

ANNUAL SURVEY OF CANADIAN LAW

COMMERCIAL LAW

*G.H.L. Fridman**

I. INTRODUCTION

Commercial law means different things to different people. Hence the contents of books on commercial or mercantile law vary considerably. Certain topics, however, always figure in books about or discussions of commercial law: for example, contracts for the sale of goods, contracts such as conditional sales agreements which enable goods to be purchased on credit, negotiable instruments and agency. This review will be concerned with developments in these areas of the law over the past few years. Such matters as insurance, combines, bankruptcy, patents and copyright, while important aspects of commercial life, must be left for others to discuss. Moreover, although there can be no doubt that the basic, general law of contract is vital to a complete understanding of the law which governs all forms and types of commercial transactions, it is unnecessary for this writer to undertake any examination of recent statutory or common law developments in regard to contract generally, as this has been done comprehensively and effectively in a recent issue of this Review.¹ Indeed the author of that particular survey went to the length and trouble of explaining recent statutory innovations in Alberta, British Columbia and Ontario that affect consumer transactions and both provide a wider range of remedies for various kinds of business malpractice and broaden the scope of the situations in which the law will intervene to upset such transactions.² Previously, a purchaser of goods or services had to establish some kind of misrepresentation or a term of the contract entitling the purchaser to rescind or sue for damages in the event of breach before protection was possible under the law. Gradually,

* Professor of Law, University of Western Ontario.

¹ Schwartz, *Contracts, Annual Survey of Canadian Law — Part 3*, 8 OTTAWA L. REV. 588 (1976).

² Trade Practices Act, S.B.C. 1974 c. 96, *as amended by* S.B.C. 1975 c. 80; 1976 c. 32; Unfair Trade Practices Act, S.A. 1975 (2nd sess.) c. 33, *as amended by* S.A. 1976 c. 54; Business Practices Act, 1974, S.O. 1974 c. 131; *see also* Business Practices Act, S.P.E.I. 1977 c. 31.

for reasons which do not need explanation here, this was extended to permit a remedy, in some circumstances, where there was "unconscionable" conduct on the part of the seller of the goods or services involved.³ These recent enactments give statutory force to common law developments, widen their scope and effectiveness, and improve the methods whereby an injured party can obtain redress. While all this clearly relates to commercial law, the reader is referred to the earlier discussion for details of these reforms in the provinces named.⁴

Other statutory changes have occurred provincially in the past few years, probably the most important of which has been the Ontario Personal Property Security Act.⁵ Although legislated several years ago, it only came into force in 1976. Whether or not this derivative of the American Uniform Commercial Code will be a precursor of similar changes in other provinces—thereby contributing to what the present writer has seen referred to as the "Americanization" of Canadian commercial law, particularly sales—remains to be seen. Other provinces have so far retained the older, more traditional ways of creating security interests in chattels. This particular innovation has involved a marked movement away from the "classical" English law doctrines, derived from the nineteenth century statutory structure designed to protect innocent third parties in the event of the insolvency of the mortgagor or borrower. Other actual or potential changes in the law of sales—some of which are also to be found in recent English statutory amendments—owe something to ideas that have been circulating and emerging south of the Canadian border. Whether all this will ever amount to the Americanization of the law of sales and similar transactions in Canada is debatable. It is open to question whether the common law, as it eventually became codified in Chalmers' statutes, the Sale of Goods and Bills of Exchange Acts, will ever cease to be the basic law of the common law provinces of Canada. By and large it has stood the test of time fairly well. It has needed some revision, but this has been provided, or is in the process of being provided. Conceptually and otherwise, it is suggested, it has served the community well. It merits a better fate than being tossed aside, to be replaced by "alien" notions expressed in outlandish language.⁶

³ See G.H.L. FRIDMAN, *LAW OF CONTRACT* 126-27, 613-17 (1976).

⁴ Schwartz, *supra* note 1, at 581-95. The British Columbia statute has been considered and applied in three reported cases: *Director of Trade Practices v. Household Fin. Corp. of Canada*, [1976] 3 W.W.R. 731 (B.C.S.C.); *Stubbe v. P.F. Collier & Son*, 74 D.L.R. (3d) 605 (B.C.S.C. 1977); and *Findlay v. Couldwell*, [1976] 5 W.W.R. 340, 69 D.L.R. (3d) 320 (B.C.S.C.), where liability under the statute was imposed in respect of an oral representation that was a deceptive act or practice.

⁵ R.S.O. 1970, c. 344, as amended by S.O. 1972 c. 1; 1973 c. 102; 1976 c. 39. See also the Manitoba Personal Property Security Act, S.M. 1973 c. 5 (not yet in force).

⁶ See Fridman, *Should Commonwealth Countries Adopt Article 2 of the Uniform Commercial Code?* in *ASPECTS OF COMPARATIVE COMMERCIAL LAW* 52-53 (W. Foster & J. Ziegel ed. 1969).

II. SALE OF GOODS

A. *Nature of the Contract*

Before the Sale of Goods Act can apply to a particular transaction, it must be shown that the transaction in question is a sale of goods within the meaning of the Act (and the earlier common law). This involves a number of factors. The transaction must indeed be a *sale*, and not some other kind of contract or relationship between the parties. The subject matter of the contract must be *goods* as defined in the Act.⁷ Recent cases have raised both these points.

Thus in *Re Kicking Horse Forest Products Ltd. and Minister of Finance*⁸ the issue was whether what had occurred was truly a sale. Under the relevant statute, tax was payable where standing timber or the right to cut standing timber was "sold". The respondent company was threatened with expropriation by the federal government. In response to this threat the company surrendered the timber rights it had been granted in a certain piece of property back to the Government of Canada in return for stipulated compensation. The Minister of Finance claimed the statutory tax on the compensation. The company argued that the transaction was not a sale (even though expropriation would have been), and that therefore the tax was not payable. This argument met with success at trial and, by a majority, in the British Columbia Court of Appeal. Ruttan J., at first instance,⁹ based his judgment in favour of the company on the lack of any assent to the transfer of ownership in the timber rights. To the learned judge there could not be a sale unless there was a mutual assent to the exchange of property for money. A different approach was adopted by the Court of Appeal, where Bull J.A.¹⁰ stressed the need for a transfer or passing of property of some kind or another (presumably making the issue of assent irrelevant). In this instance there had been no such transfer of property. The respondent company had merely relinquished its rights to the authority which had originally granted them, namely, the federal government. The learned judge likened this process to the surrender of a lease or licence by the lessee or licensee back to the original lessor or licensor. Seaton J.A. dissented on the ground that the situation in the instant case was comparable to the sale by one joint tenant of his

⁷ See G.H.L. FRIDMAN, *SALE OF GOODS IN CANADA* 4-16 (1973).

⁸ [1974] 5 W.W.R. 242, 49 D.L.R. (3d) 149 (B.C.C.A.), *aff'd without stated reasons* [1976] 1 S.C.R. 711, 57 D.L.R. (3d) 220 (1975). (In *Brown v. Woywada*, [1974] 1 W.W.R. 709, 40 D.L.R. (3d) 630 (Man. C.A. 1973), the contract was within the Manitoba Farm Implements Act, R.S.M. 1970, c. F40 (*repealed by* S.M. 1971 c. 83, s. 37) and was therefore not governed by the Sale of Goods Act. Hence the implied warranties under the Act did not apply.)

⁹ [1973] 6 W.W.R. 343 (B.C.S.C.).

¹⁰ *Supra* note 8 at 246, 49 D.L.R. (3d) at 153.

interest to the other joint tenant (or one tenant in common to another), or the amalgamation of two railway companies.¹¹ Since what had occurred was in fact the reaction of the company to the *threat* of expropriation, in other words, the threat of an enforced sale, could it not be said that the company was merely adopting an alternative resolution of its problem, one that led to the ouster of an otherwise applicable revenue law, thereby making the transaction colourable in nature? This must have been at the back of the mind of Seaton J.A. The trial judge and the majority of the Court of Appeal were clearly more influenced by the juristic nature of the contract of sale (as was the House of Lords in an earlier case relied on by the majority¹²) and were prepared to apply the strict, technical features of such a contract despite the realities of the underlying facts of the situation. As a result the company was legitimately able to avoid paying tax by surrendering instead of being conquered through the medium of expropriation. Perhaps what the court was doing, however, was construing a revenue statute strictly, against the Crown and in favour of the taxpayer, rather than purporting to lay down any general concept of what is a sale.

Another case which straddles the issues of sale and sale of goods is *Saskatoon Sand & Gravel Ltd. v. Steve*.¹³ This concerned an agreement which conferred on the plaintiff the right to dig and recover gravel from the defendant's land. In fact the plaintiff dug the gravel but did not remove it; instead, he stockpiled it on the defendant's land. Subsequently, when the agreement expired, the question arose as to whether the stock of gravel belonged to the defendant or the plaintiff. This turned upon the character of the contract between the parties. Was it a sale of goods? Or was it something else? Under the agreement the purchase price was dependent upon the measurement of the amount of gravel dug and severed. The stock of gravel in question had not yet been measured. Therefore, if this was a sale of goods, then under the appropriate section of the Saskatchewan Sale of Goods Act, namely, section 20, rule 3,¹⁴ no property could have passed. However, the court held that the contract was not one for the sale of goods. It was a contract under which the plaintiff was granted a *profit à prendre* in the defendant's land; it was a contract concerning *land*, not goods.¹⁵ Consequently, different rules as to transfer of property applied. Once the gravel was dug and severed from the land it became the property of

¹¹ See *Cooper v. Critchley*, [1955] Ch. 431, [1955] 1 All E.R. 520; *Edwards v. Hall*, [1949] 1 All E.R. 352 (K.B.); *Great West Ry. Co. v. Comm'rs of Inland Revenue*, [1894] 1 Q.B. 507 (1893).

¹² *Kirkness v. John Hudson & Co.*, [1955] A.C. 696, [1955] 2 All E.R. 345 (H.L.).

¹³ 40 D.L.R. (3d) 248 (Sask. Q.B. 1973).

¹⁴ Corresponding to the Ontario Sale of Goods Act, R.S.O. 1970, c. 421, s. 19, r. 3.

¹⁵ See *Morgan v. Russell & Sons*, [1909] 1 K.B. 357 (1908).

the grantee of the profit, the plaintiff. Hence the defendant could not prevent him from coming onto the land and claiming the gravel.

This case brings home once again not only the problem of determining whether a contract is a sale or a transaction of some other kind, but also the importance of the distinction between goods and other forms of property or other forms of consideration for the payment of money. Other recent cases illustrate the vital distinction between contracts for the sale of goods (which may involve the performance of some work by the seller of the goods) and contracts for work or services in which goods change hands incidentally. This, of course, is a classic problem.¹⁶ It is still capable of causing difficulty. The recent cases have involved contracts for custom-made electric doors for a retail store that was under construction;¹⁷ for the repair of a car, involving the installation of hoses in connection with the brake system;¹⁸ and for the installation of a rubber cone on a press roll.¹⁹ In the first and third of these instances, the contract was held to be one for work and materials, not for the sale of goods. In the case of the contract for the repair of the car, however, it was decided that there had been a sale of the hoses. When one of the hoses proved to be defective, resulting in brake failure which caused an accident in which both the plaintiff and his passenger were injured, the plaintiff had an action for breach of the statutory implied condition that the hose would be fit for the purpose for which it was required. The defendant, who had installed the hoses under the contract for repair, was liable to the plaintiff, his customer (but not to the guest passenger, who was not a party to the contract). He was entitled to recover from his supplier under the contract between them, however. In the case involving the electric door, the decision that the contract was not one for the sale of goods meant that the statutory provision²⁰ requiring a written contract, or some alternative such as part performance, earnest, or acceptance was inapplicable.²¹ The case concerning the rubber cone involved the question of when and how property in the materials passed to the purchaser. Since this was not a contract for the sale of goods, the relevant provisions of the statute did not apply. Instead property passed

¹⁶ See FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 12-14.

¹⁷ *Brunswick Glass Ltd. v. United Contractors Ltd.*, 12 N.B.R. (2d) 631 (Cty. Ct. 1975).

¹⁸ *Sigurdson v. Hillcrest Services Ltd.*, [1977] 1 W.W.R. 740, 73 D.L.R. (3d) 132 (Sask. Q.B.).

¹⁹ *Scott Maritimes Pulp Ltd. v. B.F. Goodrich Canada Ltd.*, 19 N.S.R. (2d) 181, 72 D.L.R. (3d) 680 (C.A. 1977).

²⁰ The Ontario counterpart being the Sale of Goods Act, R.S.O. 1970, c. 421, s. 5(1), relating to contracts for the sale of goods worth forty dollars or more; see FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 36-38.

²¹ In any event, it was held that the admission by the defendant in his defence that he had ordered the goods was an "acceptance" of them for the purpose of this section; see *J. Materne Design & Constr. Ltd. v. Gendel*, [1971] 2 O.R. 176, 17 D.L.R. (3d) 268 (C.A. 1970).

under the law of *bailment*, by accession, that is the mere addition of the cone to the other property already belonging to the party for whom the work was being done. These three situations suggest that the concept of "goods", or "sale of goods", is being interpreted in the manner which will most assist the party seeking a remedy. If it is better, from the plaintiff's point of view, to hold that the contract is one for the sale of goods, the courts seem prepared to do so. If, however, there is greater advantage to him in considering the contract one for work and materials, or bailment, or something else, then it would seem that such a conclusion will be drawn. While lip service is paid to the principles derived from the English and Canadian authorities²² that lay down the basis for the distinction between sales of goods and other contracts, the courts may be reaching decisions on other grounds, and for other reasons.²³

B. *Questions of Property*

The proprietary aspect of a contract for the sale of goods has two sides or features: transfer of property as between the parties to the contract and acquisition of title to the goods by the buyer as against third parties. In relation to the first, the *Saskatoon Sand & Gravel* case²⁴ referred to previously illustrates the problem with respect to sales where something remains to be done before the contract is completed—in this instance measurement of the quantity of goods sold for the purpose of ascertaining the purchase price. The question did not have to be settled here, as noted earlier, because it was found that the contract was not one of sale. Had it been such a contract, however, property in the gravel still on the defendant's land would not have passed to the plaintiff. The goods in this instance (if they had been "goods") would have been unascertained. Various statutory tests apply to determine when property in such goods passes from seller to buyer. One such test is that of "appropriation". In a recent New Brunswick case, *Hayes Bros. Buick-Opel-Jeep Inc. v. Canada Permanent Trust Co.*,²⁵ the court was faced with the classic problem of the bankrupt seller whose trustee in bankruptcy claims title to goods still on the premises of the bankrupt against the assertion of a third party that he has acquired title to the goods under a contract of sale made prior to the bankruptcy. In this

²² See, e.g., *Clay v. Yates*, 1 H. & N. 73, 156 E.R. 1123 (1856); *Lee v. Griffin*, 1 B. & S. 272, 121 E.R. 716, [1861-73] All E.R. Rep. 191; *Preload Co. of Canada v. City of Regina*, 24 W.W.R. 433, 13 D.L.R. (2d) 305 (Sask. C.A. 1958), *aff'd without stated reasons* [1959] S.C.R. 801, 20 D.L.R. (2d) 586.

