CONTRACTS

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I. INTRODUCTION

Professor Fridman in an earlier number of this *Review* [1] considered some of the ways in which English courts today restrict and regulate freedom of contract. For the purpose of his analysis he made a threefold division between the existence of a contract, its terms and content, and its termination. While not necessarily agreeing with all Professor Fridman's strictures on this judicial supervision, the present writers feel that it is of value to consider how far the Canadian cases over the past year show the same tendency. It is proposed, therefore, to review and examine these cases by using the above threefold division.

II. EXISTENCE OF CONTRACT [2]

The perennial problem of mistake is one which may be examined in the context of offer and acceptance and which is, therefore, a question affecting the existence of a contract or, alternatively, in the more traditional context, of one affecting the terms and content of a contract. If we may examine it in the former context, we find a recent Canadian decision which tends to bear out Fridman's contention that the function of the courts in such cases is to decide what is just in all the circumstances, regardless of the actual intentions of one of the parties.

In *Con-Force Products v. Rosen* [3] the court found there was a contract although the defendants took the position that in dealing with the plaintiffs they acted as officers and directors of a body corporate and never intended to deal with the plantiffs in their personal capacities. The judge adopted the objective test for acceptance traditional in cases of mutual mistake, and quoted Cheshire and Fifoot: "The question is not what the parties had in their minds, but what reasonable third parties

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[1] Fridman, *Freedom of Contract*, 2 OTTAWA L. REV. 1 (1967).

[2] Cases of judicial interference on the well-established grounds of contractual incapacity are not included. See *e.g.* Upper v. Lightening Fastener Employees Credit Union, 57 W.W.R. (n.s.) 241 (Ont. County Ct. 1966). Such contractual protection does not extend to protection against criminal charges. *R.* v. *Campbell*, 62 D.L.R.2d 188 (B.C. 1967).

[3] 64 D.L.R.2d 63 (Sask. Q.B. 1967).

would infer from their words or conduct." [4] Mr. Justice Disbery found that the plaintiffs had no knowledge that the defendant Rosen intended to act in a representative capacity for a body corporate and did not, in fact, even know of the existence of the body corporate at the time the contract was entered into. It seems, however, from his judgment that he felt it would be clearly unjust to allow the defendant to escape from a contract into which by his own acts he had led the other parties.

Another tool often used by the courts to regulate the existence of a contract is that of certainty of terms. Anson states that "[t]he law requires the parties to make their own contract; it will not make a contract for them out of terms which are indefinite or illusory." [5] However, he then refers to the court's role as an auxiliary one in assisting the parties in accordance with the maxim *id certum est quod certum reddi potest.* In actual fact this auxiliary role may be one of the more effective tools the court has for the skilful regulation of freedom of contract. This requirement of certainty was used to reach a different result in a case in many ways similar to *Con-Force Products v. Rosen.* [6] In *Causeway Shipping Centre Ltd. v. Muise,* [7] there was a lease drawn up describing the lessee as "Thomas C. Muise or his nominee." The defendant thought that he thereby assumed no personal liability and the lessee would be the company he intended to form, whereas the vice-president of the plaintiff company thought the defendant was assuming personal liability, but only until his company was formed. The Appellate Division of the Nova Scotia Supreme Court, following the English House of Lords' decision in *Scammell v. Ouston,* [8] held that the phrase "or his nominee" was so obscure and lacking in any precise meaning that it was "difficult to attribute to the parties any particular contractual intention." [9] A clarifying letter sent to the defendant was rejected, as the latter's misinterpretation of it was

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[4] Id. at 75. *See also* at 76 :

When laymen, including architects and contractors choose to wander foot-loose in the legal zoo and consequently fail to correctly identify the occupants of the promoters' cage, the partners' cage and the companies' cage, the inmates thereof nevertheless retain their proper identities. Such mistakes of legal identity by laymen bring to mind Saxe's poem "The Blind Men and the Elephant" which commences :

> It was six men of Indostan,
> To learning much inclined,
> Who went to see the elephant,
> (Though all of them were blind),
> That each by observations,
> Might satisfy his mind.

