ANNUAL SURVEY OF CANADIAN LAW

COMMERCIAL LAW

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I. INTRODUCTION

This survey examines developments in the field of commercial law during the last three or four years. Because a wide range of questions may be subsumed under this rubric, the flow of cases relevant to this survey coming before the Canadian courts has continued unabated. Agency in its many forms has been the subject of a great deal of litigation at all levels of the legal system; these cases will be examined in Part II. Developments in the field during this period have not, however, been restricted to case law, and there have been many legislative changes and innovations. Furthermore, various law reform commissions have been active, particularly in respect of the law relating to the sale of goods, and it is possible that further legislative change will result. Only now is judicial consideration of the relatively recent changes in the law relating to security interests bringing that legislation into focus and hinting of future trends. In most of these areas Ontario continues to act as a leader and only the years to come will reveal whether the other provinces follow its lead, strike out in new directions or remain with their present, largely English-based law.

II. AGENCY

Since the last survey prepared by the present author, there has been a steady stream of unreported cases involving the law of agency. For the most part these cases have not involved any totally novel, undecided points; rather, they have provided examples of the way in which the principles of agency operate. Occasionally, the resolution of the problem raised by the facts in a given case reveals the subtlety of factual and legal issues arising where an agency relationship exists; for example, was a particular party the agent of another? If so, did such agency arise by agreement or as a consequence of some estoppel? What kind of authority was possessed by the agent? How wide was its scope? Did the agent breach any duty of care, or of loyalty or fidelity owed by him to the principal? If so, what remedy is available to the principal? Such are the kinds of questions posed in the cases reported during the past three or four years, some of which will be discussed in more detail in this survey.

To say that most decisions involve the application of settled legal principles to "new" situations is not to suggest that certain fundamental issues in the law of agency have not been raised. If not determined, they have at least been discussed. Occasionally, a case arises in which it is necessary for a court to question some rule or doctrine that may have been accepted previously as beyond doubt, and the court is obliged to make some attempt to restate or perhaps rephrase the law or even indicate a new, possibly different, approach to an old problem. Such a case is *Canadian Laboratory Supplies v. Engelhard Industries Ltd.*,[1] in the

[1] [1979] 2 S.C.R. 787, 27 N.R. 193, 97 D.L.R. (3d) 1.

Supreme Court of Canada. Another important Supreme Court decision is *Rockland Industries Inc. v. Amerada Minerals Corp. of Canada*.[2] At a lower level, two cases which merit detailed consideration are the decision of the Alberta Appellate Division in *Calgary Hardwood & Veneer Ltd. v. C.N.R.*[3] and that of the Ontario Court of Appeal in *Fine's Flowers Ltd. v. General Accident & Assurance Co.*[4]

Before these important decisions are discussed, however, it may be pertinent to point out that there are some issues connected with, but peripheral to, the main principles of the law of agency that have been raised numerous times in recent years. It might almost be said that these matters are giving rise to new "growth industries", were it not for the fact that the issues involved in such cases have existed for some time, although they are possibly becoming more and more important. Perhaps the hoariest chestnut of all is the question of estate agents' commission, the amount to be paid to a realtor or real estate broker for arranging a sale or finding a purchaser. In various common law jurisdictions of Canada this is, to some extent, a matter that is regulated by statute. However, it may nonetheless be vital to determine whether, in accordance with common law rather than statutory principles, the agent in question has earned his commission and is entitled to be remunerated. In such cases the issue may involve first, the proper construction of the written agency agreement[5] and second, whether, on a correct analysis of the facts, the agent has performed what he undertook to perform by the terms of such agreement.[6] Both questions revolve around the particular facts of each

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[2] [1980] 2 S.C.R. 2, 31 N.R. 393, [1981] 1 W.W.R. 110, 108 D.L.R. (3d) 513.

[3] 16 A.R. 52, [1979] 4 W.W.R. 198, 100 D.L.R. (3d) 302 (C.A.).

[4] 17 O.R. (2d) 529, 81 D.L.R. (3d) 139 (C.A. 1977), discussed at some length by Baer, *Annual Survey of Canadian Law: Insurance Law*, 12 OTTAWA L. REV. 610, at 626-29 (1980). *See also* Irvine, *The Insurance Agent and his Duties: Some Recent Developments*, 10 C.C.L.T. 108 (1979-80); Snow, *Liability of Insurance Agents for Failure to Obtain Effective Coverage*, 9 MAN. L.J. 165 (1978-79).

[5] L. & R. Realty v. Stevens, 14 A.R. 37, 6 Alta. L.R. (2d) 317 (Dist. C. 1978), Murray Goldman Real Estate Ltd. v. Captain Devs. Ltd., 18 O.R. (2d) 421, 83 D.L.R. (3d) 466 (C.A. 1978); C. & S. Realties v. McCutcheon, 19 O.R. (2d) 247 (H.C. 1978); Metropolitan Trust Co. v. Letvala, 22 O.R. (2d) 680, 93 D.L.R. (3d) 688 (H.C. 1979), McQuay v. Beacon Homes Ltd., 13 R.P.R. 147 (Ont. H.C. 1979); Black Gavin & Co. v. Cheung, 20 B.C.L.R. 21 (S.C. 1980); Bales Realty Ltd. v. Lajeunesse, 1 Sask. R. 16 (C.A. 1979); Bolohan v. Marsh & Co., 11 R.P.R. 1 (Ont. H.C. 1979); Knowlton Realty Ltd. v. Mace, 106 D.L.R. (3d) 667 (Alta. Q.B. 1979); George W. Rayfield Realty Ltd. v. Kuhn, 30 O.R. (2d) 271 (H.C. 1980); Carsted v. Gass, 116 D.L.R. (3d) 550 (Man. C.A. 1980).

[6] Jomha Realty v. Paquette, 15 A.R. 172 (Dist. C. 1978); Robertson-Neff & Assocs. v. House, 7 B.C.L.R. 142 (S.C. 1978); Patstone Real Estate Ltd. v. Barry, 20 N.B.R. (2d) 100, 39 A.P.R. 100 (C.A. 1978); Secretarial Business Servs. Ltd. v. Kreutz, 6 Alta. L.R. (2d) 83 (Dist. C. 1978); R.B. Gibbons Realty Ltd. v. Ralph Hart Lumber Ltd., 10 R.P.R. 229 (B.C.S.C. 1979); McCulley Real Estate Ltd. v. Steele, 19 A.R. 541 (S.C. 1979); Tony Murray Assocs. Ltd. v. Morris, 26 Nfld. & P.E.I.R. 31, 72 A.P.R. 31 (Nfld. S.C. 1980); Mon Boulet Enterprises Ltd. v. Kotschorek, 5 Man. R. 10, 13 R.P.R. 227 (Q.B. 1981).

individual case;[7] consequently, it may be suggested that there is not a great deal to be learned by way of general legal principles from a minute examination of each such case. For practical purposes it may be useful for a lawyer to compare the facts of any such case with the particular facts before him; hence, a citation of these cases *en bloc* may provide an easy means of reference. For theoretical purposes, however, little would be gained from any more detailed reference. Sometimes such cases do involve another problem that requires further discussion, that of deciding whether some misconduct on the part of the agent has disqualified or disentitled him to a commission that he would otherwise have earned by his efforts and activities. Cases of this kind raise questions of disloyalty[8] or neglect.[9] When they do, they go beyond the straightforward questions of contractual construction and causation, and necessitate some examination of the true nature of the fiduciary character of the agency relationship and of the scope and content of the agent's duty to exercise care and skill or to act personally.

A second problem that has produced a large number of cases in recent years, and will no doubt continue to do so, is the question of the agent's liability to third parties with whom he has no contractual relationship for some type of misconduct such as negligence, lack of skill or misrepresentation.[10] There have been several instances where the issue was whether the agent owed a duty of care to a third party in circumstances in which the agent's alleged negligence led to economic loss, for example, loss of a bargain. Such cases have raised the question, which should be resolved by the law of torts rather than the law of agency, as to whether an agent acting for a principal owes a duty to take care to prevent economic loss to a third party with whom neither the agent nor the principal has a contract. The trend of several Canadian

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[7] And are sometimes inextricably intertwined; *e.g.*, *C. & S. Realties*, *supra* note 5; *Bales Realty Ltd* , *supra* note 5; *George W. Rayfield Realty Ltd.*, *supra* note 5; *Mon Boulet Enterprises Ltd.*, *id.*; *Tony Murray Assocs. Ltd.*, *id.*; Martin v. Brunswick Enterprises Ltd., 31 N.B.R. (2d) 120, 75 A.P.R. 120 (Q.B. 1980).

[8] Turner v. Laurentide Financial Realty Corp. (Western), 10 B.C.L.R. 215, 97 D.L.R. (3d) 429 (S.C.C. 1979); Canada Permanent Trust Co. v. Christie, 16 B.C.L.R. 183 (S.C. 1979); Campbell v. Wilroy Real Estate Ltd., 17 A.R. 414 (Dist. C. 1979); Advanced Realty Funding Corp. v. Bannink, 27 O.R. (2d) 193, 12 R.P.R. 17, 106 D.L.R. (3d) 137 (C.A. 1979); Karst v. Sellinger, 4 Sask. R. 113 (C.A. 1980); Dyck v. Nodge Real Estate Ltd., 2 Sask. R. 424 (Q.B. 1980).

[9] Academy Aluminum Products Ltd. v. McInerny Realty Ltd., 13 Alta. L.R. (2d) 170, 113 D.L.R. (3d) 289 (C.A. 1980), which involved sub-agency; Comeau v. Canada Permanent Trust Co., 27 N.B.R. (2d) 126, 60 A.P.R. 126 (Q.B. 1979).

[10] One interesting and important judgment is that of the Ontario Court of Appeal majority in Yepremian v. Scarborough Gen. Hosp., 28 O.R. (2d) 494, 110 D.L.R. (3d) 513 (C.A. 1980), which also raised the problem of hospitals' vicarious liability.

cases,[11] following the lead given by the House of Lords in the *Hedley Byrne* case[12] in 1963 (which has been adopted, approved, and utilized by many courts in Canada, including the Supreme Court[13]), has been in favour of enlarging the scope of an agent's responsibility to third parties with whom he deals or negotiates on behalf of his principal. The agent will owe a duty of care not only to his principal (of which more will be said later), but also to someone who is a stranger to the principal-agent relationship, even though the agent's primary responsibility and duty is to his principal, whose interest he must at all times protect and advance. Although this obligation is overriding, some courts have held that the advancement of the principal's interests does not permit the agent to neglect the legitimate economic interests of the third party with whom the agent is transacting. It may now be possible, therefore, for an agent to owe simultaneous duties of care, at least with respect to the kind of statements he makes, to principal and third party, with the result that he may be liable in negligence to both should harm result.

The particular problems of estate agents or realtors, whether in respect of claims for commission for their principals or potential liability towards third parties intent upon contracting with their principals, seem to be peripheral to the law of agency. Another special group of agents whose activities have given rise to many reported decisions in recent years are insurance agents. To the extent to which the difficulties of these agents, their principals and third parties with whom they have dealt, give rise to some discussion of the general nature and doctrines of agency, they will be considered in this survey. However, some of these cases are of special interest to those concerned with the law of insurance rather than that of agency, and have previously been the subject of some

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[11] Chand v. Sabu Bros. Realty Ltd., 14 A.R. 302, [1979] 2 W.W.R. 248, 96 D.L.R. (3d) 445 (C.A.); Komarniski v. Marien, [1979] 4 W.W.R. 267, 100 D.L.R. (3d) 81 (Sask. Q.B.); Chalmers v. Geisler, 11 A.R. 549 (Dist. C. 1978); Olsen v. Poirier, 21 O.R. (2d) 642, 91 D.L.R. (3d) 123 (H.C. 1978); Roberts v. Montex Dev. Corp., [1979] 4 W.W.R. 306, 100 D.L.R. (3d) 660 (B.C.S.C.). *Cf.* Hawkhead v. Sussex Realty Ltd., 13 B.C.L.R. 289, 9 R.P.R. 203 (Cty. Ct. 1979), which distinguished the *Chand* case on the ground that the latter involved an agreement that was unenforceable because of the agent's failure to obtain release of dower rights, whereas in the *Hawkhead* case the non-completion of the sale resulted from "a pragmatic frustration due to the cash position of the vendor being such that he could not, as he had agreed, provide clear title". *Id.* at 292-93, 9 R.P.R. at 207.

[12] Hedley Byrne & Co. v. Heller & Partners, [1964] A.C. 465, [1963] 2 All E.R. 575, [1963] 3 W.L.R. 101 (H.L. 1963).

[13] Haig v. Bamford, [1977] 1 S.C.R. 466, 9 N.R. 43, 72 D.L.R. (3d) 68 (1976).

examination in a recent survey by Baer.[14] Consequently it will not be necessary to repeat the discussion of certain aspects of the law concerning such agents. What is interesting, however, as a general comment upon the past few years, is the way in which the professional conduct of real estate and insurance agents in particular seems to create problems and lead to litigation. Is it the inherent nature of the two types of activity, or is it the case that those who are engaged in such activities are becoming more fraudulent or more negligent in the way they conduct themselves? Answers to these questions may not involve the law, but the experience of recent times should perhaps lead those involved in these professions to some investigation of what has been happening and why it has happened.[15] There may be important lessons to be learned from the case law with respect to the organization and regulation of these professions.

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[14] Baer, *supra* note 4. The learned author subsumes the cases under three headings. The headings in question, with some more recent cases under each, are:

(i) failure by the agent to provide suitable or adequate coverage: Dormer v. Royal Ins. Co., [1979] I.L.R. 380 (Ont. H.C.); L.B. Martin Constr. Ltd. v. Gagliardi, [1979] 1 W.W.R. 171, [1979] I.L.R. 22 (B.C.S.C. 1978); O'Donnell v. Lumbermen's Mut. Cas. Co., [1979] I.L.R. 8 (Ont. Cty. Ct.); G. R. Young Ltd. v. Dominion Ins. Corp., [1979] I.L.R. 498 (B.C.S.C.); Quickway Aviation Ltd. v. British Aviation Ins. Co., 23 A.R. 451, [1980] I.L.R. 989 (Q.B.); Hornburg v. Toole, Peet & Co., 13 Alta. L.R. (2d) 363, [1981] CAN. INSUR. L. REP. (CCH) 1-1309 (Q.B.); Gilvesy v. Steve Mayorscak Ins. Agency, 21 O.R. (2d) 836, 92 D.L.R. (3d) 405 (Cty. Ct. 1978); Kelly v. Wawanesa Mut. Ins. Co., 30 N.S.R. (2d) 294, 49 A.P.R. 294, [1980] I.L.R. 748 (C.A. 1979); Hardy's Estate v. Shand, 34 N.S.R. (2d) 59, 59 A.P.R. 59 (S.C. 1978); McLeod v. Tanner, 33 N.S.R. (2d) 343, 57 A.P.R. 343, [1980] I.L.R. 563 (S.C. 1979); Helpard v. Marine & Gen. Ins. Ltd., 43 N.S.R. (2d) 383, 81 A.P.R. 383, [1981] CAN. INSUR. L. REP. (CCH) 1-1337 (S.C. 1980); *cf.* (a) cases where there was no negligence: Fairview Enterprises Ltd. v. United States Fidelity & Guar. Co., [1979] I.L.R. 138 (B.C.S.C. 1978); Olanick v. R. Cholkan & Co., [1980] I.L.R. 1079 (Ont. H.C.); (b) cases where the principal himself was to blame: Pond v. Dovell, [1981] CAN. INSUR. L. REP. (CCH) 1-1343 (B.C. Cty. Ct. 1980);

(ii) misrepresentation by the agent of the nature of the cover: Swimnamer v. Cooperative Fire & Cas. Co., 29 N.B.R. (2d) 184, 66 A.P.R. 184 (S.C. 1980); Vermeulen v. Pitts Ins. Co., [1980] I.L.R. 1029 (Ont. Cty. Ct.); Moxness v. Cooperative Fire & Cas. Co., 17 A.R. 125, [1979] 2 W.W.R. 436, [1979] I.L.R. 134, 95 D.L.R. (3d) 365 (S.C.);

(iii) failure by the agent to perform some other duty such as renewing the insurance: Wilcox v. Norberg, [1979] 1 W.W.R. 414 (B.C.S.C. 1978), *aff'd* [1981] CAN. INSUR. L. REP. (CCH) 1-1375 (C.A. 1980); Gore Mut. Ins. Co. v. Barton, 12 B.C.L.R. 261, [1979] I.L.R. 501 (S.C.); International Bhd. of Teamsters v. Taylor-Read Enterprises, 19 B.C.L.R. 351 (S.C. 1980); New Yorker Boiler Co. v. J. Bernard Elliott Ins. Ltd., 30 N.B.R. (2d) 564, 70 A.P.R. 564 (S.C. 1980); Grove Serv. Ltd. v. Lenhart Agencies Ltd., 10 C.C.L.T. 101 (B.C.S.C. 1979); Lawrence v. Roy V. Curtis Ins. Agency Ltd., [1979] I.L.R. 144 (Ont. H.C.). For the issue of notice by an agent binding his principal, *see* Canadian Indem. Co. v. Judgment Recovery (N.S.), [1980] I.L.R. 893 (N.S.C.A.).

[15] Baer, *supra* note 4, at 625, referring to the issue of errors and omissions insurance to be carried by all insurance agencies.

It is now possible, since these special applications of agency have been discussed, to consider the ways in which more general principles of the law have been interpreted and applied during the period under review. For this purpose it is useful to divide the subject matter into several categories and discuss the developments within each separately, even though it should be borne in mind that often more than one issue in agency is raised by any given case.

A. *Creation of Agency*

Before any question of an agent's authority or his liability to his principal for breach of duty or the liability of his principal to him for failure to remunerate or indemnify can be considered, the court must first determine that an agency relationship existed. Sometimes this involves a finding that the parties had expressly or impliedly agreed to the creation of such a relationship. At other times the issue will be resolved by an application of the doctrine of estoppel. In addition, a party may make himself a principal by the process of ratifying a previously unauthorized act by a person not hitherto empowered to act as his agent. Finally, there are certain relationships which, of themselves and without the need for agreement or the kind of conduct which can lead to the operation of estoppel, may give rise to some if not all of the incidents of agency.

On two recent occasions courts have been obliged to discuss whether, on the particular facts of a case, an agency relationship had been created so as to give rise to certain consequences. In *Mellenger & Levin v. Province of New Brunswick*,[16] the plaintiff sought to obtain remuneration for having organized a meeting between the province and a certain company with a view to the latter's locating a large industrial plant in the province. The claim was dismissed on the ground that what had been done had not been performed under any contract of agency between the plantiff and the province, there being no contract under which the plaintiff was authorized to do anything. Neither the province nor a provincial corporation that was involved in the discussions was liable to pay for the services of the plaintiff under a contract of agency or on a restitutionary basis involving *quantum meruit* for services rendered. The plaintiff's actions were treated as being those of a "volunteer", one who gratuitously intervenes without promise or expectation of reward. While it is true that it was difficult on the facts of this case to find any concluded contract under which remuneration was to be paid for the services of the plaintiff, it might have been thought that, in accordance with general principles of restitution akin to those relating to agency of necessity or the remuneration or indemnification of the "non-officious" intermeddler, some compensation was due and payable to the plaintiff for having arranged the meetings from which emerged the concluded

[16] 15 N.B.R. (2d) 595, 18 A.P.R. 595 (C.A. 1976).

transaction which was the aim and purpose of the whole action. The situation of what has been called the "self-serving intermeddler"[17] has been the subject of some academic discussion in Canadian journals,[18] and may be regarded as a controversial and evolving part of the law. In so far as such situations are said to be governed by the law of agency of necessity or some analogy thereto, it can be argued that the position of those who intervene without any prior authorization or any such authorization in a clearly contractual form is to be determined by the law of agency. However, in view of the inherent difficulty in attempting to treat such persons as agents according to any correct usage of such a term, it may be thought more desirable for the law to award compensation to them, if it does so at all, not on agency principles but along the lines that have been developed, or are in the process of being developed, by the law of restitution, itself an area of the law that is as yet not finally and conclusively settled.

Another decision that involved the question as to whether or not an agency relationship existed was that in *Scott Maritimes Pulp Ltd. v. B.F. Goodrich Canada Ltd.*[19] Here the issue was whether the bailees of goods were acting as agents for the owners in making a contract of carriage when they put the goods into the hands of a carrier for delivery to the owners' place of business. It was held at trial and by the Nova Scotia Court of Appeal that, when the owners instructed the bailees to return the goods in question, they made the bailees their agents for the purpose of entering into an appropriate contract of carriage with carriers for the return of the goods. Although there is a clear distinction between agents and bailees and the powers of each are to be differentiated,[20] it is arguable that in some circumstances a bailee may well have to be given the powers of an agent, and indeed become an agent *quoad hoc*, if the bailee is properly to fulfill the duties of the particular bailment.[21]

Even where no prior authorization can be found to exist, it may be possible for the transaction entered into by the "agent" to be ratified with retrospective effect.[22] Such was one of the grounds for a finding of agency in a district court decision in Newfoundland in 1976.[23] It was also

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[17] Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. Rev. 1409 (1974).

[18] McCamus, *The Self-Serving Intermeddler and the Law of Restitution*, 16 OSGOODE HALL L.J. 115 (1978); McCamus, *Comment*, 18 OSGOODE HALL L.J. 478 (1980).

[19] 19 N.S.R. (2d) 181, 24 A.P.R. 181 (C.A. 1977).

[20] G. FRIDMAN, THE LAW OF AGENCY 18-19 (4th ed. 1976).

[21] *See* Smith v. General Motor Cab Co., [1911] A.C. 188, 80 L.J.K.B. 839 (H.L.); Tappenden v. Artus, [1963] 3 All E.R. 213, [1963] 3 W.L.R. 685 (C.A.).

[22] Not where the agent was not acting as an agent at the time when the contract was made: Edwards Real Estate Ltd. v. Bamtar Holdings, 11 A.R. 589, 7 Alta. L.R. (2d) 52 (Dist. C. 1978).

[23] Crown Realty Ltd. v. Quigley, 12 Nfld. & P.E.I.R. 463, 25 A.P.R. 463 (Nfld. Dist. C. 1976); *but see* Findlay v. Butler, 19 N.B.R. (2d) 473, 30 A.P.R. 473 (Q.B. 1977) for acceptance of purchase price as ratification.

the basis for the holding by Noble J. of the Saskatchewan Court of Queen's Bench in *Canada Trust Co. v. Gordon*[24] that a real estate broker was entitled to his commission. From the way in which the plaintiffs, who were selling land as executors of a deceased landowner, had dealt with the purchaser of the land introduced to them by the defendant agent, it was manifestly evident that the plaintiffs had ratified everything done by the agent, even though he had not necessarily been authorized in advance to do all the acts in question at any stage.

That an agency relationship can come about without any specific agreement in advance or *ex post facto* (through ratification) is well known. This situation may occur where the alleged principal and agent are husband and wife, a form of agency which has disappeared in some jurisdictions but remains in others, as illustrated by the case of *T. Eaton & Co. Maritimes Ltd. v. O'Leary*.[25] It also occurs where there is either a "holding out" or language which amounts to a "holding out" of someone as having authority to act on behalf of the one responsible for the conduct. It should be noted, as will be discussed further below, that such holding out may operate to enlarge the scope of an expressly or impliedly appointed agent's authority, and this is indeed the most common context in which the issue is raised. However, it may also become an issue where what is at stake is the question as to whether or not someone is, or is to be treated as, the agent of another. Recent cases reveal how difficult it may be to convince a court that certain conduct should be interpreted, and was reasonably understood by one of the parties, as amounting to some sort of representation that another was a third person's agent with power to bind that person. Such invocation of the doctrine of estoppel, though potentially possible, is not always easily substantiated. It may be easier to persuade a court to employ the doctrine for the purpose of broadening the scope of a real or actual agency than to convince it to use the doctrine so as to create an agency which would not otherwise exist. The extent of the difficulty may be gauged from the fact that in the four cases in which this issue was raised the argument that an agency relationship arose by virtue of estoppel did not succeed. This was so where the purpose of establishing the requisite relationship was to give effect to a contract for the purchase of a house, for breach of which and consequent expense the plaintiffs sought to sue,[26] where it was to escape from liability to pay commission by arguing that a negotiator was the agent of the plaintiffs rather than the defendants,[27] where it was to prove that a dealer to whom the money had been paid by the purchaser of a combine was the agent of the plaintiff finance company (thereby relieving the defendant from paying again),[28] and where estoppel was

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[24] [1978] 5 W.W.R. 268 (Sask. Q.B.).

[25] 11 Nfld. & P.E.I.R. 134, 22 A.P.R. 134 (Nfld. Dist. C. 1976).

[26] *Chalmers*, *supra* note 11.

[27] Burns/Pape Assocs. Inc. v. Argus Holdings Ltd., 2 Sask. R. 56 (Q.B. 1980).

[28] *See* Brumby v. Guaranty Trust Co., 6 Sask. R. 445 (Q.B. 1981); *but see* Bank of Montreal v. R.J. Nicol Constr., 32 O.R. (2d) 225 (H.C. 1981).

invoked to make a person who negotiated a sale into the agent of the defendants alleged to be the buyers of heavy equipment when they placed their name upon a bill of sale soley for the purpose of importation of the goods into Canada and the payment of customs dues.[29] In this last case the trial judge, Stratton J. of the New Brunswick Court of Queen's Bench, stated that the facts revealed that the plaintiffs had not relied on any representations and knew perfectly well that the negotiator was not acting for the alleged purchasers.[30] In the face of such an admission by a witness for the plaintiffs, it was not possible seriously to suggest any operative estoppel that could bind the defendants and make them responsible.

B. *The Agent's Authority*

Some of the cases reported during the period under review have been concerned with the problem of establishing a real or actual authority on the part of the agent to sell or buy land, negotiate terms of a contract for the purchase and sale of real estate, receive payment of money due under a mortgage or accept and pass on notice of an insurance claim that was a prerequisite for the maintenance of such a claim against the insurance company whose agent received the notification in question. Others, among them decisions of the Supreme Court of Canada, have raised the even more complex question of "apparent" or "ostensible" authority, an aspect of estoppel to which reference was made earlier.

It might be considered a relatively simple question whether an agent has been expressly or by implication authorized to act in a certain way or to receive money or information. Cases such as *Roy's Midway Ltd. v. Economical Mutual Insurance Co.*,[31] where notice of a potential claim was at issue, or *Stone v. City Trust & Mortgage Co.*,[32] where the question was whether a solicitor employed by a party who lent money on a mortgage had actual authority to receive on behalf of his principal the repayment of the money advanced on the mortgage, show that this is not the case. In both, however, after hearing the evidence, the judges who

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[29] Caledonia Inc. v. Tractors & Equip. (1962) Ltd., 31 N.B.R. (2d) 32, 75 A.P.R. 32 (Q.B. 1980).

[30] *Id.* at 40-42, 75 A.P.R. at 40-42. *See also* the language of Lerner J. in Woeller v. Orfus, 27 O.R. (2d) 298, at 307, 106 D.L.R. (3d) 115, at 124 (H.C. 1979), citing V. DI CASTRI, LAW OF VENDOR AND PURCHASER 31 (2d ed. 1976), to the effect that the authority of a real estate agent to make a contract on behalf of his principal must be clear and should not be inferred from vague and ambiguous language. Similarly, agency by implication must be proved beyond a reasonable doubt.

[31] 33 N.B.R. (2d) 387, 80 A.P.R. 387 (Q.B. 1981); *see also* Guillaume v. Stirton, 88 D.L.R. (3d) 191 (Sask. C.A. 1978), where the agent acted for both vendor and purchaser.

[32] 14 R.P.R. 248 (Nfld. S.C. 1980), distinguishing Wilkinson v. Candlish, 5 Ex. 91, 155 E.R. 39 (1850); Kent v. Thomas, 1 H. & N. 473, 156 E.R. 1287 (Ex. 1856), where the solicitor had authority to receive only *interest* and not payment of the principal.

tried these cases concluded that the agent in question possessed the necessary authority. Hence in the one case the insured was able to pursue his claim, while in the other the mortgagor was enabled to obtain a discharge of the mortgage from the lender of the money (who was bound by his agent's receipt even though the money received was never paid over to the principal). The implication of authority perhaps raises greater problems of proof and, possibly, of law. It may be a question of fact as to whether an appointed agent's authority can be stretched further by inference from the facts, but an issue of law still remains, namely, whether it is incidental to the proper performance of the agent's undertaking that the disputed authority should be exercised, or can be taken as being necessary for the fulfilment of that which the agent has been employed and instructed to achieve.[33] In two recent cases the answer was positive. One of these, *Robitaille v. Sandberg*,[34] presents certain problems with respect to the elucidation of the factual basis on which Makoff J. of the British Columbia Supreme Court reached the conclusion that a solicitor had authority to sell some property. The other, *Tanouye v. KJM Developments Ltd.*,[35] while founded upon the principle that the onus of proving agency rests upon the person alleging that an agency existed,[36] seems to be somewhat tenuous when it comes to setting out factual circumstances supporting a conclusion that the giving of money to someone to pay a deposit on a condominium sufficed to make the recipient of the cheques the agent of the one who drew them. In a third case,[37] however, Lerner J. of the Ontario High Court did not find that an agent was empowered to negotiate terms for a possible contract of sale or to accept notice that a certain condition under the contract had been satisfied (any more than such an agent would have implied authority to receive the purchase money from a contract of this kind).[38]

The cases dealing with apparent or ostensible authority are even more contradictory. That this should be the case is perhaps inevitable. There can be many interpretations of a party's conduct. Some judges might regard certain acts or words, or the employment of an individual in a given capacity, as a representation that the individual has the other party's power to enter into a contract. Others might be unprepared to draw that conclusion from such facts. This results in, for example, the difference of opinion as to the consequences of employing someone as an

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[33] G. FRIDMAN, *supra* note 20, at 97-98. Note the possibility of some "usual" authority stemming from the employment of someone as a "general agent" (*id.* at 26-28), on which, *see* the remarks of Laskin C.J.C. in Guardian Ins. Co. v. Victoria Tire Sales Ltd., [1979] 2 S.C.R. 849, [1979] I.L.R. 471, 108 D.L.R. (3d) 283, a case from Quebec decided under the Civil Code.

[34] [1977] 3 W.W.R. 669 (B.C.S.C.).

[35] 25 A.R. 200 (Q.B. 1980).

[36] Canadawide Invs. v. Muirhead, 26 W.W.R. 460, 15 D.L.R. (2d) 526 (Alta. C.A. 1958).

[37] *Woeller*, *supra* note 30.

[38] *But see* the situation with respect to the solicitor and the mortgage money in *Stone*, *supra* note 32.

industrial development officer found in the judgments of the Appellate Division of the Alberta Supreme Court in *Calgary Hardwood & Veneer Ltd. v. C.N.R.*[39] The same variation in opinions may be found in the judgments at various levels in the case of *Rockland Industries Inc. v. Amerada Minerals Corp. of Canada.*[40] Another possible source of lack of uniformity is the particular position or function of an employee for whose acts the employer is sought to be held responsible. In one case[41] an employee who signed a contract on behalf of the employer bound that employer. Therefore, it was held that the employer, who had contracted to do some work at a set price based upon an erroneous estimate of the cost of performing the work, was able to obtain only that price and could not treat the contract as not binding on the ground that the person who signed had no authority to sign, which might have resulted in the employer's being able to obtain payment for the work done on an hourly basis, not the set contract price. So, too, in *Canadian General Electric Co. v. Newman*[42] it was held that a manager who consented to bills in respect of goods supplied by the plaintiff to the manager's company being made out in the company's name bound his company by such consent, with the result that the company was bound to pay for the goods supplied. On the other hand, in *A.J. Diamond Associates v. City of Halifax*[43] an employee of the City of Halifax was held to have had no authority to grant to the plaintiff, a firm of architects, an extension of the time within which the plaintiff was obliged to produce a proposal in connection with an urban renewal project. Consequently, the plaintiff could not maintain an action for an injunction to compel the city to receive the architects' proposal and consider it with other submitted proposals, when the plaintiff's proposal was submitted after the originally agreed date.

Is it possible to extract from such cases the idea that, unless there is some positive act or statement by the party whom it is sought to bind, everything will turn upon the status of the employee whose purported agreement or contract is in issue? Such a conclusion can be drawn from some earlier cases, and from remarks, which will be considered in due course, in the judgment of the Supreme Court of Canada in the *Canadian*

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[39] 16 A.R. 52, [1979] 4 W.W.R. 198 (C.A.).

[40] 10 A.R. 137, [1978] 2 W.W.R. 44 (S.C.), *rev'd* 14 A.R. 97, [1979] 2 W.W.R. 209, 95 D.L.R. (3d) 64 (C.A. 1978), *rev'd* [1980] 2 S.C.R. 2, [1981] 1 W.W.R. 110, 31 N.R. 393, 108 D.L.R. (3d) 513.

[41] Clintar Spray & Environmental Enterprises v. Municipal Spraying, 30 N.S.R. (2d) 451, 49 A.P.R. 451 (C.A. 1979). Note that a balance sheet signed by a company's accountants may bind the company as an acknowledgement of a debt within the British Columbia Limitation Act, R.S.B.C. 1979, c. 236: Meredith v. Vamar Estates Ltd., [1979] 6 W.W.R. 443, 7 B.L.R. 241 (B.C.S.C.).

[42] 33 N.S.R. (2d) 541, 57 A.P.R. 541 (S.C. 1978). For the apparent authority of a salesman to receive payment of the purchase price of goods and to deduct therefrom his commission on such sale, *see* Seven Oaks Mfg. & Sales (1968) Ltd. v. Vaughan, [1977] 4 W.W.R. 119 (Sask. C.A.).

[43] 31 N.S.R. (2d) 510, 52 A.P.R. 510 (S.C. 1978).