²³ Some provinces have rendered the distinction unnecessary for certain purposes: see *Manitoba Consumer Protection Act*, R.S.M. 1970, c. C200, s. 1(v); *Nova Scotia Consumer Protection Act*, R.S.N.S. 1967, c. 53, as amended by 1970 c. 33; 1975 c. 19. See also Bill 22, *Consumer Protection Amendment Act*, 51st Leg. N.S., 4th sess., 1977.

²⁴ *Supra* note 13. See also *Banks v. Biensch*, 3 Alta. L.R. (2d) 41 (S.C. 1977); where the seller has to deliver, property does not pass as long as the goods are not in a deliverable state.

²⁵ 15 N.B.R. (2d) 166 (S.C. 1976).

instance various buyers (the plaintiffs) had between them ordered seven vehicles from the Bricklin company of ill-starred destiny. Fourteen vehicles had been completed by the company, but none had been delivered to the plaintiffs. However, the company had prepared documents with accompanying invoices and certificates identifying the vehicles intended for the plaintiffs by their respective serial numbers, and these documents, which were drafts on the company to enable the plaintiffs to receive delivery, had been received by the plaintiffs. Upon the bankruptcy of the company the trustee took possession of its assets, including the undelivered vehicles. Could the plaintiffs assert title as against the trustee? The court held they could. Property in the vehicles had passed to them when the vehicles were unconditionally appropriated to the different contracts. What more could the company have done, in fact, to manifest its intention to deliver a particular vehicle to a particular plaintiff-buyer? A comparison of the circumstances of this case with those of other English and Canadian cases²⁶ reveals starkly that the conduct of the company was clearly enough to satisfy the statutory requirement of unconditional appropriation.

A somewhat different point vis-à-vis transfer of property was raised in the case of *Beaver Specialty Ltd. v. Donald H. Bain Ltd.*²⁷ The Ontario Court of Appeal²⁸ had held that in a sale of goods "f.o.b.", the direction of "f.o.b." was not relevant to the place of delivery but only to the determination of the amount payable by the purchaser. Risk passed to the buyer when the seller delivered the goods to the carrier and not when the goods reached their destination. Applying this to the case of a sale of walnuts in Vancouver "f.o.b. Toronto", the Ontario court held that the risk of deterioration of the goods during transit was to be borne by the buyer even where the damage was by reason of wetting and freezing and not by causes necessarily incident to the course of transit. All the buyer could do was sue the carrier. The Supreme Court of Canada, however, approached the case from another tack. Since the goods were sold "f.o.b. the buyer's place of business" there was a presumption that property was to pass only at the time and place of delivery, that is where and when the goods reached the buyer. Risk being a corollary of title, the seller continued to bear the risk of deterioration (whether ordinary or extraordinary) until the buyer had accepted the goods and thus acquired property in them. As a result, the

²⁶ See FRIDMAN, SALE OF GOODS IN CANADA, *supra* note 7, at 87-92.

²⁷ [1974] S.C.R. 903, 39 D.L.R. (3d) 574 (1973). In a *c.i.f.* contract, delivery of the goods will *not* pass property; for that to happen there must be delivery of the documents: *Jannock Indus. Ltd. v. Acadia Forest Prod. Ltd.*, 18 N.B.R. (2d) 361 (S.C. 1977). However, there must be delivery of the contract goods as well: *Findlay & Co. v. East Indian Produce Co.*, [1973] 2 Lloyd's Rep. 515 (Q.B.).

²⁸ [1970] 2 O.R. 555, 11 D.L.R. (3d) 432 (C.A.); FRIDMAN, SALE OF GOODS IN CANADA, *supra* note 7, at 288.

buyer could refuse to accept the goods when they arrived in a damaged condition. This case might be regarded, therefore, as an illustration of the seller's duty to deliver goods that are satisfactory, a duty that is not fulfilled by merely setting such goods en route, but only by actual delivery to the buyer (unless some express or implied term of the contract or the correct interpretation of the statute permits some contrary conclusion).²⁹

Turning to the "external" side of transfer of property, as it might be called, it is to be noted that the legislation on personal property security in Ontario (and in Manitoba when it comes into effect) may have significant effects upon the vexed issue of whether to protect the true owner or an innocent buyer. In the meanwhile, as the recent Alberta case of *Re Funduk & Horncastle*³⁰ shows, other jurisdictions may still be plagued by the complexities of the legislation on bills of sale. *A* bought two trucks from Ford Motor Co. under conditional sales agreements which were not registered under the Alberta Conditional Sales Act. The documents were endorsed to Ford Motor Credit Co., which provided the financing and took over the rights of Ford Motor in respect of the trucks. *A* then sold the trucks to *H*, who took delivery of them a few days later. Shortly afterwards Ford Credit assigned to Traders Group invoices or contracts with *A* covering eleven vehicles, including the two trucks in issue. The assignment was also not registered. A document dated the day before the assignment, purporting to be a "wholesale mortgage", was entered into by *A* under which he mortgaged to Traders Group nine of the eleven vehicles in the assignment, including the disputed two. Subsequently, the question arose as to whether Traders Group could seize the trucks under the assignment and mortgage. This turned on whether *H* had acquired title to them and on the interpretation of bills of sale legislation by virtue of which a transfer of possession by delivery passes good title, curing any defect resulting from a failure to register the document. The delivery of the trucks to *H* gave him good title as against Traders Group insofar as the latter's claim was based on the chattel mortgage executed after the delivery of the trucks. There was another basis for their claim as well: as assignees of the rights of Ford Motor (and Ford Motor Credit) under the contracts made by Ford Motor with *A*, their liens had priority over the rights of *H* as buyer of the trucks. This turned on the Factors Act provisions relating to sales by a mercantile agent in possession of goods with the consent of their true owner. Apart from questions of good faith on the part of *H* and lack of notice of competing claims (which were resolved in favour of *H*), there was an issue of the authority of *A* to deal with the

²⁹ See *Winnipeg Fish Co. v. Whitman Fish Co.*, 41 S.C.R. 453 (1909). See also *Georgetown Seafoods Ltd. v. Urie Fisheries Ltd.*, 78 D.L.R. (3d) 542 (P.E.I.S.C. 1977).

³⁰ 39 D.L.R. (3d) 94 (Alta. S.C. 1973).

vehicles as a mercantile agent. This was dealt with by the court on the basis of its being "elemental law" that a franchised dealer in Ford Motor vehicles, such as *A*, had implied authority to sell in the ordinary course of business vehicles shipped to him by Ford Motor and in his possession with its consent.³¹ Authority for this proposition is to be found in *dicta* in cases concerned with the rights of a dealer who has granted a mortgage bill of sale to another party for the purpose of raising money in order to carry on business.³² However, the facts in this case did not raise any question concerning the rights of the grantor of a bill of sale. They dealt with the authority of an *agent*, namely, a mercantile agent, to dispose of goods not his. Was *A* an agent? The Alberta court concluded that because he was a franchised dealer in Ford vehicles, therefore he was an agent for Ford. This, with all due respect, is not necessarily the case. The court confused the nature of an agency agreement or relationship with that of a franchise.³³ If the court was incorrect in this respect, then the basis for the application of the Factors Act disappears. That statute relates only to the powers of a special kind of "agent". Where a seller is not such an agent, the statute affords no protection to the buyer from him (except in certain other instances which are inapplicable here). It is suggested that the reasoning of the court in this part of the case leaves much to be desired.

C. *Terms of the Contract*

1. *Pre-contractual Representations*

The courts have long been familiar with the problem of reconciling the express terms of a contract, especially where they are written, with some oral statement made prior to or at the time of contracting.³⁴ Some recent sales cases raise this question once again, and suggest that the strict attitude revealed by the Supreme Court of Canada in the non-sales case *Hawrish v. Bank of Montreal*³⁵ towards the possibility of qualifying written terms by such an oral statement may not be welcome or adopted in all jurisdictions or contexts. Thus in *Ouchar v. Bryan's Car Corner Ltd.*³⁶ the defendant's servant or agent stated at the time the car in issue was sold to the plaintiff that if something went wrong with it the plaintiff

³¹ *Id.* at 101.

³² *Walker v. Clay*, 49 L.J.C.P. 560, at 562 (1880) (Lindley J.); *Dedrich v. Ashdown*, 15 S.C.R. 227, at 243-44 (1888) (Gwynne J.).

³³ See G.H.L. FRIDMAN, *LAW OF AGENCY* 9, n. 3 (4th ed. 1976).

³⁴ See FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 240-41, 245-48; McLauchlan, *The Inconsistent Collateral Contract*, 3 DALHOUSIE L.J. 136 (1976); Fridman, *Written Contracts with an Oral Element*, 8 MAN L.J. 383 (1977).

³⁵ [1969] S.C.R. 515, 2 D.L.R. (3d) 600.

³⁶ [1975] W.W.D. 123 (Alta. Dist. Ct.). Compare the condition that was "implied" into the contract in *Wojakowski v. Pembina Dodge Chrysler Ltd.*, [1976] 5 W.W.R. 97 (Man. Q.B.).

could and should bring the car back to the seller. After the car had been driven three miles by the plaintiff it broke down. It was held that the plaintiff was entitled to return the car on the basis of the oral representation. His right to reject for breach of condition had not been lost by acceptance within the meaning of the Sale of Goods Act. The contract of sale was subject to a condition precedent by virtue of which property did not pass and the right to reject could not be lost unless and until the car proved satisfactory to the plaintiff. Here the oral statement was utilized by the court to create a condition precedent. In *Findlay v. Couldwell & Beywood Motors*³⁷ a similar statement or representation was used to construe an exemption clause in the written contract, and to establish that such clause was not intended and could not be construed so as to comprehend and prevent liability for a fundamental breach. Here the representation was as to the effectiveness of the car for the purpose for which it was intended as disclosed by the purchaser to the seller. Five days after the purchase the engine of the car blew up. The seller was liable despite an exemption clause which purported to exclude liability for breaches of condition. These are cases in which the court was able, or willing, to determine that an oral statement made prior to or at the time of contracting was meant to have contractual force. Such will not always be the case. In *Chapman's Crane Service Ltd. v. Ka & Ka Industries*³⁸ a statement to the effect that the vehicle was "ready to go to work" was found not to be a term of the contract, of any description. It was merely an innocent misrepresentation and gave no rights of action or rejection to the purchaser.

This area of the law of contract, as is well known, is replete with anomalies and difficulties. Hence the need for the recent legislation in Alberta, British Columbia, Ontario and Prince Edward Island on business and trade practices, which provides an innocent buyer with a remedy without reliance on technical distinctions between representations, terms and statements which have bedevilled many a litigant in the past century or more.³⁹ Such legislation may well have rendered unnecessary the kind of change made in the law of innocent misrepresentation in England by the Misrepresentation Act, 1967. Provinces lacking comparable legislation share the need for a revision of the law that will reduce the likelihood of problematic decisions that turn on different interpretations of phrases by different courts.

³⁷ *Supra* note 4.

³⁸ [1975] W.W.D. 26 (B.C.S.C. 1974). See also *Garner v. Lee*, [1977] 3 W.W.R. 760 (B.C.S.C.), where it was held that a statement by the auctioneer at an auction did not affect the validity of a sale that (prior to the auction) had been expressed to be without reserve, and that hence attainment of a reasonable price was not a condition precedent to acceptance of the bid and creation of a contract.

³⁹ *Supra* note 2.

2. Implied Terms

Under the Sale of Goods Act various terms are, or may be, implied into a contract for the sale of goods. Indeed, some modern legislation makes it impossible to exclude such terms from certain types of contracts for the sale of goods, namely those involving "consumers" (a word which is rapidly becoming a term of art in this part of the law). Other terms may be implied, even where they are neither expressly contained in the contract nor implied by virtue of the statute.⁴⁰ The statutory implied terms—some examples of which will be considered below—are either conditions or warranties, a dichotomy which has come under considerable criticism in recent years and may no longer be important, except within the narrow confines of the Sale of Goods Act.⁴¹ One important implied condition under the statute is that relating to the fitness of goods for the purpose for which they were bought, where that purpose has been disclosed by the buyer to the seller so as to show that the former was relying on the latter's skill or judgment (omitting in this context the proviso about sales under a trade or patent name).⁴² In two recent cases, however, the respective courts referred to an implied "warranty" as to the fitness of goods for such purpose. It is not clear whether the courts intended to invoke the *statutory* implied term, or considered that such a term was implied into the particular contract in issue irrespective of the statute, and was a warranty, rather than a condition. Nor is it clear whether the court was using the expression "warranty" to mean "term", or rather was intending to invoke shades of the distinction between warranties and conditions. In one of these cases, *Canadian Trailmobile Ltd. v. H.E. Carson & Sons Ltd.*,⁴³ the question was as to the onus of proving a *breach* of such warranty. The seller obtained judgment because the buyer had been unable to make out any breach on the part of the seller, and the buyer was therefore liable for the unpaid money. In the other case, *Green v. Holiday Chevrolet-Oldsmobile Ltd.*,⁴⁴ it may not have mattered whether the term ultimately held to have been broken was a condition or a warranty, since the plaintiff was claiming damages, not rescission. He obtained judgment for \$1,000—the original price of the car being \$2,895. The engine of the car had exploded a few days after it had been

⁴⁰ E.g., from a Code of Ethics in a trade or business: *Banks v. Biensch*, *supra* note 24.