Mr. Justice Disbery also discussed the distinction between mistake of identity and mistake of attribute and adopted the 'two-entity' test proposed by Glanville Williams, *Mistake as to Party in the Law of Contract,* 23 CAN. B. REV. 271, 380 (1945).

[5] W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 23 (22d ed. A. Guest 1964).

[6] *Supra* note 3.

[7] 63 D.L.R.2d 26 (N.S. Sup. Ct. 1967).

[8] [1941] A.C. 251. Price to be paid "on hire-purchase" terms; this phrase was held to be so indefinite as to render the contract uncertain.

[9] *Supra* note 7, at 36.

so total as to give rise to the defence of *non est factum.* Thus the court refused to validate the contract, perhaps because the parties were not on an equal commercial footing.

The British Columbia Supreme Court adopted a similar negative attitude in *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* [10] This case involved a five-year contract for the disposal of offal by the plaintiff company from the defendant's chicken processing plant. A clause provided for termination, *inter alia,* upon change of management or ownership by the new management or owner. After a sale of all the shares of the defendant company and a change of management, the plaintiff received notice of termination of the agreement. The court held that the new owners, as strangers to the contract, acquired no rights or obligations under it and, therefore, could not terminate it. If, however, the defendant company were purporting to terminate the agreement, the termination clause was not sufficiently "clear and explicit" [11] to give it this right. The clause could not be amended by the court as no "common understanding" [12] of its purpose could be found, and it was, therefore, excised from the contract. Perhaps the court was influenced by the fact that the power of termination was probably exercised due to the greatly increased value of offal rather than to the change of management.

In the case of *Gilchrist Vending Ltd. v. Sedley Hotel Ltd.,* [13] the uncertainty affected the whole contract. Here there was a form of agreement by which the hotelier purported to grant a shuffleboard operator an exclusive license to install a shuffleboard on his hotel premises. The type of shuffleboard was not specified and the terms of the agreement relating to termination and an option for the hotelier to purchase the board were also imprecise. Mr. Justice Tucker had no hesitation in stating: "Unless parties have come to an agreement the terms of which are certain or ascertainable, no agreement can be in force between them. The Court cannot make an agreement for the parties." [14] The judge also felt that there was no consideration given by the operator, as there was no obligation on him to install the shuffleboard, and the termination clause allowed him to terminate the contract upon payment of one dollar. It is unclear why the profit-sharing agreement, to take effect if the plaintiff installed the board, did not constitute sufficient consideration for the unilateral contract, and the dislike of courts for termination clauses, apparent in these two cases, seems sometimes to be supported by little legal rationale. [15]

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[10] 61 W.W.R. (n.s.) 227, 63 D.L.R.2d 753 (B.C. Sup. Ct. 1967), *rev'd,* 1 D.L.R.3d 513 (B.C. 1969).

[11] *Id.* at 233, 63 D.L.R.2d at 759.

[12] *Id.* at 234, 63 D.L.R.2d at 759.

[13] 66 D.L.R.2d 24 (Sask. Q.B. 1967).

[14] *Id.* at 28.

[15] *Compare* the above three cases *with* the case of Sawley Agency Ltd. v. Ginter, [1967] Sup. Ct. 451, 62 D.L.R.2d 768, where a patent ambiguity was construed by the Court and the contract upheld.

The strict attitude of the *Gilchrist* case with regard to consideration seems the more surprising in view of the increasing acceptance of the comparatively modern doctrine of quasi-estoppel or promissory-estoppel, by which the courts have been able to hold a party to a promise to modify or discharge an existing duty to the promisor, although unsupported by consideration, if intended to be binding or if the other party has acted upon it to his prejudice. Despite the many raised eyebrows when this principle was first enunciated in England by Mr. Justice Denning (as he then was) in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [16] it now seems to be generally accepted by the courts of both England and Canada. [17]