Laboratory Supplies case.[44] If so, then the problem remains the necessity of discovering what sort of employee holding what kind of rank will produce this automatic or semi-automatic effect as a result of what he does on the purported behalf of his employer. There may be little difficulty in assessing the quality of a director or manager of a company. What, however, is the position of other officers of the company and of those who are senior employees without necessarily being officers? In this respect, it may be noted that there has been some development in another area of the law dealing with the fiduciary position of "employees". Certain employees making "secret profits" as a result of information received while in their employment have been held accountable even though they are neither trustees nor agents in any strict sense.[45] Does this also entail the conclusion that acts performed by such parties, if purporting to be on behalf of their employers, will bind such employers under doctrines of agency law, in particular the doctrine of "apparent authority"? This is far from clear. What makes it even more problematic is the principle that an agent cannot confer authority upon himself merely by saying that he possesses such authority. This proposition is supported by many cases.[46] However, there may be some doubt about that proposition, again on the basis of what is said or inferred in the *Canadian Laboratory Supplies* case. In other words, it may be possible to argue that a representation as to authority may be made not only by the principal (who would then be bound by what the agent did), but even by the agent acting alone. In the absence of any representation by someone who could bind the principal (even if such person were not the principal himself), there can clearly be no apparent authority and no estoppel.[47] If there is a representation by words or conduct, must it be made by the principal or some superior employee or officer of the principal, or can it be made by some lesser officer or employee not normally empowered to act in the particular way that is involved in a given instance?

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[44] *Supra* note 1.

[45] Canadian Aero Servs. v. O'Malley, [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (1973); Mid-Western News Agency Ltd. v. Vanpinxteren, [1976] 1 W.W.R. 299, 62 D.L.R. (3d) 555 (Sask. Q.B.); Misener v. Misener & Sons, 21 N.S.R. (2d) 92, 28 A.P.R. 92, 77 D.L.R. (3d) 428 (C.A. 1977); Abbey Glen Property Co. v. Stumbourg, [1978] 4 W.W.R. 28, 85 D.L.R. (3d) 35 (Alta. C.A.), *aff'g* [1976] 2 W.W.R. 1, 65 D.L.R. (3d) 235 (S.C.).

[46] Farquharson Bros. v. King, [1902] A.C. 325, [1900-03] All E.R. Rep. 120 (H.L. 1902); Russo-Chinese Bank v. Li Yau Sam, [1910] A.C. 174, 79 L.J.P.C 60 (1909) (Hong Kong); Jensen v. South Trail Mobile Ltd., [1972] 5 W.W.R. 7, 28 D.L.R. (3d) 233 (Alta. C.A.); Cypress Disposal Ltd. v. Inland Kenworth Sales, [1975] 3 W.W.R. 289, 54 D.L.R. (3d) 598 (B.C.C.A.). The last case was criticized by Hansen, *Annual Survey of Canadian Law: Corporation Law*, 10 OTTAWA L. REV. 617, at 626-27 (1978); *but cf.* Berryere v. Fireman's Fund Ins. Co., [1965] I.L.R. 663, 51 D.L.R. (2d) 603 (Man. C.A.).

[47] *See, e.g.*, Hollytex Carpet Inds. v. Canadian Acceptance Corp., 16 A.R 588 (S.C. 1979).

Certainly to Prowse J.A., dissenting in the *Calgary Hardwood* case,[48] there was no question but that a representation made by the "agent" himself, and not by anyone else, would not bind the principal. The other members of the court did not have to deal with this question, because in their view the agent's authority was clearly established. McGillivray C.J.A.[49] thought that the agent had actual authority to contract as he did. However, even if he had not had such authority, there was no problem since the conduct of the principal had cloaked the agent with the necessary authority. The principal should have warned C.N.R. that the agent had not been empowered to act in this respect; it failed to do so. C.N.R. acted to its detriment in relying on an earlier letter from the principal. Therefore the principal was bound. Morrow J.A. did not decide that the agent had actual authority. It was not necessary for him to do so, because he was satisfied that the principal had by its conduct clothed the agent with apparent authority.[50] Thus, on the majority view, the issue of a representation about authority by the agent himself did not fall to be considered. However, that question was directly raised in *Canadian Laboratory Supplies Ltd. v. Engelhard Industries Ltd.*[51]

One Cook, a sales clerk employed by the plaintiff, a company which sold laboratory supplies, concocted a scheme to defraud his employer. He arranged with the defendant, a company which refined platinum, for the purchase of quantities of platinum by the plaintiff for resale to a fictitious Mr. Giles. Cook also arranged for the defendant to repurchase the platinum from Mr. Giles, in scrap form, and pay cash for what it bought. Cook, in the guise of Mr. Giles, received the cash from the defendant. Because the plaintiff and the defendant had transacted business with each other for many years, no question was raised about all this by the defendant, and the fraudulent scheme continued undetected for some time. After four years, the defendant made inquiries about the platinum transactions from the plaintiff's purchasing agent, Snook. He referred the defendant to Cook, the man dealing with Giles (whose true identity was not known to Snook or the plaintiff). On this occasion, to placate the defendant, Cook ensured that the plaintiff's accounting department paid the defendant promptly, in fact before Giles returned the platinum for cash. Two years later the defendant made further inquiries, this time from the plaintiff's vice-president of operations. These inquiries concerned the annual use of platinum by Mr. Giles. The

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[48] *Supra* note 39, at 81-87, [1979] 4 W.W.R. at 223-29.

[49] *Id.* at 73-79, [1979] 4 W.W.R. at 199-206.

[50] *Id.* at 60-64, [1979] 4 W.W.R. at 211-15, relying on C.P.R. v. C.I.B.C., 44 N.B.R. 130, 21 C.R.C. 415, 30 D.L.R. 316 (C.A. 1916); Robin Line v. Canadian Stevedoring, [1928] S.C.R. 423, [1928] 3 D.L.R. (2d) 856; Clarmont v. Mid-West Steel Products, 51 D.L.R. 340 (Sask. Q.B. 1965); Peoples Bank v. Estey, 34 S.C.R. 429 (1904); Freeman & Lockyer v. Buckhurst Park Properties, [1964] 2 Q.B. 480, [1964] 1 All E.R. 639 (C.A.).

[51] *Supra* note 1. The decision of the Ontario Court of Appeal, 16 O.R. (2d) 202, 78 D.L.R. (3d) 232 (1977), was criticized by Hansen, *supra* note 46, at 628-29.

vice-president said he would look into the matter and eventually, a year or so later, Cook's fraud was discovered. By this time over $800,000 had been paid by the defendant to Giles, *i.e.*, Cook. The plaintiff sued for conversion of the platinum, founded upon its title to the platinum ordered by Cook for Giles and upon the invalidity or unlawfulness of any claim to title in such platinum on the part of the defendant. At trial O'Driscoll J. found for the plaintiff and gave no credence to the defendant's argument that the plaintiff was estopped by its conduct from asserting title to the platinum scrap as against the defendant, who, it was argued, acquired such title through the actions of Cook, the plaintiff's agent.

The Ontario Court of Appeal reversed this decision and gave judgment for the defendant. The basis of this decision was that Cook had apparent authority from the plaintiff to buy and sell platinum on its behalf; hence, the defendant was protected because its transactions with Cook were valid contracts that were binding. The Supreme Court of Canada did not agree with this decision. However, there was a difference of opinion as to the extent of the defendant's liability. The majority of the Court (Estey, Martland, Ritchie, Pigeon, Beetz and Pratte JJ.) held that Cook had no apparent authority to deal with platinum until the time of the inquiry to Snook. Once Snook referred the defendant to the sales clerk, Cook, for settlement of the problem, the plaintiff, through its responsible agent, *i.e.*, the purchasing agent who was employed to conduct purchases on its behalf, held out Cook as having authority to handle the transactions in question. Once such holding out occurred, the defendant was not bound to investigate the honesty of Cook. Laskin C.J.C., with Dickson and Spence JJ. concurring, took a slightly different view. The purchasing agent was not a responsible officer of the plaintiff; therefore any representation he might have made with respect to the authority of Cook could not bind his employer. Once the vice-president of the plaintiff was apprised of what was happening and did nothing to stop the transactions (for at least a year or so), there was a holding out by the plaintiff of Cook as having the requisite authority. Consequently, the majority of the Court thought that the plaintiff was entitled to damages up to 1966, the date of the inquiry to the vice-president.

Two important points emerge from the judgments in this case: the first consists of the elucidation of the kind of employee for whose acts an employer may be responsible and by whose conduct or representations the employer will be bound; the second stems from certain *dicta* of Laskin C.J.C. with respect to the power of an employee with actual authority to extend that authority, as it were, by what that employee says or represents with respect to the scope and extent of his authority.

The questions that fell to be determined, along the lines indicated by the English Court of Appeal in the *Freeman*[52] case, were: (1) whether any of the relevant employees had any authority of any kind; (2) if so, which one; (3) if so, what authority to act for the company which owned

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[52] *Supra* note 50.

the platinum. Laskin C.J.C., speaking for the minority, found it impossible to equate the position of a mere clerk with that of the managing director of the company sought to be bound by the agent's representation.[53] A clerk could draw nothing from the nature of his position unless he were expressly authorized to act in the kind of transactions into which he entered for the company. In this respect Laskin C.J.C. was negating the possibility that Cook was possessed of any apparent authority to deal with the platinum. On this point, Estey J., for the majority, stated that he was in agreement with Laskin C.J.C.[54]

The Chief Justice also thought that Snook, the purchasing agent, had no managerial authority. He lacked "any back-up authority by which he could hold Cook out as having power to compose the difficulty . . . in settling accounts".[55] Consequently the representations made by Cook, even at that stage, were representations to Engelhard (the victim of the fraud) without any support from Canlab management. Estey J., on the other hand, in a long passage in which he set out the theoretical bases for modern corporate practice and the legal consequences of corporate structure so far as agency is concerned, concluded that a purchasing agent in a modern corporation of the kinds that were involved in this case was a responsible officer, at least within the scope and confines of the duties entrusted to him by the corporation.[56] Thus Snook's conduct bound the company by which he was employed and effectively precluded the plaintiff from arguing that it was entitled to sue in respect of loss occurring after the date of the defendant's inquiries from Snook. The issue was in one sense, as pointed out in the *Freeman* case,[57] one of fact. At the same time it could be said to involve questions of legal policy in that it was for the courts to decide, given the organization of modern corporations and the possibilities for the inflicting of harm or loss by the acts of a corporation's employees, how far down the line of management or control the problem of responsibility could be carried. The language of Estey J. suggested that the Supreme Court was very sensitive to the question of responsibility and wished to extend the scope of a corporation's liability for the acts and conduct of its employees. This has been happening, it may be argued, in relation to liability for tortious acts. The effect of the majority judgment in this case may well be to create a similar, if not entirely co-extensive, enlargement of a corporation's liability for the contractual acts of its employees.

Mention should also be made of the statement by Laskin C.J.C. which, in the author's view, could have significant effects on the law of

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[53] *Supra* note 1, at 799, 27 N.R. at 207, 97 D.L.R. (3d) at 10.
[54] *Id.* at 808, 27 N.R. at 214, 97 D.L.R. (3d) at 17.
[55] *Id.* at 804, 27 N.R. at 211, 97 D.L.R. (3d) at 14.
[56] *Id.* at 817-18, 27 N.R. at 223-25, 97 D.L.R. (3d) at 24-25.
[57] *Supra* note 50, at 499, [1964] 1 All E.R. at 641 (Pearson L.J.).

agency if it is ever relied upon in subsequent cases raising the issue more precisely.[58] His Lordship said at one point in his judgment:

> I do not subscribe to the proposition, in so far as it purports to be a general statement of the law, that a representation of an agent himself as to the extent of his authority cannot amount to a holding out by the principal. It will depend on what it is an agent has been assigned to do by his principal, and an overreaching may very well inculpate the principal.[59]

Does that mean that in some cases an agent may be able to extend the scope of his authority by what he himself represents, without the need arising to show any act or language of the principal on which the third party relies? Or does it mean that, because the principal had placed the agent in a certain position, it is inherent in the agent's powers to be able to affect the way in which the principal holds out the agent, and the authority with which the principal seemingly has endowed the agent? The language of Laskin C.J.C., it is respectfully submitted, is obscure and ambiguous.[60] It could lead judges faced with this problem into tortuous paths. It is to be hoped that the Supreme Court will have an opportunity to elucidate this *dictum* of the Chief Justice and to make quite clear how far, if at all, an agent can alter the nature of his apparent authority without any intervention by his principal. What the author fears is that courts may take this *dictum* as authority for greatly enlarging the present concept of apparent authority, with the result that principals may be obligated, contractually as well as tortiously, by acts on the part of their agents which are not only unauthorized but are also deliberate misrepresentations of the power and authority of such agents that could not have been foreseen, let alone permitted, by the principals.

The converse of the apparent authority situation arises where the third party dealing with the agent knows, ought to know or be suspicious, of the lack of or limitation on the agent's authority, especially his "apparent" authority. Once the third party knows that the agent lacks authority to deal with the transaction in question or in the manner in question, or there are circumstances from which the third party should be put upon his inquiry as to the agent's powers, the law is clear that the third party can no longer rely upon any prior representation and cannot bind the principal by what the agent does or says. A clear example of this is provided by *Dutch Sisters Inn (1969) Ltd. v. Continental Insurance Co.*,[61] which involved the making of a representation by an insurance

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[58] *See also* the discussion by Laskin C.J.C., *supra* note 53, at 800-05, 27 N.R. at 207-12, 97 D.L.R. (3d) at 10-14, of the issue whether it is necessary in cases of apparent authority for the principal to ratify the agent's act before the principal can sue the third party, as opposed to being sued by such party. On this point Laskin C.J.C. disagreed with the views of Blair and Lacourcière JJ.A. in the Court of Appeal, and seemed to think that the leading cases, Union Bank of Australia v. McClintock, [1922] 1 A.C. 240, 91 L.J.P.C. 108 (1921) (Aust.) and Commercial Banking Co. v. Mann, [1961] A.C. 1, [1960] 3 All E.R. 482 (P.C. 1960) (Aust.), were not confined to cases involving negotiable instruments and could be distinguished.

[59] *Supra* note 53, at 800, 27 N.R. at 207, 97 D.L.R. (3d) at 10.

[60] And conflicts with earlier authority: *see* the cases cited in note 46 *supra*.

[61] [1978] I.L.R. 970 (Ont. H.C.); *cf. Bank of Montreal*, *supra* note 28.

agent to a party desiring increased insurance coverage. The company was held not liable for the agent's representation because Parker J. found[62] that the owner of the premises knew that the agent of the company had no authority to bind any of the insurance companies which were involved (it being a subscription composite policy) since he was insured. This was a case where there seems to have been actual knowledge of the limitations on the agent's authority.

In the *Rockland Industries* case,[63] however, which reached the Supreme Court of Canada after contradictory decisions at trial and on appeal, the question was whether the third party dealing with the agent "ought" to have been put on guard and to have inquired as to the actual authority of the employee with whom it dealt. The plaintiff negotiated for the purchase of 50,000 tons of sulphur from the defendant. The negotiations were carried on with one Kurtz, an employee of the defendant. Kurtz had authority to negotiate the sale; during the course of negotiations, however, his employer revoked his authority, a fact that was unknown to the plaintiff. When the plaintiff sued for breach of the contract of sale which it believed to have been made with the defendant, the trial judge held the defendant liable.[64] On appeal the plaintiff's action for breach of contract was dismissed.[65] No apparent authority arose on the circumstances of this case, and since the agent's actual authority had been revoked, the purported contract did not exist. As noted earlier, the Supreme Court of Canada allowed the plaintiff's appeal and restored the judgment at trial. In disagreeing with the judgments in the Alberta Appellate Division Martland J., speaking for the Supreme Court,[66] concluded that there could be no stronger representation of authority than permitting negotiation by an agent who is clothed with actual authority to do so, thereby bringing into play the doctrines enunciated by the English Court of Appeal in the *Freeman* case.[67] In other words, once Kurtz had been represented as having actual authority to enter into the contract in question, there was a duty on the seller, the employer of Kurtz, to inform the plaintiff that Kurtz no longer had the requisite powers. There was no duty on the plaintiff to ensure that the authority it believed Kurtz to possess still continued in effect. What this case illustrates, it is suggested, is that someone dealing with an agent who has authority to transact business on behalf of his principal, as long as he is transacting the usual kind of business that an agent of that kind would transact, may be presumed to continue to possess such authority unless and until the principal tells the third party of any revocation of or limitation on the

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[62] *Id.* at 972.

[63] *Supra* note 2.

[64] 10 A.R. 137, [1978] 2 W.W.R. 44 (S.C.).

[65] 14 A.R. 97, [1979] 2 W.W.R. 209, 95 D.L.R. (3d) 64 (C.A. 1978).

[66] *Supra* note 2, at 15, 31 N.R. at 405, [1981] 1 W.W.R. at 120, 108 D.L.R. (3d) at 521.

[67] *Supra* note 50.

agent's authority, or unless and until some suspicious circumstance arises from which a reasonable third party might be led to inquire as to the continuation of the authority. The case is an example of an apparent continuation of real or actual authority rather than a holding out of someone as an agent or as having an extended authority.

C. *Duties of the Parties*

1. *Principal*

The chief obligation of the principal is to pay the agent his commission, the remuneration agreed upon between the parties as the agent's reward for performing the undertaking.[68] Recent cases illustrate some basic features of this obligation, which does not arise unless there is an agreement to the effect that commission will be paid. Once there is an agreement in the form of a contract, it is a matter of construction whether the circumstances under which the commission is payable, and if so, the amount of the commission where this varies with the circumstances, have occurred so as to bring the obligation into effect.[69] In the 1977 case of *Banfield, McFarlane, Evans Real Estate Ltd. v. Hoffer*,[70] however, the majority of the Manitoba Court of Appeal was willing, for reasons which are obscure, to allow the real estate agent a *quantum meruit* claim even though the parties were never *ad idem* on the question of the commission to be paid. O'Sullivan J.A. dissented on the ground that since there was no contract of agency there was no reason to allow a *quantum meruit* claim.[71] This difference of opinion brings an important issue clearly into focus: if the parties have agreed that commission is payable, it does not matter that they have not determined the precise amount of the commission or the way in which such amount may be discovered; if they have not agreed that commission is payable, then there is no contractual obligation upon the principal to pay anything for what the agent does. Whether there should be a quasi-contractual or restitutionary claim on the agent's part, should he do something which may or may not benefit the principal, is a debatable question. The law of restitution is still undecided, it is suggested, as to whether compensation should be given for all services or only for those that are requested, or whether such services should be the subject of some form of indemnification or reimbursement in respect of expenses or loss where no contractual

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[68] And to indemnify the agent against expenses such as the payment of interest, unless these have not been authorized. *See* Goldenberg v. Young, [1980] 1 W.W.R. 567 (Sask. Dist. C. 1979).

[69] *Turner*, *supra* note 8.

[70] [1977] 4 W.W.R. 465 (Man. C.A.).

[71] *Cf.* the comments by Hutcheon J. in *Robertson-Neff & Assocs. Ltd.*, *supra* note 6, and those by O'Sullivan J.A. in *Carsted*, *supra* note 5, at 554.

tie exists between the relevant parties.[72] The *Banfield* case suggests that such an obligation may arise. However, Foisy J. of the Alberta Court of Queen's Bench distinguished this case in the more recent decision in *Knowlton Realty Ltd. v. Mace*.[73] Here the defendant had listed his property with the plaintiff realtor for lease, having expressly declined to list it for sale. Shortly before the end of the listing period the property was sold to a prospective lessee who decided to buy rather than lease. No other potential lessee had appeared by the expiration of the listing period. The plaintiff sued the defendant for commission on the sale in question, or alternatively for damages for breach of contract, alleging that the defendant was in breach of the agency contract in selling the property, thereby preventing the agent from being able to lease it to a customer. The learned judge agreed with the plaintiff's contention on this point, saying that there was an implied term in the contract that the defendant would not dispose of the property until such time as the listing agreement had expired. Such a term was implied, it is suggested, despite the decision in *Luxor (Eastbourne) Ltd. v. Cooper*,[74] because without it, Foisy J. stated, the listing agreement would have no effective meaning. However, damages were not recoverable for such breach because the plaintiff had not chosen to attempt to quantify the particular damages resulting from such breach, which seems, with all respect, a very strange argument. Nor could the plaintiff recover anything on the basis of *quantum meruit*, because there had been no agreement, whether express or implied, between the parties that any remuneration was payable to the agent in the event of a sale of property, as contrasted with a lease. This appears to be a very reasonable and sensible conclusion on the issue of *quantum meruit*. Unless parties agree that there is to be payment on a certain eventuality, there would seem to be no basis for deciding that a payment should be made, particularly where, as here, the outcome alleged to have been the basis for and source of the remuneration was not brought about by the agent, but resulted from the change of mind by the third party. The *Banfield* decision, it is suggested, is an anomalous one that does not accord with the mainstream of authority on the subject of commission.

Whether or not there is agreement as to payment of commission, it is undoubtedly clear that if the fulfilment of such an agreement involves any illegality, or the whole purpose of the agency agreement is an illegal one, commission may not be claimed.[75] The principal can never be compelled to pay anything for the perpetration or performance of some illegality. A recent Nova Scotia case, *Metlege v. Ryan*,[76] illustrates this

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[72] Although there may be where the principal prevents the agent from earning commission: *see Carsted*, *id.* at 554.

[73] *Supra* note 5.

[74] [1941] A.C. 108, [1941] 1 All E.R. 33 (H.L.).

[75] Nor may the principal claim for an account of profits made by the agent. *See* Vita Credit Union v. Stotski, [1981] CAN. INSUR. L. REP. (CCH) 1-1356 (Man. Q.B. 1980).

[76] 41 N.S.R. (2d) 541, 76 A.P.R. 541, 113 D.L.R. (3d) 248 (C.A. 1980).

well. The agency agreement, under which the commission payable to the agent was based upon the difference between the listed price of the property and the actual sale price, violated provisions of regulations made under the Nova Scotia Real Estate Brokers' Licensing Act. Although the parties made a later agreement under which, by way of compromise, a lesser sum was payable as commission, it was held that neither agreement was enforceable. The whole transaction, including the compromise agreement, was tainted with the illegality of the original method of paying commission. Just as a real estate agent who acted without being licensed under the statute could not claim any commission based upon agreement or the performance of a satisfactory service (*i.e.*, *quantum meruit*),[77] so also an agent whose agreement contravened the statute was unable to enforce any claim.

Even where there is a valid and enforceable agreement to pay commission, it is a question to be determined on the facts of each case, including the proper construction of the agency contract, whether the agent has earned his commission. This does not mean that the agent must have benefited the principal; his efforts may have been unsuccessful. It does mean that his efforts must have been those required of him under the contract.[78] As O'Sullivan J.A. said in the recent Manitoba case of *Carsted v. Gass*,[79] a case should be decided by applying the principle that when an agent claims that he has earned the right to commission, the test is whether on the proper interpretation of the contract between the principal and agent the event has happened upon which commission is to be paid. In that case completion of the transaction was the event upon which commission was to be paid. That event had not happened; therefore no commission was payable on the contract. Nor, it may be added, could any claim be based on *quantum meruit* for the services of the agent unless it could be shown that the principal prevented the agent from earning commission and took advantage of the agent's work. It was not sufficient that what was intended to be achieved by the agency contract should have been achieved, whether it was a satisfactory termination of negotiations or merely the introduction of a potential purchaser, without completion of the sale. It had also to be shown by the agent that he was the "effective cause" of what happened.[80] It is important to note that an agent who has been guilty of some sort of misconduct may not be able to claim a commission, even though he was the effective cause of the successful termination of the undertaking.

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[77] Commercial Life Assurance v. Drever, [1948] S.C.R. 306, [1948] 2 D L R 241.

[78] *See, e.g.*, Chateau Realty v. Trenchard, 21 Nfld. & P.E.I.R 326, 56 A P R 326 (Nfld. Dist. C. 1978).

[79] *Supra* note 5, at 554.

[80] *Robertson-Neff & Assocs. Ltd.*, *supra* note 6, at 146, *Secretarial Business Servs.*, *supra* note 6, at 85; *Martin*, *supra* note 7, at 123.

Hence, in *Turner v. Laurentide Financial Realty Corp.*[81] the principal was obliged to pay commission to the agent even though the latter had agreed to accept a commission from the company which lent the money to the principal, the object of the agency undertaking being to find a lender. This was because the agreement with the lender did not place the agent in a position of conflict of interest with his duty to the principal. Finding a source of finance for the projected development was in the interests of the principal; therefore, anything done by the agent towards that goal could not be a breach of duty to the principal. However, as will be seen, where there is a breach of duty, such as the duty of loyalty towards the principal, the agent may be forced to yield his right to commission, and the principal will be relieved of his duty to remunerate the agent.

That duty may outlast the life of the agency. There are cases which maintain that commission may be payable to an agent in respect of prior acts of the agent which benefit the principal at a time when the agent is no longer acting for the principal. However, from the judgment of Chief Judge Decore of the Alberta District Court in *Rowles v. Al-Wood Manufacturing Ltd.*[82] it might appear that the grounds for allowing such a claim by the agent in Canada differ from those which obtain in England. The English Court of Appeal decided in *Sellers v. London Counties Newspaper*[83] that a commission was payable in such circumstances unless the principal introduced a term into the contract precluding payment of a commission after termination of the agency. In 1935 the Supreme Court of Canada decided that such commission was not payable unless there was an express term to such effect or the court could find such a term as a matter of necessary implication.[84] Hence, in the *Rowles* case such commission was payable because the contract provided that commission was payable on sales which were invoiced to the purchaser, even though delivery of the materials took place earlier. Thus, commission was payable on sales which had been made, albeit that the purchasers were not obliged to pay until later. It was payable not on the basis of moneys received by the sellers, but on the basis of moneys *due* to the sellers. Here there was an express term which could be interpreted to create a continuing obligation to pay commission. In an earlier case, *Graycombe Associates Ltd. v. Northern Stage Industries*,[85] R.E. Holland J. of the Ontario High Court was faced with a situation where there was no express term. Consequently, he was led to imply a term under which commission was payable on orders obtained by the agent prior to termination, even though the goods were not delivered until after such

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[81] *Supra* note 8. *Cf.* Canada Permanent Trust v. Hutchings, 3 R.P.R. 216 (Ont. Cty. Ct. 1977).

[82] 17 A.R. 306, 9 Alta. L.R. (2d) 61 (Dist. C. 1979).

[83] [1951] 1 K.B. 784, [1951] 1 All E.R. 544 (C.A.).

[84] Grover v. Stirling Bonding Co., [1935] 3 D.L.R. 481 (S.C.C.), *aff'g* [1934] O.W.N. 303 (C.A.).

[85] 14 O.R. (2d) 201, 73 D.L.R. (3d) 241 (H.C. 1976).

time. He took the view that a continuing commission, as it is called, was only payable where there was an express term to such effect or a term was to be implied as a matter of necessity, on the analogy of cases where the relationship between the parties could only be terminated by the giving of reasonable notice.[86] Whether there is such a divergence between English and Canadian authority as Decore D.C.J. maintained in the Alberta case[87] is a matter of opinion. It may be suggested that it is a question of emphasis rather than of true doctrinal differentiation.

2. *Agent*

Questions concerning the duties of an agent can arise in various ways. If the agent is claiming commission or remuneration, he may, as noted above, be deprived in whole or in part of any reward if he has been guilty of some misconduct involving a breach of one or more of his duties with respect to proper and faithful performance. Independently of any claim by the agent, his misconduct may be the subject of an action by the principal for breach of contract, negligence, or an accounting of profits made by the agent in contravention of his obligation of honesty or fidelity. It is also possible that a breach of duty on the agent's part could lead to the vicarious liability of the principal towards a third party damnified by the agent's acts, or might preclude the liability of a third party to the principal, by reason of some misconduct of the agent which permits the third party to raise such behaviour by way of defence to an action by the principal against the third party. Cases which turn on some of these matters will be mentioned in a later section dealing with the direct or vicarious liability of agent or principal. In this section the emphasis will be upon the internal relations of principal and agent.

The agent is obliged to perform his undertaking in person. This broad principle is subject to certain exceptions that have been recognized as limiting the force and effect of the maxim *delegatus non potest delegare*. In a recent case, *Re Deutsch*,[88] Reid J. of the Ontario High Court, for reasons connected with the jurisdiction of the Supreme Court of the province,[89] refused an application to appoint an administrator of a deceased's estate at the request of the Polish Consul, who had been appointed by a power of attorney filed by the sole beneficiary under the deceased's will to expedite the administration of the estate in question. However, the learned judge also held that, under the doctrine of agency, this would have been a valid and proper case for allowing an agent, *i.e.* the Consul, whose position as agent stemmed from the power of attorney, to appoint a sub-agent to perform the real task of the agency, namely the

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[86] *Id.* at 206-08, 73 D.L.R. (3d) at 245-47. *See also* the recent Saskatchewan case of Lilly v. Corynthian Restaurant Ltd., 7 Sask. R. 110 (Q.B. 1980).

[87] *Supra* note 82, at 310, 9 Alta. L.R. (2d) at 65.

[88] 18 O.R. (2d) 357, 82 D.L.R. (3d) 567 (H.C. 1976).

[89] Reference was made in this respect to the Trustee Act, R.S.O. 1980, c. 512, s. 37 and the Surrogate Courts Act, R.S.O. 1980, c. 491, s. 22.

administration of the deceased's estate. Since a consul is not an executive officer but usually an intermediary on behalf of others, it was possible to infer that the donor of the power of attorney to the Consul and the Consul himself both intended that he should delegate his authority. A situation such as this, while appearing to be unique and uncharacteristic, is in effect a good example of the kind of situation in which delegation is not only likely but is also contemplated as the way in which the agent is to perform his undertaking.[90] Alternatively, it could be argued that an agent like the Consul in this case is really only appointed to find and appoint someone to perform the real task that is involved in the agency. Hence an agent is appointed not to fulfill the ultimately desired purpose of the principal but only to find an agent for the principal, someone who will be in a much better position than the original agent to achieve what the principal wants. Here the purpose of the principal was the administration of the deceased's estate. The Consul was not a suitable person to bring this about. On the other hand, being resident in Canada, he was much better situated to find an administrator like the solicitor, who was intended as the delegate in this instance, than the principal, the beneficiary who was resident in Poland. This was a case of substitution rather than of true delegation.

A duty which perhaps more frequently arises for consideration by the courts is that of exercising due care and skill. A number of cases during the period under review have involved the application of standards of care by the courts to agents in the performance of their duties. Some of these concerned insurance agents whose failure to arrange for adequate insurance coverage or to protect the assured from potential loss by renewing insurance policies led to liability.[91] Sometimes the agent whose neglect was the cause of litigation was a lawyer or a real estate agent.[92] In each instance the questions considered by the courts were as to the standard of care to be expected by an agent of the type involved, especially where the agent was being rewarded for his efforts, and as to whether the particular agent had lived up to such standard.[93] A leading case, which has been cited in subsequent decisions, is that of *Fine's Flowers Ltd. v. General Accident Assurance Co.*,[94] a 1977 decision of

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[90] For use of a sub-agent and the consequences with respect to commission of the sub-agent's breach of his duty of care, *see Academy Aluminum Products Ltd.*, *supra* note 9.

[91] Tynan v. Dextraze, [1978] 4 W.W.R. 136, [1978] I.L.R. 1211 (B.C. Cty. Ct. 1977); Morash v. Lockhart & Ritchie Ltd., 24 N.B.R. (2d) 180, 48 A.P.R. 180 (C.A. 1980), *rev'g* 19 N.B.R. (2d) 254, 30 A.P.R. 254 (Q.B. 1978); McCann v. Western Farmers Mut. Ins. Co., 20 O.R. (2d) 210, [1978] I.L.R. 1227, 87 D.L.R. (3d) 135 (H.C.); *Wilcox*, *supra* note 14; *Hornburg*, *supra* note 14; General Motors Acceptance Corp. v. Fulton Ins. Agencies, 24 N.S.R. (2d) 114, 35 A.P.R. 114, [1978] I.L.R. 1058 (C.A.); Rearden v. Kings Mut. Ins., 120 D.L.R. (3d) 196 (N.S.S.C. 1981).

[92] Charter-York Ltd. v. Hunt, 2 R.P.R. 272 (Ont. H.C. 1978); Palmeri & Palmeri v. Littleton, [1979] 4 W.W.R. 577 (B.C.S.C.); *Academy Aluminum Products Ltd.*, *supra* note 9.

[93] *See* Volk v. Schreiber, 18 O.R. (2d) 446, 82 D.L.R. (3d) 602 (Dist. C. 1978), for the failure of a travel agent to advise on the need for a visa.