⁴¹ See FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 278-85.

⁴² FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 178-93; see also *Wylie v. R.C.A. Ltd.*, 5 Nfld. & P.E.I.R. 147 (Nfld. S.C. 1973).

⁴³ 9 N.B.R. (2d) 563 (S.C. 1974), *aff'd without stated reasons* 10 N.B.R. (2d) 5 (C.A. 1974). See also *Reiner v. Custom Motors Ltd.*, 20 N.S.R. (2d) 341 (S.C. 1975), where the buyer had not given notice of defects as his warranty required, and therefore had no claim.

⁴⁴ [1975] 4 W.W.R. 445, 55 D.L.R. (3d) 637 (Man. C.A.). See also *Wojakowski v. Pembina Dodge Chrysler Ltd.*, *supra* note 36.

purchased, while the plaintiff was driving in a steady, careful manner. The car had been used by a previous owner, to the dealer's knowledge, in "drag racing"—hardly the kind of activity likely to render a car satisfactory for normal use. In such circumstances, it is not surprising that the court found the defendant liable on the basis of an implied term as to the suitability of the vehicle for use by the purchaser. Two interesting points may be mentioned. First of all, even though the car was a used one, there could be an implied "warranty" of fitness. Such a warranty might be different from the kind to be expected, or implied, in the case of the sale of a new car; nonetheless, some sort of warranty could be implied. (Is this a suggestion that the warranty is statutory in origin, rather than implied from the factual circumstances? If so, then why the use of the word "warranty"?) Secondly, the basis of the judgment of Freedman C.J., of Manitoba, is that there had been a "fundamental breach of an implied warranty of fitness".⁴⁵ Without going into the detailed analysis, it is plain that this sort of language involves a confusion of ideas and concepts, a muddling of rationales and a blurring of distinctions that have been manifested in significant decisions in England and Canada over the past few decades. It may be desirable to avoid excessive rigidity and formalism in the law of sale of goods, particularly "consumer" sales. It may be that the law has been taken to extremes of refinement and differentiation by the language and decisions of some judges. However, this does not excuse any judge who cuts across such nice distinctions and seeks a satisfactory conclusion by combining inconsistent notions to produce an answer that will fit the occasion. Surely the plaintiff in this case could have been given a remedy without invoking the puzzling and, in this context, otiose and irrelevant doctrine of fundamental breach.

3. Statutory Terms

The various terms implied under the Sale of Goods Act are well known and require no elucidation or elaboration. In this survey reference will be made to some recent instances in which those terms were invoked to provide a remedy to an injured purchaser.

An interesting case, since it revives the curious and much discussed English decision in *Niblett Ltd. v. Confectioners' Materials Ltd.*,⁴⁶ is *J. Barry Winsor & Associates Ltd. v. Belgo Canadian Manufacturing Co.*⁴⁷ This case concerned the provision in the British Columbia Sale of Goods Act under which the seller impliedly promises or undertakes that he has the right to sell the goods at the material time. The sale was of electric lamps which did not have the approval of the C.S.A. Under a

⁴⁵ *Supra* note 44, at 448, 55 D.L.R. (3d) at 640.

⁴⁶ [1921] 3 K.B. 387, [1921] All E.R. Rep. 459 (C.A.).

⁴⁷ 76 D.L.R. (3d) 685 (B.C.C.A. 1976).

city by-law such lamps could not be sold without C.S.A. approval. There was no doubt that the lamps belonged to the seller, and thus the sale did not involve any failure on the part of the seller to make good title to the buyer. However, since the lamps could not lawfully be sold by the buyer in the city where the buyer intended to sell them, and since the seller knew the purpose for which the buyer wanted the lamps, it was held that the seller was in breach of the implied condition as to his right to sell the goods, and was liable to the buyer. Although the *Niblett* case has been followed previously in Canada,⁴⁸ the criticism made elsewhere of the case⁴⁹ is still valid, and applies to this more recent decision as it applies to the earlier one, namely that it makes the statutory provision far too broad in meaning and scope, and makes it apply to circumstances which seem to be far removed from its clear and plain object.

Next, reference may be made to several cases concerning the sale of goods by description and the failure of the goods to correspond with that description. In one,⁵⁰ involving a crane, the court made it clear that mere delivery to the purchaser did not amount to acceptance of the crane by him, since he was first entitled to an opportunity for reasonable examination so as to satisfy himself that it corresponded with the contractual description. Nor was the purchaser obliged to return the crane once it had been rejected. That was the duty of the seller, who was liable to refund not only the purchase price but also money spent by the purchaser in moving the crane to a place of storage and storing it for a reasonable length of time until the seller recovered it. Other cases involved the sale of plastic pipe,⁵¹ ethanoldiphenylene glycol anti-freeze (the fluid delivered contained very little ethylene glycol, which made it less effective as an anti-freeze),⁵² and semen from a bull.⁵³ In the last instance the semen delivered came from a bull other than the one specified in the contract. Hence it failed to correspond with the description. The sale was not simply of bull's semen, but of semen from a particular bull. The buyer had made it clear to the seller (if indeed any such indication was necessary in view of the importance of the subject matter of the contract to farmers engaged in building up a suitable herd) that the quality of the offspring to come from his cows was of great

⁴⁸ *Egekvist Bakeries Inc. v. Tizel*, [1950] 1 D.L.R. 585, [1950] O.W.N. 9 (H.C. 1949), *aff'd without stated reasons* [1950] O.W.N. 168, [1950] 2 D.L.R. 592 (C.A.).

⁴⁹ FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 107-108.

⁵⁰ *Tower Equip. Rental Ltd. v. Joint Venture Equip. Sales*, 9 O.R. (2d) 453, 60 D.L.R. (3d) 621 (H.C. 1975).

⁵¹ *Cimco Ltd. v. Starr Mfg. Ltd.*, 17 N.S.R. (2d) 381 (C.A. 1976). Note the unusual defence of contributory negligence on the part of the buyer raised, unsuccessfully, by the seller.

⁵² *Bakker v. Bowness Auto Parts Co.*, 68 D.L.R. (3d) 173 (Alta. C.A. 1976). There is a good discussion of "sales by description" by Clement J.A. in this case.

⁵³ *Steele v. Maurer*, 73 D.L.R. (3d) 85 (Sask. Q.B. 1976).

moment; hence the need to ensure that the "father" of the artificially inseminated calves should have the right qualities and virtues!⁵⁴

Goods may have to be fit for the purpose for which they were intended, as seen earlier, where such purpose has been made known to the seller. In some of the cases examined above, in which reference was not made to the statute, a "warranty" was implied. Other examples involve reliance upon the statutory implied term. In *Willis v. F.M.C. Machinery & Chemicals Ltd.*,⁵⁵ the sale was of insecticide and herbicide. The seller was held liable when the two chemicals, both of which were sold for use on the plaintiff's land, interacted and damaged the plaintiff's crop. The company pleaded that the sale had been made under the trade name of the products, invoking the proviso in the statute referred to earlier. It was held, however, that the plaintiff buyer had relied upon the seller's skill and judgment in advising him as to the suitability of the chemicals concerned. Therefore the proviso was inapplicable and the sellers were liable. The proviso was not raised, and was not relevant, in two more recently decided cases, one involving a shot-shell reloading machine⁵⁶ (in which the Alberta Appellate Division held that the manufacturer was no more liable in tort than the seller was under the Sale of Goods Act⁵⁷) and the other arising from a defect in the cap of a bottle of soda water, which caused personal injury to the purchaser.⁵⁸ In this last instance liability was founded not only upon the unfitness of the goods for the purpose for which they were sold, but also upon the more general notion of "unmerchantability"—a concept which has undergone much judicial interpretation in recent years, and statutory modification in England⁵⁹ if not, as yet, in Canada.

It should also be noted that terms may be implied under other statutes, as well as the Sale of Goods Act, where special types of goods are the subject matter of a contract of sale. Such statutes give rise to consequences that may differ from those normally ensuing from a breach of the terms and requirements of the Sale of Goods Act. Under the Manitoba Consumer Protection Act,⁶⁰ for example, where goods are unmerchantable or unfit for the buyer's purpose the seller cannot

⁵⁴ Hence the calculation of damages in this case on the basis of the value of the calves that should have been produced and the loss of one year's production from such progeny.

⁵⁵ 11 Nfld. & P.E.I.R. 361, 68 D.L.R. (3d) 127 (P.E.I.S.C. 1976).

⁵⁶ *Lem v. Borotto Sports Ltd.*, 58 D.L.R. (3d) 465 (Alta. S.C. 1975).

⁵⁷ With reference to the need to warn the buyer more than he was warned by the written instructions that came with the goods, see *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569, 25 D.L.R. (3d) 121 (1971).

⁵⁸ *McMorran v. Dominion Stores Ltd.*, 14 O.R. (2d) 559, 74 D.L.R. (3d) 186 (H.C. 1977). Goods are *not* "unmerchantable", however, when they are fit for some purpose: see *Demuyne v. Bittner*, 3 A.R. 334, [1977] 4 W.W.R. 200 (S.C.), where seeds produced a crop, even though it was not as good as contemplated.

⁵⁹ Supply of Goods (Implied Terms) Act, 1973, c. 13.

⁶⁰ R.S.M. 1970, c. C200, s. 58(1).

remedy the defect or abrogate the buyer's right to reject.⁶¹ Under the Saskatchewan Agricultural Implements Act it would seem (although at one time there were inconsistent decisions at first instance⁶²) that a seller is entitled to exclude the warranties that would otherwise be implied in a contract under the statute. Hence the buyer could not rescind the contract on the ground of the unfitness of the goods for the purpose for which he had bought them, and could not recover the purchase price for failure of consideration.⁶³

4. *Exclusion Clauses*

Mention of these cases, in which the effect of an exclusion clause upon statutorily implied terms was raised, leads to a consideration of the broader question of the validity and effectiveness of any attempt to preclude in advance all liability for the provision of defective goods, or for some other misperformance of a contract for the sale of goods. To the long list of cases in which the nature and effect of such clauses have been discussed in relation to contracts generally,⁶⁴ there must be added, so far as sales of goods are concerned, the decision in *Beldessi v. Island Equipment Ltd.*⁶⁵ In this case, the fact that the goods were defective while they were being rented prior to their purchase by the original lessee, as well as the fact that the seller tried numerous times to cure the defect, did not prevent the buyer from repudiating the contract and claiming damages in spite of the exclusion clause. This was because the clause in question was not sufficiently certain and clear to oust liability for breach of a "fundamental term", and the failure of the goods to work properly was a breach of such a term. The buyer's knowledge of the deficiencies of the goods, and the seller's attempts to try to put the goods into working order, did not affect the right to repudiate. This, surely, must be at the very limits of the doctrine of "fundamental breach" or "breach of a fundamental term". It would be difficult to find a case in which the efforts of the seller to exclude his liability were greater or the merits of the buyer lesser. Cases like this make the

⁶¹ *Friskin v. Holiday Chevrolet-Oldsmobile Ltd.*, 72 D.L.R. (3d) 289 (Man. C.A. 1976).

⁶² *Rein v. Machula*, [1975] 1 W.W.R. 215 (Sask. Dist. Ct.); *Hunchak v. Moker & Thompson Equip. Ltd.*, [1976] W.W.D. 147 (Sask. Q.B.).

⁶³ *Rein v. Machula*, [1977] 2 W.W.R. 244 (Sask. C.A. 1976).

⁶⁴ See FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 304-309, 538-40; FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 218-25.

⁶⁵ 41 D.L.R. (3d) 147 (B.C.C.A. 1973). See also *Mulrooney v. Greene*, 12 Nfld. & P.E.I.R. 292 (Nfld. Dist. Ct. 1976), where rescission was ordered of the contract for the sale of a used car purchased on an "as is, where is" basis. It was held that the defects in steering and brakes constituted a "fundamental breach". In *Neilsen v. Maclin Motors Ltd.*, 71 D.L.R. (3d) 744 (Alta. S.C. 1976), and *Cain v. Bird Chevrolet-Oldsmobile Ltd.*, 12 O.R. (2d) 532, 69 D.L.R. (3d) 484 (H.C. 1976), it was held that the sellers had lost their right to rely on exemption clauses because the trucks that were sold were seriously defective. In the Alberta case the truck was a used one, whereas in the Ontario case a new truck had been sold.

attempts by some of the English courts to turn the doctrine into one of construction rather than of substantive law seem mere *brutum fulmen*.

And yet the case of *Findlay v. Couldwell & Beywood Motors*,⁶⁶ considered earlier, perhaps goes further. There, it will be recalled, the scope of the exclusion clause was restricted by the contents of a "pre-contractual" representation. Courts, it seems, will go to almost any lengths to foil the workings of an exclusion clause expressly inserted by a seller into a contract in order to protect himself from liability. In all fairness it would seem that the more appropriate way to achieve this is by the kind of legislation that has been passed in recent years in some Canadian jurisdictions⁶⁷ making it impossible for sellers, in consumer sales, to oust the operation of the normally applicable implied terms.

5. *Effect of Acceptance*

Such cases also illustrate the extent to which courts are prepared to go in order to find that goods have not been "accepted" within the meaning of the Sale of Goods Act, since this would prevent the buyer from rejecting them on the grounds of breach of condition. Cases discussed earlier have already exemplified this trend. One other may be cited: the decision in *Burroughs Business Machines Ltd. v. Feed-Rite Mills (1962) Ltd.*⁶⁸ The contract was for the sale of a computer system. The seller was obliged to install the system and write programmes for it. The system, when installed, did not function satisfactorily. Several months of effort were expended in an attempt to make it work. Eventually the buyer purported to rescind the contract; he rejected the system and claimed damages. The seller, not unreasonably, argued by way of defence that the buyer had accepted the goods and could not now reject. In addition to deciding that there had been a "fundamental breach" (which made the issue of acceptance irrelevant⁶⁹), the court held that there had not been an acceptance within the meaning of the Sale of Goods Act of Ontario. A buyer who gave his seller a reasonable time in which to make the goods function properly was not accepting the goods. Again, one may make the comment that this seems to go a long way towards making nonsense of well-established doctrines of law. It is true that in the crane case considered earlier⁷⁰ mere delivery of the

⁶⁶ *Supra* note 4.

