 D.L.R.2d 233 (N.S. Sup. Ct. 1964).
[146] 6 Ont. L.R. 521, at 522 (Div. Ct. 1903).
[147] 18 Ont. 448 (Q.B. 1889).
[148] [1965] 1 Ont. 275 (High Ct.).