[94] *Supra* note 4.

the Ontario Court of Appeal. It may be taken as typical of the kind of situation coming before the courts, even though it dealt with the specific case of an insurance agent. The plaintiff relied on the defendant insurance agent, one Campbell, to see that its business was adequately covered. A policy was taken out with the defendant insurance company, which did not insure against a particular loss, namely, the freezing of the plaintiff's greenhouses as a result of defective water pumps. This loss occurred, and the plaintiff sued both the insurance company and the agent. At trial,[95] Fraser J. found the insurance company not liable, either in tort or contract, since the policy of insurance did not cover the risk and the company was guilty of no tortious breach of duty. The agent, however, was liable both in contract and in tort; he had failed to fulfill his contractual duty as the plaintiff's agent to keep its plant covered for all foreseeable insurable and normal risks (of which what had occurred was one example). He was liable in negligence for failing to warn the plaintiff of the gap in its coverage. His duty to give such warning stemmed from his relationship with the plaintiff as its agent. On appeal the judgment of Fraser J. was upheld. The reasons of Estey C.J.O. (as he then was) are interesting in that he put the liability of Campbell, the agent, not on the basis of contract,[96] but on the twin bases of negligence and equity. The relationship between Campbell and the plaintiff gave rise to a duty of care which was broken by Campbell. He owed the plaintiff a duty to report on the gap in the insurance and he failed to do so, as a consequence of which the plaintiff was denied an opportunity to protect its business by taking out appropriate insurance cover.[97] The alternative and simultaneous liability in equity arose from the fiduciary relationship between Campbell and the plaintiff. By not informing the plaintiff of the true situation with respect to its insurance coverage, Campbell had failed to disclose his departure from his instructions in time to enable the plaintiff to obviate or mitigate the damages which ensued.[98] This, it is suggested, is a somewhat novel approach to the fiduciary obligations involved in the agency relationship. The fiduciary obligations of an agent are usually understood to refer to and involve his honesty and fidelity, his inability to make a secret profit or to act in a manner which conflicts with his duty to the principal and his personal interest. Cases referred to later illustrate the nature and scope of these obligations. Fiduciary obligations have not normally been held to embrace a duty to act with care and to warn the principal of, or disclose to him, any dereliction by the agent from the performance of his duty of care. The approach of Estey C.J.O. is unusual

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[95] 5 O.R. (2d) 137, 49 D.L.R. (3d) 641 (H.C. 1974).

[96] It was unnecessary to do so: *supra* note 4, at 532, 81 D.L.R. (3d) at 143.

[97] *Id.* at 532-34, 81 D.L.R. (3d) at 143-44.

[98] *Id.* at 534-35, 81 D.L.R. (3d) at 145, relying on Laskin v. Bache & Co., [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A. 1971) and Nocton v. Lord Ashburton, [1914] A.C. 932, [1914-15] All E.R. Rep. 45 (H.L. 1914), cases that dealt with quite different situations and required the application of equity because the common law did not cover the type of loss or kind of misconduct involved.

and if adopted and applied, as it has been in at least one case,[99] then it may have the effect of rendering obsolete and inoperative any earlier distinction that may have existed between the duties of care and skill and that of honesty. If any agent may be held liable in equity for negligence, there would appear to be little point in making any differentiation between the agent's duty to act with care and the agent's duty to act with honesty and fidelity. Yet, at common law, there was a clear difference between the duty to act honestly and the duty to act with care. Indeed, the reluctance of the courts to provide a remedy for a merely negligent as opposed to fraudulent misstatement sprang from the desire of the courts to distinguish between honesty and carefulness so as to prevent any suggestion that an act of carelessness was the same thing as an act of dishonesty.[100] If the views expressed by Estey C.J.O. are accepted and applied, the courts may be able to whittle down even more than they have in the years since 1963 the previously sharp distinction between honesty and care.

The other members of the Court of Appeal, Wilson and Blair JJ.A., were able to uphold the liability of the agent on simple contractual grounds without recourse either to the law of tort or equity.[101] With all respect to the views of Mr. Justice Estey, this seems to be a more acceptable, although more traditional, attitude for the court to adopt in a case of this kind. There was a contract of agency between the parties and this involved the proper performance of the agency undertaking by Campbell. It was a question of contractual interpretation whether Campbell's instructions could be said to have been fulfilled when he took out the kind of insurance policy which he did and omitted to include the particular risk that occurred. There was no ambiguity in Campbell's instructions such that he could validly argue that he had performed what he had been instructed to perform.[102] Therefore, he was liable for breach of contract.

As is evident from later cases in which the *Fine's Flowers* decision has been quoted and applied,[103] there are several alternative grounds upon which an agent may be found liable to his principal when he has behaved in a negligent or neglectful fashion. His liability may be contractual or tortious, and it now may even be for breach of some fiduciary duty, a liability arising in equity. Notwithstanding the suggestion that this last possibility may exist, it is argued that only the

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[99] *McCann*, *supra* note 91, at 212-13, [1978] I.L.R. at 1228-29, 87 D.L.R. (3d) at 138 (Stark J.). *Cf.* the discussion of the agent's duty to exercise proper care to protect the interests of the principal by Fawcus J. in *Gore Mut. Ins. Co.*, *supra* note 14 (failure by agent to note on an insurance policy the change of location of the principal's mobile home). Other cases that have relied on the *Fine's Flowers* case but have not involved the "equity approach" are *Wilcox*, *supra* note 14, and *Hornburg*, *supra* note 14. *See also Quickway Aviation Ltd.*, *supra* note 14.

[100] *See Hedley Byrne & Co.*, *supra* note 12.

[101] *See supra* note 4, at 538-39, 81 D.L.R. (3d) at 148-49 (Wilson J.A.).

[102] *Id.* at 539-42, 81 D.L.R. (3d) at 149-53.

[103] *See* the cases cited note 99 *supra*.

first two grounds should be contemplated by the courts. Equity comes into play more appropriately when some allegation of "dishonesty" (whether by this is meant fraud at common law or a lapse from proper standards of good faith as understood in equity) is made against an agent.

In this context, reference may be made to several cases over the past few years in which questions of loyalty, fidelity, honesty and the like have been raised by principals seeking to avoid payment of commission or to obtain an accounting of profits made by agents over and above what they were legitimately entitled to receive from the principal himself by way of commission.

The source of the agent's liability is his duty to make full disclosure of everything that would operate upon and affect the interests of his principal. Once the principal knows the facts, it is for him to decide whether he agrees with and concurs in what the agent is doing, even if that should advance the interests of the agent. There is nothing to stop the principal from allowing the agent to make a double commission (from the principal himself and the third party) or to enjoy a profit over and above the agreed commission, for example, by purchasing the principal's property himself and then selling it to a third party. However, full disclosure is required or the agent will forfeit his commission and may be liable to account for profits made by his actions. Several recent cases have involved the agent's failure to disclose that his course of conduct resulted in a clash between the interests of the principal and his own personal interests when acting for more than one party. In all of them the agent thereby forfeited his right to commission.[104] In one, the agent was also unable to recover any indemnity for expenses he had incurred in endeavouring to fulfill the agency undertaking.[105] In other instances the agent was not acting for a third party as well as the principal. The agent was acting for himself but did not reveal to the principal that this was the case. Sometimes the agent was secretly purchasing the principal's property for himself and then making a profit on a resale to a third person.[106] The consequence was that the agent was held accountable to the principal for the profit made by the agent, which ought to have been made by the principal.[107] In one case the agent in question was a sub-agent, held to the same standards as the agent himself.[108] In *Jackson*

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[104] *Canada Permanent Trust Co.*, *supra* note 8; *Campbell*, *supra* note 8; *Advanced Realty Funding Corp.*, *supra* note 8; *Comeau*, *supra* note 9.

[105] *Advanced Realty Funding Corp.*, *supra* note 8.

[106] Cymar Leasing v. Cross Country Realty, 5 Alta. L.R. (2d) 238 (Dist. C. 1978); Keeler & Keeler v. Jack's Real Estate, 1 Sask. R. 444 (C.A. 1979). *Cf* Edwards Real Estate v. Bamtar Holdings, 7 Alta. L.R. (2d) 52, 7 R.P.R. 169 (Dist. C. 1978). Also where the third party was the agent's *father*, commission was irrecoverable: *see Dyck*, *supra* note 8.

[107] The result was also the same where there was no secrecy: *Karst*, *supra* note 8 *See also Lilly*, *supra* note 86.

[108] Guaranty Trust Co. v. Jerol Invs., 7 A.R. 1, 4 Alta. L.R. (2d) 215 (Dist C. 1977).

v. Packham Real Estate Ltd.,[109] the misconduct of the agent took the form of concealing the fact that a better offer of purchase for the principal's property had been received after he had transmitted to the principal the offer which was ultimately accepted, but before such acceptance. After the acceptance of the lower offer, the agent obtained the exclusive listing of the property from the offeror and arranged for the sale of the property from the offeror in question to the third party whose better offer had been kept from the original principal. Thus, the agent made two commissions. The original principal, the vendor of the property in the first transaction, sued the agent, the agent's employer and the original purchaser from him. The principal's action failed against the purchaser but succeeded against the first two parties. Lerner J. stressed the fiduciary relationship between agent and principal and the agent's duty to disclose the identity of, and potential information concerning, all prospective purchasers. His failure to make such disclosure constituted a violation of a fundamental element of that relationship.

It must be shown, however, that the agent did in fact exclude the principal and was seeking to serve the interests of another besides the one for whom he was contracted to act, whether that other was himself or a third party. Consequently, in *Goodfellow v. Drschiwiski*,[110] the buyer's action for specific performance of a contract of sale was successful. The seller endeavoured to argue that the sale should not be enforced because his agent had been acting for the buyer as well, without disclosing such fact. On appeal Prowse J.A., while accepting that if those had been the facts the situation would have involved a breach of duty by the agent that would have allowed the seller to avoid liability, found that such a situation did not arise.[111] Moreover, it would appear from the judgment of McEachern C.J.B.C. in *Turner v. Laurentide Financial Realty Corp.*,[112] that, even where the agent is acting for both sides in a transaction and has not made full disclosure, there may be no misconduct on the part of the agent if what he was doing was nonetheless fundamentally in the interests of his original principal. In this case an agent was employed by the defendant to find someone willing to lend it money on a long-term loan. The agent had originally introduced one potential lender to the defendant but those negotiations proved unsuccessful. Then the agent found another possible lender who, unknown to the defendant, promised to pay a commission to the agent if the planned loan came about. Those negotiations also failed. Thereafter the first lender changed its mind and the loan to the defendant was ultimately made by the first potential lender found by the agent. The agent's claim to commission was based upon (a) the first agreement between the agent and the defendant, whereby the latter promised to pay a commission of one-quarter percent; and (b) a later agreement raising that to one-half

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[109] 28 O.R. (2d) 261, 109 D.L.R. (3d) 277 (H.C. 1980).
[110] 18 A.R. 561 (C.A. 1979).
[111] *Id.* at 567.
[112] *Supra* note 8.

percent, before the second potential lender was found. One of the problems was that the offer to find a new lender for an increased commission was never accepted by the defendant.[113] So far as the claim for one-quarter percent was concerned, however, the defendant argued that the acceptance of a promise to pay commission by the second potential lender meant that the agent had acted inconsistently with the interests of the defendant and had forfeited any right to commission from it. This argument, as noted earlier, was rejected by the learned judge.[114] His point was that the agent was still acting in the interests of the principal, the defendant, since he was obliged to find financing for it. According to McEachern C.J.B.C., anything done by the agent towards that goal could not be a breach of duty by the agent. It is suggested that even though the "double commission" situation never arose because of the agent's failure to negotiate successfully with the second lender, the conduct of the agent was nevertheless tainted with disloyalty. It may well be that no actual breach occurred, but there was still a failure to satisfy the standards of complete honesty and disclosure expected by the principal of his agent. The learned judge thought that what the agent had done was not inconsistent with his duty of loyalty and fidelity to the principal.[115] It is suggested that the reverse was the case. The fact that the agent had made such an arrangement with one possible lender of money might have involved the agent in doing the same with others. It was almost mere coincidence that it did not happen in that way, because the first lender returned to the negotiations. The fact that the judge had some feeling that the increased commission "agreement" was somehow affected by the arrangement made by the agent with the second, and as it turned out, ultimately unsuccessful lender of the money, was irrelevant. The case does not in principle make any inroads into the basic doctrine, but it does reveal how it may sometimes be possible to reinterpret both principles and facts to permit an agent to do strange things. The approach of McEachern C.J.B.C., it is suggested, is a deviation from the normally strict standards expected of and imposed upon agents by the courts.

D. *Liability of the Parties*

1. *Principal*

(a) *Tort*

A principal may be liable for a wrong personally committed. He may also suffer the consequences of a wrong committed by his agent

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[113] *Id.* at 221-22, 97 D.L.R. (3d) at 434.

[114] *Id.* at 223-26, 97 D.L.R. (3d) at 436-39.

[115] *Id.* at 225, 97 D.L.R. (3d) at 438, relying on Regal (Hastings) Ltd. v. Gulliver, [1967] 2 A.C. 134, [1942] 1 All E.R. 378 (H.L. 1942), which is strange in view of the very strong approach taken by the House of Lords to the agent's duty in that case and the way in which that case has been applied in subsequent decisions in England and Canada.

under the doctrine of vicarious liability. His liability may have two major consequences. First, some wrongful act of the agent may disentitle the principal to enforce a contract entered into with a third party as a result of the agent's misconduct, or may, as suggested in *Goodfellow v. Drschiwiski*,[116] allow the principal to argue that he should not be bound by a transaction entered into by his agent, who, in doing so, breached a duty of loyalty to the principal. Although this argument met with no success in that case, the idea that a principal can evade liability upon a contract so improperly negotiated by his agent was approved. Second, an agent who perpetrates a tort in the course of fulfilling the agency undertaking may make his principal liable to an injured third party. Many cases of this kind involve what are instances of a master's liability for the torts of his servant but it is unnecessary, in the present context, to discuss the general principles of such liability.[117] Others, however, concern situations in which an agent has behaved negligently, with the result that sometimes the principal has been held liable[118] (perhaps with a right to indemnity from the guilty agent).[119] Sometimes, where the agent acted outside the scope of his authority, the principal has escaped such vicarious responsibility.[120]

The more usual situation occurring in recent years was that of the agent guilty of some form of misrepresentation, innocent in some instances, negligent, even fraudulent, in others. The question then arose whether the principal was bound by what the agent had done or was immune from responsibility on some ground. The principal would be liable if what the agent did was within the scope of what he was employed to do, like the bank manager giving information and advice about investments to a customer of the bank in *Dixon v. Bank of Nova Scotia*.[121] In that case, the language of the trial judge did not clarify whether he thought that the representations made by the bank manager were fraudulent or merely negligent. On either basis the bank was held liable. However, a principal would not be liable for the fraud of his agent when the agent was doing something for which he had no authority. Thus in *Ottesen v. Wolstencroft Agencies Ltd.*,[122] Anderson J. in British Columbia stated[123] that a real estate salesman would make his principal, the real estate agent, liable for false representations to a purchaser of property because the making of representations was part of the everyday work of a real estate salesman; he would not make the principal liable for

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[116] *Supra* note 110.

[117] A recent case, involving the very special issue of the liability of a hospital for wrongs committed by doctors, nurses, etc., was *Yepremian*, *supra* note 10.

[118] G.R. Young v. Dominion Ins. Corp., [1979] I.L.R. 498 (B.C.S.C.); Fenn v. City of Peterborough, 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A. 1979); *see also* text accompanying note 133 *infra*.

[119] *Fenn*, *id.*

[120] *Kelly*, *supra* note 14; *O'Donnell*, *supra* note 14.

[121] 13 B.C.L.R. 269 (Cty. Ct. 1979).

[122] 10 R.P.R. 54 (B.C.S.C. 1979).

[123] *Id.* at 59-61.

fraud in obtaining delivery of a deed because conveyancing, registration and bargains relating thereto were not matters ordinarily dealt with by real estate salesmen, unlike the position of a solicitor's clerk in the famous case of *Lloyd v. Grace, Smith & Co.*[124] Nor was a principal liable for or bound by a misrepresentation made by his agent when he did know that such misrepresentation was being made, which was the case where the misrepresentation was innocent, or negligent, but perhaps not so where it was fraudulent.[125] Yet, a fraudulent principal will be liable for his own fraud, whereas an agent who relied upon a statement from such principal and passed it on to the third party as being correct may not be guilty of any negligence, nor would he be guilty of fraud or deceit, so as to make the agent liable to the third party. This is what Grant J. held in *Kisil v. John F. Stevens Ltd.*[126] There, an officer of a corporation told an estate agent, who was selling property for the corporation, that the water for the house was satisfactory. In fact, as the officer knew, this was untrue. It was held that the purchaser could have the contract for the purchase of the house rescinded for fraud and could sue the officer of the corporation and the corporation for deceit but he could not hold the estate agent, who was totally innocent of fraud, liable for fraud or negligence.

(b) *Contract*

The liability of a principal in contract for what has been agreed upon by an agent depends upon whether the one making the contract was his agent and, if so, whether what was done was within the scope of such agent's authority. Such matters are discussed in a number of recent cases which have been considered previously.[127] As noted earlier, there are several decisions in which Canadian courts have grappled with the sometimes difficult issues of contract, ratification, and estoppel, upon which the ultimate question of a principal's liability may turn.

2. *Agent*

(a) *Tort*

An agent may be liable in tort to his principal for breach of the agent's duty to exercise care and skill in the performance of the agency undertaking. It has already been noted that recent cases have endorsed the view that such liability on the part of the agent may be founded in the tort of negligence or upon breach of a contractual duty.[128] In light of

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[124] [1912] A.C. 716, [1911-13] All E.R. Rep. 51 (H.L. 1912).

[125] *Moxness*, *supra* note 14; *Komarniski*, *supra* note 11. In the latter case, the agent was held liable for negligent misrepresentation and was granted indemnification against the principal: *see* Reiter, *Comment*, 8 R.P.R. 230 (1979).

[126] 42 N.S.R. (2d) 148, 77 A.P.R. 148 (S.C. 1980).

[127] *See* text accompanying notes 16-67 *supra*.

[128] *See* text accompanying notes 91-102 *supra*.

recent developments, it would seem that a principal who has been affected injuriously by such neglect on the part of his agent is not compelled to bring suit in contract, but may allege negligence as the basis for the agent's liability.[129] Further, according to the opinion of Estey J., then Chief Justice of Ontario, in the *Fine's Flowers* case,[130] the agent's liability for negligence or lack of care and skill may be posited upon breach of fiduciary duty. This is an unusual way of characterizing such misconduct on the part of an agent and has been criticized by the author of another survey dealing with insurance law.[131] It may also be noted that the agent could be made liable to his principal on the basis of a tortfeasor's statutory obligation or liability to contribute to the damages payable by another tortfeasor or to indemnify such other tortfeasor completely.[132] This will arise wherever a principal is rendered liable to a third party as a result of his agent's negligence or breach of duty. If the principal is totally innocent of wrongdoing, but is made liable purely on the basis of the doctrine of *respondeat superior*, the agent may be obliged to provide a complete indemnity. Such was the case in *Fenn v. City of Peterborough*,[133] which involved a very serious "accident" resulting from negligence in dealing with gas mains. The culprit was the Public Utilities Commission of the city. Because the Commission was the statutory agent of the municipality, the latter could be held vicariously liable for the events which occurred as a consequence. In the litigation which followed, the Ontario Court of Appeal held that the municipality was entitled to be indemnified by the Commission in respect of the damages payable by the former to the injured parties. Such liability was put on the basis of a common law right of a principal found vicariously liable to obtain indemnification from his agent whose negligence caused the damage. However, it might be added that there could also be some analogous, possibly even broader, liability arising under statute in most, if not all, Canadian common law jurisdictions.

It was also noted earlier that an agent may be personally liable in tort to a third party for some wrongful act causing harm or damage to such third party. There is no doubt as to such liability where the agent has perpetrated some fraud, while acting either within or outside the scope of his authority,[134] or where the agent has behaved negligently and thereby caused physical damage to another.[135] The issue which has given rise to

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[129] *See* Fridman, *The Interaction of Tort and Contract*, 93 L.Q.R. 422 (1977); G. FRIDMAN, THE LAW OF CONTRACT IN CANADA 155 (1st Supp. 1980); Schwartz, *Hedley Byrne and Pre-Contractual Misrepresentations: Tort Law to the Aid of Contract?*, 10 OTTAWA L. REV. 581, at 581-92 (1978), and cases, *etc.* therein cited.

[130] *Supra* note 4, at 532-34, 81 D.L.R. (3d) at 142-44; *see* text accompanying notes 96-98 *supra*.

[131] Baer, *supra* note 4, at 627-28.

[132] *See, e.g.*, the Negligence Act, R.S.O. 1980, c. 315, s. 2, where the phrase used is "found at fault".

[133] *Supra* note 118.

[134] Wandinger v. Lake, 2 Bus. L.R. 39, 78 D.L.R. (3d) 305 (Ont. H.C. 1977); Lessner v. Wright, 26 N.B.R. (2d) 35, 55 A.P.R. 35 (Q.B. 1979).

[135] *Cf. Yepremian*, *supra* note 10.

more debate has been whether an agent can be liable to a third party where the agent has carelessly misrepresented something or given mistaken advice, in reliance on which the third party has acted to his detriment, for example, by entering into a contract with the principal or with some other party, and so suffered economic loss. Such instances involved the problem of liability for negligent misstatements, which has been the subject of much discussion inside and outside the courts during the past twenty years. As previously noted,[136] there is Canadian authority for the proposition that an agent who acts in this way will render himself personally liable to such third party, whether or not what he does can also make his principal liable in tort (or affect the contractual relations between principal and third party), in accordance with the general doctrines of the law of agency.

(b) *Contract*

Exceptionally, an agent can be held liable on a contract which he has negotiated or has purported to negotiate on behalf of a principal. One possible example is where there is no principal or the agent himself negotiated as a principal. In *Lunenburg County Press Ltd. v. Demone*[137] the defendant, who was a political candidate, ordered newspaper advertising from the plaintiff and represented to it that his political party would pay. In fact the party had forbidden the candidate to advertise and, when called upon to pay for the advertisements, it refused. In these circumstances the Nova Scotia Court of Appeal held the candidate personally liable. There was no agency relationship between the candidate and his party; he had no authority, actual or apparent, to bind it by making a contract for such advertising. Consequently, the candidate himself was contracting as a principal. This case illustrates that if there is no principal, the agent himself contracts as principal.[138] More recently, the New Brunswick Court of Appeal, in *Northrop v. Taylor*,[139] held an agent personally liable on a contract to purchase a house when the agent had agreed to such purchase in his own name and the intended principal failed to adhere to the contract because of failure to obtain the necessary mortgage financing. There was no evidence to support the defendant's contention that he had acted as an agent to the knowledge and with the concurrence of the third party. Whatever the intention between the intended purchaser and the agent, as between the agent and the vendor of the house, the court drew the conclusion that it was intended that the agent should contract as a principal so as to be bound by the transaction.

Another way in which an agent may be made personally liable, where there is no principal or the agent has acted without authority, is by

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[136] *See* text accompanying notes 10-13 *supra*.
[137] 26 N.S.R. (2d) 179, 40 A.P.R. 179 (C.A. 1978).
[138] G. FRIDMAN, *supra* note 20, at 176-77.
[139] 31 N.B.R. (2d) 185, 75 A.P.R. 185 (C.A. 1980).

suing the agent for breach of what is generally termed the "implied warranty of authority".[140] The problem with this approach is that, unless a specific claim is made by a plaintiff based upon this form of liability, the court will give no relief on this ground. In some recent cases, therefore, where a plaintiff sued the agent on the contract entered into by the agent for his principal and there was no personal liability undertaken by the agent, the court could not create liability on this alternative ground because it was not pleaded.[141] This was the case even where the agent had purported to act for a company which was not in existence at the time the contract in question was signed.[142] Since the agent had signed as agent, and not in a manner which indicated his personal responsibility on the contract, contractual liability was not possible. The plaintiffs ought to have included in their claim a plea that, in the alternative, the agent was liable for warranting that he had authority from a valid, existing principal to make the contract. That such a mode of proceeding would be successful and would enable a court to hold the agent liable is illustrated by *Delta Construction Co. v. Lidstone*.[143] The facts differed from those of the previous case only in that in the *Delta Construction* case work had been done by the plaintiff, as contrasted with the mere signing of a contract. Nevertheless, the company, when incorporated, was not liable to the plaintiff; however, the individual defendant, the agent who sought the performance of the work by the plaintiff, was held liable for breach of warranty of authority. Noel J. of the Newfoundland Supreme Court, also held that the plaintiff had suffered no damage or loss by reason of this warranty and its breach. Its loss had flowed from the subsequent failure of the company, which could not pay the price of the work. To hold the agent liable in place of the company would have meant making the agent the guarantor of the company's debts. This the learned judge would not do[144] since neither the plaintiff nor the agent had intended that this should be the effect of what had taken place. It may be argued that the learned judge was incorrect in saying that the damage suffered by the plaintiff did not come about because of the breach of warranty of authority by the agent. Without the agent's request or order for the work on the company's behalf, the plaintiff presumably would not have undertaken the work. It may be that the agent, in doing this, was not "warranting" that the company could and would pay for the work. He was warranting that he had the company's authority to order the work to be done. Surely this necessarily involved an additional conclusion or finding that he was warranting that the company would pay for the work with the result that,

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[140] G. FRIDMAN, *supra* note 20, at 178-82.

[141] A.E. LePage Ltd. v. Kamex Devs. Ltd., 6 O.R. (2d) 193, at 196, 78 D.L.R. (3d) 223, at 226 (C.A. 1977) (Blair J.A.), *aff'd*, *sub nom*. A.E. LePage Ltd. v. March, [1979] 2 S.C.R. 155, 105 D.L.R. (3d) 84; General Motors Acceptance Corp. v. Weisman, 23 O.R. (2d) 479, at 484, 96 D.L.R. (3d) 159, at 164 (Cty. Ct. 1979).

[142] *A.E. Le Page*, *id.*

[143] 29 Nfld. & P.E.I.R. 70, 82 A.P.R. 70, 96 D.L.R. (3d) 457 (Nfld. S.C. 1979).

[144] *Id.* at 78-79, 82 A.P.R. at 78-79, 96 D.L.R. (3d) at 462.

when the company did not do so for whatever reason, he made himself liable for breach of such warranty. It was invalid to argue that this should not be so because it would have turned the agent into a guarantor; he was not saying that he was making himself personally liable on the contract and for the debt if the principal debtor did not pay. Rather, he was impliedly saying that his principal existed and had authorized him to make such a contract. In fact the company did not exist and had not authorised such work. Therefore, the agent ought to have been liable for the loss incurred by the plaintiffs, namely, the price of the work.

The third and possibly most important ground upon which an agent can be held liable for a breach of contract transacted by him on behalf of a principal is where the agent has personally engaged himself by such contract, even though he has also bound his principal. It is a perplexing question, as may be seen from an examination of the decided cases,[145] whether in any given instance an agent has effected such personal liability. Recent cases reveal once again the difficulties inherent in this issue. In several, the court found that the agent was liable in this way[146] but in others it came to the opposite conclusion.[147] Everything, of course, depends upon the precise facts of the case. It is, after all, the intention of the parties, as manifested in the documents in which the contract is contained or the statements made by the parties from which the contract is deduced or constructed, that governs this. As recent decisions show, the knowledge or belief of the third party may be of extreme importance. If the third party is unaware of the alleged principal's existence, or unaware that the agent was contracting for such principal, the probable consequence will be that the agent is personally liable.[148] If the third party knows and understands that the agent is agreeing to the contract as an agent, and not otherwise, it will be very difficult, if not impossible, for the third party subsequently to argue that the agent was contracting personally.[149] For present purposes, it seems unnecessary to proceed beyond these simple propositions.

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[145] G. FRIDMAN, *supra* note 20, at 178-82.

[146] Domfab Ltd. v. Ross, 22 N.S.R. (2d) 185, at 194, 31 A.P.R. 185, at 194 (S.C. 1976); Blackwood Hodge Atlantic Ltd. v. Connolly, 25 N.S.R. (2d) 621, 36 A.P.R. 621 (S.C. 1977); Lundrigan v. Pierce, 29 N.S.R. (2d) 648, 45 A.P.R. 648 (S.C. 1978); Rent Rite Truck Rentals Ltd. v. André Industries Ltd., 18 A.R. 353 (Dist. C. 1978); McNulty Cartage Ltd. v. McManus, 29 N.B.R. (2d) 332, 66 A.P.R. 332 (Q.B. 1980); Double D. Boiler Repairs Ltd. v. Granville Assocs., 37 N.S.R. (2d) 534, 67 A.P.R. 534 (S.C. 1979); W. Rodgerson's Insulators Ltd. v. Bezanson, 39 N.S.R. (2d) 81, 71 A.P.R. 81 (C.A. 1979).

[147] Sabb Inc. v. Shipping Ltd., [1979] 1 F.C. 461 (App. D. 1978); *General Motors Acceptance Corp.*, *supra* note 141; C.I.B.C. v. Vopni, [1978] 4 W.W.R. 76, 86 D.L.R. (3d) 383 (Man. Q.B.); *Delta Constr.*, *supra* note 143.

[148] *Blackwood Hodge Atlantic Ltd.*, *supra* note 146; *McNulty Cartage Ltd.*, *supra* note 146.

[149] *A.E. LePage*, *supra* note 141.

E. *Termination*

One aspect of the termination of an agent's authority has already been discussed: the question whether an agent is entitled to commission in respect of activities for which the agent is responsible (and for which he would have earned commission had they come to fruition while he was still an agent), when the benefit of those activities is not felt by, or does not accrue to, the principal until after the date when the agent ceases to be in the service of the principal.[150] In the present context, what must be considered is the way in which recent decisions have approached and dealt with the ways in which the agency relationship is ended. Three particular problems have come before the courts during the period under review: termination by notice, termination as a consequence of the principal's acts which render the agency no longer feasible or necessary, and termination by reason of the death of the principal.

In *Dart & Oliphant Holdings Ltd. v. Yamaha Motor Canada Ltd.*[151] the plaintiff was a motorcycle dealer and the defendant the distributor of the product in which the plaintiff dealt. For several years the plaintiff had dealt in the defendant's product, and the system of merchandising had never varied. However, there was never any written agreement between the parties. In March 1976 the defendant cancelled the dealership without any notice. This was shortly before the busiest sales period of the year. In these circumstances O'Byrne J. of the Alberta Supreme Court gave the plaintiff damages of $4,000 representing the loss to it during the period of "reasonable" notice of termination of the dealership to which the learned judge thought the plaintiff was entitled. Although there was no written agreement, and *a fortiori* no express term as to the duration of the dealership and the period of notice required for its cancellation, the judge thought that some term along the lines of "reasonable" notice could be implied. As His Lordship said at one point: "[M]any terms are obvious in the implicit working arrangements which existed over a period of many years".[152] By way of contrast, in a more recent case from Newfoundland,[153] the agent seeking to terminate an agency relationship gave thirty days' notice. The issue was whether the agreement between the parties (one that was not in writing but involved the plaintiff, as agent, distributing goods manufactured by the defendant, the principal) could be ended by either party giving such notice or only by mutual consent. Mahoney J. concluded that the former was the right approach to adopt. He found also that thirty days was a reasonable period of notice, having regard to the fact that business was transacted between the parties on the basis that the payment of money by one to the other was made every thirty days. In this instance, as in the one previously discussed, the court

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[150] *See* text accompanying notes 82-86 *supra*.

[151] 10 A.R. 366 (S.C. 1977).

[152] *Id.* at 368.

[153] Pratt Representatives (Newfoundland) Ltd. v. Hostess Food Products Ltd., 18 Nfld. & P.E.I.R. 412, 47 A.P.R. 412 (Nfld. S.C. 1978).

was obliged to attempt to understand the commercial background and to interpret and give effect to the actual course of dealing between the parties, in order to appreciate the terms upon which they had agreed implicitly even if not expressly. Such a task is not an enviable one for a court. Perhaps parties should make every effort, as for the most part they do, to avoid the necessity for courts to cope with such problems, by seeing to it that their business dealings are properly and adequately provided for in an appropriate written contract.

A possibly more intriguing problem was raised in *Woodpulp Inc. (Canada) v. Jannock Industries Ltd.*[154] This relates to the vexed question of whether the principal is allowed to terminate the agency without incurring any responsibility for loss resulting to the agent in the form of loss of opportunity to earn commission.[155] Unless some express contractual term obliges the principal to continue to pay the agent's commission,[156] the agency contract will be terminated by frustration should something happen that renders the continuation of the agency impossible, where the event occurred without the direct intervention of the principal (for example, the destruction of his business by fire). If the principal himself makes continuation of the agency impossible by closing down his business, can the same result occur? *Rhodes v. Forwood*[157] was a case which said that it would if the principal had not bound himself by contract to continue to make payments or to carry on his business for any stipulated period. This was the situation in this recent New Brunswick case. The defendant, a manufacturer of woodpulp, agreed in 1971 that the plaintiff would sell its woodpulp as the defendant's agent until 1976. It guaranteed that it would make 70,000 tons of woodpulp available to the agent per year. At the end of 1974, however, the defendant sold its pulp mill and purported to terminate the plaintiff's agency. It was held that this constituted a breach of contract by the defendant, although, on appeal, the plaintiff's damages were reduced by more than $100,000. The effect of the express language of the contract, according to Hughes C.J., delivering the judgment of the Court of Appeal,[158] was that although the defendant had not impliedly undertaken not to sell the mill, it could not do so without providing that the purchaser of the mill perform the defendant's undertaking with the plaintiff with respect to the allocation of the product of the mill during the term of the agency agreement. Failure to do so rendered the defendant liable for breach of the undertaking while the agency agreement remained enforceable. *Rhodes v. Forwood*[159] was distinguished, as it was in

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[154] 26 N.B.R. (2d) 358, 55 A.P.R. 358 (C.A. 1979).

[155] G. FRIDMAN, *supra* note 20, at 307-08.

[156] Turner v. Goldsmith, [1891] 1 Q.B. 544, [1891-4] All E.R. Rep. 384 (C.A. 1891); Devonald v. Rosser & Sons, [1906] 2 K.B. 728, [1904-7] All E.R. Rep. 988 (C.A. 1906).

[157] 1 App. Cas. 256, [1874-80] All E.R. Rep. 476 (H.L. 1876).

[158] *Supra* note 154, at 375-76, 55 A.P.R. at 375-76.

[159] *Supra* note 157.

Turner v. Goldsmith.[160] The problem seems to resolve itself into one of construction of contract (much like the whole issue of the agent's commission and the issue of frustration of contract).