⁶⁷ S.N.S. 1975 c. 19, amending Consumer Protection Act, R.S.N.S. 1967, c. 53. Compare the statutes in British Columbia, Manitoba and Ontario noted in FRIDMAN, SALE OF GOODS IN CANADA, *supra* note 7, at 218.

⁶⁸ 42 D.L.R. (3d) 303 (Man. C.A. 1973), *aff'd* 64 D.L.R. (3d) 767 (S.C.C. 1976). See also *Pub. Util. Comm'n of Waterloo v. Burroughs Business Machines Ltd.*, 6 O.R. (2d) 275, 52 D.L.R. (3d) 481 (C.A. 1974). See also *Burridge v. City Motors (Nfld.) Ltd.*, 10 Nfld. & P.E.I.R. 451 (Nfld. Dist. Ct. 1976).

⁶⁹ See *Wojakowski v. Pembina Dodge Chrysler Ltd.*, *supra* note 36, where it was held that the buyer was entitled to repudiate the contract because there had not been an unconditional acceptance of the goods. Morse J. added *obiter* that this was also a case of fundamental breach justifying repudiation.

⁷⁰ *Supra* note 50.

crane was not enough to constitute acceptance. There, however, it was reasonable for the buyer to have an opportunity to examine the crane to see if it functioned. In this case, on the other hand, more was involved than simply taking delivery. Some time had passed before the buyer sought to reject the computer system. The facts here are closer to those in the *Beldessi* case,⁷¹ where efforts were made to rectify the deficiencies of the goods. Surely a buyer should be put to his election: does he want to reject for nonconformity or misperformance, or does he wish to retain the goods and endeavour to have them made suitable for his purposes? The time has come to introduce some doctrine akin to that in the Uniform Commercial Code⁷² regarding the "curing" of defects, rather than to continue to permit the buyer to blow hot and cold and still reject in the last resort after the seller has done his best. Would not the buyer be adequately protected and compensated by his claim for damages? These are questions which these recent cases, following earlier ones to the same effect,⁷³ bring sharply to mind.

D. Termination of the Contract and Remedies

Frustration of contract has been pleaded as an excuse for non-performance in several recent cases concerned with contracts relating to land, and different answers have been given in the light of slightly different fact situations.⁷⁴ This issue arose in relation to goods in an interesting case that ultimately reached the Supreme Court of Canada. In *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Co.*⁷⁵ there was a contract for an annual sale of waste paper. The contract contained a *force majeure* clause, under which there would be no liability on the part of the buyer to buy in the event of "non-availability of markets" for the goods manufactured by the buyer out of the waste product sold by the seller. One year later the buyer refused to accept the year's stock of goods. He argued that there was no profitable market for his goods. The buyer was thus endeavouring to have applied in his favour an *express* term in the contract dealing with what might otherwise have been pleaded as "frustration" on the basis of an implied term or of the need to construe and give effect to the contract in such a way as to recognize that the substratum of the contract had disappeared.

⁷¹ *Supra* note 65.

⁷² Art. 2-508.

⁷³ *Lightburn v. Belmont Sales Ltd.*, 69 W.W.R. 734, 6 D.L.R. (3d) 692 (B.C.S.C. 1969); *Barber v. Inland Truck Sales Ltd.*, 11 D.L.R. (3d) 469 (B.C.S.C. 1970); *Polar Refrigeration Serv. Ltd. v. Moldenhauer*, 60 W.W.R. 284, 61 D.L.R. (2d) 462 (Sask. Q.B. 1967).

⁷⁴ See *Capital Quality Homes Ltd. v. Colwyn Constr. Ltd.*, 9 O.R. (2d) 617, 61 D.L.R. (3d) 385 (C.A. 1975); *Graham v. Wagman*, 73 D.L.R. (3d) 667 (Ont. H.C. 1976); *Victoria Wood Dev. Corp. v. Ondrey*, 74 D.L.R. (3d) 528 (Ont. H.C. 1977).

⁷⁵ 4 N.R. 539, 56 D.L.R. (3d) 409 (S.C.C. 1975). For an interesting discussion of this case, see Veitch, Comment, 54 CAN. B. REV. 161 (1976).

The buyer's task was easier than if he had been compelled to rely on the general law rather than a term of the contract between the parties. However, it was still necessary for him to show that the circumstances came fairly and squarely within the scope and meaning of the contractual term—which in a sense was tantamount to establishing that a "frustrating event" had occurred. The vicissitudes of the case as it went through the courts reveal the difficulty of the decision that had to be made. The seller succeeded at trial. It was held that by the "non-availability of markets" clause, the parties had meant that as long as a market was available, whether or not it was profitable, the buyer was obliged to accept delivery of the contractual goods. This decision was reversed in the New Brunswick Court of Appeal: "available market" was held to mean a market that was not only available but also profitable.⁷⁶ The Supreme Court of Canada restored the verdict in favour of the seller. The real cause of the buyer's current difficulties was not some extrinsic development not contemplated by the contract but the buyer's own lack of business foresight in undertaking commitments that he ought to have known he might not be able to fulfill. The Supreme Court relied on a finding at trial that there had been no substantial change in market conditions. The *force majeure* clause could not be construed so as to accommodate such a situation. In a sense, therefore, if this was a case of frustration (which is doubtful, since frustration has never been considered to cover a change of circumstances which simply makes a contract less profitable or less desirable, only one that makes a contract utterly impossible to perform, or completely worthless and pointless to perform), it was a case of "self-induced" frustration. The buyer in fact "bit off more than he could chew". Although this case turns upon construction of the language of a written contract, nonetheless it does contain some more general insights into the termination of a contract through change of circumstances. It is not without its relevance for the law of contract in general, especially the law of frustration.

When a contract for the sale of goods is breached, a frequently invoked remedy is rejection of the goods, rescission of the contract and a suit for damages. Cases in which a buyer has purported to reject and rescind, where very often the question of an exclusion clause or the issue of fundamental breach is raised, have previously been mentioned and discussed. As was seen earlier, one of the problems involved in such instances may be that the buyer, by his conduct, has "accepted" the goods, thereby losing his right to reject them.⁷⁷ The buyer's

⁷⁶ 8 N.B.R. (2d) 207, 46 D.L.R. (3d) 732 (C.A. 1974).

⁷⁷ *Supra* notes 50, 65 & 68. Rescission may also be denied and damages only awarded if the buyer has obtained substantially what he had bargained for, despite the presence of some minor defect or deficiency in the goods: see *Selesse v. Central Garage Sales & Serv. Ltd.*, 18 N.B.R. (2d) 64 (S.C. 1977).

conduct may raise other similar problems. In another recent case⁷⁸ the buyer was seeking not rescission of the contract and damages for its breach but the return of the money he had given the seller by way of deposit. Originally the contract had provided that time was of the essence.⁷⁹ The stipulation was later waived by the buyer, thereby relieving the seller of his contractual duty to deliver by the agreed date. When delivery still did not occur, the buyer purported to repudiate the contract and recover his deposit. He was unsuccessful. By his subsequent behaviour, namely the waiver, he had deprived himself of the right to terminate the contract for non-performance.

The recovery of a deposit is an unusual form of recourse. The usual remedy is an action for damages. In such an action, as the statute makes plain,⁸⁰ the measure of damages is based on the rules in *Hadley v. Baxendale*,⁸¹ whether what has occurred is a breach of condition or a breach of warranty. The application of those rules, however, as is well known, is very flexible. Different measures of damages were recovered in some of the cases previously discussed. In one, damages for breach of warranty equalled the purchase price for the car paid by the buyer;⁸² in another, where there had been a breach of condition, the damages represented not only the purchase price but also the money spent by the buyer on storing the rejected goods.⁸³ In the case involving bull's semen,⁸⁴ the frustrated buyer obtained not only the difference in value between the calves actually produced by the semen which had been delivered to him and the calves which the correct semen would have produced, but also the loss of one year's production by such desired and intended progeny.⁸⁵ Thus, sometimes consequential as well as direct losses are recoverable in an action for breach of the contract. Much depends, as the *Hadley v. Baxendale* doctrine stipulates, on the nature of the contract and the knowledge of the seller.

Finally, some mention should be made of attempts to invoke equitable remedies in place of the common law claim for damages.

⁷⁸ *Sunstrum Ranching Co. v. Int'l Bldg. Systems Ltd.*, [1975] 4 W.W.R. 86 (Sask. Dist. Ct. 1974).

⁷⁹ On this point see FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 459-60, and the recent House of Lords decision in *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1977] 2 All E.R. 62.

⁸⁰ See FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 345-47, 378-88.

⁸¹ 9 Ex. 341, 156 E.R. 145 (1854). See FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 558-62, 568-69.

⁸² *Wojakowski v. Pembina Dodge Chrysler Ltd.*, *supra* note 36.

⁸³ *Tower Equip. Rental Ltd. v. Joint Venture Equip. Sales*, *supra* note 50. In *Burridge v. City Motors (Nfld.) Ltd.*, *supra* note 68, the buyer was allowed to rescind the contract because of fundamental breach. He recovered his purchase price and the expenses he had incurred in his attempt to repair the car.

⁸⁴ *Steele v. Maurer*, *supra* note 53.

⁸⁵ *Quaere* whether such calves would necessarily have been conceived and born from such semen, or might there not have been some untoward, natural prevention of proper conception and birth.

These are rarely sought in cases of sale of goods, but the statute does not eliminate all resort to equity. For a claim for specific performance of a contract for the sale of goods to succeed, the sale must be one of specific or ascertained goods.⁸⁶ Even then the remedy will be discretionary. The nature of the goods is vital in this connection. In *Humboldt Flour Mills Co. v. Boscher*⁸⁷ the seller agreed to plant and deliver the produce from an agreed quantity of seed. When the buyer sued for specific performance of this contract, he failed to allege that the seed had been planted or that there was any production from it. The court refused the remedy of specific performance under the appropriate provision of the Sale of Goods Act. The goods were not specific within the meaning of the Act, nor had they become ascertained as required by the section. In another seed case,⁸⁸ in which the seller agreed to sell mustard seed to the buyer and failed to deliver as stipulated, the buyer sought an interim injunction to restrain the seller from selling his stock of seed to others. This, in effect, was an indirect way of achieving specific performance of the contract (comparable to those cases involving contracts of personal service where injunctions have been granted to restrain the employee from breach by working elsewhere even though specific performance to force the employee to work for the other party would not be decreed).⁸⁹ The injunction was refused. Following the well-known case of *Re Wait*,⁹⁰ the court held that the buyer had no property in the stock of seed belonging to the seller. Hence he had no interest to be protected by an injunction. Damages for breach of the contract to deliver mustard seed would be an adequate and appropriate remedy. These decisions illustrate once again the difficulties inherent in seeking to assert an equitable remedy in relation to this type of contract. On the whole, the law prefers a buyer (or seller where appropriate) to rely on his remedies of rejection, rescission and damages, rather than to seek the aid of equity in respect of a contract that was wholly common law in origin and was not historically within the ambit of protection afforded by the Court of Chancery.

III. CREDIT TRANSACTIONS AND METHODS OF GIVING SECURITY

A. Conditional Sales

1. Strict Construction of Statutes

Several cases within the period under review illustrate the somewhat strict attitude adopted by the courts in their interpretation and

⁸⁶ See FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 397-99; *id.* at 48-49 on the meaning of "specific" and "ascertained".

⁸⁷ 50 D.L.R. (3d) 477 (Sask. Q.B. 1974).

⁸⁸ *The Olds Produce Co. v. Montana Mustard Seed Co.*, 37 D.L.R. (3d) 625 (Sask. Q.B. 1973).

⁸⁹ See FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 602-606.

⁹⁰ [1927] 1 Ch. 606 (C.A.).

application of provincial legislation governing conditional sales. The courts are insistent that the letter of the statutes be precisely obeyed before they will give protection to the vendor who is seeking the benefit of such legislation, either as against the original purchaser under the conditional sales agreement or against some third party.⁹¹ Various particular issues have arisen. For example, what is meant by "delivery" of possession under these statutes? It was stated in one British Columbia case⁹² that this meant actual physical delivery of the chattel, not a symbolic delivery or what the Romans called *traditio brevi manu*. Hence, in the case in question, where there were two successive agreements, the first of which involved delivery and registration, the rights of the vendor against the purchaser and others were protected. In another case from the same province, *Re Loncar*,⁹³ it was held that a mobile home was not a motor vehicle for the purposes of the Act, and that therefore the agreement was valid as against the trustee in bankruptcy of the purchaser. This point was upheld on appeal, although the court found other reasons for reversing the original decision.⁹⁴ One further British Columbia case is also instructive. In *John Deere Ltd. v. Poncilius*⁹⁵ the seller failed to give the buyer precise notice of the cost of repossession and storage, as required under the Act. This was held to invalidate the notice, thereby extinguishing the action on the conditional sales agreement and in turn resulting in the loss of the collateral security, a chattel mortgage, given by the buyer to the seller. In matters of this kind, therefore (and the same will be seen to be the case in relation to chattel mortgages given under bills of sale), we must speak by the card, as Hamlet says, or else equivocation will undo us!