During the past year the Appeal Division of the New Brunswick Supreme Court applied this doctrine in the case of *Subsurface Surveys Ltd. v. John Burrows Ltd.*[18] In that case the plaintiff was entitled by his contract with the defendant to accelerate the maturity date of a particular sum which was owing by giving notice after any monthly instalment was ten days in arrears. The defendant, over a period of sixteen months, was consistently in arrears but the plaintiff never exercised this right to accelerate. The court, therefore, held that he was now estopped by his conduct from accelerating the due date of the principal sum unless he had given reasonable notice to the defendant that he intended to return to a strict requirement of due performance. Mr. Justice Ritchie suggests, however, some distrust of "subsequent extensions or enlargements" [19] of the doctrine of promissory estoppel as originally applied in the *Hughes* and *Birmingham* cases, [20] and there is no indication that the present case will lead to any relaxation in Canada of the technicalities limiting this doctrine. [21]

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[16] [1947] K.B. 130 (1946).

[17] *See, e.g.*, Canadian cases from the past year: Ivanczuk v. Center Square Devs. Ltd., [1967] 1 Ont. 447, 61 D.L.R.2d 193 (High Ct.); Baldwin v. Rhinhart, 63 D.L.R.2d 420 (Sask. Q.B. 1967); Modde v. Dominion Glass Co., [1967] Sup. Ct. 567, 63 D.L.R.2d 193; Traders' Finance v. Nadon, 62 D.L.R.2d 459 (Ont. High Ct. 1967); *Re* Ben Ginter Constr. Co. v. International Union of Operating Engineers, 62 D.L.R.2d 485 (B.C. Sup. Ct. 1967), estoppel by union representative bound members of union. *Cf.* Puciato v. Charles, 59 W.W.R. (n.s.) 193, (B.C. Sup. Ct. 1967), where accord and satisfaction was found.

[18] 62 D.L.R.2d 700 (N.S. 1967).

[19] *Id.* at 720.

[20] Hughes v. Metropolitan Ry., 2 App. Cas. 439 (1877); Birmingham & District Land Co. v. London & Northwest Ry., 40 Ch. D. 268 (C.A. 1889).

[21] *Cf.* Sloan v. Union Oil, [1955] 4 D.L.R. 664 (B.C. Sup. Ct.), where there was an abortive attempt to establish promissory estoppel as an independent cause of action.

Other Canadian cases of the past year dealing with existence of a contract—offer and acceptance: Highland Constr. Co. v. Borger Constr. Ltd., 59 W.W.R. (n.s.) 627 (Sask. Q.B. 1967). Amicale Yarns Inc. v. Canadian Worsted Mfg. Ltd., [1968] 2 Ont. 59 (High Ct.). Conditions precedent: Gordon Leaseholds v. Metzger, [1967] 1 Ont. 580 (High Ct.); G. & R. Constr. v. S. Slope Holdings Ltd., 63 W.W.R. (n.s.) 65 (B.C. Sup. Ct. 1968); Marketeers Diversified, Inc. v. O'Reilly, 66 D.L.R.2d 459, (B.C. Sup. Ct. 1968). Intention: Galpin v. Auld, 59 W.W.R. (n.s.) 257 (B.C. 1967); Teasdale v. MacIntyre, [1967] 2 Ont. 169 (High Ct.); Lillie v. Sanderson, 60 W.W.R. (n.s.) 535(Man. Q.B. 1967); Laurent v. Thibeault, [1968] 1 Ont. 285 (1967), agreements to share gas expenses did not create contractual obligations, *cf.* Coward v. Motor Insurers Bureau, [1963] 1 Q.B. 259. Intention to create documents under seal: Linton v. Royal Bank of Canada, 60 D.L.R.2d 398 (Ont. High Ct. 1966); Wulff v. Oliver, 61 W.W.R. (n.s.) 632 (B.C. Sup. Ct. 1967); Dauphinee v. Height, 63 D.L.R.2d 743 (N.S. Sup. Ct. 1967).