However, the effect of death upon the agency relationship is not a matter of construction of contract; it is a question of law. As pointed out by Tallis J. of the North West Territories Supreme Court in *McCallum v. Trans North Turbo Air (1971) Ltd.*,[161] relying on some remarks of Addy J. in the Ontario case of *Wilkinson v. Young*,[162] except in cases of irrevocable authority,[163] the death of the principal terminates a contract of agency.[164] In the *Wilkinson* case, Addy J. appeared to be referring to cases of gratuitous agency created for the benefit of the principal. An agency between solicitors and client was not to secure an interest of the agent, that is the solicitors, and was therefore not an irrevocable agency. On the basis of this and other authority which, it is suggested, ought not to be confined only to instances of gratuitous agency, Tallis J. held that the death of a client terminated the authority of the solicitors to accept a proffered payment to the deceased in settlement of an action for damages which the deceased, through the solicitors, was bringing against the defendants as a result of an aircraft accident in which the deceased was injured. It should be noted that at the material time the solicitors knew that the deceased, their client, had died, but this fact had not been disclosed to the clerk of the court or to the defendant's solicitors, who had arranged for payment into court. Would the situation have been the same if the deceased's solicitors had had no knowledge of his death? Tallis J. did not deal with this. On the analogy of cases involving the mental incompetence of a principal after creation of an agency relationship, the question is open. Some authorities suggest that insanity terminates agency regardless of the agent's knowledge of the principal's mental state,[165] and that death has the same consequence.[166] Others say that an agent who acts in ignorance of his principal's insanity can bind his principal,[167] and lack of knowledge of the principal's death can, and should, have the same effect.[168] Can the principles of estoppel operate

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[160] *Supra* note 156.

[161] 8 C.P.C. 1 (N.W.T.S.C. 1978).

[162] [1972] 2 O.R. 239, at 240, 25 D.L.R. (3d) 275, at 276 (H.C.).

[163] *See* G. FRIDMAN, *supra* note 20, at 305-06.

[164] The limited exception to this, contained in The Powers of Attorney Act, R.S.O. 1970, c. 357, s. 1, was repealed by The Powers of Attorney Act, 1979, S.O. 1979, c. 107, s. 11.

[165] Yonge v. Toynbee, [1910] K.B. 215, [1908-10] All E.R. Rep. 204 (C.A. 1909). As to powers of attorney in Ontario, *see* now the Powers of Attorney Act, R.S.O. 1980, c. 386, ss. 4-8.

[166] Blades v. Free, 9 B. & C. 167, 109 E.R. 63 (K.B. 1829).

[167] Drew v. Nunn, 4 Q.B.D. 661, [1874-80] All E.R. Rep. 1144 (C.A. 1879); *Re* Parks, 8 D.L.R. (2d) 155 (N.B.C.A. 1956).

[168] Smout v. Ilbery, 10 M. & W. 1, 125 E.R. 357 (Ex. 1842).

against the estate of a deceased or insane principal? Should they do so? The answers to these questions are far from clear.[169]

F. *Some Particular Issues*

1. *Powers of Attorney*

In *Findlay v. Butler*,[170] Dickson J. of the New Brunswick Supreme Court held that a power of attorney under which an attorney was authorized to sell a house included the power to execute a deed to property in favour of the purchaser. It so happened that the question did not need to be determined since the principals had ratified the execution of the deed by accepting the purchase price with knowledge of what the attorney had done.

More important than any decision, however, is the change in the law in Ontario, as a result of a report of the Ontario Law Reform Commission,[171] part of which was enacted by legislation. The statute in question is The Powers of Attorney Act, 1979,[172] which repealed the earlier statute on the same subject.[173] The recent Act achieves a number of reforms. It sets out a possible form for a general power of attorney, under which the attorney can do anything that the donor of the power could lawfully do by an attorney.[174] It provides for the protection of those dealing with an attorney, as against the donor of the power or his estate, if the attorney acts after the termination of the power. The attorney will also be protected as long as he and any third party act in good faith and in ignorance of the termination.[175] The most important provision of the Act[176] relates is to the exercise of a power of attorney during the legal incapacity of the donor. Such legal incapacity is limited to mental infirmity.[177] A power of attorney may now specifically provide that the power may be exercised during any subsequent infirmity;[178] immediate termination of the power in such circumstances[179] is no longer the law. A power containing this provision may be revoked by the donor at any time

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[169] Hence, presumably, the protection in Ontario under the provisions of the Powers of Attorney Act, R.S.O. 1980, c. 386, s. 3, of parties dealing with an agent acting under a power of attorney which has been terminated.

[170] 19 N.B.R. (2d) 473, 30 A.P.R. 473 (S.C. 1977).

[171] ONTARIO LAW REFORM COMMISSION, REPORT ON POWERS OF ATTORNEY (1972).

[172] R.S.O. 1980, c. 386.

[173] R.S.O. 1970, c. 357.

[174] R.S.O. 1980, c. 386, s. 2.

[175] S. 3(1). Note the special provisions relating to rights to money paid in exercise of the power: *see* s. 3(2).

[176] Ss. 5-10. These sections apply notwithstanding any agreement or waiver to the contrary: *see* s. 4.

[177] S. 1(*b*); *see also McCallum*, *supra* note 161.

[178] S. 5. As to witness of the execution of such power, *see* s. 6.

[179] *See* text accompanying notes 165-69 *supra*.

while he has legal capacity.[180] Where a power contains such a provision, it will be invalid, despite the provision, if the donor has been judicially declared mentally incompetent and a committee has been appointed for such donor.[181] The same applies where an order has been made under the Mental Incompetency Act to the effect that the donor is incapable of managing his affairs, and a person having the powers of a committee has been appointed[182] or the Public Trustee becomes committee of the donor's estate.[183] Other provisions of the Act deal with the right of those having an interest in the donor's estate (once the donor is incapable) and others, when permitted by the court, to apply to the surrogate court for an order relating to passing of accounts by the attorney[184] or for the substitution of another attorney for the attorney named in the power.[185]

2. *Undisclosed Principals*

The device of undisclosed agency may have its uses and may be employed under certain conditions. The cases indicate that those conditions are very rigorous and that the law treats the notion of undisclosed agency as anomalous and not easily or readily recognized.[186] Some recent cases are a testimonial to the law's prejudice against allowing a party to allege that he was acting as agent for an undisclosed principal or that he was the undisclosed principal for whom an ostensible party to a contract was, in truth, acting at all material times.

In *Vancouver Equipment Corp. v. Sun Valley Contracting Ltd.*,[187] one company amalgamated with another company with the latter still carrying on the former's business using the former company's name. The litigation under discussion stemmed from a contract made with the defendant by the new company acting under the name of the old pre-amalgamation company. By the time the litigation was commenced the old company, which had been dormant for several years, had been struck off the provincial register of companies. The defendant applied to have the writ set aside or for the proceedings to be stayed. The plaintiff company applied to have the new company substituted as the plaintiff by virtue of the doctrine of undisclosed principal. After citing earlier British Columbia authority,[188] the learned trial judge of the British Columbia Supreme Court held that the circumstances did not reveal that the defendant believed that it was contracting with anyone other than the

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[180] S. 7.
[181] S. 8(*a*).
[182] S. 8(*b*).
[183] S. 8(*c*).
[184] S. 9.
[185] S. 10.
[186] *See* G. FRIDMAN, *supra* note 20, at 191-202.
[187] 16 B.C.L.R. 362 (S.C. 1979).
[188] Baker v. MacGregor, 20 B.C.L.R. 15, [1914] 6 W.W.R. 132 (C.A.); Van Hemelryck v. New Westminster Constr. Co., [1920] 3 W.W.R. 709, 55 D.L.R. 589 (B.C.C.A.).

plaintiff, *i.e.*, the dormant, older company. Hence the judge refused the plaintiff company's application, and allowed the application for a stay on the part of the defendant company, thereby necessitating the resuscitation of the older company on the provincial register.

So, too, in *Jones v. Young*[189] the New Brunswick Court of Appeal, reversing the judgment of Richards J. at first instance, held that parol evidence was not admissible to establish that a husband who had signed an agreement for the purchase of a house of which the spouses were joint tenants was acting as his wife's agent, she being an undisclosed principal. However, proof of agency was not necessary on the facts of the case. The sellers were unable to enforce the contract of purchase because a term as to a septic tank was a condition and not a warranty, which meant that the fact that the tank was defective permitted the purchaser to rescind. What is relevant in the present context, however, is the reluctance of the court, in view of older English authority,[190] to allow anyone but the named party and signatory on a contract to be revealed as a party without actual, specific participation and acknowledgement.

Even where there was an allegation of fraud on the part of a plaintiff, and it was argued that to prevent financial harm to the plaintiff the court should look behind the forms and determine that a mortgagor (a limited liability company) was really purchasing property and mortgaging it on behalf of the individual who owned the company, which was a holding company with no assets of its own, such individual being the undisclosed principal of the company, the court was unwilling to invoke the doctrine. Instead Stevenson J. of the New Brunswick Queen's Bench held that the financial organization of the various defendants and their relationships were all quite proper: the use of the limited liability company was permitted by the law to avoid or limit personal liability. It did not make sense and was not necessary to find that the holding company was the agent for an undisclosed principal.[191]

III. Negotiable Instruments

Developments in this part of commercial law have largely occurred through the case law. Before discussing these, however, mention should be made of an amendment to the Bills of Exchange Act that came into force on 1 December 1980. This was achieved by a provision of the Banks and Banking Law Revision Act, 1980.[192] In Part V of that statute, which *inter alia* replaced the Bank Act by a new statute, Part III of the

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[189] 21 N.B.R. (2d) 480, 37 A.P.R. 480 (C.A. 1978).

[190] Humble v. Hunter, 12 Q.B. 310, [1843-60] All E.R. Rep. 468 (1848); Formby Bros. v. Formby, 102 L.T. 116, 54 Sol. J. 269 (C.A. 1910).

[191] 390346 Ont. Ltd. v. Malidav Holdings Ltd., 31 N.B.R. (2d) 72, 75 A.P.R. 72 (Q.B. 1980).

[192] S.C. 1980, c. 40, s. 92.

Bills of Exchange Act was amended by adding, immediately preceding section 165, the following provisions:

> In this Part, "bank" includes every member of the Canadian Payments Association established under the *Canadian Payments Association Act*[193] and every credit union, as defined in that Act,[194] that is a member of a central, as defined in that Act,[195] that is a member of the Canadian Payments Association.[196] [footnotes added]

Part III of the Bills of Exchange Act deals with "Cheques on a Bank". The effect of this amendment, therefore, is to widen the definition of "bank". Prior to the new enactment, "bank", for the purposes of the Bills of Exchange Act, meant "an incorporated bank or savings bank carrying on business in Canada".[197] The amendment of the Act has the effect of including under the ambit of the Bills of Exchange Act organizations that were not banks in the traditional sense. Such organizations will now be able to issue instruments which have the force and effect of cheques. Clearly, in view of the extent to which credit unions and trust companies were being used by people in everyday transactions, there was great need to amend the law to promote commercial convenience and to take into account the realities of daily life for many Canadians.

The case law over the past few years has concerned many aspects of the law of bills. Most discussions have involved cheques. There are some, however, in which promissory notes have produced problems. Although the statute contains particular provisions, in different parts, for cheques drawn on a bank and promissory notes, there are sufficient common elements in these negotiable instruments to make it unnecessary to draw such a sharp distinction for the purposes of this survey. Accordingly, reference will be made to decisions relating to both kinds of instrument.

Before the law relating to bills of exchange can be applied to any given instrument or document, it must first be determined whether the document in question falls within the definition contained in section 17(1) of the Act. Hence in *Ford Motor Credit Co. of Canada v. Hanson Ford Sales Ltd.*,[198] Osler J. of the Ontario High Court held that the provisions of section 42 of the Act (which deal with "days of grace" where a bill is not payable on demand) applied to an instrument entitled

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[193] Ss. 54-89.

[194] *See* s. 55(1) for a definition of "central co-operative credit society".

[195] *Id.*

[196] Membership of the Association is dealt with in s. 57(1), setting out the original members, and ss. 57(2), (3) and (4), setting out the organizations that can become members.

[197] Bills of Exchange Act, R.S.C. 1970, c. B-5, s. 2. *See* now the Bank Act, S.C. 1980, c. 40, ss. 2(1), 4, Schedule A; Quebec Savings Bank Act, R.S.C. 1970, c. B-4 (*amended by* S.C. 1980, c. 40, ss. 3-43). For the previous situation, *cf.* Duncan & Dist. Credit Union v. Greater Victoria Sav. Credit Union, [1978] 3 W.W.R. 570 (B.C.S.C.).

[198] 7 Bus. L.R. 80 (Ont. H.C. 1979).

"debenture" issued by Hanson in favour of the plaintiff company. The instrument stated that it was to be treated as a negotiable instrument. Therefore the defendant, which had guaranteed payment on the instrument, was entitled to the statutory period of grace and payment on demand could not be enforced against it as guarantor. The converse of this may be seen in the judgment of Noel J., one of the members of the Newfoundland Court of Appeal, in *Provincial Refining Co. v. Newfoundland Refining Co.*[199] There the learned judge held that an assignment of book debts, in the circumstances of the case, when given by a company, was also a promissory note. However, in an earlier decision,[200] the same court held that a note given as security for a loan was not a valid promissory note because it was not an "unconditional" promise to pay, as set out in section 176(1) of the Act. By way of contrast, in *Trans Canada Credit Corp. v. Ramsay*,[201] McQuaid J. of the Prince Edward Island Supreme Court held that the lack of any settlement of the interest rate in a note did not prevent its being regarded as a promissory note within the Act. The parties intended that the note should be a promissory note, and therefore sections 3 and 32 of the Act (which deal with completion of a note within a reasonable time, and the notion of good faith) applied to rectify an omission. In *Macleod Savings & Credit Union Ltd. v. Perrett*[202] lack of certainty as to the date when payment was due under an alleged promissory note was fatal to a party's claim that a note signed by the other party was a promissory note. Clement J.A. refused to permit extrinsic evidence to be admitted in order to elucidate what the parties intended.[203] The instrument on its face disclosed an inherent uncertainty for which the Act provided no cure.

Given that a document is a bill of exchange, there may be problems as to the kind of bill involved. In a case which was discussed in the previous survey,[204] *Canada Life Assurance Co. v. C.I.B.C.*,[205] Lerner J. and the Ontario Court of Appeal disagreed as to whether cheques issued by a party in Canada on the New York agency of a Canadian bank were inland or foreign bills. This determination had an important consequence as regards the law applicable to the situation which arose when

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[199] 20 Nfld. & P.E.I.R. 381, at 392-94, 53 A.P.R. 381, at 392-94 (Nfld. C.A. 1978).

[200] C.I.B.C. v. Curtis, 15 Nfld. & P.E.I.R. 92, 38 A.P.R. 92 (Nfld. C.A. 1978). *Cf.* Bank of Montreal v. Kon, 8 A.R. 593, [1978] 2 W.W.R. 503, 82 D.L.R. (3d) 609 (S.C.).

[201] 27 Nfld. & P.E.I.R. 144, 74 A.P.R. 144 (P.E.I.S.C. 1980).

[202] 11 A.R. 116, [1978] 6 W.W.R. 178, 91 D.L.R. (3d) 612 (C.A.). *Cf.* Canada Permanent Trust Co. v. Kowal, 32 O.R. (2d) 37 (H.C. 1981), where a provision that on default the whole sum should immediately become due and payable at the option of the holder did not prevent the note from being effective.

[203] Citing in support, *id.* at 116, [1978] 6 W.W.R. at 180, Fridman, *Annual Survey of Canadian Law: Commercial Law*, 10 OTTAWA L. REV. 127, at 158 (1978).

[204] Fridman, *id.* at 163.

[205] 14 O.R. (2d) 777, 74 D.L.R. (3d) 599 (C.A. 1976), *rev'g* 8 O.R. (2d) 210, 57 D.L.R. (3d) 498 (H.C. 1975).

endorsements were forged. Lerner J. held that the cheques were inland bills; therefore the Canadian statute applied and the bank had no defence to an action brought after the bank had cashed the cheques. The Court of Appeal held that they were foreign bills and therefore New York law applied to give the bank a complete defence. The Supreme Court of Canada has now heard an appeal from this decision and has upheld the Ontario Court of Appeal.[206] In the opinion of Estey J., who delivered the judgment of the full court, the bills were foreign bills within the meaning of the Act because the cheques were not drawn within Canada upon a person resident therein. Under the Act a bank may be a person resident in more than one place. In this instance the bank was resident in the United States, at the agency upon which the cheques were drawn. Even though a Canadian bank was involved, the drawee of the cheque was a foreign resident. In arriving at this conclusion, Estey J. relied upon English decisions which interpreted the meaning of the word "residence" in slightly different contexts for the purposes of taxation statutes[207] and for the purposes of deciding the proper place for presentment of cheques, where the place of payment was a branch of a bank which had more than one branch.[208] Moreover, the analysis by Estey J. of the general design and purpose of the Bills of Exchange Act[209] led him to conclude that the intention of Parliament was to limit inland bills "in the case of cheques to those which are drawn within Canada . . . and which are directed to a bank in Canada".[210] Here the parties recognized that the cheque was directed to the New York agency of the bank. The fact that the head office of the bank was in Canada did not alter the real situation. The fact that a bank may have many residences[211] was something which was of great importance, as Lerner J. had accepted but had not given effect to in his judgment. Thus, it would seem that in determining the status of a bill of exchange, high regard must be given to the intention of the parties insofar as they have indicated, by the way the bill is drawn, the place with which they meant the bill to have the greatest connection. There appears to be more than a hint here of the doctrine in the conflict of laws that the governing law of a contract should be the law which the parties

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[206] [1979] 2 S.C.R. 669, 27 N.R. 227, 98 D.L.R. (3d) 670.

[207] Unit Constr. Co. v. Bullock, [1960] A.C. 351, [1959] 3 All E.R. 831 (H.L. 1959); Rex v. Lovitt, [1912] A.C. 212, 81 L.J.P.C. 140 (1911) (Can.).

[208] Prince v. Oriental Bank Corp., 3 A.C. 325, [1874-80] All E.R. Rep. 769 (P.C. 1878) (N.S.W.); Woodland v. Fear, 7 E. & B. 519, 26 L.J.Q.B. 202 (1857). *See also* Bank of Montreal v. Dominion Bank, 60 D.L.R. 403 (Ont. Cty. Ct. 1921). *But see* the remarks of Estey J. on the dangers of adopting principles laid down by courts dealing with taxation or other statutes which happen to employ the same terminology: *supra* note 206, at 681, 27 N.R. at 238, 98 D.L.R (3d) at 678, citing *Ex parte* Breull, 16 Ch. D. 484, [1874-80] All E.R. Rep. 646 (C.A. 1880); Naef v. Mutter, 31 L.J.C.P. 357, 10 W.R. 758 (1862).

[209] *Supra* note 206, at 681-83, 27 N.R. at 238-40, 98 D.L.R. (3d) at 679-81.

[210] *Id.* at 683, 27 N.R. at 240, 98 D.L.R. (3d) at 681.

[211] Irwin v. Bank of Montreal, 38 U.C.Q.B. 375 (1876); Bank of Toronto v. Pickering, 46 O.L.R. 289, 17 O.W.N. 161 (H.C. 1919).

intended should govern their transaction, except, possibly, where this might involve an attempt to evade some mandatory provision of a law which would otherwise affect the contract. The case is an interesting one, therefore, not only on the precise issue at hand, but also as an object lesson on how to read and interpret a statute where there are no clear words in it that are capable, in themselves, of resolving the problem.

Another kind of bill of exchange which may be created by parties, as a result of amendments to the original Act that were mentioned in the earlier survey,[212] is a "consumer note". Several recent cases have involved such bills. Whether a note or bill is a consumer note within the Act depends upon the purpose for which the note is issued. Hence the differing decisions to be found in the cases.[213] In one case, for example, *C.I.B.C. v. Perrault*,[214] a note was held not to be a consumer note because the party who had obtained money under the note had not used the money so obtained to buy the car that was in question; he had used cash obtained from other sources. In *Re MacLaren*,[215] Cowan C.J. of the Nova Scotia Supreme Court adopted the reasoning of Fulton J. of British Columbia in an earlier case,[216] to find that a certain transaction was a cash purchase of a car and did not involve a "consumer purchase" as defined in the statute. Therefore a promissory note given by the buyer of the vehicle was not a consumer note and was not invalid. This had the consequence of not invalidating a chattel mortgage given to secure repayment of the note. The buyer's trustee in bankruptcy failed in his attempt to prevent the bank which had issued the note and the mortgage from obtaining priority as a secured creditor in the buyer's bankruptcy.

It has been seen that extrinsic parol evidence may not be admitted to establish that an apparently incomplete or uncertain promissory note is in fact valid because its terms are settled.[217] The strictness of the parol evidence rule also underlaid the refusal of the New Brunswick Court of Appeal, in *Trecartin Estate v. Flame Bar-B-Q Ltd.*,[218] to qualify a promissory note that was clear and obligatory by admitting evidence of a collateral agreement. By way of contrast, in *Mabey v. Mansonville Plastics Ltd.*,[219] Stratton J. of the New Brunswick Supreme Court held that a promissory note could not be enforced on its own terms because it was part of a wider agreement for the sale of a business. The note and the agreement of sale were interconnected and formed part of one transaction. Therefore extrinsic evidence was admissible to join them

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[212] Fridman, *supra* note 203, at 162, referring to the 1970 amendment adding ss. 188-92 to the Bills of Exchange Act, R.S.C. 1970 (1st Supp.), c. 4, s. 1

[213] *Cf.* Royal Bank of Canada v. Siemens, [1978] 2 W.W.R. 298, 82 D.L.R. (3d) 527 (B.C. Cty. Ct.) and *Bank of Montreal*, *supra* note 200.

[214] 6 Man. R. (2d) 169, [1980] 6 W.W.R. 759 (Q.B.).

[215] 30 N.S.R. (2d) 694, 49 A.P.R. 694, 88 D.L.R. (3d) 222 (S.C. 1978).

[216] *Royal Bank of Canada*, *supra* note 213.

[217] *See* text accompanying note 202 *supra*.

[218] 23 N.B.R. (2d) 567, 44 A.P.R. 567 (C.A. 1978).

[219] 24 N.B.R. (2d) 689, 48 A.P.R. 689 (Q.B. 1978).

together and show that they were intended to constitute one contract. It seems very difficult to find any valid, clear difference between these cases upon which the distinction could be based.

There may be other problems connected with the validity and enforceability of a bill of exchange or promissory note. For example, a note that is tainted with illegality may not be enforced through the courts. This was held to be the case where a transaction in respect of which a note was given involved a false representation of the purchase price made to the U.S. Export-Import Bank for the purpose of increasing a loan given by that bank.[220] A signature may bind a party who signs a promissory note even if the note is signed in blank,[221] and even if the place of payment of the note is changed.[222] However, a forged endorsement will not bind a party on whom a cheque is drawn as long as the maker of the note gives the appropriate statutory notice within a year of learning of the forgery.[223] In *Bank of Montreal v. Attorney General of Quebec*,[224] the Supreme Court of Canada, reversing the lower Quebec courts, held that the Crown was bound by these provisions of the Bills of Exchange Act, because the Crown was bound by a contract to which it had given valid consent, and the transaction with the bank involved a contract. Hence the dispute between the parties was to be dealt with in accordance with commercial law and custom, including the Bills of Exchange Act. For these reasons, the Supreme Court refused to allow the government, that is, the Crown, to recover the money debited to the government's account by the bank in consequence of the payment made on the forged endorsement of the cheque. However, where the appropriate notice is given, there will be a right to recover money paid out improperly under a forged signature, unless the claimant is bound by the acts of an agent who behaved improperly. This did not occur in *Forster v. Forbes*,[225] where the plaintiff's cheque was wrongfully converted by the defendant bank as a result of improper acts by the plaintiff's agent, acting without authority. However, in *Paul v. Western Canada Lottery Foundation*,[226] the plaintiff was not able to succeed against the bank which had cashed a cheque submitted by a fraudulent person who had pretended to be the winner of a lottery ticket, thereby obtaining a cheque made out in the name of the true winner (the plaintiff). The plaintiff had an action against the lottery for negligence

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[220] Thompson v. Biensch, 3 Sask. R. 353, [1980] 6 W.W.R. 143 (C.A.).

[221] *See* Bank of Nova Scotia v. Manchur, [1978] 5 W.W.R. 323 (Man. C.A.), applying ss. 31, 32 of the Bills of Exchange Act.

[222] *See* Bank of Nova Scotia v. Hogg, 24 O.R. (2d) 494, 99 D.L.R. (3d) 729 (Cty. Ct. 1979), in which the learned county court judge held that a common law rule as to authority to complete a bill became applicable under s. 10 of the Bills of Exchange Act because this rule was not inconsistent with the strict interpretation of ss. 131 and 133.

[223] Bills of Exchange Act, s. 49(1) and (3).

[224] [1979] 1 S.C.R. 565, 25 N.R. 330, 96 D.L.R. (3d) 586 (1978).

[225] [1978] 4 W.W.R. 464 (B.C.S.C.).

[226] [1979] 1 W.W.R. 232, 92 D.L.R. (3d) 347 (Sask. Q.B. 1978).

and the foundation had an action against the bank, but the plaintiff had no part in the dealings with the cheque.

The problem of authority can arise in other ways under the Act. Thus, there may be a question whether one who signs a bill of exchange is signing in his personal capacity or as an agent for another, such as a company. If there is nothing on the bill to indicate any agency, then the signatory will be personally liable (as in the general law of agency).[227] Conversely, if an agent, previously known to be an agent, deals with a cheque made payable to his principal, and the bank pays out on such cheque, then the bank may be protected from liability to the true payee, the principal, on the ground of estoppel.[228]

With respect to parties to a bill of exchange, it was held by Cormack J. of Alberta that where a person had made herself jointly and severally liable on a promissory note, she could not require the bank in whose favour the note had been executed to proceed against her and the other joint signatory, her husband.[229] However, a widow who had signed a promissory note in favour of a bank, under which she virtually took over her deceased husband's debts, was held not liable on such note on the grounds of unconscionability or "inequality of bargaining power".[230] The plea that a transaction involving a promissory note was an unconscionable transaction under the the Unconscionable Transactions Relief Act of Ontario succeeded in *Perlmutter v. Jeffrey*,[231] in which various other defences to an action brought on the note failed to succeed. One such defence was that the defendant had signed the note only as an accommodation party. This was unsuccessful since, under section 5(2) of the Act, an accommodation party is liable to a holder of the note for value whether or not the holder knew the party in question to be an accommodation party when he took the note. As to the possibility that the payee of a bill might be fictitious, it was held by a county court judge in

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[227] Victor (Canada) Ltd. v. Farbetter Addressing & Mailing Ltd., 3 Bus. L.R. 312 (Ont. H.C. 1978). *Cf.* Royal Bank of Canada v. Lefaivre, [1979] 4 W.W.R. 70 (Sask. C.A.); Dubé v. Gray, 32 N.B.R. (2d) 709, 78 A.P.R. 709 (Q.B. 1980). *See also C.I.B.C., supra* note 147, where reliance was placed by Hewak J. upon s. 52(2) of the Bills of Exchange Act, which speaks in terms of a construction more favourable to the validity of the instrument; this would be the case where a holder in due course is concerned. With respect to the parties to the note, effect should be given to their intention in making and accepting the note.

[228] Mar-Jac Dev. Ltd. v. C.I.B.C., 4 Bus. L.R. 45 (Que. Prov. Ct. 1978).

[229] Provincial Treasurer of Alberta v. LaFrance, 13 Alta. L.R. (2d) 142 (Q.B. 1980).

[230] Royal Bank of Canada v. Hinds, 20 O.R. (2d) 613, 88 D.L.R. (3d) 428 (H.C. 1978); a common law defence presumably preserved by s. 10 of the Bills of Exchange Act, R.S.C. 1970, c. B-5.

[231] 23 O.R. (2d) 428 (H.C. 1979), on the ground that a bonus and the rate of interest made the cost of the loan that was involved rather high, which raised a triable issue under the Unconscionable Transactions Relief Act. *Cf.* Trans Canada Credit Corp. v. Ramsay, 27 Nfld. & P.E.I.R. 144, 74 A.P.R. 144 (P.E.I.S.C. 1980), where there was no inequality between an astute businessman and a moneylender and the loan in question was neither harsh nor unconscionable.

New Brunswick,[232] applying an earlier decision,[233] that if the drawer was a real person, as the finance company was in this case, and had designated an existing person as the payee, and intended that person to be the payee, it was impossible that the payee should be fictitious even though, as in this case, the payee had been impersonating someone else, a fictitious individual. Hence the plaintiff could sue on the cheque which had been negotiated to him by the impersonator in return for merchandise and cash.

Payment has its own problems. If it is alleged that the debt evidenced by a promissory note has been paid, possession of the note may be proof of such payment. At the most, however, this gives rise only to a rebuttable presumption that payment had been made.[234] A demand for payment may not have to be made, even where a promissory note is stated to be payable on demand. Such a note is a present debt, which is "at maturity" as soon as it is given, and it is payable without proof of any specific demand being made for payment.[235] With respect to payment, the provisions of section 167 of the Act may be noted, as these have been the subject of a recent Saskatchewan judgment. Under that section, a bank's duty and authority to pay a cheque drawn on it by its customer are determined, *inter alia*, by countermand of payment. In *Sparkle Wash Ltd. v. Saskatoon Credit Union Ltd.*,[236] the plaintiff company issued a cheque for $3,642, drawn on the defendant credit union. Later an official of the plaintiff company spoke to an officer of the credit union to advise that the plaintiff company wished to stop payment. In accordance with the instructions the official filled out a form, but in the amount of $3,612. The form contained a clause purporting to hold the defendant credit union harmless from inadvertent payment. Despite the form, the credit union cashed the cheque and debited the plaintiff company's account. The company sued and the credit union defended the suit on the grounds that (a) the incorrect amount on the form was the fault of the plaintiff company; and (b) the clause protected it from liability. The credit union also claimed that, having discharged a legal liability of the plaintiff company, it would be inequitable to allow the plaintiff

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[232] Kirsh Ltd. v. Household Fin. Corp., 26 N.B.R. (2d) 430, 55 A.P.R. 430 (Cty. Ct. 1979).

[233] Harley v. Bank of Toronto, [1938] O.R. 100, [1938] 2 D.L.R. 135 (C.A.); *cf.* s. 21 of the Act, and Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd., n1977] S.C.R. 456, 8 N.R. 451, 74 D.L.R. (3d) 26 (1976), on which *see* Fridman, *supra* note 203, at 161.

[234] Bank of Nova Scotia v. Beckwith, 27 N.B.R. (2d) 269, 60 A.P.R. 269 (Q.B. 1979). For the effect of receipt of a cheque and its deposit in the acount of the payee, the creditor of the drawer of the cheque, *see Re* Pacific Mobile Corp., 34 C.B.R. (2d) 8 (Que. C.S. 1979).

[235] Belows v. Dalwyn, [1978] 4 W.W.R. 630 (Man. Q.B.); National Bank of Canada v. Budovitch, 33 N.B.R. (2d) 445, 80 A.P.R. 445 (Q.B. 1981); *cf.* C.I.B.C. v. Lalonde, 6 C.P.C. 194 (Ont. H.C. 1978); Hannem v. M.N.R., 34 D.T.C. 1091, [1980] C.T.C. 2089 (Tax Rev. B.). *See* text accompanying note 247 *infra*.

[236] [1979] 2 W.W.R. 320 (Sask. Dist. C.).

company to succeed. The action appears to have proceeded solely on the potential liability of the credit union under the Bills of Exchange Act and the common law of contract. No argument was put forward on restitutionary grounds, although some decisions in England and Canada might suggest that a payment of a cheque after a "stop order" could lead to a claim for the return of such money.[237] The plaintiff company was successful because (a) under section 167 a countermand was not required to be in writing, except for the purposes of evidence and clarity; therefore the plaintiff company had fulfilled the requirements of the section, and the credit union could not rely on its provisions; (b) the error with regard to amount had been that of the credit union's clerk, not the plaintiff company's official; therefore the "hold harmless" clause was ineffective to protect the defendant credit union; and (c) since the liability of the plaintiff company to the payee of the cheque was not clear, it could not be said that the credit union had discharged its clear legal liability to the plaintiff company. Therefore no equitable doctrine operated in favour of the credit union.[238]

A bank's duty to its customer to pay a cheque drawn on it is one matter but, by virtue of section 127 of the Act, a bank is under no duty to the payee of a cheque to honour a cheque drawn upon it. This is because the cheque does not of itself operate as an assignment of funds in the account. Hence, in *Atlas Plastics Corp. v. Bank of Montreal*[239] the New Brunswick Court of Appeal held that a bank was not liable for alleged negligence in its delay in presenting a cheque for payment within a reasonable time. The plaintiff, a Missouri company, in payment for goods sold to a New Brunswick company, received a cheque drawn on the St. John branch of the defendant bank. The cheque was deposited in the plaintiff's bank in Missouri, and from there was forwarded for collection to a branch of the defendant bank in Toronto, and then to the St. John branch. Because of postal delays, by the time the cheque reached St. John the company which had drawn the cheque had failed, and the cheque was not honoured. For this the bank was not responsible. A bank is not liable for a cheque drawn on a customer's account where

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[237] Shapera v. Toronto-Dominion Bank, [1971] 1 W.W.R. 442, 17 D.L.R. (3d) 122 (Man. Q.B. 1970); Bank of Nova Scotia v. Fraser, 23 N.S.R. (2d) 562, 32 A.P.R. 562 (S.C. 1976); Toronto-Dominion Bank v. Anker Electric Motor & Equip. Co., 22 O.R. (2d) 369, 93 D.L.R. (3d) 510 (Cty. Ct. 1978); Royal Bank of Canada v. Huber, [1972] 2 W.W.R. 338, 23 D.L.R. (3d) 209 (Sask. C.A.); Bank of Montreal v. Mollegaard, 10 N.B.R. (2d) 216, 4 A.P.R. 216 (Cty. Ct. 1974); Royal Bank of Canada v. Boyce, [1966] 2 O.R. 607, 57 D.L.R. (2d) 683 (Cty. Ct.); Barclay's Bank Ltd. v. W.J. Simms, Son & Cooke (Southern) Ltd., [1980] Q.B. 677, [1979] 3 All E.R. 522 (1979). *Cf.* Toronto-Dominion Bank v. Crown Real Estate & Ins. Ltd., 7 Sask R. 58 (Dist. C. 1980). Apart from the *Shapera* case, however, these were all instances of a *bank* attempting to recover from the payee who had cashed the cheque. Does this mean that only the bank can recover, and not the customer whose account has been debited?