One Ontario case, involving a somewhat different point however, reveals a possibly less strict, more realistic approach to problems of construction. In *Re H.G. Young Mines International Ltd.*,⁹⁶ a bankruptcy case, the question was whether the vendor's title to television sets which were in the possession of the bankrupt company, a dealer in such sets, was preserved if the conditional sales agreement was not registered. This depended upon whether these were "household furniture" agreements, which did not require registration under section 2(5) of the

⁹¹ The transaction must, of course, be a conditional sale: see *McIntosh Cartage Co.*, 18 C.B.R. (N.S.) 195 (B.C.S.C. 1973), *rev'g Re Otis Elevator Co.*, [1975] 1 W.W.R. 97, 51 D.L.R. (3d) 277 (B.C.C.A. 1974). Nor will the holder of an uncrystallized floating charge made before the creation of a chattel mortgage be protected by the Conditional Sales Act: see *Glendale (Atl.) Ltd. v. Gentleman*, 76 D.L.R. (3d) 303 (N.S.S.C. 1977).

⁹² *Hawker Siddeley Canada Ltd. v. Sigurdson*, [1975] 3 W.W.R. 60, 52 D.L.R. (3d) 116 (B.C.C.A. 1974).

⁹³ [1976] 5 W.W.R. 187 (B.C.S.C.).

⁹⁴ [1976] 6 W.W.R. 57 (B.C.C.A.). See the recent amendments contained in the Attorney General Statutes Amendment Act, 1977, S.B.C. 1977 c. 3.

⁹⁵ 2 B.C.L.R. 55 (S.C. 1977).

⁹⁶ 22 C.B.R. (N.S.) 185 (Ont. H.C. 1976).

Ontario Act. Grange J.⁹⁷ held that in modern times television sets were household furniture. They were, said the learned judge, an integral part of most Canadian households, as much a part of the furniture as tables, chairs, sofas, or beds and more likely pieces of furniture than pianos, organs, or other musical instruments (which were specifically mentioned in the legislation).

When a seller purports to repossess goods sold under a conditional sales agreement, under the provisions of the relevant legislation, the courts will scrutinize the seller's actions most carefully to see whether he had scrupulously followed the letter of those provisions. Here again, strict construction is the rule. In one Saskatchewan case⁹⁸ this was held to lead to the conclusion that the buyer could not waive the requirement that a notice containing all the statutory particulars be given him by the seller before a sale of repossessed goods. His right to such complete notice was a statutory, not a contractual one; hence he could not be permitted to relieve the seller of the correlative duty placed on him by the legislation. In *University Mercury Sales Ltd. v. Phillips Housing Ltd.*,⁹⁹ the New Brunswick court was faced with a situation in which the buyer had voluntarily returned the goods to the seller, with instructions to sell them if the seller had the chance to do so (in order to reduce, if not remove entirely, the buyer's debt to the seller). The seller sold the goods for a sum less than the amount owed by the buyer and sued for the deficiency. The buyer pleaded that, having repossessed, the seller could not now sue for money owing (a question to which there will be reference later). It was eventually held that what had occurred did not amount to repossession under the Act. Therefore the seller's right to claim the purchase price had not been extinguished. A more recent case from the same province, *Canadian Acceptance Corp. v. Melanson*,¹⁰⁰ illustrates that if the situation is within the statute, strict adherence to its requirements is necessary, otherwise the seller will lose his right to sue for any deficiency still outstanding after a resale of the goods following repossession.

2. *The Pursuit of Alternative Remedies*

A common problem in relation to conditional sales agreements is the extent to which an unpaid seller can sue for the price (or damages) when the statute limits his remedies, regulates the conditions under which such a claim may be made, or compels the seller to make an election between remedies. Different possible situations are illustrated in cases over the past few years.

⁹⁷ *Id.* at 188.

⁹⁸ *Industrial Acceptance Corp. v. Hardybala*, 39 D.L.R. (3d) 756 (Sask. Q.B. 1973), *aff'd* [1974] 6 W.W.R. 189, 48 D.L.R. (3d) 756 (C.A.).

⁹⁹ 8 N.B.R. (2d) 562 (C.A. 1974).

¹⁰⁰ 14 N.B.R. (2d) 279 (S.C. 1976).

In one case, *Traders Group Ltd. v. Smith*,¹⁰¹ it was held that where the buyer had wrongfully disposed of the goods to a third party, a statute which gave the seller an election between repossession of the goods and an action for the purchase price did not preclude the seller from suing for the purchase price in *tort*, in an action for conversion, even though he had already begun to seize the goods. The position is different where contractual remedies are being pursued. In *Re Leippi*¹⁰² it was made clear that if the seller repossesses the goods under a conditional sales agreement he cannot sue for the purchase price—repossession is his only remedy. On the other hand, if he sues for the price without seeking repossession, he does not lose his proprietary rights in the goods unless and until the purchase price has been fully paid (when title is transferred by action); hence the right to sue for conversion—an action based upon proprietary, not contractual, rights—in the case previously cited. A more recent British Columbia case, *Metrocan Leasing Ltd. v. Virani*,¹⁰³ involved recent amendments to that province's legislation similar to provisions in Alberta and Newfoundland. Under the legislation, if the seller seized the chattel he could not then sue for the price, and *vice versa*. What was the situation, the court asked in the case, where there was a guarantee? Did seizure of the goods also relieve the guarantor of liability for any deficiency in the purchase price? Could the guarantor, by his agreement, contract out of any such liability? The court held that it depended upon whether the security involved in the transaction was imposed by the creditor himself or by operation of law. If the former, the guarantor would be relieved; if the latter, then he still remained liable for any deficiency.

The position of third parties who were not originally involved in the agreement is an issue that has arisen before. The legislation, which may differ in certain details and respects from province to province, may force the seller to choose between available remedies—or, in the case of Saskatchewan, permit the seller only to repossess the goods in certain situations—and then the question is whether an assignee (or someone else) may be sued. In *C.L. Hagan Transportation Ltd. v. Canadian Acceptance Corp.*,¹⁰⁴ which involved the Saskatchewan statute that limited the seller's remedies, the Supreme Court of Canada held that the assignor of the chattel mortgage (the original seller of the goods) could be sued by his assignee for the unpaid purchase price where the original purchaser of the goods defaulted on payment. Such an assignee was not affected by the statute. His right came from his assignor's personal covenant to pay the purchase price if the original buyer failed to pay.

¹⁰¹ 66 D.L.R. (3d) 153 (Alta. Dist. Ct. 1976).

¹⁰² [1976] 5 W.W.R. 463 (B.C.S.C.).

¹⁰³ [1977] 1 W.W.R. 585, 1 B.L.R. 49 (B.C.S.C. 1976).

¹⁰⁴ [1974] S.C.R. 491, [1973] 6 W.W.R. 172, 38 D.L.R. (3d) 10.

Following this, in an Alberta case¹⁰⁵ the Appellate Division was in disagreement as to the situation where the original debtor had gone bankrupt. Did this affect the liability of his guarantor? Two members of the court, McDermid and Clement J.J.A., held that the bankruptcy destroyed the debtor's liability; hence, if the principal obligation terminated, there could be no subsidiary one. Prowse J.A. took the view, rather similar to that of the Supreme Court in the *Hagan Transportation* case, that the situation of the principal debtor did not affect the rights and liabilities of the guarantor or surety. (In this the members of the court took different views as to the effect of the well-known decision of the Supreme Court of Canada in *Edmonton Airport Hotel Co. v. Crédit Foncier Franco-Canadien*.¹⁰⁶) Wright J., in the Manitoba case of *Traders Group Ltd. v. LaJambe*,¹⁰⁷ arrived at a conclusion similar to that of the majority of the Alberta Court of Appeal as to the immunity from suit of a guarantor where the principal debtor could not be sued. In that case, the guarantor was held not liable because the creditor had failed to give proper notice to the principal debtor, thereby prejudicing both debtor and guarantor, and the original debt, in the form of a lien note, was no longer valid. It would seem that the distinguishing feature in the *Hagan Transportation* case was the *distinct* obligation of the original seller of the goods, namely his personal covenant, which was not interpreted as a guarantee or indemnity. If the obligation of the secondary debtor can be treated as arising from a separate document or transaction, then it will not be affected by any statutory limitations on rights of action, any requirements as to election, or the invalidity of the purported exercise of his rights by the creditor.¹⁰⁸ There appears to be a very fine line here, much akin to the distinction between indemnity and guarantee that was created by courts in cases under the Statute of Frauds.¹⁰⁹ This distinction undoubtedly affects the rights of a vendor of goods (or his assignee) under a conditional sales agreement—or some other form of security—where he seeks to recover his loss from someone other than the original purchaser-debtor.

3. *Status of the Act*

Legislation on conditional sales may be said to be distinctive and *sui generis*, in the sense that it is not a part of the general law of sales (which is contained in the Sale of Goods Act, as affected by the provisions of the Factors Act in those provinces which have the latter as well as the former statute¹¹⁰). So far as the nature and incidents of a

¹⁰⁵ *Targa Holdings Ltd. v. Whyte*, [1974] 3 W.W.R. 632, 44 D.L.R. (3d) 208 (Alta. C.A.).

¹⁰⁶ [1965] S.C.R. 441, 50 D.L.R. (2d) 510.

¹⁰⁷ 49 D.L.R. (3d) 753 (Man. Q.B. 1974).

¹⁰⁸ Compare *British Acceptance Corp. v. Hansen*, [1974] 3 W.W.R. 461, 44 D.L.R. (3d) 421 (Alta. C.A.).

¹⁰⁹ See FRIDMAN, *LAW OF CONTRACT*, *supra* note 3, at 202-205.

¹¹⁰ See FRIDMAN, *SALE OF GOODS IN CANADA*, *supra* note 7, at 133.

conditional sale contract are concerned, the governing rules are those of the Conditional Sales Act (where such statute is still in force within a jurisdiction, as will be seen later). Hence, the rights of an innocent third party to goods which were subject to a conditional sales agreement when the third party purchased them or acquired some interest in them from the original buyer under the conditional sales agreement are not spelled out in the Sale of Goods or Factors Acts, but rather in the Conditional Sales Act. This is at least the situation in Saskatchewan, as the court suggested in *Commercial Credit Corp. v. Massey-Ferguson Industries Ltd.*¹¹¹ Therefore even if the purchaser in that case had been in good faith, and without notice of the other party's interest in the goods (which was not the case), and even if the sale to the purchaser had been in the ordinary course of business (which it was not since it was a sale to a principal shareholder of the company which had been the original purchaser of the goods), the situation would still not have resulted in good title being obtained by the purchaser, because as the court stated, the provisions of the Sale of Goods and Factors Acts which enable someone without title to pass good title to a third party did not apply to conditional sales contracts.

There appears to be one exception to this, however, which is perhaps derived from the law relating to bills of sale. As seen earlier, in connection with the Alberta case of *Re Funduk & Horncastle*,¹¹² there is authority for the proposition that if a trader grants a bill of sale over his business chattels, by way of mortgage, for the purpose of raising the money to enable him to purchase such chattels to do business, or to remain in business, then any sales of such chattels to third parties in the regular course of business will be valid to pass title free of any interest under the mortgage even if the bill of sale is registered. This applies despite the policy of the Bills of Sale Acts to prevent frauds on third parties, especially creditors of a tradesman, by making registration necessary where the mortgagor retains possession of goods but title of some sort is vested in someone else. The decision is explicable if it is realized that the real purpose of the mortgage and loan was to enable the trader to continue in business and that it would be illogical to permit him to do this and yet not have the legal power to dispose of the chattels in such a way as to confer title on purchasers for value acting in good faith in the ordinary course of business.¹¹³ In the case of *Terra Power Tractor Co. v. Chapman*¹¹⁴ an Alberta court applied the same principle

¹¹¹ 42 D.L.R. (3d) 456 (Sask. Q.B. 1973), which followed *Kozak v. Ford Motor Credit Co.*, [1971] 3 W.W.R. 1, 18 D.L.R. (3d) 735 (Sask. C.A.). The situation has been held to be different in British Columbia and Ontario: see FRIDMAN, SALE OF GOODS IN CANADA, *supra* note 7, at 277-78. This may now have been changed in Ontario as a result of the Personal Property Security Act, R.S.O. 1970, c. 344.

¹¹² *Supra* note 30.

¹¹³ See *Walker v. Clay*, and *Dedrich v. Ashdown*, *supra* note 32.

¹¹⁴ 2 Alta. L.R. (2d) 247 (Dist. Ct. 1977). See also *Dalglish v. Industrial Acceptance Corp.*, 2 Alta. L.R. (2d) 261 (S.C. 1977).

to a situation in which the trader had raised the necessary funds not by bill of sale, or chattel mortgage, but by a conditional sales agreement. In other words, the trader had bought the goods with which he was dealing in the course of his business under a conditional sales agreement. This agreement was duly registered by the vendor under the Alberta Conditional Sales Act. The purchaser of the goods, the trader, then sold the goods to a third party buying in good faith in the ordinary course of the trader's business. This buyer was held to obtain good title, free of any interest retained by the original vendor under the conditional sales agreement. The registration of the agreement did not amount to notice to the whole world of the vendor's title, so as to preclude the operation of the section of the Factors Act under which a mercantile agent in possession of goods with the consent of the owner could pass good title to an innocent third party buying without notice of the true owner's title.¹¹⁵

4. *The Effect of Movement of Chattels*

In *Traders Group Ltd. v. Concorde Truck & Camper Rentals Ltd.*,¹¹⁶ there was a conditional sale in Alberta, duly registered in that province. Later the agreement was assigned to the plaintiffs by the original vendor, and the agreement was registered in British Columbia.¹¹⁷ This registration was retrospective in effect. Thus the plaintiffs were protected by the British Columbia Act and could recover the goods from the defendant, a third party, in British Columbia. In *Re Harris and Hirst Enterprises Ltd.*¹¹⁸ goods were sold in California under a conditional sales agreement that was subject to Californian law. A claim for repossession of the goods was made in Manitoba. It was held that the validity of the agreement and the extent of the obligations it created were governed by Californian law, but claims for repossession in Manitoba invoked Manitoban law as to registration and restriction of the vendor's remedies. This is certainly consistent with the *Traders Group* decision, in which British Columbia law, the *lex fori*, was applied to a claim by the vendor/assignee of the agreement. A similar application of the *lex fori* was made in a case concerning a "foreign"—extra-provincial—chattel mortgage.¹¹⁹ But in a recent Alberta case,¹²⁰ of which more will be said later, the trial

¹¹⁵ See FRIDMAN, SALE OF GOODS IN CANADA, *supra* note 7, at 122-28; FRIDMAN, LAW OF AGENCY, *supra* note 33, at 219-27.

¹¹⁶ [1974] 4 W.W.R. 530, 45 D.L.R. (3d) 732 (B.C.S.C.).

¹¹⁷ *But see* General Motors Acceptance Corp. v. Hubbard, 18 N.B.R. (2d) 248 (S.C. 1977), where the court upheld the sale in New Brunswick of a car originally purchased in Ontario under a conditional sales agreement. The Agreement was not registered in New Brunswick until after the sale.

¹¹⁸ 55 D.L.R. (3d) 24 (Man. Q.B. 1975).

¹¹⁹ Seibold v. First Nat'l Bank, [1976] 1 W.W.R. 151 (Sask. C.A. 1975).

¹²⁰ Royal Bank of Canada v. College Mercury Sales Ltd., [1977] 1 W.W.R. 645 (Alta. C.A.), *rev'g* [1976] 3 W.W.R. 167 (S.C. 1975).

court's application of the domestic law of the *lex fori* to the seizure of goods subject to a "foreign" chattel mortgage was reversed by the Appellate Division, which appears to have held that the validity of the chattel mortgagee's acts was governed by a special "conflicts" rule of the *lex fori*.

B. *Bills of Sale*

It has already been noted that there are features shared by conditional sales agreements and bills of sale, used in this context to refer to "mortgage" bills of sale (as contrasted with "absolute" bills, under which goods are sold outright although possession of them is retained by the vendor). While a conditional sales agreement is basically a way of financing the purchase of goods where the buyer lacks the necessary money at the time of purchase, and a mortgage bill of sale is a device for raising a loan of money on the security of goods which may or may not already be owned by the mortgagor, both types of transaction may be used for the purpose of enabling someone who does not have the full purchase price at the material time to buy goods without having to wait until he can truly afford them, in a manner which secures the creditor's debt and affects the purchaser's title for all purposes, especially so far as concerns his right or power to transfer title to a third party. In view of this underlying similarity in the nature of the two transactions, it is hardly surprising that the courts have frequently interpreted the legislation which respectively governs them in much the same way.

Before illustrating this, mention should be made of a case¹²¹ in which the validity of a change in the British Columbia Bills of Sale Act was called into question. The amendment in issue precluded a mortgagee under a bill of sale from suing on a promissory note given by the mortgagor after the mortgagee had seized the goods subject to the mortgage. It was argued by the mortgagee that in so far as the provincial statute purported to affect rights under a bill of exchange it was *ultra vires*, since the British North America Act¹²² gave exclusive jurisdiction over bills of exchange and promissory notes to the Parliament of Canada. The court held, however, that the true purpose of the statute was to deal with "property and civil rights",¹²³ and that therefore the statute was *intra vires* the provincial legislature. This was, there can be no doubt, a very subtle and clever argument on the part of the creditor/mortgagee. From a commercial point of view (whatever may be said of it from a constitutional standpoint), the creditor's position is

¹²¹ Canadian Imperial Bank of Commerce v. Materi, [1975] 2 W.W.R. 299, 50 D.L.R. (3d) 400 (B.C.S.C. 1974). As to the relationship between the Conditional Sales Act, 1961, S.B.C. 1961 c. 9, and the federal Bankruptcy Act, R.S.C. 1970, c. B-3, see *Re Nishi Industries Ltd.*, [1977] 4 W.W.R. 674 (B.C.S.C.).

¹²² S. 91(18).

¹²³ B.N.A. Act, s. 92(13).

entirely consistent with the various cases, some of which have been previously considered,¹²⁴ in which the attempt of a creditor to invoke alternative (and cumulative) remedies has been discussed. So far as the original parties, namely the principal creditor and debtor, are concerned, it would seem that if the creditor is purporting to pursue remedies arising from the *same* document or instrument, for example, seizure and an action for money, he will be precluded from doing so by statutory provisions; if separate instruments or documents are used as the basis for suit, as in the case just cited, where the bill of exchange was a distinct transaction from the mortgage, then the creditor will be successful. This explains why the mortgagee who sued for judgment in *Negus Edwards Ltd. v. Mahal West Resorts Ltd.*¹²⁵ lost the right to assert his property interest under the chattel mortgage, with the result that he stood equally with other creditors of the mortgagor. The situation where the dispute arises between the creditor and a guarantor has already been discussed, and was clarified in *Metrocan Leasing Ltd. v. Virani*.¹²⁶

The strictness with which the legislation governing bills of sale is applied by the courts may be illustrated by several decisions. If there has been faulty registration, not in accordance with the Act;¹²⁷ or an insufficient description of the goods subject to the mortgage;¹²⁸ or a failure to swear the appropriate affidavit by the mortgagee at the *correct* time, that is after the chattel mortgage has been created;¹²⁹ or a failure to register;¹³⁰ then the document may be totally ineffective, or effective only against some, but not all, parties.¹³¹ In other words, the courts demand that the strict letter of the statutes be obeyed; the intent to create a valid chattel mortgage will not suffice. One case, however, suggests that there may be different views on a certain aspect of this area of the law in different provinces. In *Henfrey v. Munck International A/S*,¹³² the bill of sale stated that the consideration for the transaction was \$60,000, when in fact the true consideration given was \$46,000. Did this render the bill of sale invalid? It was held by the British Columbia court, interpreting the statute of that province, that this deviation from the truth, even if it was made in good faith, meant that the bill of sale

¹²⁴ See text *supra* between notes 101 & 103.

¹²⁵ 2 B.C.L.R. 269 (S.C. Chambers 1977).

¹²⁶ *Supra* note 103.

¹²⁷ *Carlson v. Avco Financial Services Ltd.*, [1974] 3 W.W.R. 80 (Alta. Dist. Ct.).

¹²⁸ *Re Bentley*, 1 O.R. (2d) 120, 39 D.L.R. (3d) 488 (H.C. 1973); *Bank of Montreal v. Young*, 3 Alta. L.R. (2d) 11, 76 D.L.R. (3d) 147 (Dist. Ct. 1977); *Re Hutchinson*, [1977] 4 W.W.R. 547 (B.C.S.C. Chambers).

¹²⁹ *Re Upper Canada Zoological Soc'y*, 8 O.R. (2d) 340, 20 C.B.R. (N.S.) 51, 58 D.L.R. (3d) 36 (C.A. 1975).

¹³⁰ *Fratkin v. Canadian Imperial Bank of Commerce*, [1977] 2 W.W.R. 470 (Man. Q.B.).

¹³¹ It will, for example, be ineffective as against a party lending or giving money credit after the due date for registration: *Fratkin*, *supra* note 130. See also *Bolduc v. Boettcher*, [1977] 2 W.W.R. 453 (Sask. Q.B.).

¹³² [1976] 2 W.W.R. 107, 65 D.L.R. (3d) 363 (B.C.C.A. 1975).

offended the statute and was void as against the trustee in bankruptcy of the mortgagor. As Bull J.A. pointed out,¹³³ this was the situation in both British Columbia and Alberta, where the statutes required the substantially correct consideration to be stated; in Ontario, on the other hand, it had been decided that the fact that the consideration was falsely or incorrectly stated did not make the bill of sale invalid *per se*, but merely permitted the court to invalidate it if in its discretion it thought that what had occurred had been fraudulent. Misstatement of the consideration was a factor that might influence the court in coming to such a conclusion.

Finally, as with conditional sales agreements, a bill of sale granted in jurisdiction *A* may be the basis of litigation in jurisdiction *B*. It would appear that even though the *lex loci contractus* may govern the creation and validity of the bill of sale or chattel mortgage, questions of enforcement of remedies and the like must be dealt with in accordance with the *lex fori* (which, in the circumstances, is also the *lex loci solutionis*). Thus in *Seibold v. First National Bank*,¹³⁴ the mortgagor under a chattel mortgage given in Nebraska sold the goods to a *bona fide* purchaser for value without notice in Saskatchewan within thirty days of the goods having been brought into that province (this being the time period within which the mortgagee should have registered the bill of sale in Saskatchewan under that province's Bills of Sale Act). In these circumstances it was held that the sale was invalid as against the chattel mortgagee. At the material time he had not failed to comply with the statute; therefore he could not be penalized under it. In *Royal Bank of Canada v. College Mercury Sales Ltd.*¹³⁵ a chattel mortgage had been granted in British Columbia, where it was duly executed and registered. Under the British Columbia statute no affidavit of the *bona fides* of the grantee was required (though such an affidavit was required for valid bills of sale by way of chattel mortgage under the Alberta statute in respect of Albertan bills of sale). The goods were subsequently brought to Alberta, where, under that province's Act, registration of the bill of sale in Alberta was necessary as the basis of seizure or repossession of the goods in that province. In the absence of an affidavit of *bona fides*, the trial judge held that the purported registration in Alberta was invalid, and that therefore seizure was not possible. On appeal this was reversed by the Appellate Division. That court applied other provisions of the Alberta statute, under which "foreign" bills of sale did not require the affidavit in question for valid registration so as to permit their enforce-

¹³³ *Id.* at 111, 65 D.L.R. (3d) at 366.

¹³⁴ *Supra* note 119. Compare the cases cited *supra* at notes 131 & 132 on the importance of time.

¹³⁵ *Supra* note 120. Cf. *Bank of Montreal v. Jack Gardiner Used Cars Ltd.*, 73 D.L.R. (3d) 146 (N.S.S.C. 1977), where the mortgagee did not comply with the requirements of the *lex fori*, and was denied possession.

ment in Alberta. In other words, whereas the trial judge was applying the "domestic" law of bills of sale to the case of a "foreign" bill, the court of appeal preferred to apply what might be termed the "conflicts" principles of the *lex fori* in the determination of the rights of a grantee under a "foreign" bill of sale. Nonetheless, it must be noted, what was invoked was not the *lex loci contractus*, namely British Columbia law, but the *lex fori*, that is Alberta law, albeit Alberta law including the conflict of laws aspects.

C. Statutory Changes

The majority of Canadian provinces (and the federal territories) still retain the older forms of creating secured transactions involving chattels. In Ontario, as is well known, the older law relating to bills of sale, chattel mortgages and conditional sales was replaced by the Personal Property Security Act,¹³⁶ which in effect introduced into the law in Canada the scheme devised in the United States and contained in Article 9 of the Uniform Commercial Code, which, either in whole or in part, has been adopted generally in the United States. As of April 1, 1976 (perhaps a significant date!) the Assignment of Book Debts, Bills of Sale, Chattel Mortgages and Conditional Sales Acts of Ontario were repealed, and in their place the Personal Property Security Act came into force. In *Re Margaritis (Galaxie Family Restaurant)*¹³⁷ the court was concerned with the effect of the transitional provisions of the statute. A chattel mortgage had been created and registered before April 1, 1976, under the previous law. Owing to the lack of an affidavit of *bona fides*, however, it was void as against the trustee in bankruptcy of the grantor under the old law. After April 1, the chattel mortgage became a "security interest" under the new statute. The question was whether this change of name and status rendered what had been an invalid chattel mortgage a valid security interest after April 1, 1976 so as to bind the trustee in bankruptcy. It was held that the Personal Property Security Act only affected and changed the status and effects of transactions that were valid under the previous law; it did not and could not make valid and enforceable that which was bad prior to the date the statute came into force. Thus, it will still be necessary, at least for some time, to bear in mind the previous statutes and the law they contained in order to discover whether a "security interest" is valid and so comes within the scope of the new legislation. All new secured transactions entered into after April 1, 1976 will have to conform to the requirements of the Personal Property Security Act, a complex, but presumably

¹³⁶ R.S.O. 1970, c. 346, as amended by S.O. 1972 c. 1; 1973 c. 102; 1976 c. 39; 1977 c. 23.

¹³⁷ 12 O.R. (2d) 178, 68 D.L.R. (3d) 234 (H.C. 1976), *aff'd* 16 O.R. (2d) 83, 77 D.L.R. (3d) 359 (C.A. 1977).

workable, piece of legislation.¹³⁸ Lawyers, and others in Ontario, are now obliged to learn a new language and acquire a new outlook on ways and means of raising money on the security of chattels and other personality (without, however, being able to forget the old law—which presumably may also be of importance in conflict of laws situations, involving, for example, bills of sale created in other jurisdictions where similar novel legislation has not been enacted). One jurisdiction where such legislation is on the statute books, though it has not yet been brought into force and effect, since, as in Ontario, many administrative changes have to occur and be absorbed before the scheme of the statute can be put into effect without difficulty, is Manitoba.¹³⁹ There, too, the legislature has been persuaded to enact the demise of the older law and its replacement by the newer American model. It remains to be seen whether the change in Ontario (and, ultimately, is Manitoba) (a) proves successful and is an improvement on the previous state of the law both practically and theoretically; and (b) can persuade other provincial legislatures to enact similar changes in the law of their respective jurisdictions.

There is other legislation affecting indirectly, if not directly, transactions in which one party becomes the debtor of another, however that relationship may be created. In the Northwest Territories, the Pawnbrokers and Second-Hand Dealers Ordinance of 1974¹⁴⁰ regulates the conduct of the affairs of benefactors of those who wish to raise, or save, money. In British Columbia the Debtor Assistance Act, 1974¹⁴¹ was enacted to help debtors cope with their debts and make satisfactory settlements with their creditors. During the period under review, Ontario¹⁴² and Newfoundland¹⁴³ enacted legislation regulating the way in which reports of consumers' credit-worthiness are obtained and handled. Gradually, by these and other statutes (such as those seen earlier which affect the power of a seller to limit or exclude his liability for defective goods, or protect the purchaser of goods from victimisation through multiple liabilities¹⁴⁴), the situation of consumers purchasing goods without necessarily paying the full price at time of the sale is being accorded protection by the State. Recently proposed federal legislation¹⁴⁵ may also have a significant effect in this regard. The age of

¹³⁸ For a detailed analysis of the Act, see F. CATZMAN, *PERSONAL PROPERTY SECURITY LAW IN CANADA* (1976).