[238] Is this conclusive of any restitutionary claim by the customer? *Cf. Bank of Montreal*, *id.*

[239] 27 N.B.R. (2d) 625, 60 A.P.R. 625 (C.A. 1979).

there are no funds in the account at the time the cheque is presented for payment. However, a bank may be liable for negligence towards a customer or a third party such as the payee of a cheque, although in the *Atlas Plastics* case it was held at first instance that there had been no negligence. Nor was there negligence in a case[240] involving credit unions, which were not banks at the time (though they would come within the ambit of the Bills of Exchange Act by virtue of the recent amendment).[241] Here the alleged negligence consisted of delay in giving notice of dishonour. A bank may also be under an obligation to a customer, or perhaps a third party with whom the bank is negotiating, not to take unfair or undue advantage, or to act unconscionably, as is indicated by *Royal Bank of Canada v. Hinds*.[242]

Notice of dishonour, which is dealt with in sections 96 to 108 of the Act, was the subject of discussion in the recent Ontario County Court judgment of *Caisse Populaire (St. Jean Baptiste) Belle Rivière Ltée. v. Provincial Bank of Canada*.[243] As a result of some inexplicable delays, a bill which had been dishonoured was nonetheless paid, with the result that the defendant bank, in whose favour a cheque drawn on the plaintiff credit union had been issued, received a credit for the amount on the face of the cheque. The credit union's claim for the return of the sum failed because the plaintiff credit union had not given proper notice of dishonour, after knowledge of the drawer's lack of sufficient funds had come to its attention, to fulfill the requirements of the Act. Hence the endorser of the bill, *i.e.*, the defendant bank, was discharged. In contrast, in the more recent Newfoundland case of *Bank of Nova Scotia v. Pittman*,[244] where the payee of a cheque was being sued by the bank upon a branch of which the cheque in question had been drawn, the plea that notice of dishonour had not been given as required under the Act was unsuccessful and the payee, who was sued as endorser of the cheque, was held liable.

This last case is also relevant to the question of presentment for payment.[245] For the purposes of sections 85 to 95 of the Act, presentment for payment did not occur in this case until the cheque arrived at the drawer's branch of the plaintiff bank, upon which the cheque was drawn. The defendant's telephoning that branch before cashing the cheque (the endorsement and cashing of which constituted negotiation of the cheque for the purposes of section 60 the Act) in order to discover whether or not

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[240] *Duncan & Dist. Credit Union*, *supra* note 197.

[241] *See* text accompanying notes 192-97 *supra*.

[242] *Supra* note 230.

[243] 23 O.R. (2d) 742, 97 D.L.R. (3d) 527 (Cty. Ct. 1979).

[244] 22 Nfld. & P.E.I.R. 278, 58 A.P.R. 278 (Nfld. Dist. C. 1979). *Cf.* Coupar v. Cox, 42 N.S.R. (2d) 461, 77 A.P.R. 461 (Cty. Ct. 1978), where it was held that written notice of dishonour was not required.

[245] Which is not necessary where the drawer of a cheque notifies the payee that he has stopped payment: Galco Enterprises Ltd. v. Hatty, 27 N.B.R. 608, 60 A.P.R. 608 (Q.B. 1979).

there were sufficient funds on deposit in the drawer's name to satisfy the cheque was held not to constitute presentment for payment. In contrast with the situation with respect to cheques, it would seem that, where a promissory note is involved, neither demand for payment nor presentment for payment are required, despite the provisions of sections 183 and 184 of the Act, which speak of presentment for payment of such a note. Section 183 deals with presentment at a particular place and section 184 with presentment for purposes of making the endorser of such a note liable. In *C.I.B.C. v. Lalonde*,[246] Grange J. of the Ontario High Court held that it was not necessary to aver in an action on a promissory note that either demand or presentment had taken place. The execution of the note, without more, binds its maker. The same was held in the tax case,[247] in which the issue was whether the taxpayer was liable for tax when the note was delivered or at some later date. It was held that the amount in the note was due on its delivery. Presentment was not necessary for payment, although it was a prerequisite for an action. Moreover, failure to make a demand went only to the question of costs. It would appear that there is some conflict on these matters, as both the court in the *Lalonde* case and the tribunal in the tax case referred to the indecisive nature of the prior authorities.

Some recent cases have involved questions relating to the release of one of several debtors, where a bill of exchange was given either by the debtors jointly or by one debtor in settlement of a debt that was severally or jointly incurred with another party. The effect of such a release is more a matter for the general law of contract, or that of creditor and debtor, than for the law of negotiable instruments. However, it may be that the release of one debtor, *e.g.*, by the acceptance of a bill of exchange, will release the other debtor. This depends, however, upon the intention of the parties,[248] the language they use,[249] and whether or not the bill is dishonoured.[250] It should be noted that a bill of exchange will be discharged by being dishonoured.[251] It will also be discharged if it is paid in due course by or on behalf of the drawer or acceptor.[252] Furthermore, as explained by Thorson J.A., delivering the judgment of the Ontario Court of Appeal in *Bank of Nova Scotia v. Dorval*,[253] where the owners

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[246] *Supra* note 235; *cf. Coupar*, *supra* note 244, where it was held that there was no need for written notice of presentation.

[247] *Hannem*, *supra* note 235.

[248] Avco Financial Servs. v. Doyle, 24 Nfld. & P.E.I.R. 34, 65 A.P.R. 34 (P.E.I.S.C. 1979).

[249] *C.I.B.C.*, *supra* note 147.

[250] *See* text accompanying note 139 *supra*.

[251] *Royal Bank of Canada*, *supra* note 227. It then ceases to be a negotiable instrument within the meaning of the Act.

[252] Bills of Exchange Act, s. 139(1). Thus when a promissory note payable to a bank was endorsed by the defendant and the note was subsequently satisfied by the plaintiff who originally made it, the note was discharged and, since no renewal was issued, the plaintiff was unable to recover the amount paid on the note from the defendant: *Dubé*, *supra* note 227.

[253] 25 O.R. (2d) 579, 7 Bus. L.R. 263, 104 D.L.R. (3d) 121 (C.A. 1979)

of property gave a promissory note in respect of a loan made by a bank, and the bank then took a collateral mortgage on property owned by the makers of the note and subsequently foreclosed on the mortgage, the holders of the promissory note, in whose favour it was drawn, may be unable to sue on such note, even in respect of any deficiency on the loan not satisfied by the realization of the mortgaged property by sale after foreclosure. Although not provided for in the Bills of Exchange Act, this would also appear to be a form or mode of discharging a bill.

The final matter to be considered is that of "holders in due course". A holder of a bill is the payee, as are the endorsee of a bill in possession of it and the person in possession of a bill payable to bearer.[254] The rights and powers of such holders are set out in section 74 of the Act, which also delineates the rights of holders in due course, the nature and definition of whom are provided in sections 56 to 59. The application of these provisions depends upon whether a party who sues on a note, or otherwise seeks to enforce it, is a mere "holder" or comes within the more protected status of "holder in due course". In the earlier survey[255] it was seen that there had been some difference of opinion in Canadian courts over the question whether the original payee of a bill (who is undoubtedly a holder) can legitimately claim to be a holder in due course. In two more recent cases the meaning of these terms was relevant. In *Dubé v. Gray*,[256] it was held that the maker of a promissory note could not be a holder and, therefore, *a fortiori* he could not be a holder in due course, although that issue does not appear to have been material on the facts of the case. In *Coupar v. Cox*,[257] the original payee of a promissory note was again held not to be a holder in due course. Nor can a third party, one who is not the original payee, be regarded as a holder in due course, if he has not taken the bill in good faith.[258] Hence in *Highland Park Honda Ltd. v. Chuka*,[259] the appellant did not come within the statutory definition. The facts in this case involved the sale of a car financed by a loan from a finance company that was accompanied by a promissory note secured by a chattel mortgage. The car was ultimately sold to the appellant, who then sold it to a customer. Later the appellant discovered that a chattel mortgage existed, whereupon he paid off the mortgage to the finance company and took an assignment of the mortgage and the promissory note.[260] Since the appellant had appropriated the car at the time of the assignments, the Saskatchewan Court of Appeal held that, in these circumstances, the appellant was not entitled to the protection of the Act as a holder in due course. Brownridge J.A.

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[254] Bills of Exchange Act, s. 2.

[255] Fridman, *supra* note 203, at 160.

[256] *Supra* note 227.

[257] *Supra* note 244.

[258] Bills of Exchange Act, s. 56(1)(*b*).

[259] [1978] 6 W.W.R. 112 (Sask. C.A.).

[260] On the difference between "negotiation" of a bill under the Act and "assignment", *see* Gencab of Canada Ltd. v. Murray-Jensen Mfg. Ltd., 29 O.R. (2d) 552, 114 D.L.R. (3d) 92 (H.C. 1980).

dissented on this point,[261] finding that there was no evidence that the appellant had notice of the equity claimed by the original maker of the promissory note before the car was sold to the appellant's customer. The real issue concerned the question whether the maker of the note had transferred his equity in the car to another person so that such person could transfer it to the appellant. This was the case and therefore no ground existed for denying the appellant the status of holder in due course. Similarly, in *C.I.B.C. v. Burman*[262] a bank which cashed a post-dated cheque before its ostensible date was not a holder in due course because the drawer could countermand payment before such date, as indeed had occurred in this case.

By way of contrast, several other recent decisions may be cited in which parties have been held to be holders in due course. This was so in one instance[263] where the bank claiming such status after cashing a cheque had inquired of the maker's bank whether there were sufficient funds, and then cashed the cheque although told that there were not. Since the drawer's bank had advised that the maker was a valued customer and arrangements would be made to cover the cheque, the paying bank was held to have acted in good faith and without notice of any defect in the bill.[264] Similar lack of knowledge of the defective nature of a bill enabled a bank to recover, as a holder in due course, after crediting the bill to the account of the payee.[265] In another case, *I.A.C. Ltd. v. Donald E. Hirtle Transport Ltd.*,[266] the plaintiff finance company was the assignee of a promissory note made by the purchaser of a trailer. Both parties knew that the trailer would not be delivered until a later date. It was never delivered, and the purchaser defaulted on the note. It was held by the Nova Scotia Court of Appeal, upholding the trial judge, that the finance company was a holder in due course and could enforce the note. Moreover, in *Galco Enterprises Ltd. v. Hatty*,[267] Stratton J. of the New Brunswick Court of Queen's Bench held that a holder of a cheque which had been endorsed to him could be a holder in due course, even though such holder had given no consideration for the cheque, as long as some previous holder had given consideration, in the form of postponement of a floating charge. The creditor of a mortgagor had agreed to do so in return for the issuance of the cheque by the mortgagor. Therefore, the concept of holder in due course, although it has been long established in mercantile law and under legislation dealing with

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[261] *Supra* note 259, at 114-15.

[262] 38 N.S.R. (2d) 262, 69 A.P.R. 262 (Cty. Ct. 1979).

[263] Royal Bank of Canada v. Hickey, 12 A.R. 603 (Dist. C. 1978).

[264] *Cf.* the facts in Bank of Nova Scotia v. Taylor, 27 N.B.R. (2d) 14, 60 A.P.R. 14 (Cty. Ct. 1979); *Bank of Nova Scotia*, *supra* note 244.

[265] Caisse Populaire (St. Jean Baptiste) Belle Rivière Ltée. v. A & L. Auto Wreckers Ltd., 18 O.R. (2d) 344, 82 D.L.R. (3d) 766 (H.C. 1978).

[266] 29 N.S.R. (2d) 482, 45 A.P.R. 482 (C.A. 1978); *cf.* Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd. (No. 2), 8 Bus. L.R. 238, 108 D.L.R. (3d) 585 (B.C S.C 1979).

[267] 27 N.B.R. (2d) 608, 60 A.P.R. 608 (Q.B. 1979). *Cf.* Hoeller v. Roberts, 19 B.C.L.R. 333 (Cty. Ct. 1979).

negotiable instruments, is still capable of causing problems of a legal and factual kind for courts.

IV. Sale of Goods

During the last few years some provinces have enacted legislation affecting certain kinds of contracts for the sale of goods. For example, Newfoundland now possesses a statute[268] which seeks to regulate unfair business or trade practices along the lines of similar statutes in Alberta, British Columbia, Ontario and Prince Edward Island.[269] In 1978, Ontario prohibited pyramidic sales by repealing the earlier Pyramidic Sales Act, 1972.[270] Perhaps the most important legislative changes directly affecting the sale of goods have occurred in Saskatchewan and New Brunswick. The Saskatchewan Consumer Products Warranties Act[271] was passed to give greater protection to purchasers of "consumer" goods participating in "consumer sales". The Act broadens the scope of the notion of "warranties" and gives rights of action to the buyer for breaches of such warranties, over and above any rights of actions stemming from the common law or the provincial sale of goods act. Further protection is afforded by means of statutory provisions dealing with the obligation of the seller to make good a breach. He must pay damages in respect of loss suffered by the buyer, whether or not the breach was remedied; he must pay the cost of any remedy obtained by the buyer from someone other than the original seller. In addition, the buyer may be able to reject goods for a substantial breach or one that is not remediable. The New Brunswick Consumer Product Warranty and Liability Act[272] also extends the meaning and scope of express warranties in consumer transactions, and provides for remedies in addition to those otherwise available to the buyer under the provincial sale of goods act. The effect of these statutes, the scope and contents of which have been discussed in greater detail elsewhere,[273] is to improve the situation of

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[268] The Trade Practices Act, S.N. 1978, c. 10.

[269] Alberta: The Unfair Trade Practices Act, S.A. 1975 (2d sess.), c. 33 (*as amended by* S.A. 1976, c. 54); British Columbia: Trade Practice Act, R.S.B.C. 1979, c. 406; Ontario: Business Practices Act, R.S.O. 1980, c. 55; Prince Edward Island: Business Practices Act, S.P.E.I. 1977, c. 31. For a comment on these Acts, *see* Schwartz, *Annual Survey of Canadian Law: Contracts*, 8 Ottawa L. Rev. 588, at 589-95 (1976). *See also* G. Fridman, *supra* note 129, at 476-78.

[270] The Pyramidic Sales Act, 1972, S.O. 1972, c. 57 (*repealed by* S.O. 1978, c. 105).

[271] R.S.S. 1978, c. C-30 (*as amended by* Bill 44, Leg. Sask., 1980-81: still awaiting proclamation).

[272] S.N.B. 1978, c. C-18.1 (*as amended by* S.N.B. 1980, c. 12). The original Act, except for s. 6, was proclaimed in force 1 Jan. 1981. For a recent application of the Act, *see* Audet v. Central Motors Ltd., 35 N.B.R. (2d) 143, 88 A.P.R. 143 (Q.B. 1981).

[273] G. Fridman, *supra* note 129, at 183-85, 472-76.

buyers who fall within the statutorily defined category of "consumer purchasers", distinguishing them from buyers of a more commercial or industrial kind. In these two provinces, therefore, the law relating to sales of goods must not be understood to go beyond what is contained in their sale of goods acts and the common law. The latter operates to regulate the nature, scope and content of the contract of sale of goods and the remedies which may be available where a party has incurred loss as a result of a breach of such contract.

Worthy of note is the recent report on sale of goods of the Ontario Law Reform Commission.[274] This extensive and complex document critically examines the present law of sale of goods in the province and makes recommendations for its revision. In place of the present sale of goods act, the Commission recommends the passage of a new act, far more detailed and elaborate than the existing statute, that will have its foundations in Article 2 of the Uniform Commercial Code.[275] It is open to question whether this report and the statute it proposes will meet with complete approval, or will lead to legislative changes that would alter materially the classic and long accepted law of the sale of goods. However, for anyone interested in and concerned about the present law and its possible shortcomings, this study is essential reading.

The remainder of this discussion on developments in the law of sale of goods over the past few years is concerned with decisions of Canadian courts in which the provisions of the various provincial sale of goods acts and the common law have been the subject of comment, analysis and application. For this purpose it is useful to consider the case law under various headings.

A. *The Contract of Sale and its Formation*

Under this general rubric some recent cases involving the following issues will be examined: whether a contract is a contract of sale or a contract for goods and materials; by what system of law a particular contract of sale of goods is governed; the capacity of an infant to enter into a valid contract of sale of goods; and the statutory requirements as to writing in the case of certain contracts for the sale of goods.

1. *Contract of Sale or Contract for Work and Materials?*

In *McNeil v. Ja Ron Construction Co.*[276] the familiar problem of differentiating between a contract for the sale of goods and one for work and materials arose once again. The plaintiff hired a contractor to build a

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[274] ONTARIO LAW REFORM COMMISSION, REPORT ON SALE OF GOODS (D.M. da Costa Chairman 1979) [hereafter cited as REPORT].

[275] U.C.C. s. 2 (1972). Note that in the projected revision the American code is not closely followed.

[276] 35 N.S.R. (2d) 150, 62 A.P.R. 150 (S.C. 1979).

house. The defendant was a subcontractor who agreed to construct the septic system. Because the defendant was anxious about the payment for its work, the pipe and tanks for the septic system were place *in situ* but were neither connected nor covered over. Later the defendant placed sand and gravel in the excavations. The defendant was not paid so it returned and removed the materials in question. The plaintiff sued the defendant unsuccessfully for trespass. It was held that property in the pipes and tanks had not passed to the plaintiff because the septic system materials had not been affixed to the plaintiff's property. However, as regards the present context, Cowan C.J. of the Nova Scotia Supreme Court Trial Division held that this contract was not a contract for the sale of goods but one for work and materials. Hence the Sale of Goods Act had no application and no property could pass between the parties under the provisions of that Act.

Similarly, in *Air Equipment Ltd. v. Cape Construction Ltd.*,[277] the plaintiff dealer sold to the defendant an excavator that developed problems in its dipper mechanism, but the plaintiff was unable to correct the fault. The defendant therefore refused to pay for the excavator and decided to rent a replacement machine during the time the excavator was being repaired. The plaintiff sued for the cost of repairs to the excavator and the defendant counterclaimed for the cost of the replacement machine. At trial the plaintiff was successful, but the defendant's counterclaim was also allowed. It appears, therefore, by implication rather than in anything expressly said by Grant J. that the parties did not regard the contract as one of sale but as one of repair, *i.e.*, a contract for work done and materials supplied. In the Court of Appeal, however, the counterclaim was dismissed and the appeal of the dealer was allowed. The court felt that the trial judge had erred in principle in holding that the respondent was entitled to damages for the cost of the replacement excavator. There was no evidence supporting the trial judge's conclusion that the second excavator was a replacement. It was in fact retained as an additional machine.

In a recent Saskatchewan case, *Saskatoon Sand & Gravel Ltd. v. Steve*,[278] the plaintiff was permitted to enter the defendant's land to dig for and sever gravel from the soil and haul it away. The contract between these two parties was held to involve the creation of a *profit à prendre* which gave rights over, but did not involve a sale of, the gravel which was severed. Hence, the moment the gravel was removed from the soil, ownership therein passed to the donee of the *profit*, the plaintiff. The fact that under the contract the gravel had to be measured to compute the purchase price did not prevent title from passing by virtue of the Sale of Goods Act, because the sale of gravel was not a sale of goods.[279]

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[277] 42 N.S.R. (2d) 564, 77 A.P.R. 564 (C.A. 1980), *rev'g* 37 N.S.R. (2d) 217, 67 A.P.R. 217 (S.C. 1979).

[278] 97 D.L.R. (3d) 685 (Sask. C.A. 1979), *aff'g* 40 D.L.R. (3d) 248 (Q.B. 1973).

[279] For a discussion on the passing of property in contracts for the sale of goods, *see* G. FRIDMAN, *supra* note 129, at 77-110.

2. *Legal System by Which a Particular Contract is Governed*

Assuming that a contract is one involving the sale of goods,[280] it may be relevant to determine the legal system by which the contract is governed. In a country like Canada there are several jurisdictions and each has enacted its own laws on the sale of goods. Despite the similarities in these laws, there are differences. This means the rights of the parties can vary depending on where the contract is made.

The Queen v. Thomas Equipment Ltd.[281] illustrates the importance of this point in relation to questions of jurisdiction to try an alleged offence. The accused, a New Brunswick corporation, sold farm implements to a dealer in Alberta. The accused was charged with an offence contrary to section 22(3) of the Farm Implements Act of Alberta because it failed to repurchase unused farm implements following a demand for repurchase from the dealer. The accused and the dealer had entered into a contract which governed various aspects of the sale of the accused's products and stipulated that the law of New Brunswick applied.

The vendors were convicted at trial but the conviction was overturned, upon a case stated, on the ground that the vendors were not an entity within Alberta, since they were not registered as an extra-provincial company under the Alberta Companies Act. The Appellate Division affirmed that decision on the case stated, but the Supreme Court of Canada allowed an appeal by the Crown and restored the conviction. The Court held that the fact that the contract provided that New Brunswick law was applicable did not preclude a prosecution for this offence under the Alberta statute. The agreement between the parties was subject to regulation by the Alberta statute and the accused was subject to the provisions of this statute because all the farm implements that it was called to purchase were situated in Alberta. It was not penalized under the Act for its conduct in New Brunswick but for what it failed to do in Alberta. The Court added that the accused became subject to the duties imposed by statute irrespective of the law of contract which governed the parties.

The issue as to which legal system governs a particular contract could become particularly important if Ontario enacts a new statute as recommended by the Ontario Law Reform Commission.[282] If its suggestion becomes law, there will be a significant difference between the law in Ontario and the law in other common law provinces. Experience with legislation on personal property security shows that other provinces have been slow to follow the Ontario lead, hence the

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[280] A transaction may not be a contract at all, but a gift, even though the parties purport to make it look like a contract. *See, e.g.*, Jones v. Jones' Estate, 5 Sask. R. 27, 5 E.T.R. 252 (Q.B. 1979).

[281] [1979] 2 S.C.R. 529, 26 N.R. 499, 96 D.L.R. (3d) 1.

[282] *Supra* note 274.

importance of determining the legal system applicable to a contract for the sale of goods.

3. *Capacity of Infants*

The niceties of the law relating to infants can cause many difficulties. It is not surprising, therefore, that several jurisdictions, for example, Alberta and British Columbia,[283] have recommended changes in the law of infants' contractual capacity. In *Prokopetz v. Richardson's Marina Ltd.*,[284] the British Columbia Supreme Court was faced with such a problem arising from the provisions of the British Columbia Infants Act making certain contracts by an infant absolutely "void". The infant plaintiff, a former employee of the defendant, had purchased goods and materials on credit from the latter and from other suppliers for the purposes of constructing a boat. He built the boat, tested it and found that it leaked badly. Having lost his current employment, the plaintiff stripped down the boat and moved to another town. The defendant took possession of what was left of the boat and of as much equipment as it could. The plaintiff's request that his property be returned was not responded to; he consequently sued for trespass. The defendant argued that the plaintiff had abandoned the boat and that the contract under which the plaintiff had obtained the building materials was void because of the plaintiff's infancy. However, the plaintiff's claim was successful, but only insofar as it related to those goods which had not been bought from the defendant. Macdonald J. held that the contract was void under the Infants Act; therefore, property in the goods sold by the defendant to the plaintiff did not pass, so that the defendant had the right to possession of those, but no other, goods.

4. *Statutory Requirements that the Contract be in Writing*

If there is to be a valid contract for the sale of goods, there must be a concluded agreement between the parties. In *Drummond, McCall & Co. v. Coastal Structural Steel Ltd.*,[285] Glube J. of the Nova Scotia Supreme Court held that, on the facts of the case, no agreement had ever been concluded. An important factor in this regard was that the amount of goods to be purchased had never been fixed, even though the buyer had arranged financing and shipping destinations for the steel plates which were the subject of the purported contract. In any event, the buyer's claim for breach of contract when the seller sold the steel plates to another purchaser failed on the ground that the contract had not been put

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[283] Note that some Commonwealth jurisdictions, namely New South Wales and New Zealand, have already enacted such changes.

[284] [1979] 2 W.W.R. 239, 93 D.L.R. (3d) 442 (B.C.S.C. 1978).

[285] 37 N.S.R. (2d) 239, 67 A.P.R. 239 (S.C. 1979). *See also* Alteen's Jewellers Ltd. v. Cann, 40 N.S.R. (2d) 504, 73 A.P.R. 504 (Cty. Ct. 1980), where no agreement was concluded because there was no meeting of minds on the question of consideration.

in writing, as required under section 6 of the Sale of Goods Act of Nova Scotia. The fact that the buyer arranged for funds and requested a delivery date did not amount to part performance sufficient to take the contract out of the scope of the Act so as to render writing unnecessary. On the other hand, in another case from a maritime province, *Woodville Co. (Canada) v. Neguac Shellfish Co.*,[286] it was held that even if the contract for the sale of goods was not in writing, whenever the seller actually shipped the fish to the buyer following telephone orders and a confirming telex, there was sufficient acceptance of the buyer's offer to purchase to create an exception to the rule requiring contracts to be in writing.[287] This was so even though the seller had never signed a purchase confirmation form sent to it by the buyer.

B. *Property and Title*

Questions of property or title to goods can arise either as between the original parties to a contract for the sale of goods or as between two strangers. In the latter situation, each individual asserts title in different ways: one as the original owner of goods, the other as having acquired them through someone who obtained the goods from the original owner. Different issues and different legal principles apply to each of these instances. Recent decisions furnish examples of the way in which the statutory provisions attempt to cope with the various possibilities.

1. *The Passing of Property*[288]

It was noted earlier that if the contract between the parties was void, as where the buyer was an infant and the transaction came within the British Columbia Infants Act, no property would pass.[289] This was an unusual case. For the most part these decisions are concerned with the question whether property has passed in accordance with the relevant sections of the appropriate sale of goods act.[290] This will depend, as is well known, upon the precise category into which goods fall — specific, unascertained or future — and upon the intention of the parties.[291]

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[286] 31 N.B.R. (2d) 460, 75 A.P.R. 460 (Q.B. 1980). *See also* Concrete Servs. Ltd. v. Ancroft Dev. Ltd., 44 N.S.R. (2d) 224, 83 A.P.R. 224 (S.C. 1980).

[287] *See* REPORT, *supra* note 274, vol. 1, at 110, where it is recommended that insofar as contracts for the sale of goods are concerned, there should be no requirement that they be in writing.

[288] Note the Ontario Law Reform Commission's recommendation that Ontario abandon the "lump" concept of title and adopt an "issue-oriented" approach with respect to the rights, obligations and remedies of sellers, buyers and third parties. *Id.* at 259-82.

[289] *Prokopetz*, *supra* note 284.

[290] The issue of whether property passes becomes relevant in any discussion of such subjects as risk, insurable interest, right to payment of the purchase price, right to reject, *etc.* Hence, the recommendation referred to in note 288 *supra*.

[291] *E.g.*, Jansen v. Greenwich Yachts Ltd., 28 C.B.R. (N.S.) 236 (B.C.S.C. 1978); *Re* August Leasing Ltd., 18 A.R. 338 (Dist. C. 1978).

The last few years have provided some examples of cases involving unascertained goods. For property to pass in such goods two ingredients are necessary: identification and appropriation of the goods. In *Enheat Ltd. v. Polley*[292] it was held that property did not pass at the time an agreement was signed. The goods, 250 tons of cast iron moulds, were not specifically identified or ascertained. Hence, the seller could not sue for the purchase price of the goods when the buyer failed to take delivery. Instead, the seller could sue for damages based on the market price for such moulds at a time when it would have been reasonable for him to mitigate his damages by selling them at that price. By way of contrast, in *Bolstridge v. Ervin G. Canam Ltd.*[293] the plaintiff potato farmer packaged and graded potatoes for sale with equipment and bags provided by the defendant potato dealer. The potatoes conformed with the appropriate standard when they were packaged but not when they were delivered. The buyer refused to pay for the goods pleading that they remained at the seller's risk until they reached their destination. The seller started an action for the purchase price. The court held that the contract between the parties was one for the sale of "unascertained goods" but once they were packaged, the potatoes became unconditionally appropriated to the contract. Hence, property passed and the seller was able to recover the purchase price.

Even the reservation by the buyer of the right to inspect the goods after delivery, and to reject them if defective, may not prevent the passing of property in goods which have been identified and appropriated to the contract. In one particular instance,[294] such a reservation did not prevent the passing of property under the Sale of Goods Act of Ontario, nor did it indicate a "different intention" that would displace the usual statutory presumption as to the passing of property in such goods. Property passed, subject to revesting if the goods were found to be defective.

In one final instance, the issue of property became relevant to the rights of a buyer against a carrier of goods for delivery to the buyer. In *Magna Electric & Computers Ltd. v. Speedway Express Ltd.*[295] goods were shipped "f.o.b. Montreal" from Montreal to the plaintiff, a buyer in Nova Scotia. The correct number of packages was shipped, but sixty or seventy packages never arrived. Moreover the bill of lading incorrectly described the goods as "heaters" when in fact the packages contained both heaters and thermostats. The buyer's action for failure to deliver the missing packages succeeded. This case depended in part on whether the buyer had acquired property; Jones J. of the Nova Scotia Supreme Court held that in fact property in the goods passed upon their delivery to the carrier.

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[292] 29 N.S.R. (2d) 569, 45 A.P.R. 569 (S.C. 1978).

[293] 33 N.B.R. (2d) 448, 80 A.P.R. 448 (Q.B. 1981).

[294] Pullman Trainmobile Can. Ltd. v. Hamilton Transp. Refrigeration Ltd., 23 O.R. (2d) 553, 96 D.L.R. (3d) 332 (H.C. 1979).

[295] 34 N.S.R. (2d) 704, 59 A.P.R. 704, 91 D.L.R. (3d) 310 (S.C. 1978).

2. *Title*

One way in which title may pass even though the owner has never agreed to its transfer is where goods are obtained by fraud and the true owner has not repudiated the fraudulently negotiated contract in time, *i.e.*, before the fraudulent party has disposed of the goods to an innocent third party taking for value and without notice of the fraud. The distinction is often drawn between fraud and theft. It is a distinction that depends upon the intention of the true owner of the goods. This issue arose in *Jim Spicer Chev Olds Ltd. v. Kinniburgh*.[296] A truck was purchased by the defendant by fraudulent means and was subsequently resold several times. In an action to determine who would bear the loss, the court decided in favour of the innocent third parties, on the ground that the plaintiff intended to part with the property in the truck, even though it did so only because of the fraudulent representation made to it by one of the defendants.

Another situation in which someone can acquire good title is where a buyer in possession, with the consent of the owner, purports to sell the goods to an innocent third party. This occurred in *Caledonia, Inc. v. Tractors & Equipment (1962) Ltd.*[297] In this case the plaintiff company sold some goods to the defendant Slattery. One Mr. Trainor acted as intermediary between the vendor and the buyer; he negotiated the purchase price with the plaintiff. Slattery paid the plaintiff but what he paid was not the price negotiated by Trainor. The goods were delivered to Slattery but Trainor failed to pay the full purchase price to the plaintiff. Stratton J. of the New Brunswick Court of Queen's Bench dismissed the plaintiff's action. He held that, under the Sale of Goods Act, Trainor, as a buyer in possession of the goods with the consent of the seller, transferred good title to Slattery. Since the latter acted in good faith and without notice of any rights in or over the goods possessed by the plaintiff *vis-à-vis* Trainor, he obtained a clear title.[298]

A further possibility is a sale by a mercantile agent in the usual course of his business, under both the Sale of Goods Act and the Factors Act.[299] As indicated in a recent Alberta case, *Mortimer-Rae v. Barthel*,[300] such provisions contemplate a sale "in the course of business" and not a sale of a "business". In that instance, the plaintiff

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[296] [1978] 1 W.W.R. 253 (Alta. Dist. C. 1977).

[297] 31 N.B.R. (2d) 32, 75 A.P.R. 32 (Q.B. 1980). *See also* the text accompanying note 29 *supra*.

[298] *See* the Ontario Law Reform Commission's recommendations in respect of transfer by non-owners, REPORT, *supra* note 274, vol. 2, at 283-318.

[299] *See* G. FRIDMAN, *supra* note 129, at 138-44. *See also* the suggestion by the Ontario Law Reform Commission that the Factor's Act be repealed in view of the wider exception to the *nemo dat* rule that the Commission proposes, under which title to goods entrusted to *any* merchant might be passed by a sale in the ordinary course of business of such merchant, if he deals in such goods: REPORT, *supra* note 274, vol. 2, at 298-301, 317.

[300] 11 Alta. L.R. (2d) 66, 105 D.L.R. (3d) 289 (S.C. 1979)

bought an art gallery from the defendants. No inventory was supplied by the defendants but the plaintiff provided his own, with the aid of one of the defendants. Certain paintings were said to belong to the gallery when in fact they were in the possession of the gallery on consignment. In an action by the plaintiff for damages for misrepresentation, it became necessary to decide whether or not title in these paintings had passed to him when he bought the gallery. It was held that title in the paintings remained with the artists. The Sale of Goods Act and Factors Act contemplated a sale in the course of business and not a sale of the business itself. Therefore, the plaintiff did not obtain title to the paintings and he was entitled to damages.