¹³⁹ *Personal Property Security Act*, S.M. 1973 c. 5, as amended by S.M. 1977 c. 28. See also S.M. 1973 cc. 6, 7 and 8, which provide for the necessary changes in the *Sale of Goods, Bills of Sale and Assignment of Book Debts Acts*.

¹⁴⁰ O.N.W.T. 1974 (3rd) c. 7, s. 1.

¹⁴¹ S.B.C. 1974 c. 25.

¹⁴² *Consumer Reporting Act*, 1973, S.O. 1973 c. 97.

¹⁴³ *The Credit Reporting Agencies Act*, 1973, S. Nfld. 1973 c. 76.

¹⁴⁴ Discussed *supra* in text.

¹⁴⁵ Bill C-16, *Borrowers and Depositors Protection Act*, 30th Parl., 2nd sess., 1976 (second reading Nov. 4, 1976). The Bill was subjected to considerable criticism and

consumerism has spawned, and continues to spawn, a progeny of statutory guardians, armed with all sorts of devices or shaped to resemble some fearsome, and keenly sensitive, nanny. "Time . . . must have a stop", wrote Shakespeare: but not, apparently, legislatures grimly determined to regulate every facet of commercial life!

IV. NEGOTIABLE INSTRUMENTS

Despite the fact that the law relating to negotiable instruments has long been codified, and successfully at that, from time to time there do appear problems which require resolution by the courts, in much the same way as in those areas of the law which are wholly the product of the activity of the courts. In this regard it is notable that in *Glatt v. Ritt*,¹⁴⁶ Wright J., when faced with a problem as to the admissibility of extrinsic evidence to elucidate the nature of a signature on a promissory note, cited and adopted English authority regarding use of the policy underlying the law of negotiable instruments for the purpose of discovering the true and correct meaning of the statutory provisions where there is doubt or ambiguity, particularly in the case of an apparently stringent rule.¹⁴⁷ Perhaps this doctrine explains the reasoning and decisions in some recent cases: concerning the onus of proof, that value was not received by the holder of a bill of exchange;¹⁴⁸ and that the Crown was not bound by the limitation period of one year within which notice of forgery must be given¹⁴⁹ (under section 49(3) of the Bills of Exchange Act¹⁵⁰). While more rigid doctrines of statutory construction explain the original decision in *MacMillan v. MacMillan*¹⁵¹ that a valid renunciation of a bill of exchange must be in writing, the case of *Canada Life Assurance Co. v. C.I.B.C.*,¹⁵² involving the meaning of the expression

lapsed at the close of the Session. Replacement legislation has been promised. The purpose of the original Bill was, *inter alia*, to control interest rates.

¹⁴⁶ [1973] 2 O.R. 447, 34 D.L.R. (3d) 295 (H.C.).

¹⁴⁷ Cf. *J.D.F. Builders Ltd. v. Albert Pearl (Management) Ltd.*, [1975] 2 S.C.R. 846, 3 N.R. 215, 49 D.L.R. (3d) 422 (1974), where the individual signer of the note was not liable, it being decided that only the corporate signature was effective. In the *Glatt* case, the individual signers were not allowed to prove that they signed as agents, not intending to be bound personally. In *Medic v. Taylor*, [1975] 6 W.W.R. 725, 59 D.L.R. (3d) 321 (B.C.S.C.), the *Albert Pearl* approach was adopted rather than that employed in *Glatt*. Because of the difficulties inherent in this issue, summary judgment was refused in *Pacific W. Airlines Ltd. v. Gauthier*, 2 Alta. L.R. (2d) 52 (C.A. 1977). See also *Moir v. Livingstone*, 16 N.B.R. (2d) 584 (Cty. Ct. 1975).

¹⁴⁸ *Bank of Nova Scotia v. Bauer*, [1976] 2 W.W.R. 52 (B.C.C.A. 1975). Note the dissenting opinion of Robertson J.A.

¹⁴⁹ *Attorney General of Quebec v. Bank of Montreal*, [1974] C.S. 374 (Que.).

¹⁵⁰ R.S.C. 1970, c. B-5.

¹⁵¹ [1975] 2 W.W.R. 156, 51 D.L.R. (3d) 478 (Sask. Q.B. 1974), *aff'd on other grounds* 76 D.L.R. (3d) 760 (C.A. 1977).

¹⁵² 14 O.R. (2d) 777, 74 D.L.R. (3d) 599 (C.A. 1976).

"inland bill", perhaps illustrates as much the influence or relevance of policy as formal notions of construction.

Another problem which has arisen is whether a particular instrument is or is not a promissory note, and therefore subject to the provisions of the Bills of Exchange Act. When the case of *MacMillan v. MacMillan*¹⁵³ went on appeal, it was held, dismissing the appeal, but on different grounds, that a promise to pay \$1,000 a year, starting with payment for "the 1969 crop", did not make the document in question a promissory note, because it was not for a sum certain in money nor was the amount payable at a fixed or determinable future time within section 176(1) of the Act. Perhaps more importantly, in *Bank of Canada v. Bank of Montreal*,¹⁵⁴ the Supreme Court of Canada was divided equally (with the result that the decision of the Ontario Court of Appeal stood) on the issue of whether a bank note issued by the Bank of Canada was a promissory note. Bank notes had been sent by the Bank of Montreal to one of its branch offices. While in transit the notes were destroyed by fire. The question was whether the Bank of Canada was obliged to replace them. If they were promissory notes (in view of the statement on the face thereof that the "Bank of Canada will pay to bearer on demand" the sum in question), the Bank of Canada was liable. If they were not, then the Bank of Canada had no responsibility. At first instance¹⁵⁵ the Bank of Canada was held liable. The Ontario Court of Appeal upheld that decision.¹⁵⁶ In the Supreme Court of Canada, Laskin C.J.C., Martland, Judson and Dickson JJ. were of the opinion that the Bank of Canada was not liable. It was not a private debtor within the provisions of the Bills of Exchange Act. Money could not be a promise to pay money, within the statutory definition of promissory note. Such bank notes were not, in modern times, convertible to gold or anything else. Legislation would be required to make the Bank of Canada responsible to replace destroyed bank notes. Beetz, Ritchie, Pigeon and de Grandpré JJ. were of the opposite view. Form was the test, and the documents, the bank notes, were in the form of a promissory note, as set out in the Bills of Exchange Act. The fact that the notes were also currency did not affect their status as promissory notes. Hence section 10 of the Act, under which the maker of a promissory note which had been destroyed was bound to replace it, applied so as to make the Bank of Canada liable. The judgments of Laskin C.J.C. and Beetz J., on opposing sides, repay careful study from

¹⁵³ *Supra* note 151. Compare *Avco Delta Corp. v. MacKay*, 4 A.R. 565, [1977] 5 W.W.R. 4, 76 D.L.R. (3d) 541 (C.A.). See also *Bank of Nova Scotia v. Windjammer Ltd.*, 17 N.B.R. (2d) 24 (S.C. 1977).

¹⁵⁴ 16 N.R. 93, 76 D.L.R. (3d) 385 (S.C.C. 1977).

¹⁵⁵ [1972] 1 O.R. 657, 24 D.L.R. (3d) 13 (H.C. 1971).

¹⁵⁶ [1972] 3 O.R. 881, 30 D.L.R. (3d) 24 (C.A.).

the point of view not only of principle, but also as examples of judicial technique as well as the application of various "sources" of law in order to arrive at a satisfactory conclusion.

Where a bill of exchange is altered after it was originally made, the effect of the alteration will depend upon its materiality. In *Traders Group Ltd. v. Baker*¹⁵⁷ the maker of a promissory note later executed another note evidencing a revision of the originally agreed terms of payment. It was held that the endorser of the original note remained liable to the holder. Here there was no sufficiently material change to discharge the validity of the original bill. In other cases, however, it has been held that such a change had taken place, the distinction being between a "physical alteration" of the bill and some other action which, while affecting the original bill, does not alter it in a physical way.¹⁵⁸ It is one thing to alter the date on the bill, for example, and another to issue a new bill, as in the *Baker* case, altering some contractual terms as between the original parties but not making any apparent difference to the first document.

There appears to be a difference of opinion between some provincial courts as to the scope of the expression "holder in due course". In *Niagara Finance Co. v. Avco Financial Services Ltd.*¹⁵⁹ the Alberta judge, following the view of the House of Lords in *Jones v. Waring & Gillow*,¹⁶⁰ held that one of the original payees of a cheque could not be a holder in due course, even if the cheque were subsequently endorsed only to him, and was therefore not protected by those provisions of the Act which are designed to shield such a party from the dire consequences of some fraud, mistake or the like. But in *Monette v. Mollot*¹⁶¹ a Quebec court came to the very opposite conclusion and rejected the English view. With all respect, it seems strange, even absurd, to consider an original payee of a bill—even if he is only one of two or more—as a person who could become a holder in due course, as that concept developed prior to 1883 and as it is obviously meant in the statute. Surely the "policy" of the law, as referred to earlier, would lead to the conclusion that such a payee was never intended to be regarded as being in the category of holders in due course.

¹⁵⁷ 40 D.L.R. (3d) 765 (N.S.S.C. 1973). Compare *Canadian Line Materials Employees Union Ltd. v. Williams*, 4 O.R. (2d) 245, 47 D.L.R. (3d) 529 (Ct. Ct. 1974); *Provincial Bank of Canada v. Whiteoak Constr. Ltd.*, 15 N.B.R. (2d) 408 (S.C. 1976).

¹⁵⁸ *La Caisse Populaire de Caraquet Ltée v. LeBlanc*, 8 N.B.R. (2d) 102 (S.C. 1972). Compare *Royal Bank of Canada v. Davidson*, 2 N.S.R. (2d) 605 (S.C. 1970), *aff'd* 3 N.S.R. (2d) 540, 25 D.L.R. (3d) 202 (C.A. 1972); *Rapid Discount Corp. v. Thomas E. Hiscott Ltd.*, 15 O.R. (2d) 658, 76 D.L.R. (3d) 450 (H.C. 1977).

¹⁵⁹ [1975] 2 W.W.R. 352 (Alta. Dist. Ct. 1974). Compare *Rapid Discount Corp.*, *supra* note 158; *Central Factors Corp. v. Bragg*, 76 D.L.R. (3d) 585 (B.C.S.C. 1977).

¹⁶⁰ [1926] A.C. 670, [1926] All E.R. Rep. 36 (H.L.).

¹⁶¹ [1975] C.S. 108 (Que.).

Forgeries and fictitious parties, as always, have continued to create difficulties.¹⁶² A recent decision in the Supreme Court of Canada,¹⁶³ which involved a dissent by Laskin C.J.C., concerned the misconduct of an employee who had been guilty of "payroll padding", by preparing for signature by the employer's payroll officer cheques which were payable to fictitious persons or persons chosen at random, some of whom had worked for the employer in the past but to whom payment was not due. It was held by the majority of the Supreme Court, upholding decisions at trial and by the Quebec Court of Appeal,¹⁶⁴ that the bank was liable to the employer for paying those cheques which were made payable to the real persons, but not liable for those payable to the fictitious ones. The real issue was whether section 21(5) of the Bills of Exchange Act—dealing with fictitious or non-existent payees—applied, making the cheques payable to bearer and thus valid when endorsed by the fraudulent clerk, or whether section 49(1), dealing with forged signatures, rendered the cheques and the payments inoperative. Laskin C.J.C. dissented, preferring to state that there was no rational distinction between the two kinds of cheques, in respect of both of which the bank, being *bona fide*, should be protected, the loss properly falling upon the employer of the fraudulent clerk, much as in tort cases involving a dishonest servant or agent the employer carried the risk as a consequence of the employment. In this opinion he was joined by Dickson J. Spence J. also dissented, but expressed his views slightly differently from those of the other dissentients, even though, like them, he believed there was no realistic distinction between the two groups of "non-existent" payees of the cheques. The majority were content in effect to follow earlier Canadian authority, and to take the view that the onus should be on the bank to act in such a way as to prevent the fraudulent cashing of cheques. It is plain that there was an important clash of policy in the approaches adopted by the different members of the Supreme Court. What has now emerged is that if something is to be done to free banks from liability in all cases, it will have to be achieved by statutory amendment. One cannot but have sympathy for the view that the employer, who is the maker of the cheque in such a case, should bear the onus of controlling possible frauds.

The activities of banks have also proved a fertile source of litigation in this area. Not only has there been the usual crop of cases concerned with whether or not a bank has behaved with reasonable care in the

¹⁶² As to ss. 60-62 of the Bills of Exchange Act, R.S.C. 1970, c. B-5, and estoppel, see *Booth Fisheries Can. Co. v. La Banque Provinciale du Canada*, 7 N.B.R. (2d) 138 (S.C. 1972).

¹⁶³ *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456, 74 D.L.R. (3d) 26 (1976).

¹⁶⁴ *Royal Bank of Canada v. Fix Fast Ltd.*, [1974] C.A. 213 (Que.).

discharge of the duty it owes to its customer,¹⁶⁵ there have also been cases giving rise to other issues. For example, in *Bank of Nova Scotia v. Sanborn*,¹⁶⁶ the defendant had issued what purported to be a "cheque" drawn on a credit union. It was held that the credit union was not a bank within the meaning of the relevant legislation; hence the document, whatever else it might be, could not be a cheque within the meaning and scope of the Bills of Exchange Act. In *Bank of Nova Scotia v. Sharp*¹⁶⁷ the British Columbia Court of Appeal approved of a banking custom which could be traced back over a hundred years, to the case of *Owens v. Quebec Bank*.¹⁶⁸ The custom was to credit a customer's account with the value of a cheque drawn in his favour, and then to debit the account by the appropriate amount should the cheque later be dishonoured. Hence the customer could sue for negligence, or breach of duty, if he was not notified by the bank of the dishonouring of the cheque, where such lack of notice caused him damage.