C. *Contents of the Contract*

Many of the cases arising out of contracts for the sale of goods revolve around the application of the law relating to representations and express and implied terms. There is a wide range of possibilities from mere representations to express terms, from collateral warranties to implied conditions. Consequently, it is hardly surprising that courts have been required more than once to determine the status of a particular statement, whether explicit or implicit and whether made as part of the contractual negotiations or to encourage the conclusion of an agreement. Moreover, the numerous statutory implied terms and their elucidation continue to plague courts in Canada, despite the long history of explication and exegesis, in this country and elsewhere, of the statutory language. It is hardly surprising, therefore, that recent legislation of the kind referred to earlier[301] has sought to eradicate some of the difficulties by revising the definition of "warranty" and by making it increasingly difficult for certain types of sellers to exclude the operation of statutory implied terms. Such legislation has also sought to revise the scope and definition of such terms. In addition, in its recent report on sale of goods,[302] the Ontario Law Reform Commission suggested similar changes in the law of representation and warranties, as well as alterations and improvements to the current statutory law. Meanwhile, decisions involving subtle differentiation and legal niceties still require discussion.

Some of these cases illustrate the problem of determining when a representation becomes part of a contract of sale so as to qualify as a "warranty" (using that term in its broadest possible sense).[303] Others involve the effect of representations upon attempts to exclude the operation of otherwise applicable express or implied warranties or

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[301] *See* text accompanying notes 271 and 272 *supra*.

[302] *Supra* note 274, vol. 1, at 135-51, 193-241.

[303] Municipal Spraying & Contracting Ltd. v. National Harbours Bd., 38 N.S.R. (2d) 39, 69 A.P.R. 39 (S.C. 1979); Selig v. Bottcher, 26 N.S.R. (2d) 347, 40 A.P.R. 347 (S.C. 1978); Bouchard v. South Park Mercury Sales Ltd., [1978] 3 W.W.R. 78, 85 D.L.R. (3d) 404 (Man. Q.B.); Wallace Constr. Specialties Ltd. v. Mihalcheon Holdings Ltd., [1979] 3 W.W.R. 145 (Sask. Dist. C.).

conditions.[304] Such exclusion may be affected by a finding that the "representation" amounts to a collateral warranty or contract. Such a finding may lead to a manufacturer's liability, since the courts now have a tendency to hold that it can be directly responsible to the buyer.[305] This responsibility is distinct from the possible or actual liability of a seller of the goods and arises when the manufacturer has produced defective goods.

In other instances, the manufacturer's liability is not founded upon an actual or implied warranty, but rather is based upon negligence in producing the goods. Liability in such instances lies in tort, not in contract,[306] and this sometimes leads to another problem: if there has been some misrepresentation or some negligence in the manufacture of the goods and the statements or conduct of the manufacturer or the seller have led to a contract for the purchase of the goods, can there be any independant tort liability despite the fact that a contract is in existence between the relevant parties? Reported cases during the period now under review have raised these questions and have not always answered them completely or satisfactorily.[307]

It must be noted that in sale of goods cases, where actions may be brought against many parties, for example, sellers, agents, manufacturers and suppliers, there may be many potential causes of action and distinct grounds upon which judgment may be granted. The law of sale of goods, at least in this particular aspect, straddles the law of contract and that of torts. It brings into play questions of contract, fraud, negligence and misrepresentation, among many others. This may explain current use of the term "products liability" as a convenient label under which problems raised by the sale or dissemination of defective goods are considered. Often, the sale of such goods results in economic or even physical loss or damage to parties who may be in a contractual relationship with someone or may be the victims of some default, without ever having been involved contractually with the party who is, or is

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[304] Arsenault v. Richman, 28 Nfld. & P.E.I.R. 259, 79 A.P.R. 259 (P.E.I.S.C. 1980).

[305] Murray v. Sperry Rand Corp., 23 O.R. (2d) 456, 96 D.L.R. (3d) 113 (H.C. 1979); *Municipal Spraying & Contracting Ltd., supra* note 303; Maughan v. International Harvester Co. of Can., 38 N.S.R. (2d) 101, 69 A.P.R. 101, 112 D.L.R. (3d) 243 (C.A. 1980); Fuller v. Ford Motor Co. of Can., 22 O.R. (2d) 764, 94 D.L.R. (3d) 127 (Cty. Ct. 1978); Wildwood Farm Servs. Int'l (1975) v. Enns, 1 Man. R. (2d) 426, [1980] 2 W.W.R. 17 (Q.B. 1979). *See also* General Motors Products of Can. Ltd v. Kravitz, [1979] 1 S.C.R. 790, 25 N.R. 271, 93 D.L.R. (3d) 481 (1978), on the effect of a conventional warranty by the manufacturer. On the issue of liability of a distributor, *see* Leitz v. Saskatoon Drug & Stationery Co., 4 Sask. R. 35, [1980] 5 W.W.R. 673, 112 D.L.R. (3d) 106 (Q.B.).

[306] Langille v. Scotia Gold Corp. Ltd., 33 N.S.R. (2d) 157, 57 A.P.R. 157 (S.C. 1978); Labrecque v. Saskatchewan Wheat Pool, 3 Sask. R. 322, [1980] 3 W.W.R. 558, 110 D.L.R. (3d) 686 (C.A.); Lavoie v. Poitras Gas & Oil Ltd., 28 N.B.R. (2d) 541, 63 A.P.R. 541 (C.A. 1979); *Fuller, id.* On negligence of a distributor, *see Leitz, id.*

[307] Wiseman v. R.C. Day Ltd., 23 Nfld. & P.E.I.R. 105, 61 A.P.R. 105 (Nfld. Dist. C. 1979); *Municipal Spraying & Contracting Ltd., supra* note 303.

alleged to be, at fault. However, more specific and detailed consideration of certain matters is merited in the light of recent decisions.

1. *Express Terms*

Where a seller or manufacturer has expressly warranted or guaranteed the quality of goods, or has stated that the goods will possess certain capabilities or features, the content of the contractual obligation is obviously much clearer. Indeed, in such situations it may not be possible for the allegedly defaulting party to rely on an exemption or exclusion clause,[308] nor may it be necessary for the buyer to invoke the doctrine of "fundamental breach" in order to achieve redress in respect of his loss.[309] As long as the status of the undertaking is plain and it can be seen to be a "warranty", the position of the buyer is sound. There may, however, be problems. First, if the warranty is alleged to have been given by the manufacturer, it may be open to question whether such warranty is binding in the sense of involving a contractual obligation. The manufacturer may be treated as not being privy to the contract between the seller and buyer, as in *Langille v. Scotia Gold Cooperative Ltd.*[310] If a manufacturer's warranty is treated as a "conventional warranty", to use the language of the Supreme Court of Canada in *General Motors Products of Canada Ltd. v. Kravitz*,[311] then the buyer will have a remedy against the manufacturer, as well as whatever remedy he has, or might have, against the seller of the goods.[312] Second, if what is involved is a written or oral warranty given by the seller to the buyer at the time of the sale, the buyer will be protected as long as he can prove that the defect amounted to a breach of such warranty and did not, for example, result from his own use or abuse of the goods.[313] The onus of establishing this fact is on the seller.[314] Third, it may be a debatable question as to whether a statement made by a seller is intended to be a warranty rather than a representation.[315] A mere representation will not give rise to liability unless there is fraud.[316] In both *Bouchard v. South Park Mercury Sales Ltd.*[317] and *Selig v. Bottcher*[318] the court had to determine whether what the seller had said was a warranty. In the former

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[308] *General Motors of Can. Ltd.*, *supra* note 305.

[309] Whittaker v. Ford Motor Co. of Can., 24 O.R. (2d) 344, 98 D.L.R. (3d) 162 (Div'l Ct. 1979); *Maughan*, *supra* note 305.

[310] *Supra* note 306; *see also Whittaker*, *id.*

[311] *Supra* note 305.

[312] *E.g.*, *Murray*, *supra* note 305; *Fuller*, *supra* note 305.

[313] McGuire v. M.M.H. Prefab Ltd., 27 N.B.R. (2d) 160, 60 A.P.R. 160 (S.C. 1979); Mallaley v. Goiziou, 27 N.B.R. (2d) 309, 60 A.P.R. 309 (S.C. 1979). *See also* Carr v. G.& B. Auto Mart Ltd., [1978] 5 W.W.R. 361, 89 D.L.R. (3d) 59 (Man. Q.B.).

[314] Bennett-Dunlop Ford Sales Ltd. v. Tait, 2 Sask. R. 281 (Dist. C. 1980).

[315] *Wallace Constr. Specialties Ltd.*, *supra* note 303.

[316] *Arsenault*, *supra* note 304.

[317] *Supra* note 303.

[318] *Id.*

case, the issue concerned the mileage previously covered by the vehicle that was being sold. In the latter case, the issue was the excellence of the engine. In both instances, it was held that, to find out whether the representation made by the vendor was a binding promise or an innocent misrepresentation, the following test must be applied: would an objective intelligent bystander reasonably infer that a warranty was intended? Both courts found that in the situations presented, the answer was positive and the buyers were successful.

One feature emerges from some of these recent cases, namely, that wherever possible, the courts are willing, indeed anxious, to extend the scope of liability to parties other than the buyer and the seller for goods which are defective. By the employment of well-known contractual devices such as collateral warranties and misrepresentation, courts in Canada have continued the process, begun in the nineteenth century, of widening a contract's reach and extending its applicability.

2. *Statutory Implied Terms*

(a) *The Right to Sell*

The implied condition that the seller has the right to sell the goods at the time of the sale was considered in *R.J. Rental v. Hynes*.[319] The plaintiff bought a Chevrolet car from the defendant; unfortunately, the car was subsequently repossessed by a prior conditional seller of whose existence the plaintiff was unaware. The plaintiff sued his seller for breach of the implied condition that the seller had the right to sell and for breach of the implied warranty that the car was free from charges and encumbrances.[320] Applying the principles outlined in textbooks and in such cases as *Rowland v. Divall*[321] and *Re Hutchinson*,[322] Steele C.J. of the Newfoundland District Court held that the plaintiff was entitled to succeed. Since the repossession by the third party had occurred correctly under the provincial Conditional Sales Act, the seller did not have the right to sell the car to the plaintiff when he did so. However, unlike what occurred in *Rowland v. Divall*, the plaintiff's receipt of the car meant that he could no longer treat what had happened as a breach of a condition; he was compelled to proceed as if what had taken place had been a breach of warranty and sue for damages.[323] However, the eventual result was the same, because the plaintiff's damages amounted to the price he had paid for the car. In addition, the use of the car enjoyed by him for the period between the date of sale and the date of repossession did not reduce his

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[319] 19 Nfld. & P.E.I.R. 444, 50 A.P.R. 444 (Nfld. Dist. C. 1978). For a discussion of the seller's right to sell, *see* G. FRIDMAN, *supra* note 129, at 114-25.

[320] The issue of implied warranty that the goods will be free from any charge or encumbrance will be discussed below: *see* text accompanying notes 324-32 *infra*

[321] [1923] 2 K.B. 500, [1923] All E.R. 270, 67 Sol. J. 703.

[322] [1977] 4 W.W.R. 547, 24 C.B.R. (N.S.) 204 (B.C.S.C.).

[323] *See* the discussion on this point in G. FRIDMAN, *supra* note 129, at 124-25

loss in any way. It is interesting to note that the plaintiff here, unlike the plaintiff in the *Rowland* case, did not argue failure of consideration, although the outcome of both cases was the same. It may be argued that, if the action by a plaintiff in a case such as this is based upon breach of condition (or breach of warranty by reason of the statutory election that has to occur in such instances), there ought to be some room for diminution of the plaintiff's damages. This could be done by taking into account any value he had obtained by his possession and use of the goods.

(b) *Freedom from Encumbrances and Quiet Possession*

Ancillary to the implied condition as to the right to sell goods are the implied warranties as to quiet possession of the goods and their freedom from any charges or encumbrances.[324] As in the *Hynes* case,[325] claims for breach of conditions are often joined with claims relating to warranties. However, there may be situations in which only a claim for breach of one or other of the implied warranties is material. For example, in *Mortimer-Rae v. Barthel*,[326] which has already been mentioned in connection with the acquisition of title under a contract of sale of goods, it was also held that, by reason of the fact that the paintings were held on consignment and belonged to the artists, the sellers of the art gallery were guilty of a breach of the implied warranty that the goods were free of charges and encumbrances.

A more interesting decision, since it involved consideration of recent English authority on the statutory provisions relating to quiet possession, is that of Osler J. of the Ontario High Court in *Gencab of Canada Ltd. v. Murray-Jensen Manufacturing Ltd.*[327] Gencab (formerly Dominion Electric Manufacturing Co.) sold certain dies, fixtures, machinery and inventories relating to the production of service entrance equipment to the defendants. The sale was financed by a down-payment and a non-negotiable promissory note payable in three installments. This note was guaranteed by the defendants, *i.e.*, the company and certain officers of the company in their personal capacities. The manufacture and sale of the patented articles by the plaintiff, Gencab, was objected to by the owner of the patent, Canadian General Electric. The latter threatened to enforce its patent rights over the major articles produced by the dies, tools, and other machinery. Gencab held a licence to produce these articles, but that licence had not been transferred to the defendant. Following this, the defendant ceased to use the articles purchased from Gencab. Three actions arose from these facts: first, Gencab sued the defendant company for the balance owing on the note; second, Gencab sued the survivors of the original guarantors for the same relief as in the

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[324] For a description of these implied warranties, *see* G. FRIDMAN, *id.* at 125-29.
[325] *Supra* note 319.
[326] *Supra* note 300.
[327] 29 O.R. (2d) 552, 114 D.L.R. (3d) 92 (H.C. 1980).

first action; finally, and this is the action which will be examined here, the defendant company sued Gencab for breach of the warranty of quiet possession. In this action, it claimed the return of money already paid as well as damages. The issue was whether the threat of action by Canadian General Electric was sufficient interference with the right of quiet enjoyment to entitle the buyer to damages. Osler J. decided in favour of the buyer. He applied the provisions of the Sale of Goods Act and followed two English decisions: *Niblett Ltd. v. Confectioners' Materials Co.*[328] and *Microbeads A.G. v. Vinhurst Road Markings Ltd.*[329] On the evidence, the learned judge was persuaded that the defendant company discontinued the use of the machinery it had purchased from Gencab, because it was afraid of a legal action by the patent holder, an action which could lead to substantial damages being awarded against it if it continued in the business. Thus, in this case, as in the English *Microbeads* case, the threat of an infringement action by a patent holder was considered to be a clear disturbance of possession and was therefore a breach of the warranty as to quiet possession. Although it was argued that the implied warranty could not apply because the defendant buyer knew of the patent and licensing agreement, the learned judge held that such knowledge did not negate the implied warranty.[330] He also held that actual dispossession was unnecessary for there to be a breach; it would be too burdensome to expect the buyer to wait until action was brought before deciding not to risk infringement of a patent.[331] Finally, Osler J. stated that the damages awarded for such breach could be set off against the amount due under the note in the action by Gencab. On the whole this appears to be a very sound and reasonable decision based firmly upon the English precedent even though, as the judge pointed out,[332] these precedents are not binding and are only persuasive having regard to the identical language of the English and Ontario Sale of Goods Act.

(c) *Correspondence with Description*

The recent Nova Scotia case of *Truro Volkswagen Ltd. v. O'Neil*[333] affords an interesting example of a car dealer bringing an action against a customer for breach of the implied condition that goods should correspond with their description. This reversal of the normal situation occurred when a customer traded in her old car in part payment of the price of a new one. The old car had been repaired previously by the dealer. On the day of the agreement, the defendant customer stated that

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[328] [1921] 3 K.B. 387, [1921] All E.R. 459, 37 T.L.R. 653 (C.A.). For a discussion of this case, *see* G. FRIDMAN, *supra* note 129, at 119-21, 125.

[329] [1975] 1 All E.R. 529, [1975] 1 W.L.R. 218, [1975] 1 Lloyd's Rep. 375 (C.A. 1974). For a discussion of this case, *see* G. FRIDMAN, *id.* at 126-27.

[330] *Supra* note 327, at 561, 114 D.L.R. (3d) at 101.

[331] *Id.*

[332] *Id.*

[333] 43 N.S.R. (2d) 558, 81 A.P.R. 558 (C.A. 1980).

her old car would be delivered to the plaintiff dealer in the same condition as it was in at that time. In fact, when it was delivered, the car was in much worse condition. Upon discovering the truth, the garage brought a successful action. At trial it was found that the description of the car given by Mrs. O'Neil was not exact; on the date of delivery, the car was not in the same condition as on the date of the agreement. This decision was upheld on appeal, although the quantum of damages was reduced. It is worthy of note that, in his judgment on behalf of the Court of Appeal, MacKeigan C.J. said that he doubted whether the sale of the trade-in vehicle was a sale "by description" within the meaning of the Sale of Goods Act.[334] With respect, such a doubt seems unwarranted, because when the customer said that her car was suffering from "the same old problem", she was giving the plaintiff a description of the state of quality of her automobile upon which he could base his decision whether or not to take the car as a trade-in. In the circumstances, can it be said that there is any material difference between describing a car as of a certain year or of a certain type (as in *Beale v. Taylor*[335]) or as being new or free from defects (as in the case of the underpants in *Grant v. Australian Knitting Mills Ltd.*[336]), and describing the car as having only "the same old problem" when, in all these cases, the seller knows that what he is saying is not true and would come as a surprise and a disappointment to the buyer? However, the issue became irrelevant, according to the learned Chief Justice, because there was an express condition in the contract of sale that the motor vehicle given in exchange should be in the same condition at the time of delivery as it was at the date of the agreement. Hence there was no need for the garage to rely on any implied term when there was a perfectly good express term upon which it could found its action.

(d) *Quality*

The bulk of the recent cases dealing with statutory implied terms involve two important conditions that relate to the quality of the goods sold: fitness for the purpose for which they have been bought and merchantability.[337]

(i) *Fitness for purpose*

Before the statutory implied condition of fitness for purpose can be applied to a given contract, various requirements have to be satisfied. There has to be knowledge by the seller of the purpose for which the

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[334] *Id.* at 562, 81 A.P.R. at 562. For a discussion of sales by description, *see* G. FRIDMAN, *supra* note 129, at 192-99.

[335] [1967] 3 All E.R. 253, [1967] 1 W.L.R. 1193, 111 Sol. J. 668 (C.A.).

[336] [1936] A.C. 85, [1935] All E.R. Rep. 209 (P.C. 1935) (Aust.).

[337] For a discussion of these two conditions, *see* G. FRIDMAN, *supra* note 129, at 203-32.

buyer required the goods, and reliance by the buyer on the seller's skill or judgment. In some recent cases, the statutory ingredients have clearly been present,[338] and the buyer has been able to pursue a remedy, either for breach of condition[339] or for breach of warranty,[340] when property in the goods had been transferred[341] or when the goods had been accepted by the buyer.

In other instances, however, it has been a matter of establishing that an essential element in the operation of the statute is present. Thus in several cases, the court found that the buyer had made known expressly to the seller the purposes for which the goods were intended,[342] although in one case, *Centennial Realties Ltd. v. Westburn Industrial Enterprises Ltd.*,[343] the buyer failed to recover. Cowan C.J. held that, despite such notification by the buyer to the seller, the former relied on his own judgment as to the suitability of the goods, and not that of the seller. Decisions can be found, therefore, on both sides of the line with respect to such reliance.[344] In one case, *Larkin v. D. Alex MacDonald Ltd.*,[345] McQuaid J. of the Prince Edward Island Supreme Court held that the fact that the buyer informed the seller of the use for which he needed the goods did not necessarily show that the buyer relied on the seller's skill or judgment. In another instance,[346] the buyer was obviously the most knowledgeable person involved in a particular transaction; therefore, reliance of the kind required by the Act could not be proven. However, as stated in one instance by Stevenson J. of the New Brunswick Supreme

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[338] *E.g.*, in *Wallace Constr. Specialties Ltd.*, *supra* note 303, the seller knew that the floor of the building was to be coloured "international orange". Also, the buyer relied on the seller's judgment that the premixed hardener and sealer would be suitable to cover the floor in question. *See also Maughan*, *supra* note 305; Arnett v. Mohacsy, 24 A.R. 414 (Q.B. 1979).

[339] *E.g.*, Curtis v. Rideout, 27 Nfld. & P.E.I.R. 392, 74 A.P.R. 392 (Nfld S.C. 1980); Borys v. Kern Hill Co-op. Ltd., 1 Man. R. 260 (Cty. Ct. 1979).

[340] *Cf.* Massey v. Mountain View Plumbing & Heating Ltd., 104 D.L.R. (3d) 575 (B.C. Cty. Ct. 1979).

[341] *See* Larkin v. D. Alex MacDonald Ltd., 23 Nfld. & P.E.I.R. 208, 61 A.P.R. 208 (P.E.I.S.C. 1979).

[342] *Murray*, *supra* note 305; *Wildwood Farm Servs. Int'l (1975) Ltd.*, *supra* note 305; Eastland Constr. Ltd. v. Gondola Point, 25 N.B.R. (2d) 129, 51 A.P.R. 129 (Q.B. 1979); Rosseway v. Canadian Kenworth Ltd., 11 A.R. 91, 6 Alta. L.R. (2d) 177 (Dist. C. 1978).

[343] 31 N.S.R. (2d) 64, 52 A.P.R. 64 (S.C. 1978).

[344] The following cases are examples of decisions where a court has found that the buyer had relied on the seller's skill and judgment: Connop v. Canadian Car Div. Hawker Siddeley Can. Ltd., 24 O.R. (2d) 593, 98 D.L.R. (3d) 747 (C.A. 1978); *Borys*, *supra* note 339; *Rosseway*, *supra* note 342; *Eastland Constr. Ltd.*, *supra* note 342; *Wildwood Farm Servs. Int'l (1975) Ltd.*, *supra* note 305; *cf.* the following decisions where it was found that there was no reliance by the buyer on the seller's skill and judgment: Venus Electric Ltd. v. Brevel Products Ltd., 19 O.R. (2d) 417, 85 D.L.R. (3d) 282 (C.A. 1978); Boethuck Ford Ltd. v. Hillier, 28 Nfld. & P.E.I.R. 3, 79 A.P.R. 3 (Nfld. Dist. C. 1979).

[345] *Supra* note 341.

[346] *Boethuck Ford Ltd.*, *supra* note 344.

Court, the necessary reliance did not have to be exclusive; the buyers might also have relied on someone else.[347] The issue of reliance is central to the condition that goods be fit for the purpose for which they are bought.

A further important point is whether or not, as required by the statute, the seller of goods normally sells goods of that description. In *Eastland Construction Ltd. v. Gondola Point*,[348] Stevenson J. held that the goods were of a kind that the seller would normally supply in the course of his business. Therefore, the implied condition of fitness for a particular purpose applied. However, in *Arsenault v. Richman*,[349] a case which concerned the private sale of a car, the statutory provision was inapplicable because the seller did not deal in such goods in the ordinary course of his business.

Of course, even if the implied condition does operate in any given instance, it must still be shown by the buyer that the goods were not fit for the intended purpose. Hence in one case,[350] although it was held that the contract was subject to the condition, the buyer failed because the goods were fit for the purpose for which they were intended.

(ii) *Merchantability*

Considerable anguish has been caused over the years by the interpretation and application of the statutory provisions relating to the implied condition that goods sold must be of "merchantable quality". Recent legislation in England has endeavoured to alleviate the problems by redefining the meaning of "merchantable quality".[351] However, in many provinces, the pristine language of the Sale of Goods Act still applies. Thus, it is necessary to examine and understand how the courts give effect to this clause.

For the most part, recent cases have not dealt extensively with the application of this condition. They have been content simply to decide whether or not, considering all the relevant circumstances, goods were or were not merchantable.[352] Some decisions, however, have given rise to a more elaborate consideration of issues which may arise when a buyer

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[347] *Eastland Constr. Ltd.*, *supra* note 342, at 144-45, 51 A.P.R. at 144-45.

[348] *Supra* note 342. *See also Venus Electric Ltd.*, *supra* note 344, at 422, 85 D.L.R. (3d) at 287.

[349] *Supra* note 304.

[350] *Labrecque*, *supra* note 306. However, the manufacturers were held liable in tort for negligence in not warning the plaintiff of possible danger to flax crops. The plaintiff was also negligent in that he ought to have known not to plant his flax as deeply as he did. Damages were therefore apportioned equally.

[351] The Supply of Goods (Implied Terms) Act 1973, U.K. 1973, c. 13, s. 3.

[352] *Cf.* the following cases where goods were held to be "merchantable": *Labrecque*, *supra* note 306; *Carr*, *supra* note 313, with cases where goods were held not to be of "merchantable quality": *Wallace Constr. Specialties Ltd.*, *supra* note 303, DeBlois Likely Ltd. v. H.F. Russell Seafoods Ltd., 17 Nfld. & P.E.I.R. 23, 46 A.P.R. 23 (P.E.I.S.C. 1977).

attempts to rely on this implied condition as a ground for rejecting the goods, rescinding the contract, or claiming damages. However, one must always bear in mind the fact that in appropriate situations, for example, when there is a transfer of property in specific goods, an injured buyer can only sue for damages, as if what had occurred were a breach of warranty.[353] In *Leitz v. Saskatoon Drug & Stationery Co.*,[354] the plaintiff relied on this implied condition in his action for damages for personal injuries against the seller and the distributor of the goods. The plaintiff went to the defendant's drug store in order to purchase sunglasses. On the sunglasses the distributors had placed a tag reading: "First in safety. Impact and scratch resistant lenses." The plaintiff bought the glasses and wore them while acting as a coach in a softball game. A ball struck his face, shattering the left lens, as a result of which pieces of glass entered his left eye. Sirois J. held both the seller and the distributors liable to the buyer for negligence (the seller being entitled to indemnification from the distributors). Following what was said and held in *Grant v. Australian Knitting Mills*,[355] the learned judge decided that the sale of the sunglasses came within the scope of the statute; the goods were bought by description and were not of merchantable quality as the lenses were not impact and scratch resistant. Therefore, the implied condition of merchantability applied and the plaintiff was awarded a substantial sum in damages.

In another case, goods were also found not to be of merchantable quality when their age was not what was expected by the buyer. In *Freeway Sales & Distributors Ltd. v. Hogan*,[356] the buyer attended at the defendant's place of business in order to purchase a boat and motor which were "a few years old or a couple of years old". The defendant sold the plaintiff a boat, motor and trailer which were traded as 1976-77 models and were described as "used". In fact the boat was probably as old as 1970, the motor was a 1974 model and the trailer a 1972 model. In these circumstances, the Manitoba County Court judge held that the defendant breached the warranty with respect to merchantability as provided by the Manitoba Consumer Protection Act,[357] and this entitled the buyer to damages under the provincial sale of goods act.

The purpose for which the buyer intends the goods to be used may also be relevant to the question of merchantability. Consider, for example, the following cases from Prince Edward Island[358] and New Brunswick.[359] In both situations, the court was concerned with the normal use of the goods and the possibility that they might be used in some different, perhaps improper way. In the former case, the plaintiff

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[353] *Larkin*, *supra* note 341.
[354] *Supra* note 305.
[355] *Supra* note 336.
[356] 5 Man. R. (2d) 51 (Cty. Ct. 1979).
[357] R.S.M. 1970, c. C-200.
[358] *Larkin*, *supra* note 341.
[359] *Lavoie*, *supra* note 306.

bought a truck from the defendant for the purpose of hauling pulpwood. He made the vendor aware of the use he wanted to make of the truck. From the very beginning, the vehicle did not function properly and eventually the plaintiff brought an action. The learned judge stated that the issue was whether the truck was suitable to perform the ordinary function that might be normally expected of a one-ton heavy duty truck, not whether it was suitable for hauling full loads of pulpwood. The distinction between these two issues could be relevant to the possible liability of the seller under the implied condition as to fitness for purpose, which was discussed above. Where, however, merchantability was concerned, the question was whether the goods were suitable for normal or usual functions. Since the evidence established that the truck was not so suitable and it could not be shown that its unsuitability resulted from any fault, neglect or carelessness of the buyer, the seller was held liable for breach of the condition (because property had passed, however, such breach had to be treated as a breach of warranty).

In the New Brunswick case, which arose from the purchase by the plaintiff of a gasoline tank which leaked and caused the buyer's soil to be polluted, the trial judge dismissed the buyer's claim against the seller and the manufacturer on the ground that the buyer had used the tank for an improper purpose and had installed it improperly and in a dangerous place. The tank was designed to hold furnace oil, but the buyer required it for storing gasoline. The seller filled the tank with gasoline but did not check the tank for leaks and did not warn the buyer about possible leaks, although similar tanks had been found in the past to have the same problem. On appeal to the New Brunswick Court of Appeal, the seller and the manufacturer were held liable for damages. Applying *Grant v. Australian Knitting Mills*,[360] Richards J.A., delivering the judgment of the court, held that there had been a breach of the condition as to merchantable quality and that the manufacturers were also liable in negligence. However, the buyer was successful, but he was held to be twenty percent at fault for his delay in checking for a leak.

The issue of the buyer's responsibility for the proper use of goods when he complains of breach of the implied condition as to merchantability was vital in the recent judgment of the Supreme Court of Canada in *Schreiber Bros. v. Currie Products Ltd.*[361] The appellant was an experienced roofing contractor which had undertaken to replace a large roof at a Ford Motor Company plant in Windsor. For this purpose it bought a certain type of asphalt from Currie Products Ltd., who supplied asphalt manufactured by Gulf Canada Ltd. After only fifteen months, the roof was found to be defective because of large blisters formed in its membrane. The appellant sued the supplier for breach of the implied

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[360] *Supra* note 336.

[361] [1980] 2 S.C.R. 78, 31 N.R. 335, 108 D.L.R. (3d) 1. *Cf.* Bind v. Alex Dupuis Ltd., 25 N.B.R. (2d) 285, 51 A.P.R. 285 (C.A. 1979), where the evidence showed that the purchaser, a contractor, was at fault in the way he used the building materials that were the subject of the action. Their unsuitability was therefore not established.

condition of merchantability. The supplier brought in the manufacturer as a third party, seeking to make it liable if the buyer's claim succeeded. At trial, judgment was given for the buyer, but this was reversed by the Ontario Court of Appeal. The plaintiff appealed to the Supreme Court of Canada. In his reasons for judgment, Laskin C.J.C. pointed out that both inferior courts were satisfied that the roof had failed in ordinary use and not because of faulty workmanship by the plaintiff. The issue which divided the inferior courts was a narrow one: whether the buyers had discharged the burden of proving that on the balance of probabilities, the defect in the asphalt existed when it left the manufacturer's plant. The Court restored the judgment at trial and held that it was sufficient that the plaintiff show that a defect existed when the goods were delivered by the supplier Currie, without being required to prove the cause of the defect. In other words, even if the asphalt was defective, the buyers had to show that faulty workmanship or other probable causes arising after the asphalt was delivered could be eliminated as potential sources of the failure of the roof. In the circumstances of this case, and in view of the evidence before the trial judge, the Court's decision seems to be appropriate and just.

3. *Exclusion Clauses*

An integral part of many contracts of sale of goods (as indeed of many other types of contract) is a clause which exempts, excludes or limits liability on the part of either party. The general law relating to such clauses has undergone much development and discussion over the past several years,[362] and sale of goods cases have figured very prominently in such development and discussion.[363] The recent decisions involving such clauses reveal how the courts have a predilection for holding them inapplicable to protect a party who is in default. By relying on the doctrine of strict construction, courts will very often determine that an attempt to exclude or limit liability has been unsuccessful.

The decision of the Supreme Court of Canada in the *Kravitz* case,[364] on appeal from Quebec, shows that manufacturers who endeavour to exclude liability on a warranty will not succeed easily. The attitude of the court appears to have been that the manufacturers or professional sellers may not rely on such clauses to the detriment of the non-professional buyer. Although this was a decision under the Civil Code, it indicates that the courts are prepared to go to great lengths to cut down the operative effect of such clauses. Thus, in *Bennett-Dunlop Ford Sales*

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[362] G. FRIDMAN, *supra* note 129, at 298-309. *See also* Photo-Productions Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.); Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co., [1980] 2 S.C.R. 718, 33 N.R. 460, 116 D.L.R. (3d) 193.

[363] G. FRIDMAN, *supra* note 129, at 308-14.

[364] *General Motors*, *supra* note 305.

Ltd. v. Tait,[365] a Saskatchewan District Court judge held that an exclusion clause in a "Warranty Facts Booklet" might have availed the plaintiffs, who sold and then repaired a vehicle, if the repairs had been performed under the warranty that went with the vehicle. The plaintiffs chose to say that the warranty was not involved in the kind of damage that had occurred. Therefore, the judge was able to find that the exclusion clause did not operate in their favour.

On the other hand, in *Arsenault v. Richman*[366] McQuaid J., of the Prince Edward Island Supreme Court, said that where the contract stated that the goods were sold on an "as is" basis, with "no warranty expressed or implied", this meant that the buyer was purchasing what she knew she was buying, namely, a second hand car, and could not complain unless there had been some misrepresentation, whether fraudulent or innocent. In this case, the alleged misrepresentation consisted of silence with respect to a known defect. The seller failed to tell the buyer that the car stalled. However, this did not turn what was positively said about the car into something absolutely false.[367] Hence there was no misrepresentation that could overcome the exclusion of warranties by the statement in the written memorandum.[368]

Misrepresentation will not be the only reason for disallowing a defence based on an exclusion clause. Such a clause will not operate where there has been a fundamental breach, the nature of which will be considered further below.[369] Nor will an exclusion or disclaimer clause that refers only to warranties effectively protect the seller against liability for breach of a condition that is implied under the Sale of Goods Act.[370] The principle of strict construction, therefore, is still very much at the forefront of thinking in the courts in Canada.

D. *Performance of the Contract*

1. *Acceptance*

The effects of acceptance of goods on potential claims for breach of an express or implied condition of the contract have been referred to earlier. As was seen, where goods have been accepted it may no longer be possible for the buyer to reject the goods or claim rescission of the

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[365] 2 Sask. R. 281 (Dist. C. 1980).