The 1970 amendments to the Bills of Exchange Act,¹⁶⁹ which affected the rights of an assignee of a bill connected with a consumer transaction by enabling the party liable on the bill to raise against the assignee the same defences he had against the vendor under the principal contract (either a sale of goods or conditional sales agreement), have been considered in some recent cases. In one, *C.I.B.C. v. Lively*,¹⁷⁰ it was held that the purchaser had bought some chinchillas for business purposes, not in order to pursue a hobby (as he suggested). Hence the provisions of the Act did not apply. But in *C.A.C. Ltd. v. Galbiati*¹⁷¹ the purchase of a second-hand vehicle was held, in the circumstances, to be a consumer purchase and so within the ambit of the statute's protection. In connection with the use of negotiable instruments to finance sales of goods, reference should also be made to the decision of the Supreme Court of Canada in *Industrial Acceptance Corp. v. Richard*,¹⁷² which seems to fit uneasily with the earlier case of *Range v. Belvedere Finance Corp.*¹⁷³ The question was whether or not a promissory note made and issued in conjunction with a conditional sales contract was part of the contract or was some other kind of acknow-

¹⁶⁵ *Giordano v. Royal Bank of Canada*, [1973] 3 O.R. 771, 38 D.L.R. (3d) 191 (C.A.); *Groves-Raffin Constr. Ltd. v. Bank of Nova Scotia*, [1976] 2 W.W.R. 673, 64 D.L.R. (3d) 78 (B.C.C.A. 1975); *Royal Bank of Canada v. Klip'N Kurl Salon Ltd.* 1 Alta. L.R. (2d) 378 (Dist. Ct. 1976); *Bibaud v. Banque de Montréal*, [1975] C.A. 186 (Que.); *Toronto Dominion Bank v. Caisse Populaire St-Camille*, [1975] C.A. 188 (Que.).

¹⁶⁶ [1975] W.W.D. 45, 54 D.L.R. (3d) 74 (B.C. Cty. Ct. 1974).

¹⁶⁷ [1975] 6 W.W.R. 97, 57 D.L.R. (3d) 260 (B.C.C.A. 1975).

¹⁶⁸ 30 U.C.Q.B. 382 (C.A. 1870).

¹⁶⁹ Ss. 188-192, R.S.C. 1970 (1st Supp.), c. 4, s. 1.

¹⁷⁰ 46 D.L.R. (3d) 432 (N.S.S.C. 1974); compare *Neptune Acceptance Ltd. v. Williams*, 5 O.R. (2d) 158, 49 D.L.R. (3d) 662 (Cty. Ct. 1974).

¹⁷¹ [1977] 1 W.W.R. 280 (Sask. Dist. Ct. 1976); compare *Canadian Imperial Bank of Commerce v. Langlois*, 2 B.C.L.R. 83 (S.C. 1977).

¹⁷² [1975] 1 S.C.R. 512, 51 D.L.R. (3d) 559 (1974).

¹⁷³ [1969] S.C.R. 492, 5 D.L.R. (3d) 257.

ledgement of debt, and was therefore no longer a bill of exchange within the meaning and scope of the statute. If it was not a promissory note, then the seller of the goods who signed it was not an endorser and was therefore not liable on it. In the circumstances, because the goods were received by the purchaser under the conditional sales contract (unlike the situation in the *Range* case), the note was still a promissory note, and had the appropriate effect.

Finally, further mention is merited of the case of *Canada Life Assurance Co. v. C.I.B.C.*,¹⁷⁴ in which the Ontario Court of Appeal reversed the original decision of Lerner J. of the High Court.¹⁷⁵ In this case a number of cheques were issued by the plaintiff to be paid out of an account at the defendant bank's agency in New York. As a result of the fraud of the plaintiff's New York agent, the bank paid a large sum of money out on cheques with forged endorsements. The question was whether the applicable law was that of Canada or that of the State of New York. If the former, then the plaintiffs would recover. If the latter, then under the New York statute the bank was protected. This depended first of all upon whether the cheques were "inland bills" within the meaning of section 25(1) of the Canadian Bills of Exchange Act. The cheques were drawn not on the Canadian bank, but on its New York "Agency", which was a distinct "person" for these purposes and was resident in the foreign jurisdiction, namely New York. The Court of Appeal held, contrary to the views of Lerner J., that the cheques did not fall within the statutory definition of inland bills. The second point in issue concerned the application of the first part of section 161 of the Bills of Exchange Act, under which the interpretation of the drawing, endorsement and acceptance of a bill drawn in one country and negotiated, accepted or payable in another is determined by the law of the place where the contract is made. This turned on whether "interpretation" meant "the meaning of the words of the endorsement" or "the legal effect of the endorsement". However, the Court of Appeal took the view that whichever approach was adopted, the law of New York applied, and that the bank was therefore protected under Article 3-405(1)(c) of the Uniform Commercial Code. By neatly concluding that the bills were foreign bills, and by applying the general law relating to negotiable instruments with a foreign element, the court was able to sidestep the vexed problem of statutory interpretation raised by the application of section 161 of the statute. It is to be hoped that, whether or not this case is appealed to the Supreme Court of Canada—a step which might be justified by the amount of money, as well as the issues of principle involved—the point will one day be settled by some court of authority.

¹⁷⁴ *Supra* note 152.

¹⁷⁵ 8 O.R. (2d) 210, 57 D.L.R. (3d) 498 (H.C. 1975).

V. AGENCY

The main principles of the law of agency are well settled. Recent cases do not reveal any tendency to revise them or call them into question. Rather they illustrate the nature and functioning of the agency relationship. Thus, before any of the principles of the law of agency can apply to a given situation, it must be shown that the parties intended to negotiate or transact on the basis that one was the agent of the other (or of some third party).¹⁷⁶ In *Cowe v. United Contractors Ltd.*¹⁷⁷ it was held that the situation did not give rise to an agency relationship because the third party, who had transacted with the person now said to have been the agent of another, did not intend to contract with that person as an agent. He was contracting with him with no special regard for his possible status as an agent. It was a more direct, personal relationship, not one that depended upon any representative character such party may have possessed. However, in *Fidelity Realty Ltd. v. Rockingham Realty Ltd.*,¹⁷⁸ where the party in question signed an agreement for the sale of land owned by himself and the second defendant, it was held at first instance¹⁷⁹ that he had signed as an agent *and* in his own right as a co-owner of the land, and that therefore he was liable. Here there was agency as well as a transaction that did not involve agency.

Once it is shown that an agency relationship is involved, then questions of the authority of the agent (and the extent to which the principal will be bound), as well as of the respective duties of principal and agent, can arise. One perennial problem regarding authority is the issue of ostensible or apparent authority, arising from a "holding out" by the principal. This is a difficult conceptual as well as factual question to analyse and apply. In *Hayes v. Douglas*¹⁸⁰ there was no great difficulty; the owner of the property had held out his real estate agent as having authority to make the contract in question, and hence he was bound thereby. But in the interesting case of *Cypress Disposal Ltd. v. Inland Kenworth Sales (Nanaimo) Ltd.*,¹⁸¹ the issue of holding out divided the British Columbia Court of Appeal. The plaintiff had agreed to buy two trucks from the defendant company, under a contract by which the latter was liable to pay \$300 a day for late delivery. The written form contract provided that the contract did not bind the

¹⁷⁶ Which is why the decision that the dealer was an agent was important in *Re Funduk*, *supra* note 30.

¹⁷⁷ 13 N.B.R. (2d) 573 (S.C. 1975).

¹⁷⁸ 13 N.S.R. (2d) 54 (S.C. 1975).

¹⁷⁹ The decision was later reversed on other grounds: 17 N.S.R. (2d) 527 (C.A. 1976).

¹⁸⁰ [1976] 5 W.W.R. 308 (Alta. S.C.) This case also involved the application of the Lord's Day Act, R.S.C. 1970, c. L-13, s. 4. Concerning that issue see FRIDMAN, LAW OF CONTRACT, *supra* note 3, at 375-78.

¹⁸¹ [1975] 3 W.W.R. 289, 54 D.L.R. (3d) 598 (B.C.C.A.). See Fridman, *Oral Contracts with a Written Element*, *supra* note 34, at 400-401.

company until accepted by one of its officers. The company manager refused to accept the contract with the "late delivery" clause in it. The salesman then forged the plaintiff's signature on another form that did not contain the controversial clause, which he submitted to the company. He told the plaintiff that the original contract, with the "late delivery" clause, had been accepted. The trucks were not delivered on time. The plaintiff sued. The truth about the forgery became known. Was the company liable? It was held that it was not. The salesman had no authority to bind the company and could not give himself authority to do so. The plaintiff knew, because the form contract had told him so, that the salesman did not have complete authority and needed the approval of someone senior to him. Hence the purported contract was not binding on the company. The question in this case, as in many others, was whether an agent could confer authority upon himself by his own acts, once the third party dealing with him knew that he was an agent, and even though he had only limited authority. Since the fact that such authority was limited was known to the third party, the conduct of the agent alone could not alter or expand his real authority. The third party was put on notice, and even the act of the principal in "holding out" the salesman as an agent could not result in any prejudice to the principal. The question, in effect, was another illustration of the age-old conundrum of determining which of two innocent parties should suffer as a result of the activities of a rogue. In this instance, as in the case of the Royal Bank and the "payroll padding" considered earlier, the court took the view that the employer should not have to bear the risk of the rogue's actions. It should be noted, however, that Seaton J.A. dissented in this case, preferring to hold, on very broad principles of vicarious *tort* responsibility, that the company should carry the burden created by its servant's conduct and should be bound by the contract.¹⁸² There have been several cases in earlier, but still recent, years in which this question had led to divided opinions.¹⁸³ It would seem that it will long result in dissension among judges, not so much as to the law (although there are some vital issues of principle here that may be said to remain unresolved) as with respect to policy.

Finally, what of the various duties that are reciprocally owed between principal and agent? The chief obligation of the principal is to pay the agreed commission.¹⁸⁴ However, before this is exigible the agent

¹⁸² Contrast the view of the principal's liability for the tortious acts of his servant in *Canadian Laboratory Supplies Ltd. v. Englehard Indus. of Canada Ltd.*, 68 D.L.R. (3d) 65 (Ont. H.C. 1975).

¹⁸³ See *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, [1973] 5 W.W.R. 547, 36 D.L.R. (3d) 561; *Berryere v. Fireman's Fund Ins. Co.*, 51 D.L.R. (2d) 603 (Man. C.A. 1965); *Jensen v. South Trail Mobile Ltd.*, [1972] 5 W.W.R. 7, 28 D.L.R. (3d) 233 (Alta. C.A.).

¹⁸⁴ Hence it may be that the principal cannot escape liability for such commission by disposing of the business in respect of which the agent was earning his commission. A term may be implied into the contract of agency to the effect that the

must establish that he has earned his commission, that is, that he was the "effective" cause of the transaction which he was appointed to bring about (whether or not this turned out to be profitable for the principal). This is a question of fact, as is illustrated by the case of *Teichmann v. Smilestone*,¹⁸⁵ where, on analyzing the facts, it became clear that the agent, a broker, had brought about the purchase from the principal of the shares involved. The main duty of an agent, apart from that of fulfilling the purpose of the agency, is to maintain faith with his principal: to keep the latter's confidence, and not make an improper profit out of the situation. He must avoid conflicts of interest and duty; he must advance the interests of his principal, not those of himself. All this is trite law but is astonishing how many cases are litigated each year in which the question is whether an agent (or, in some instances, someone who is not an agent but is otherwise occupying a similar fiduciary position vis-à-vis another party)¹⁸⁶ has broken that duty, or whether the duty arose at all in the circumstances. Where an agent,¹⁸⁷ or a sub-agent acting for or on behalf of the original agent,¹⁸⁸ wishes to buy the principal's property, full disclosure must be made. If no such disclosure occurs then specific performance of the purported contract of purchase will be denied to the "dishonest" agent.¹⁸⁹ It is quite clear that in such situations there is a heavy onus on the agent who wishes to avail himself of the opportunity opened up by his occupation of a confidential position. In *Merritt v. Myers*¹⁹⁰ this was carried to the extent of making an agent liable for non-disclosure where she had arranged for the sale of the principal's property to a company in which not the agent, but her husband, was the principal shareholder. Not only Caesar must be above suspicion! It would seem from what is occurring in regards to the traditional agency relationship and others which resemble, but are not precisely, relationships of principal and agent¹⁹¹ that the courts in Canada are seeking to enlarge the scope of the equitable doctrines of accountability, and are broadening the content of the rules respecting conflict of interest.

principal will not put it beyond his power to enable the agent to earn the commission: *Woodpulp Inc. (Canada) v. Jannock Indus. Ltd.*, 17 N.B.R. (2d) 184 (S.C. 1977). See FRIDMAN, *LAW OF AGENCY*, *supra* note 33, at 307-309.

¹⁸⁵ 10 N.S.R. (2d) 1 (C.A. 1974).

¹⁸⁶ Compare *Hawrelak v. City of Edmonton*, [1975] 4 W.W.R. 561, 4 N.R. 197, 54 D.L.R. (3d) 45 (S.C.C.), and the comment thereon: Jacobs, Comment, 23 MCGILL L.J. 97 (1977).

¹⁸⁷ *Wood v. St. Jules*, 12 O.R. (2d) 529 (C.A. 1976); *Kramer v. Cooper*, [1975] 2 W.W.R. 1 (B.C.S.C. 1974); *D'Atri v. Chilcott*, 7 O.R. (2d) 249, 55 D.L.R. (3d) 30 (H.C. 1975).

¹⁸⁸ *Palinko (Palinka) v. Bower*, [1976] 4 W.W.R. 118 (Alta. C.A.).

¹⁸⁹ *Id.*

¹⁹⁰ 10 N.B.R. (2d) 124 (S.C. 1974).

¹⁹¹ Compare *Canadian Aero Serv. Ltd. v. O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (1973); *Abbey Glen Property Corp. v. Stumborg*, [1976] 2 W.W.R. 1, 495, 65 D.L.R. (3d) 235 (Alta S.C.); *Evans v. Anderson*, [1977] 2 W.W.R. 385 (Alta. C.A.).