[366] 28 Nfld. & P.E.I.R. 259, 79 A.P.R. 259 (P.E.I.S.C. 1980).

[367] *Applying* Bell v. Lever Bros. Ltd., [1932] A.C. 161, [1931] All E.R. Rep. 1 (H.L. 1931).

[368] On which *see* G. FRIDMAN, *supra* note 129, at 315-17.

[369] Bonar Packaging Ltd. v. M. Rose & Sons Ltd., 28 N.B.R. (2d) 196, 63 A.P.R. 196 (Q.B. 1979), *applying Murray*, *supra* note 305.

[370] *Murray*, *supra* note 305. The Sale of Goods Act, R.S.O. 1980, c. 462.

contract.[371] However, it is sometimes a debatable question whether acceptance, as defined by the Ontario Sale of Goods Act, has occurred.[372]

In *Bolstridge v. Ervine G. Canam Ltd.*[373] it was held that the buyer's act of exporting potatoes which he had purchased from the plaintiff sellers was inconsistent with the continued ownership of such potatoes by the sellers. Therefore, acceptance of the goods was deemed to have occurred within the meaning of the Act.[374] Similarly, the subsequent sale of a machine by a farmer, along with his farm, constituted original acceptance of the machine, and thus affected the purchaser's right to reject the machine for not being fit for the purpose for which it was intended.[375]

On the other hand, taking and maintaining possession of goods, even for a prolonged period of time, does not necessarily mean there has been acceptance. In *Massey v. Mountain View Plumbing & Heating Ltd.*,[376] the buyer had not intimated to the sellers that he had accepted the goods. The stove that had been bought never worked properly and the sellers were called upon over several months to repair the stove but did not, or could not, do so. It was held that acceptance had not taken place despite the fact the buyer had taken delivery of and paid for the stove in question.

2. *Delivery*

Under the Ontario Sale of Goods Act, if no time is fixed for delivery, it must take place within a reasonable time.[377] In *Alteen's Jewelry Ltd. v. Cann*[378] the fact that a ring was not delivered within a reasonable time was fatal to the seller's claim for the price of the ring (although it was also held that no concluded contract had come into existence through lack of agreement as to the consideration).

In *Mix v. Highmar Confectioners Ltd.*,[379] the Ontario Court of Appeal held that business records, invoices, books of account, and so on could be used to establish that goods alleged to have been sold and

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[371] *Carr*, *supra* note 313; *Wildwood Farm Servs. Int'l (1975) Ltd.*, *supra* note 305; J.W. Bird & Co. v. Alex Dupuis Ltd., 25 N.B.R. (2d) 285, 51 A.P.R. 285 (C.A. 1979). *See also* text accompanying notes 340-41 *supra*; REPORT, *supra* note 274, vol. 2, at 444-67.

[372] S. 5(3). *See generally* G. FRIDMAN, *supra* note 129, at 265-75; REPORT, *supra* note 274, vol. 2, at 467-75.

[373] 33 N.B.R. (2d) 448, 80 A.P.R. 448 (Q.B. 1981).

[374] Sale of Goods Act, R.S.N.B. 1973, c. S-1, s. 37.

[375] *Wildwood Farm Servs. Int'l (1975) Ltd.*, *supra* note 305.

[376] 104 D.L.R. (3d) 575 (B.C. Cty. Ct. 1979).

[377] R.S.O. 1970, c. 421, s. 28(2). *See generally* G. FRIDMAN, *supra* note 129, at 241-62; REPORT, *supra* note 274, vol. 2, at 331-41.

[378] 40 N.S.R. (2d) 504, 73 A.P.R. 504 (Cty. Ct. 1980).

[379] 32 C.B.R. (N.S.) 1 (Ont. C.A. 1979).

delivered by the plaintiff had actually been delivered, so as to permit the plaintiff to claim successfully for the price of such goods.

3. *Fundamental Breach*

In considering whether a contract of sale of goods has been performed, it may be material to determine whether what has occurred amounts to fundamental breach of the contract.[380] Some acts on the part of a seller or buyer may constitute a breach of a duty to deliver goods, to ensure that the goods conform to sample or description, or to accept or pay for the goods. Other alleged breaches may be even more significant, if it is possible to conceive of such a distinction.

The idea of fundamental breach, as is well known, has been very important in relation to the effects of an exclusion or exemption clause. Recent cases reveal that the courts are not always prepared to accept that a breach is "fundamental", so that the party at fault has often been found liable notwithstanding the fact that the contract purports to exclude or limit his liability. A fundamental breach would also allow the buyer to reject the goods or rescind the contract, despite the passing of property in such goods or their acceptance, and would also preclude him from treating a breach as a breach of an express or implied condition.[381] In fact, in the majority of cases dealing with this question during the period under review, claims of fundamental breach have met with no success. Does this indicate, in any way, some new and stricter approach by the courts to this entire issue? That remains to be seen. Meanwhile, as an examination of these cases should reveal, it is a matter of convincing a court that the kind of breach that is alleged to have taken place is so important in nature that it renders the entire contract useless, and thus should result in giving the injured party a much broader and more significant remedy than if some minor infraction had been involved.

The plea of fundamental breach was relied on with success in *Bélanger v. Fournier Chrysler Dodge (1975) Ltée.*,[382] a New Brunswick case, in which a used car turned out to be completely unroadworthy because it was severely rusted. The county court judge held that this amounted to a fundamental breach, a conclusion in which the Court of Appeal concurred. Since having the car repaired would have cost as much as the car was worth, the plaintiff buyer was entitled to recover the purchase price. It is interesting to compare and contrast this decision with that of the Divisional Court of the Ontario High Court in *Whittaker v. Ford Motor Co. of Canada*,[383] which also concerned a car with continual rust problems. One of the issues in this case was whether the rusting of the car could be considered to involve a fundamental breach, when,

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[380] G. FRIDMAN, *supra* note 129, at 535-40.
[381] *See* text accompanying notes 340-41 & 369 *supra*.
[382] 25 N.B.R. (2d) 673, 51 A.P.R. 673 (C.A. 1979).
[383] 24 O.R. (2d) 344, 98 D.L.R. (3d) 162 (H.C. 1979).

despite attempts to repair the damage, the problem was never satisfactorily solved. Although the car rusted early, the court said it was always capable of operation as a motor vehicle; it could always be operated in a normal fashion between point A and point B. Hence, while the facts brought the case "perilously close" to a situation of fundamental breach, the evidence did not reach the plateau required by the cases[384] to prove this element. On the other hand, where a truck purchased for use in hauling heavy trailers was off the road for 129 days in seven months for repairs, it was held[385] that a fundamental breach had occurred. The buyer was entitled to rescission of the contract and damages for all loss resulting from the breach by the seller of his fundamental obligation to deliver a workable truck.

As noted earlier,[386] even if there is an exclusion clause in the contract of sale, this will not avail the seller if he is guilty of a fundamental breach, as in *Bonar Packaging Ltd. v. M. Rose & Sons Ltd.*[387] There the subject matter of the contract was potato bags. They were defective and caused the partial loss of a shipment of potatoes. Notwithstanding the presence in the contract of a condition purporting to exclude the seller's liability for consequential loss resulting from defective bags, the seller was held liable for the buyer's loss. Exemption clauses did not operate, said Creaghan J. of the New Brunswick Court of Queen's Bench, when a product did not operate substantially as it should have.

As was previously noted,[388] not all buyers have been as fortunate in their efforts to rely on the notion of fundamental breach in support of claims for rescission or damages. Temporary breakdowns of a piece of farm equipment did not constitute a fundamental breach of a contract of sale of such equipment in *Langille v. Scotia Gold Co-operative Ltd.*,[389] nor did the fact that a used car developed mechanical problems not readily ascertainable at the time of sale in *Mallaley v. Goiziou*.[390] In another case[391] it was held that delays in unloading boxes of blueberries, under a contract which involved the purchase of a million pounds of blueberries, did not constitute a fundamental breach, even though the failure to deliver on time caused problems for the buyer of the goods.

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[384] Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 367, [1966] 2 All E.R. 61 (H.L. 1966), R.G. McLean Ltd. v. Canadian Vickers Ltd., [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A. 1970); Cain v. Bird Chevrolet-Oldsmobile Ltd., 20 O.R. (2d) 569, 88 D.L.R. (3d) 607 (C.A. 1977).

[385] Murphy v. Penney Motors Ltd., 23 Nfld. & P.E.I.R. 152, 61 A.P.R. 152 (Nfld. S.C. 1979). *See also Rosseway*, *supra* note 342.

[386] *See* text accompanying note 375 *supra*.

[387] *Supra* note 375.

[388] *See* text following note 387 *supra*.

[389] *Supra* note 306.

[390] 27 N.B.R. (2d) 309, 60 A.P.R. 309 (Q.B. 1979).

[391] Gaklis & Christy Crops Ltd. v. Wells, 37 N.S.R. (2d) 451, 67 A.P.R. 451 (C.A. 1979).

The burden of establishing a fundamental breach rests with the party alleging such breach.[392] Hence in several instances[393] a buyer who was purchasing a second-hand vehicle failed to establish such a breach when it was obvious that the buyer knew what he or she was buying, and appreciated or must be taken to have appreciated that such a vehicle was not of the same quality as a new vehicle. From such cases it becomes clear that the knowledge of the buyer and his appreciation of the usual quality of the article he is buying are material factors, as is also the question whether what was delivered to the buyer basically corresponded in nature and quality with what he intended to obtain.

E. *Remedies*[394]

1. *Rejection of Goods*

In *Massey v. Mountain View Plumbing & Heating Ltd.*[395] the buyer wished to reject goods and recover their purchase price some six months after they had been purchased, installed and paid for. The goods in question consisted of a wood-burning stove. The buyer had made it clear to the seller that he wanted it to be capable of burning all night. When the stove was allowed to do so, however, it became dangerously overheated. During the six month period several attempts were made by the seller to have the defects remedied. Ultimately it became clear that the stove was not fit for the purpose for which the buyer intended it should be used. On these facts, the learned county court judge found that there had been a breach of the implied condition that the goods would be fit for the purpose for which they were bought.[396] Despite the time that had elapsed since purchase and the efforts by the seller to remedy the defects at the buyer's behest, it was still possible for the buyer to reject the goods. Acceptance of the goods had not taken place within the meaning of the Act (as noted earlier[397]), because a reasonable time had not yet elapsed since the date of purchase.

2. *Rescission*

In certain situations rescission of the contract (whether or not also involving rejection of goods delivered under the contract) may be an appropriate remedy to be sought by a buyer. In one instance, *Colfax Inc.*

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[392] *Arsenault*, *supra* note 304, at 264-65, 79 A.P.R. at 264-65 (P.E.I.S.C. 1980) (McQuaid J.).

[393] *Id.*; *Arnett*, *supra* note 338; *Beothuck Ford Ltd.*, *supra* note 344.

[394] The various remedies available to sellers and buyers are discussed at length, and a number of recommendations are made, in REPORT, *supra* note 274, vol. 2, chs. 16-18. *See also* G. FRIDMAN, *supra* note 129, chs. 15 & 16.

[395] *Supra* note 376.

[396] *See* text accompanying notes 338-51 *supra*.

[397] *See* text accompanying note 376 *supra*.

v. General Foods Ltd.,[398] rescission was allowed by the court, and damages were awarded for breach of the contract in consequence of such rescission. Here two contracts were made between the parties for the purchase from the seller, a refiner of oils, of a particular shortening with a specified composition. The goods delivered under the first contract did not completely satisfy the buyer, but no complaint was made at that time. During the course of subsequent deliveries, the market price of the oil fell. The buyer repudiated both contracts, being no longer satisfied with the contract price. Subsequent analysis of the oil, conducted at the request of the buyer, indicated that the condition of the specified composition had been neglected by the seller. When the seller sued for damages for breach of the contract, his action failed. It was held that the buyer was entitled to claim rescission on the basis of the seller's failure to fulfill the express terms of the contract. What was more, the breach which had occurred with the first delivery was not a severable breach, but one which indicated the likelihood of future breaches. The failure to fulfill the first contract justified the buyer's repudiation of the second (as well as the first). Nor did the original reason for repudiation, namely economic circumstances, make any difference since the buyer did have a perfectly valid ground for repudiation, the failure of the goods to conform to the terms of the contract (much as in employment contracts, it might be said, a ground discovered later can justify a summary dismissal which was not valid at the time it occurred).

Rescission (and return of the contract price) was also allowed in *Adams v. Canadian Co-operative Implements Ltd.*[399] Here the basis for rescission was not breach of contract or even fundamental breach, but misrepresentation. Such misrepresentation was negligent, not fraudulent, but it gave rise to an *error in substantialibus*. Hence, even though the contract was executed by the delivery of and payment for the used haystacker that was the subject of the contract, it was held that the innocent misrepresentation of the seller could justify rescission because the buyer had not received what he had bargained and given consideration for, namely, a haystacker that would work with a 540 r.p.m. power take-off on the buyer's only tractor (he received instead a machine that would only operate on a 1000 r.p.m. power take-off). Although there is authority for this approach,[400] the use of the doctrine of *error in substantialibus*[401] to permit contracts to be upset where there is neither mistake nor fraud is misleading and unjustifiable in principle.

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[398] 10 Bus. L.R. 174 (Ont. H.C. 1979).

[399] 20 A.R. 533 (Q.B. 1979).

[400] Northern & Central Gas Corp. v. Hillcrest Collieries Ltd., [1976] 1 W.W.R. 481, 59 D.L.R. (3d) 533 (Alta. S.C. 1975); Ruscheinsky v. A. Spencer Co., [1948] 2 W.W.R. 392 (B.C.S.C.); F. & B. Transp. Ltd. v. White Truck Sales Manitoba Ltd., 51 W.W.R. 124, 49 D.L.R. (2d) 670 (Man. C.A. 1965).

[401] Fridman, *Error in Substantialibus: A Canadian Comedy of Errors*, 56 CAN. B REV. 603 (1978).

However, there can be no doubt that its use in the circumstances of the above case did enable the court to permit rescission when it might otherwise not have been possible (although an action for damages might have been founded upon the breach of some implied statutory condition). In other instances, however, rescission was denied by the courts. In *Arsenault v. Richman*[402] rescission was denied because no misrepresentation had occurred. In *Arnett v. Mohacsy*[403] it was denied because the implied "warranty" (as it was referred to by Rowbotham J. of the Alberta Court of Queen's Bench) was not of such a fundamental nature as to entitle the buyer to rescind the contract. Although the car motor was presented as new in the advertisement in response to which the plaintiff purchased the car, the plaintiff could have ascertained for himself whether or not the motor was new. Nevertheless, the buyer was awarded general damages for breach of this implied warranty of fitness.

3. *Damages*

In the majority of cases, the plaintiff is seeking the remedy of damages, on the subject of which there are several recent cases.

Bélanger v. Fournier Chrysler Dodge (1975) Ltée.,[404] which was discussed earlier, contains further points of interest on the subject of damages. The New Brunswick Court of Appeal thought that an award of the purchase price of the vehicle by way of damages for fundamental breach was legitimate, since the cost of repairing the car would have been as much as the value of the car, *i.e.*, the price at which it was bought, and because the court would not disturb the county court judge's "unorthodox although equitable"[405] decision to deduct from the buyer's award a sum of sixty dollars for each month the plaintiff had used the car. This looks like mitigation, although it was not put on such a basis. A more genuine example of mitigation is to be found in *Enheat Ltd. v. Polley*.[406] There the damages awarded were based on the market price of the cast iron which was the subject of the contract, not on the date of the breach (when the buyer failed to take delivery) but on the date when it would have been reasonable for the seller to mitigate his loss by selling the cast iron at the then current market price. The seller's failure to take reasonable steps to mitigate his loss affected his claim for damages in respect of the buyer's undoubted breach.

In two cases it was held that the lack of any evidence of economic loss on the part of the buyer meant that only nominal damages could be awarded for a breach of contract committed by selling goods that were not of the right quality,[407] or by failing to deliver goods that had been

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[402] 28 Nfld. & P.E.I.R. 259, 79 A.P.R. 259 (P.E.I.S.C. 1980).
[403] *Supra* note 393.
[404] *Supra* note 382.
[405] *Id.* at 681, 51 A.P.R. at 681.
[406] 29 N.S.R. (2d) 569, 45 A.P.R. 569 (S.C. 1978).
[407] *Langille*, *supra* note 306.

purchased.[408] In this latter instance damages were awarded for loss of profit, even though none were given for alleged loss of goodwill because although the court found some evidence of loss of goodwill there was no evidence that it resulted in any financial loss. Damages for loss of profit were not granted in *Wildwood Farm Services International (1975) Ltd. v. Enns*[409] because there was no evidence that any such profit had been lost. No other customer was in existence who would have bought from the defendant, a dealer in the plaintiff's goods, the goods which the defendant sold to a third party and for which the latter did not pay when they were found to be unfit for the purpose for which they had been bought. A very special system for removing manure from barns was involved — hence the impossibility of showing that the defendant could have disposed of these goods otherwise than to the party in question.[410]

V. Credit Transactions and Methods of Giving Security

A. *Conditional Sales*

1. *Scope of Legislation and Formalities*

Certain arrangements between parties to a transaction concerning goods raise the question of whether the transaction can be considered a conditional sale and thus within the scope of the appropriate provincial legislation or whether the kind of goods involved in the transaction require the application of the same or similar legislation. Thus in *International Harvester Credit Corp. of Canada Ltd. v. Leedahl*,[411] the plaintiff leased a vehicle to the defendant under an agreement providing that, on default, the plaintiff could sell the vehicle without notice and then sue for the deficiency. The defendant argued that the transaction was in reality a conditional sale, requiring the service of notice on him prior to resale by the plaintiff. Hughes J. dismissed the plaintiff's action. The learned judge held that since the agreement clearly gave the defendant an option to purchase the vehicle, it was a conditional sale, to which the Saskatchewan Conditional Sales Act[412] and Limitations of Civil Rights Act[413] (under which the plaintiff's right to repossession of the goods was limited) applied. Similarly, in an Alberta case between the same plaintiff

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[408] *Gaklis*, *supra* note 391.

[409] 1 Man. R. (2d) 426, [1980] 2 W.W.R. 17 (Q.B. 1979).

[410] *Cf.* the situation in respect of additional and substituted buyers, and the exclusion of the market test, as discussed in G. Fridman, *supra* note 129, at 397-400.

[411] [1978] 3 W.W.R. 649 (Sask. Q.B.).

[412] R.S.S. 1965, c. 393, s. 16.

[413] R.S.S. 1965, c. 103, s. 18 (*amended by* S.S. 1970, c. 37, s. 2; 1973, c. 57, s. 2).

and a different defendant,[414] Greschuk J. of the Supreme Court of Alberta held that the transaction, though expressed to be a lease, was a conditional sale and this meant that the plaintiff, having seized and resold the vehicle, had no right to sue for any deficiency resulting from the price obtained on resale.[415] However, in two other recent Alberta cases the transaction was held not to be a conditional sale. One involved a "c.o.d." contract with a reservation of title in the vendor until payment of the price in full.[416] The other concerned the lease of a vehicle to the defendant, without any language in the lease that would suggest that the defendant (the lessee) could obtain title to the vehicle on the termination of the lease.[417] The exclusion of the legislation sometimes has resulted from a decision that the subject-matter of the contract did not come within the purview of the relevant statute, for example, where a tractor was not a farm implement[418] within the meaning of The Saskatchewan Family Farm Protection Act,[419] or a mobile home was not a trailer[420] under The Alberta Conditional Sales Act,[421] or a potato harvester was not a motor vehicle[422] within the definition contained in the British Columbia Conditional Sales Act.[423]

If a transaction is within the statute it must conform to the required formalities. In *Clarkson Co. v. G.T.E. Sylvania Canada Corp.*[424] the vendor under such a contract sought to argue, in reliance on section 35 of the Saskatchewan Act,[425] that even though the contract had not been executed within ten days of the delivery of the goods as required by the Act, since no one had been misled the court was entitled to disregard the

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[414] International Harvester Credit Corp. of Can. v. Dolphin, 7 Alta. L.R. (2d) 123, 88 D.L.R. (3d) 326 (S.C. 1978). *But see* Ramsey v. Pioneer Machinery Co., 15 Alta. L.R. (2d) 140 (C.A. 1981).

[415] *See* text accompanying notes 446-49 *infra* with respect to choice of remedies.

[416] W.C. Fast Enterprises Ltd. v. All-Power Sports (1973) Ltd., 9 Alta. L.R. (2d) 289 (Dist. C. 1979).

[417] Crosstown U-Drive & Leasing v. MacLean, 19 A.R. 77, 10 Alta. L.R. (2d) 171 (Dist. C. 1979).

[418] Associates Acceptance Co. v. Olchowy, [1978] 3 W.W.R. 106, 85 D.L.R. (3d) 88 (Sask. C.A.).

[419] S.S. 1971 (2d sess.), c. 3, s. 15 (*suspended on* 31 Jul. 1972, by S.S. 1971 (2d sess.), c. 3, s. 30(1)).

[420] Plaza Equities Ltd. v. Bank of Nova Scotia, [1978] 3 W.W.R 385, 84 D.L.R. (3d) 609 (Alta. S.C.). *Cf.* Royal Bank of Canada v. Beyak, 8 Sask. R. 145, 119 D.L.R. (3d) 505 (Q.B. 1981); C.I.B.C. v. Noseworthy, 24 Nfld. & P.E.I.R. 326, 65 A.P.R. 326 (Nfld. S.C. 1979), *rev'd* 31 Nfld. & P.E.I.R. 60, 87 A.P.R. 60 (Nfld. C.A. 1980).

[421] R.S.A. 1970, c. 61, s. 2(*b*).

[422] Bank of British Columbia v. Stampede Equipment Ltd., 15 B.C.L.R. 19, 104 D.L.R. (3d) 477 (S.C. 1979).

[423] S.B.C. 1961, c. 9, s. 2 (*amended by* S.B.C. 1977, c. 31, s. 5).

[424] 27 C.B.R. (N.S.) 5, 85 D.L.R. (3d) 763 (Sask. Q.B. 1978), *aff'd* 88 D.L.R. (3d) 160 (C.A. 1978).

[425] Conditional Sales Act, R.S.S. 1965, c. 393.

statutory requirement and uphold the contract. The trial judge[426] and the Saskatchewan Court of Appeal rejected this argument, however, and agreed with the argument of the plaintiff, who was the receiver of the purchaser under the contract, that the contract was void. On the other hand, in *Re Cascade Cattle Co.*[427] it was held that the regaining of possession of the goods by the lessor under such a contract cured the lack of registration under the British Columbia Conditional Sales Act,[428] although it would not have done so if proceedings by certain parties under section 15 of that Act had been commenced before such repossession had occurred. The failure of a registration of a motor vehicle under the Alberta Act[429] to include the letter "F", which was part of the vehicle's registration number, was fatal to the claim of the conditional sales vendor as against that of a third party who was a *bona fide* purchaser of the vehicle from the original conditional sales purchaser.[430] Strict conformity with the appropriate statute, at least where the issue involved claims by third parties, was also insisted upon by the court in *Bank of Nova Scotia v. Mustang Machinery Ltd.*,[431] in which the contract did not fulfill the statutory requirements of Alberta,[432] where it was registered, or of Saskatchewan,[433] where it was made. Hence the contract was a nullity *vis-à-vis* the general creditors of the conditional sales purchaser.

2. *Rights of Vendor*

Where a transaction is a conditional sale, problems may arise with respect to the rights of the vendor, should the purchaser be guilty of some default or wrongdoing. For example, in *Bank of Nova Scotia v. Parisien*[434] the question arose whether a bank, which was the assignee from the vendor of a conditional sales contract, could sue for conversion of the goods which were the subject of the contract, when the original vendor, Smith, resold the goods to Parisien, who then resold them. The

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[426] Relying on Iverson v. Sherman, 59 W.W.R. 252 (Sask. Q.B. 1967), Leoville Savings & Credit Union Ltd. v. Campagna, 75 W.W.R. 66, 13 D.L.R. (3d) 240 (Sask. Q.B. 1970); Industrial Acceptance Corp. v. Hardybala, [1974] 6 W.W.R. 189, 48 D.L.R. (3d) 756 (Sask. C.A.).

[427] 102 D.L.R (3d) 71, *reported as* Sonicus Holding Ltd. v. Coopers, 31 C B.R. (N.S.) 115 (B.C.S.C. 1979). *Cf.* Dalgleish v. N.C.R. Canada Ltd., [1979] 2 W.W.R. 584, 94 D.L.R. (3d) 28 (Alta. S.C.).

[428] S.B.C. 1961, c. 9, s. 2 (*as amended by* S.B.C. 1977, c. 31, s. 5).

[429] R.S.A. 1970, c. 61, s. 5 (*as amended by* S.A. 1971, c. 18, s. 2).

[430] General Motors Acceptance Corp. of Canada Ltd. v. Karamanles, 108 D.L.R. (3d) 583 (Alta. Q.B. 1979).

[431] 13 Alta. L.R. (2d) 257, 114 D.L.R. (3d) 527 (Q.B. 1980). *Cf. Dalgleish*, *supra* note 427.

[432] The Conditional Sales Act, R.S.A. 1970, c. 61, ss. 4, 12 (*as amended by* S.A. 1975 (2d sess.), c. 68, s. 121(*b*)).

[433] The Conditional Sales Act, R.S.S. 1978, c. C-25, s. 5(1).

[434] [1978] 2 W.W.R. 626, 82 D.L.R. (3d) 688 (Man. C.A.)

appeal of Parisien, who had been held liable at first instance (where a default judgment was also obtained by the bank against Smith), was based on the argument that the bank could not sue for conversion since it had failed to repossess the goods so that, by allowing Smith to possess the goods and sell them, the bank came within the scope of the section of The Manitoba Sale of Goods Act which provides for an exception to the *nemo dat* rule based upon estoppel.[435] Parisien's appeal was dismissed. The failure of the bank to repossess did not preclude the action for conversion, and the bank was not deprived of its choice of remedy merely because it had failed to repossess. The terms of the Act did not apply; merely allowing someone possession of goods while such person was being permitted to pay for them by instalments did not give rise to any estoppel against the true owner. To hold otherwise would have meant that taking a conditional sales contract as a form of security, rather than a chattel mortgage, would amount to a blameworthy act, a proposition which Hall J.A.,[436] speaking for the Manitoba Court of Appeal, quite rightly, it is suggested, was not prepared to accept. Nor did the act of Smith in reselling to Parisien constitute a breach of section 58(1) of The Consumer Protection Act,[437] which relates to the warranty of title given on a sale of goods within the Act.

Repossession of the goods, as a remedy for default, may involve obtaining an order from the court. Such an order may not be obtained where the buyer has already paid a high proportion of the total amount payable under the conditional sale, for example, two-thirds. Hence in one case[438] the purchaser under such a contract argued that the seizure of the goods without a court order was a wrongful action on the part of the conditional vendor. That argument failed because a careful investigation of the facts revealed that the purchaser had only paid sixty-one per cent of the total relevant amount. On the other hand, in a Manitoba case[439] involving The Consumer Protection Act,[440] the vendor who repossessed goods without a court order was held responsible to the buyer when the goods were destroyed by fire, because less than twenty-five per cent of the balance owing on the price of the goods was still outstanding. The buyer was able to recover the value of the goods at the time of the seizure, less the unpaid portion of his debt under the contract. Seizure of goods was held to be invalid in *Stage Inns (Cranbrook) Ltd. v. Standard Metal Products Ltd.*,[441] where the vendor was a registered owner within

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[435] R.S.M. 1970, c. S-10, s. 23. *See* G. FRIDMAN, *supra* note 129, at 133-38.

[436] *Supra* note 434, at 630, 82 D.L.R. (3d) at 691.

[437] R.S.M. 1970, c. C-200. *See generally* S. WADDAMS, LAW OF CONTRACTS 296-300 (1977).

[438] Crump v. Wolfe Chevrolet-Oldsmobile Ltd., 5 B.C.L.R. 227, 83 D.L.R. (3d) 278 (Cty. Ct. 1978).

[439] Turkitch v. Ford Motor Credit Co. of Canada, 92 D.L.R. (3d) 753 (Man. Q.B. 1979).

[440] R.S.M. 1970, c. C-200, s. 49(1).

[441] 17 B.C.L.R. 1 (C.A. 1979).

the meaning of the British Columbia Conditional Sales Act.[442] The requirements of the Act had not been complied with by the vendor and some of the goods seized by him were fixtures and therefore not capable of seizure under the Act. The goods in question were items of kitchen equipment that had been attached so as to become fixtures. Strict compliance with the provisions of the statute will also be required before a vendor can sue for any deficiency on the part of the purchaser. Hence in *Leboe v. Amanat Holdings Ltd.*,[443] the vendor failed to recover such deficiency upon the purchaser's default after he had sold the goods that were the subject of the conditional sales contract. The vendor was unable to prove service on the purchaser of the notice of intention to sell.[444] It must also be remembered, as pointed out in the earlier survey,[445] that under the Conditional Sales Act the conditional vendor may be forced to elect which of two remedies he wishes to pursue: either repossession of the goods or an action for the deficiency. As explained by Halvorson J. in Saskatchewan,[446] once the goods are surrendered by the conditional purchaser to the conditional vendor, the indebtedness of the former is extinguished, as long as this action takes place with the vendor's consent.[447] In another case, *Re Szeles*,[448] the British Columbia Court of Appeal discussed the effect of suing for the amount owed by the purchaser. In that case, the purchaser made an assignment in bankruptcy after the bank, the assignee of the conditional sales agreement from the vendor, brought the proceedings for the deficiency. The bank claimed to be a secured creditor. It was held by McKinnon J. and the Court of Appeal that the bank had lost its right to repossess, and therefore its prior status as a secured creditor, by suing for the debt. The bank had not lost its proprietary right to the goods, but such a proprietary right did not amount to anything in the nature of a mortgage or charge upon the bankrupt's property; nor did it give rise to any lien thereon in the absence of any specific provision of the Conditional Sales Act to that effect. A conditional sale, whatever the intent of the parties, is not viewed by the law as a charge or mortgage: it is a sale of goods. A chattel mortgage effected under the Bills of Sale Acts[449] *is* a mortgage. Such transactions

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[442] S.B.C. 1961, c. 9, s. 12(8) (*as amended by* S.B.C. 1978, c. 25, ss. 323, 332-33) (*replaced by* Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, s. 16).

[443] 7 B.C.L.R. 46 (S.C. 1978).

[444] Note the changes made in Prince Edward Island with respect to the procedure for claiming deficiences in the sale price after the goods have been sold by the vendor (or his assignee): An Act to Amend the Conditional Sales Act, S.P.E.I. 1980, c. 16 (*amending* R.S.P.E.I. 1974, c. C-16, *as amended by* S.P.E.I. 1978, c. 2, s. 2).

[445] Fridman, *supra* note 203, at 148-50.

[446] Atco Structures Ltd. v. Foley, 107 D.L.R. (3d) 406, at 410-11 (Sask. Q.B. 1979).

[447] *But see International Harvester*, *supra* note 414, at 139-40, 88 D.L.R. (3d) at 340, where Greschuk J. said that it did not matter whether the repossession amounted to a seizure or a surrender.

[448] 9 B.C.L.R. 26, 93 D.L.R. (3d) 730 (S.C. 1978), *aff'd* 16 B.C.L.R. 110, 107 D.L.R. (3d) 393 (C.A. 1979).

[449] S.B.C. 1961, c. 6 (*replaced by* Chattel Mortgage Act, R.S.B.C. 1979, c. 48).

are very different and are governed by different rules of law. They do *not* fall within the Sale of Goods Acts.[450]

3. *Rights of Third Parties*

Because of the particular status of a conditional sales contract, problems can also arise with respect to the rights of third parties who may have acquired the goods that are the subject of such a contract where the goods are disposed of by the conditional purchaser.

In *Canadian Imperial Bank of Commerce v. Andrews*,[451] for example, the dispute was between the assignee of the conditional vendor and a purchaser in good faith from the conditional purchaser. The Manitoba Court of Appeal held that the provision of The Sale of Goods Act,[452] dealing with purchases in good faith from a buyer of goods who is in possession of the goods (albeit without title therein)[453] did not apply where title remained in the vendor until payment of the purchase price was made in full. Hence the innocent buyer from the conditional purchaser did not obtain a title that prevailed over that of the assignee of the conditional vendor.[454] Similarly, a party who purchased a vehicle which was believed to be free of encumbrances obtained no title when the goods were in fact subject to a lien arising from a conditional sales contract. When the goods were seized by the conditional vendor, the innocent buyer bought a replacement vehicle and was able to recover damages to cover the costs thereby incurred from the party who had sold the vehicle to him (a seller at a public auction).[455]

However, in other instances it has been held that parties who obtained some other interest in goods that were at the time, or in certain cases, subsequently, the subject of a conditional sales contract acquired a title or interest which prevailed over that of the conditional sales vendor. This has been held with respect to a mortgagee of a mobile home;[456] the

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[450] R.S.B.C. 1960, c. 344. *See generally* G. FRIDMAN, *supra* note 129, at 17-18.

[451] [1979] 1 W.W.R. 673, 94 D.L.R. (3d) 294 (Man. C.A. 1978). Note that the conditional sales contract was made and registered in British Columbia, but the goods were taken to Manitoba where the resale by the conditional vendor occurred. The court held that, since all the transactions except the original contract took place in Manitoba, the law of that province applied. Contrast the cases and discussion in the earlier survey, *supra* note 203, at 152-53.

[452] R.S.M. 1970, c. S-10, s. 28(2).

[453] *See* G. FRIDMAN, *supra* note 129, at 152-56.

[454] *See* the discussion with respect to the inapplicability of the "estoppel" provisions of the Sale of Goods Act in *Bank of Nova Scotia*, *supra* note 434. But a person who purchased from a conditional purchaser who sold to the innocent third party as a trader in the ordinary course of business was protected under the terms of the British Columbia Conditional Sales Act, S.B.C. 1961, c. 9, s. 18(2) (*replaced by* the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, s. 30) in Garden City Auto Sales Ltd. v. Byrne, 19 B.C.L.R. 114 (S.C. 1980).

[455] Rowland's Transport Ltd. v. Nasby Sales & Servs. Ltd., 16 A.R. 192 (S.C. 1978).

[456] *Plaza Equities Ltd.*, *supra* note 420.

receiver-manager appointed by debenture holders under the terms of a floating charge;[457] the holder of a floating charge on all the assets of a debtor (including goods purchased by the debtor under conditional sales contracts which had not been registered as required by the Act before the holder of the floating charge became a creditor of the conditional purchaser);[458] and debenture holders whose mortgage by way of floating charge was created after the execution of the conditional sales contract, but in innocence of its existance and in good faith.[459] However, in *Bank of Nova Scotia v. Mustang Machinery Ltd.*,[460] to which reference has been made earlier,[461] the holder of such a debenture did not have priority over the general creditors of the bankrupt purchaser of goods under a conditional sales contract. The debenture had been made before the goods in question were acquired by the bankrupt, but it crystallized after that date. Hence the debenture holder was not a subsequent mortgagee so as to be protected under The Alberta Conditional Sales Act. However, a garage-keeper's lien, duly accepted for registration under the British Columbia Mechanic's Lien Act,[462] took a priority over a conditional sales agreement that had been registered before the performance of the services in respect of which the garage-keeper was exercising the lien.[463]

B. *Bills of Sale*

The similarity between conditional sales contracts and "mortgage" bills of sale was pointed out in the earlier survey.[464] In the present context it is necessary to consider only recent cases which have further illustrated and elucidated some of the more typical problems that come before the courts in relation to such transactions, *i.e.*, where a party creates a chattel mortgage on goods which he is buying or already owns.

One basic difficulty is that of establishing the validity of a bill of sale. Before the mortgagee can enforce his security in accordance with the legislation, he must clearly prove that the alleged bill or chattel

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[457] Roynat Ltd. v. Chilko Modulars Ltd., [1978] 4 W.W.R. 710, 27 C.B.R. (N.S.) 278 (B.C.S.C.).

[458] Royal Bank of Canada v. I.A.C. Ltd., 20 Nfld. & P.E.I.R. 402, 53 A.P.R. 402 (Nfld. S.C. 1978). *Cf.* the situation under the Ontario Personal Property Security Act, R.S.O. 1970, c. 344 (*now* R.S.O. 1980, c. 375), in *Re* Brill Shirt Co., 28 C.B.R. (N.S.) 317, 1 P.P.S.A.C. 20 (Ont. H.C. 1978).

[459] *Dalgleish*, *supra* note 427.

[460] *Supra* note 431. *But see Re* Hillstead Ltd., 26 O.R. (2d) 289, 103 D.L.R. (3d) 347 (H.C. 1979), an Ontario case under the Personal Property Security Act, where the interest of a trustee in bankruptcy took priority over a conditional sales agreement executed prior to, but registered after, the filing of the petitions in bankruptcy.

[461] *See* text accompanying note 431 *supra*.

[462] R.S.B.C. 1960, c. 238 (*replaced by* Repairers Lien Act, R.S.B.C. 1979, c. 363).

[463] Mack Financial (Canada) Ltd. v. Surrey Truck Sale & Serv. Ltd., 10 B.C.L.R 204 (S.C. 1978).

[464] *Supra* note 203, at 153.

mortgage complies with the requirements of the relevant provincial statute. If there are errors of description in the documents registered under the legislation,[465] or if there is a failure to register the document in accordance with the Act,[466] such mistakes may be fatal to a claim by the mortgagee. In the case of *Porter v. Clutterbuck*,[467] the mortgagor attempted to argue that the chattel mortgage was invalid by reason of illegality, in that it contravened the provisions of The Ontario Planning Act.[468] This argument failed because even if the document contravened The Planning Act, this did not affect the validity of the mortgage as a contract. In any event, the mortgagor was estopped from raising the illegality, since by doing so he was endeavouring to benefit or profit from his own complicity in such illegality. This decision was criticized by H.R. MacEwen in an annotation[469] on the grounds that if the mortgage contravened The Planning Act it was a nullity, contrary to the views of the Divisional Court. It might also be argued that the refusal of the court to permit the mortgagor to raise illegality on the ground that his own acts estopped him from doing so is a strange attitude for a court to take when dealing with the issue of illegality in the law of contract.

The right of the mortgagee to seize goods in the event of default is one that may be closely supervised by some other statute, as in Manitoba[470] or Newfoundland, where in *Canadian Imperial Bank of Commerce v. Noseworthy*,[471] one of the points at issue was whether an amendment to the Bills of Sale Act[472] applied to the situation. That amendment restricted the application of a section of the main Act,[473] which held that mortgagees could not repossess and resell the goods *and* sue for the unpaid amount owed by the debtor, to the situation between the seller and buyer. The plaintiff in this case was a bank which had lent

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[465] McConnell v. Main Outboard Centre Ltd., [1978] 4 W.W.R. 718 (Man. Q.B.); Niagara Fin. Co. v. Proctor, 32 N.S.R. (2d) 208, 54 A.P.R. 208 (S.C. 1978); H.F. Russell Sea Foods Ltd. v. Mason, 36 N.S.R. (2d) 322, 64 A.P.R. 322 (S.C. 1979); Watson v. Bank of Nova Scotia, 37 N.S.R. (2d) 189, 67 A.P.R. 189 (S.C. 1979); Royal Bank of Canada v. Attorney General of Canada, 26 N.S.R. (2-) 352, 40 A.P.R. 352, 88 D.L.R. (3d) 95 (C.A. 1978); Inland Kenworth Sales (Sheena) Ltd. v. Eidsveick, 8 B.C.L.R. 142, 91 D.L.R. (3d) 156 (S.C. 1978); Chrysler Credit Canada Ltd. v. Commissioner of North-West Territories, 108 D.L.R. (3d) 198 (N.W.T.S.C. 1979).

[466] *Re* Holden, 32 C.B.R. (N.S.) 161 (Man. Q.B. 1979); Smiths' Estates v. Canada Acceptance Co., 40 N.S.R. (2d) 707, 73 A.P.R. 707 (S.C. 1980).

[467] 3 R.P.R. 317 (Ont. Div'l Ct. 1978).

[468] R.S.O. 1970, c. 349, s. 29 (*as amended by* S.O. 1971, vol. 2, c. 2, ss. 1, 2; 1972, c. 118, s. 3; 1973, c. 168, ss. 6, 7; 1974, c. 53, s. 4; 1975 (2d sess.), c. 18, s. 1; 1976, c. 38, s. 2; 1976, c. 64, s. 1) (*subsequently amended by* S.O. 1978, c. 93, s. 2); *now* R.S.O. 1980, c. 379, s. 29.

[469] *Supra* note 467, at 317-18.

[470] *McConnell*, *supra* note 465, applying The Consumer Protection Act, R.S.M. 1970, c. C-200, s. 100(*h*) (*enacted* S.M. 1970, c. 63, s. 33, *as amended by* S.M. 1972, c. 51, s. 12; 1974, c. 53, s. 17).

[471] *Supra* note 420.

[472] The Bills of Sale (Amendment) Act, S.N. 1974, No. 42, s. 4.

[473] Bills of Sale Act, R.S.N. 1970, c. 21, s. 14.

money on the security of goods purchased by the borrower with such money. Goodridge J. held that the amended section applied (to the advantage of the bank) because at the time of the amendment the debtor was not in default and therefore had acquired no right to be excused from repayment upon repossession of the goods by the mortgagee. This was, however, reversed on appeal.[474]

It should be noted that where a mortgagee does repossess and resell the goods, claiming the right to receive any deficiency from the mortgagor (if allowed under the legislation), the mortgagee must resell at a reasonable price. Therefore a sale by a bank-mortgagee to a customer at a sacrifice price was a breach of this obligation,[475] as was the rapid resale of an aircraft through a single newspaper advertisement at a very reduced price.[476]

Sometimes, however, a mortgagee is restricted in respect of the remedy he may pursue on default by the mortgagor. In *Bank of Montreal v. Hatcher*[477] it was argued that an election of remedies, as under the Newfoundland Conditional Sales Act,[478] applied also to mortgagees under the Bills of Sale Act. This argument succeeded at trial but failed when the bank appealed to the Newfoundland Court of Appeal, on the ground that the bank was not the seller of goods to which the Conditional Sales Act provision applied. A different result followed in another case from the same province, *Canadian Imperial Bank of Commerce v. Curtis*.[479] There the bank, which had lent money on the strength of a chattel mortgage and a promissory note from the borrower, was suing on a guarantee given by the borrower's father. It was held that the promissory note, and therefore the guarantee, was conditional upon the chattel mortgage. Liability ceased on the latter when the goods were repossessed and resold by the bank (by virtue of the Conditional Sales Act provision which applied under the Bills of Sale Act). This case was distinguished in the *Hatcher* case on the ground that an amendment to the Bills of Sale Act had restricted the application of the relevant provisions to bills of sale made between buyers and sellers. An attempt in an Alberta case[480] by the owner of goods, the mortgagor, to rely on a similar provision in that province's legislation[481] failed on the same ground, namely that the mortgagee was not a vendor of the goods. The same result followed in an Ontario case, *Re Jones*,[482] where there was a chattel mortgage which accompanied mortgages on real property given in

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[474] 31 Nfld. & P.E.I.R. 60, 87 A.P.R. 60 (Nfld. C.A. 1980).

[475] Provincial Bank of Canada v. Brun, 27 N.B.R. (2d) 523, 60 A.P.R. 523 (Q.B. 1978).

[476] Hansen v. C.I.B.C., 29 N.B.R. (2d) 195, 66 A.P.R. 195 (Q.B. 1980)

[477] 19 Nfld. & P.E.I.R. 514, 50 A.P.R. 514 (Nfld. C.A. 1979).

[478] R.S.N. 1970, c. 56, s. 12(3).

[479] 15 Nfld. & P.E.I.R. 92, 38 A.P.R. 92 (Nfld. C.A. 1978).

[480] Bank of British Columbia v. Achtymichuk, 17 A.R. 496 (Dist. C 1979).

[481] The Conditional Sales Act, R.S.A. 1970, c. 61, s. 19.

[482] 31 C.B.R. (N.S.) 213 (Ont. H.C. 1979).

respect of the same debt. The mortgagee claimed that he could sell the land pursuant to a power of sale in the mortgages and then claim the debt under the chattel mortgage. The trustee in bankruptcy of the debtor disallowed the mortgagee's claim for the return of chattels or their proceeds, and this was upheld by Anderson J. on appeal. The reason given was that, on the sale of the land, the creditor was no longer in a position to restore all the property upon the security by which repayment of the debt was promised. However, legislation which gave the mortgagee an election to "seize or sue"[483] did not affect security given against land, according to Locke J. in the British Columbia case of *Toronto-Dominion Bank v. Maxine's Restaurant*.[484] Hence the lender's rights under an assignment of a lease given in part as security for a loan by a bank survived commencement of an action for possession of goods covered by a chattel mortgage. The claim for possession, however, even though later abandoned and withdrawn, effectively barred any other rights under the chattel mortgage.

As regards the rights of third parties over goods which have been made the subject of a chattel mortgage (whether prior or subsequent to the acquisition of some right or interest by the third party), the recent decisions of courts in Canada present a bewildering array of possibilities. The actual decision in each instance depends upon the facts of the case and the particular statutory provision that may be involved. What the cases reveal is that on occasion various claims by parties with an interest based upon a transaction other than a chattel mortgage have prevailed over the claims by chattel mortgagees: for example, execution creditors,[485] debenture holders,[486] subsequent purchasers taking for value and in good faith,[487] trustees in bankruptcy[488] and assignees of a conditional sales contract.[489] On other occasions, however, chattel mortgages have prevailed over claims asserted by the holder of a floating charge,[490] a subsequent purchaser of goods in the possession of a

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[483] Bills of Sale Act, S.B.C. 1973, c. 7, s. 4.

[484] 16 B.C.L.R. 74, 105 D.L.R. (3d) 639 (S.C. 1979).

[485] MacKay v. Sheriff of the County of Halifax, 29 N.S.R. (2d) 183, 45 A.P.R. 183 (S.C. 1978).

[486] *Re* Dickens, 24 N.B.R. (2d) 607, 48 A.P.R. 607 (Q.B. 1978).

[487] Pozdnekoff v. Royal Bank of Canada, 34 N.S.R. (2d) 435, 59 A.P.R. 435, 96 D.L.R. (3d) 627 (S.C. 1979); People's Nat'l Bank of Washington v. Stadium Plumbing & Heating Ltd., 9 Alta L.R. (2d) 16 (Dist. C. 1979); Roshick v. Pachkowsky, 4 Man. R. (2d) 181 (Q.B. 1980); Royal Bank of Canada v. Brunswick Ford Sales, 26 N.B.R. (2d) 78, 55 A.P.R. 78 (C.A. 1979).

[488] *Re* Albion Paving Co., 26 C.B.R. (N.S.) 277 (Ont. H.C. 1978), on the ground that the parties making the pledge had no right to do so, not being the owners of the chattels.

[489] *Chrysler Credit Canada Ltd.*, *supra* note 465. *Cf.* the situation of the conditional sale vendor in Blower v. Hepburn, 13 Alta. L.R. (2d) 100 (Q.B. 1980).

[490] Harvey Dodds Ltd. v. Royal Bank of Canada, 1 Sask. R. 78, 105 D.L.R. (3d) 650 (C.A. 1979).

mercantile agent,[491] a judgment creditor,[492] the assignee of a conditional sales contract,[493] and a trustee in bankruptcy.[494] What all these sometimes conflicting decisions indicate is that the rights of third parties are never clear and must vary with the circumstances. Perhaps this variety in the decisions explains the need for legislation like the Ontario Personal Property Security Act[495] and justifies the nature and scope of such statutes, of which more will be said in the next section.

C. *Security Interests*

Ontario was the first province to replace its earlier legislation on conditional sales, bills of sale and so on by a Personal Property Security Act.[496] Manitoba followed suit[497] and Saskatchewan has now enacted such a statute,[498] which came into force on 1 May 1981. The Yukon Territory has also passed an ordinance along similar lines,[499] although it has not yet been proclaimed in force by the Commissioner. Reference should also be made to the Alberta legislation of 1979,[500] under which certain personal property security registration requirements are removed from the scope of existing legislation so that, as modern business practices change and advance in respect of such matters, regulations may be used to reflect such changes.

At the present time, the reported cases are chiefly from Ontario. Some mention and discussion of these is material to an understanding of how the Ontario legislation is interpreted and applied by the courts. It may be expected that the Ontario experience will be repeated elsewhere, and that the Ontario decisions will have some persuasive effect upon the decisions of courts in other provinces which now, or in the future, adopt such legislation.

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[491] Toronto-Dominion Bank v. Dwyer, 6 Alta. L.R. (2d) 202 (Dist. C. 1979).

[492] Del Equipment Ltd. v. Bank of British Columbia, 8 B.C.L.R. 71, 93 D.L.R. (3d) 607 (S.C. 1978). *Cf.* Continental Automotive Inc. v. LeGassick, 29 N.B.R. (2d) 456, 66 A.P.R. 456 (Q.B. 1980), where a crystallized floating charge took priority over a subsequent judgment debtor.

[493] *Chrysler Credit Canada Ltd.*, *supra* note 465.

[494] *Re* Windham Sales Ltd., 31 C.B.R. (N.S.) 130, 102 D.L.R. (3d) 459 (Ont. H.C. 1979).

[495] R.S.O. 1980, c. 375.

[496] *See* Fridman, *supra* note 203, at 156. A leading work on the subject is R. McLAREN, SECURED TRANSACTIONS IN PERSONAL PROPERTY IN CANADA (1980).

[497] The Personal Property Security Act, R.S.M. 1970, c. P-35 (*enacted* 1973, c. 5, ss. 2-40, 44-69, *in force* as of 1 Sep. 1978).

[498] The Personal Property Security Act, S.S. 1979-80, c. P-6 (*proclaimed in force* effective 1 May 1981).

[499] Personal Property Security Ordinance, O.Y.T. 1980, c. 20.

[500] The Chattel Security Statutes Amendment Act, S.A. 1979, c. 35. Note also that proposals for the enactment of a Personal Property Security Act have been put forward in both Alberta and British Columbia: *see* the review of R. McLAREN, *supra* note 496, by Ivankovich, 30 U.N.B.L.J. 258 (1981).

There has been some elucidation of the scope of the Act. In *Commercial Credit Corp. v. Harry D. Shields Ltd.*[501] R.E. Holland J. held that the landlord's right to distrain involved a lien that was given by a rule of law and did not come within the Act. Therefore, since the provisions of the Act had no application, the landlord's claim had priority over a chattel mortgage which was governed by the Act. So, too, in *Re Berman*[502] the Ontario Court of Appeal had to consider the effect of bankruptcy upon a registered retirement savings plan which the bankrupt had obtained with borrowed money. The money was lent by the trust company which gave and regulated the plan. The bankrupt had signed a direction to the trust company to apply the proceeds of any redemption of the plan first to satisfy the loan, redemption being contemplated as taking place at the suit of the bankrupt, not the trust company. When the trustee in bankruptcy applied for directions, Steele J., at first instance held that the direction given to the trust company did not constitute a "security interest" within The Personal Property Security Act, but that the interest of the trust company was subordinate to that of the trustee in bankruptcy, who was therefore entitled to all the proceeds of the plan. On appeal this was reversed, the court applying principles of the law of trusts. However, in the course of the judgment the court held that The Personal Property Security Act did not apply to the facts of this case. The trust company held a charge on the proceeds of the retirement plan in respect of the money advanced to purchase the plan, but it did not have the kind of interest which attracted the application of the statute.

What, then, is a "security interest"? Clearly the resolution of this question is vital to the whole operation and effect of the statute. In another court of appeal decision, *Re Beaton*,[503] it was held by the majority[504] that a wage assignment was a security interest which required "perfection" within the meaning of the Act by registration. If unregistered, it was an "unperfected security interest" (of which more will be said below) and was therefore subordinated to the interest of a trustee in bankruptcy. The trustee in bankruptcy had no such interest until he applied to the court under section 48 of The Bankruptcy Act.[505] Therefore, the assignee under the wage assignment, a credit union, was entitled to all moneys withheld by the employer under the assignment from wages owing to the bankrupt up to the date of the trustee's application under The Bankruptcy Act. Thornson J.A. dissented[506] on the ground that The Bankruptcy Act provision applied to all wages received before and after the making of the statutory order and had the effect of

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[501] 1 P.P.S.A.C. 99, 112 D.L.R. (3d) 153 (Ont. H.C. 1980).

[502] 31 C.B.R. (N.S.) 313, 1 P.P.S.A.C. 81, 105 D.L.R. (3d) 380 (Ont. C.A. 1979), *rev'g* 30 C.B.R. (N.S.) 164, 97 D.L.R. (3d) 379 (H.C. 1979).

[503] 30 C.B.R.(N.S.) 225, 101 D.L.R. (3d) 338 (Ont. C.A. 1979).

[504] *Id.* at 226-29, 101 D.L.R. (3d) at 351-53 (Arnup J.A., with Wilson J.A. concurring).

[505] R.S.C. 1970, c. B-3.

[506] *Supra* note 503, at 229-41, 101 D.L.R. (3d) at 339-51.

ensuring that such wages be available to the bankrupt for the support and maintenance of himself and his dependents. That availability was not subject to any rights of an assignee under an earlier wage assignment. In two cases,[507] Saunders J. held that consignment agreements relating to goods were not intended to create a security within the Act, so that the original owner of goods had a better right to them than the consignee's trustee in bankruptcy. For a consignment arrangement to come within the Act, said the learned judge,[508] it must create a security interest within the meaning of the relevant section of the Act[509] and in the context of the Act such an agreement must be intended to secure the payment or performance of an obligation on the part of the consignee. Failing evidence of any such intention in these cases, the agreement did not create the pertinent interest. In a county court decision,[510] it was held that custom-made thermos windows constructed with aluminum frames installed by screwing them directly into the masonry walls of a building were "building materials that have been affixed to realty", and as such could not come within the definition of "security interest" in section 1(y) of the Ontario Act. Hence the party which had purported to register a notice of security pursuant to the Act was not entitled, when the contractor went bankrupt, to any priority over mechanics' liens which arose in connection with the building for which the windows were intended.

Should a transaction come within the scope of the Act, it must then be determined whether the security interest in question was validly created and registered. These matters give rise to much the same sort of questions as have arisen (and in other provinces still do arise) with respect to the creation and registration of bills of sale, conditional sales contracts and so on. Thus it has been held that the validity of a registration was not upset by clerical errors,[511] or by the fact that the financing statement did not itemize the goods to which the interest referred.[512] On the other hand, invalidity has resulted from clerical errors

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[507] *Re* Stephanian's Persian Carpets Ltd., 34 C.B.R. (N.S.) 35 (Ont. H C. 1980); *Re* Toyerama Ltd., 34 C.B.R. (N.S.) 153, 1 P.P.S.A.C. 126 (Ont. H.C. 1980).

[508] *Re Stephanian's*, *id.* at 41.

[509] The Personal Property Security Act, R.S.O. 1970, c. 344, s. 1(y); *now* R.S.O 1980, c. 375, s. 1(y).

[510] Rockett Lumber & Bldg. Supplies Ltd. v. Papageorgiou, 30 C.B.R. (N.S.) 183 (Ont. Cty. Ct. 1979).

[511] Polano v. Bank of Nova Scotia, 23 O.R. (2d) 324, 95 D.L.R. (3d) 510 (Dist C. 1979); *Re* Lawrence, 26 O.R. (2d) 3, 31 C.B.R. (N.S.) 125 (H.C. 1979); *Re* Robert Sist Devs. Corp., 17 O.R. (2d) 305, 80 D.L.R. (3d) 445 (H.C. 1977). *But see Re* Alduco Mechanical Contractors Ltd., 27 O.R. (2d) 323, 32 C.B.R. (N.S.) 48, 106 D.L.R (3d) 540 (H.C. 1979), where a mistake was labelled not a clerical error, but an omission when the bank filed a financing change statement that failed to show that the name of the debtor had changed. Thus the trustee in bankruptcy prevailed over the bank

[512] West Bay Sales Ltd. v. Hitachi Sales Corp. of Canada, 20 O.R. (2d) 752, 88 D.L.R. (3d) 743 (H.C. 1978).

that were misleading,[513] and the omission of the debtor's natural name (in a statement which included only the debtor's business name).[514] Late registration has also deprived a creditor of the protection of the statute.[515]

If a security interest is "unperfected", the claims of the holder of the security will be subordinated to those of the debtor's trustee in bankruptcy. "Perfection" is effected in various ways under the Act and certain recent cases have been concerned with these methods. Thus in *Re Johnson*,[516] an attempt was made to perfect a security interest by registration after the lapse of the prescribed time. An order was obtained by the claimant to extend the time for registration *nunc pro tunc* to the actual date of registration. When the debtor went bankrupt, it was held that this could not perfect the security interest retroactively so as to give it superiority to the interest of the debtor's trustee in bankruptcy. The same judge, Steele J., held in another case[517] that the assignee of a conditional sales contract, which had been properly registered, did not have a perfected security interest in money in a bank account that contained the proceeds of the sale by auction of the goods that were the subject matter of the conditional sale. In *Re Ovens*,[518] where a registration was irregular, the result was that the claimant did not have a perfected security interest. On the other hand, in *Re Pelee Motor Inn Ltd.*[519] the conditional vendor under a conditional sales contract in respect of which a financing statement was registered was held to have priority over the interests of the conditional purchaser's trustee in bankruptcy, a decision reached by Anderson J. only after considering certain problems relating to the inconsistency between the provisions of sections 47 and 22 of the Act. The trustee of a proposal made by a debtor, who was the purchaser of goods under a contract that reserved title in the seller, obtained no better rights as against the security interest of the conditional vendor than would have been available to the debtor personally, since a trustee did not come within the protection of section 22(1)(*a*)(iii) of The Personal Property Security Act.[520]

The question of priorities with respect to claims and debts is obviously connected with the definition of "security interest" and the

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[513] McMullen v. Avco Financial Servs. of Canada Ltd., 24 O.R. (2d) 440, 98 D.L.R. (3d) 560 (H.C. 1979), *appeal dismissed* 28 O.R. (2d) 255, 109 D.L.R. (3d) 512 (C.A. 1980).

[514] *Re* Ovens, 26 O.R. (2d) 468, 32 C.B.R. (N.S.) 42 (C.A. 1979). *Cf. Re* Owl Restaurants Ltd., 27 C.B.R. (N.S.) 159 (Ont. H.C. 1977), where the security interest was void because it was registered under thebusiness name of the debtor instead of the corporate name.

[515] *Re* Smith, 19 O.R. (2d) 157, 1 P.P.S.A.C. 19 (Cty. Ct. 1978); Demos v. Niagara Financing Co., 1 P.P.S.A.C. 96 (Man. Cty. Ct. 1980).

[516] 23 O.R. (2d) 717, 30 C.B.R. (N.S.) 210 (H.C. 1979).

[517] *Re* Kryzanowski, 24 O.R. (2d) 18, 30 C.B.R. (N.S.) 204 (H.C. 1979).

[518] *Supra* note 514.

[519] 18 O.R. (2d) 700, 83 D.L.R. (3d) 757 (H.C. 1978), *appeal dismissed* 28 C.B.R. (N.S.) 224 (C.A. 1978).

[520] *Re* Mercantile Steel Prods. Ltd., 20 O.R. (2d) 237, 27 C.B.R. (N.S.) 161 (H.C. 1978).

notion of "perfection". Not surprisingly, many of the reported cases are concerned with this aspect of the statute's operation. In *Kevill v. Trans Canada Credit Corp.*[521] it was held that a security interest, once perfected and with priority, was not affected by any assignment of such interest. In *Re Triad Financial Services*[522] Southey J., considering section 53(1)(*c*) of the Act (which deals with the prejudicial effect of late renewal of a registration) held that this provision gave priority over an unperfected security interest to a creditor who made an advance under a debenture during the period that the security interest remained unperfected, even though that creditor did not search the register. Such a debenture creditor is "prejudiced", within the meaning of the section, whether or not he consciously relies on the state of perfection of the disputed security interest. The importance of the sequence of registration for priority was stressed by Saunders J. in *National Trailer Convoy of Canada Ltd. v. Bank of Montreal.*[523] There the bank's registration of its purchase money security interest had priority because, although the bank and the vendor under a conditional sales agreement had registered their respective interests within the thirty-day statutory period, only the bank had registered its interest within the ten-day period mentioned in section 34(3) of the Act. Hence the bank took priority. The validity and superiority of a chattel mortgage as against a debtor's trustee in bankruptcy were also upheld by Saunders J. in *Re Country Kitchen Donuts Ltd.*,[524] in which the bank's interest, a chattel mortgage, was created at a time when the bank was ignorant of the existence of the company (having dealt only with individual incorporators as individual borrowers), and the bank had perfected its interest by registration, a perfection that never became "unperfected" (as set out in section 49(2) of the Act) even though the bank had learned of the transfer of the chattels to the company.[525]

Perhaps the most interesting and most important decision on priorities, however, is that of the Ontario Court of Appeal in *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.*[526] The plaintiff supplied lumber to Four Seasons Chalet Ltd. on terms that title was to remain in the suppliers until payment. Subsequently a written document was executed to give effect to this agreement, and a financing statement was registered under the Act. Before the lumber was supplied, Four Seasons had given security to the defendant bank under section 88 of The Bank Act.[527] The

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[521] 23 O.R. (2d) 432 (Cty. Ct. 1979).

[522] 24 O.R. (2d) 423, 98 D.L.R. (3d) 555 (H.C. 1979), *appeal dismissed* 27 O.R. (2d) 506, 106 D.L.R (3d) 706 (C.A. 1979), *leave to appeal refused* [1980] 1 S.C.R. xiii.

[523] 10 Bus. L.R. 196, 1 P.P.S.A.C. 87 (Ont. H.C. 1980).

[524] 34 C.B.R. (N.S.) 252, 1 P.P.S.A.C. 176 (Ont. H.C. 1980).

[525] For the situation of guarantors of a loan, *see Re Windham Sales Ltd.*, *supra* note 494.

[526] 29 O.R. (2d) 193, 12 Bus. L.R. 93 (C.A. 1980), *aff'g* 1 P.P.S.A.C. 29 (H.C. 1979).

[527] R.S.C. 1970, c. B-1 (*replaced by* Banks and Banking Law Revision Act, S.C 1980, c. 40): *see* the text accompanying note 192 *supra*.

bank seized the lumber under the security agreement after the execution of the written conditional sale agreement, but before registration of the financing statement. In an action to determine the priority of the claims by the supplier and the bank, judgment was given by O'Leary J. at trial in favour of the supplier. By a majority, this judgment was upheld by the Court of Appeal. After a careful review of the history of this part of the law, and the alteration of the common law by first The Conditional Sales Act and later The Personal Property Security Act,[528] Arnup J.A. considered that the provisions and effects of The Personal Property Security Act on the creation, perfection and priority of a security interest under that statute took precedence over the provisions of The Bank Act in regard to securities given to a bank. Houlden J.A.[529] thought that Four Seasons could give no greater title to the lumber than Four Seasons itself possessed, which was a title subject to the rights of the suppliers as conditional vendors. Therefore, the bank acquired nothing under its security. Wilson J.A. dissented on the ground that the bank's security interest attached to the lumber on its delivery to Four Seasons, at which time the conditional sales agreement was ineffective against the bank for want of a writing signed by the debtor as required by section 10(*b*) of The Personal Property Security Act, so that the bank's interest outweighed that of the suppliers.[530] Obviously this case raises difficult questions, not only as to the construction and interpretation of two complex statutes dealing with somewhat similar subjects (though from different aspects), but also as to the interrelation of a federal and provincial statute regulating the creation and effects of security interests in chattels. It is to be hoped that the Supreme Court of Canada will have an opportunity to resolve the major difference of opinion evident in the various judgments of the Ontario Court of Appeal.

Finally, mention should be made of some other points which have recently arisen. It would seem that, in appropriate circumstances, an injunction may be granted to prevent a party from dealing with chattels which are secured under the Act, where an award of damages to an injured party would not suffice.[531] Moreover, the power of the court to appoint a receiver under The Judicature Act[532] is not diminished by The Personal Property Security Act. Thus, the holder of a security interest under the latter Act is not precluded from applying to the court for the appointment of a receiver to manage the partnership business which gave the security.[533] As regards the "conflicts" provisions of the Act, the

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[528] *Supra* note 526, at 194-202, 12 Bus. L.R. at 96-105.

[529] *Id.* at 202-04, 12 Bus. L.R. at 105-08.

[530] *Id.* at 204-07, 12 Bus. L.R. at 108-12.

[531] Turf Care Prods. Ltd. v. Crawford's Mowers & Marine Ltd., 23 O.R. (2d) 292, 5 Bus. L.R. 89, 95 D.L.R. (3d) 378 (H.C. 1978), *leave to appeal refused* 23 O.R. (2d) 292, 95 D.L.R. (3d) 378 (Div'l Ct. 1978).

[532] R.S.O. 1980, c. 223, s. 19.

[533] Cantamar Holdings Ltd. v. Tru-View Aluminum Prods., 23 O.R. (2d) 572, 6 Bus. L.R. 209 (H.C. 1979).

Ontario Court of Appeal held in *Trans Canada Credit Corp. v. Bachand*[534] that the purchaser of a car in Ontario was protected against the holder of a security interest created first in New Brunswick, though later perfected by registration in Ontario. This was because the period for perfecting the security interest in Ontario under the Act had lapsed and the filing of the financial statement a few days later, after the lapse of that earlier period, was inoperative, null and void. In finding for the innocent Ontario purchaser, the court adopted the reasoning in McLaren's *Secured Transactions in Personal Property in Canada*[535] to the effect that the statutory period within which an extra-provincial security interest must be perfected in Ontario does not mean that the protection is absolute without the need for subsequent action by the security holder. To take such an attitude would cause injustice to an innocent purchaser.[536] Thus the extra-provincial security holder must obey the statute strictly if he is to continue to have in Ontario the protection which he originally may have had elsewhere.

VI. Conclusion

Some general comments may be made in conclusion. From the foregoing discussion it may be seen that the law of agency, negotiable instruments, sale of goods, and credit transactions involving chattels is continuing, to a limited extent, to evolve, both in the decisions of courts and through the actions of legislatures. The Ontario "experiment" with personal property security legislation is working and is gradually being undertaken by other provinces. Although the courts have not made any significant alterations in the common law of agency or in the interpretation of the statutory provisions relating to sales or to negotiable instruments, some relatively minor developments have been occurring. Perhaps the most interesting potential change in the future is in respect of the law of sale of goods. The extensive and far-reaching report of the Ontario Law Reform Commission,[537] if it ever achieves the status of legislation, could greatly affect the way in which the law and the courts deal with that particular contract. This, in turn, may have consequences for other parts of the law, for example, contract and perhaps even agency. If the trend towards consumer protection has begun to slow in recent years, despite the enactment of some relevant legislation in Saskatchewan and New Brunswick and the adoption of legislation against unfair business practices in Newfoundland, the movement towards the rationalization of credit transactions involving the creation of some kind of security for the creditor is growing in strength in Canada. It is

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[534] 30 O.R. (2d) 405, 1 P.P.S.A.C. 185 (C.A. 1980).
[535] *Supra* note 496, vol. 1, at 7-10.
[536] *Supra* note 534, at 408-09, 1 P.P.S.A.C. at 188-90 (MacKinnon A.C.J.O.).
[537] *Supra* note 377.

therefore to be expected that commercial law in this country will still present both interest and novelty for the practitioner and the student alike in years to come.