III. Terms and Content of Contract

It is in the field of terms and content that Professor Fridman particularly deprecates judicial interference with the individual's freedom of contract. Many Canadian cases of the past year illustrate the implication of additional terms into contracts by the courts. [22] With regard to the converse problem of exclusion or exemption clauses, the Canadian courts have adhered to a policy of strict control rather than the potentially more liberal policy suggested in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale.* [23] This case held that there is no substantive rule of law that liability for certain breaches of contract cannot be excluded, but that it is a question of construction in each case whether the exemption clause effectively excludes liability for the particular breach. "Reasonable notice" [24] of the exemption clause will still be necessary; such clauses will doubtless be strictly construed *contra proferentem* [25] and will even perhaps render the contract meaningless and unenforceable if they purport to exclude liability for non-compliance with the main purpose of the contract. But the question now seems to be essentially one of contractual intention, albeit intention as interpreted by the courts.

The Manitoba Court of Queen's Bench, however, preferred a more traditional approach in *Keelan v. Norray Distributing Ltd.* [26] The standard form conditional sales contract used by the parties in the sale to the plaintiffs of unusual coin-operated automobile vacuum cleaners, contained a broad exclusion clause in fine print on the reverse side. The plaintiffs alleged breach of the implied condition of fitness for purpose, having received merchandise "no better than junk." [27] Chief Justice Tritschler held that the plaintiffs had no reasonable notice of the clause and that, anyway, following *Karsales (Harrow) Ltd. v. Wallis,* [28] the exemption clause could not exclude liability for a "fundamental breach" of the contract. Although

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[22] *E.g.*, International Tools v. Kollar, 67 D.L.R.2d 386 (Ont. 1968), to prevent employee revealing trade secrets of employer. Invention in course of duty belongs to employer: Gage v. Sugden, [1967] 2 Ont. 151 (High Ct.). Good faith: Robin Nodwell Mfg. Ltd. v. Formost Devs., 52 Can. Pat. R. 244 (Alta. Sup. Ct. 1966). That premises reasonably safe: Finigan v. Calgary & Heritage Park Soc'y, 62 W.W.R. (n.s.) 115 (Alta. 1967). Reasonable notice in contract of indefinite hiring: Atkins v. Lawrence, 62 W.W.R. (n.s.) 439 (Sask. 1967). Custom of stock exchange in brokerage contract: Greenshields Inc. v. McDonough, [1968] 1 Ont. 297 (High Ct. 1967). Termination only as provided by Schools Act, and so forth, in teachers' contract: Mahoney v. Newcastle Bd. of Trustees, 61 D.L.R.2d 77 (N.B. 1966). Hours of Work and Vacations with Pay Act: Stewart v. Park Manor Motors Ltd., 66 D.L.R.2d 143 (Ont. 1967). Sale of Goods Act: Consolidated Motors v. Wagner, 63 D.L.R.2d 266 (Sask. Q.B. 1967), *re* title. Fitness for purpose: Benzansor v. Kaintz, 61 D.L.R.2d 410 (N.S. Sup. Ct. 1967). Polar Refrigeration Serv. Ltd. v. Moldenhauer, 61 D.L.R.2d 462 (Sask. Q.B. 1967).

[23] [1966] 2 All E.R. 61 (H.L.).

[24] *E.g.*, Wayne Distributions & Advertisers Ltd. v. General Accident Assurance Co., [1967] 2 Ont. 204 (High Ct.).

[25] *E.g.*, Canadian Bldg. Materials Ltd. v. W.R. Meadows of Canada Ltd., [1968] 1 Ont. 469 (High Ct.).

[26] 62 D.L.R.2d 466 (Man. Q.B. 1967).

[27] *Id.* at 476.

[28] [1956] 2 All E.R. 866 (C.A.).

one sympathizes with the desire to protect the consumer, it is suggested that the same result may have been achieved on the more logical basis of *Suisse Atlantique*.

The courts' dislike of exemption clauses stems from the "almost paternalistic" [29] view that the parties should not impose excessive or unconscionable demands upon each other. This view is also one of the bases for the courts' rejection of contracts or severance of certain terms as contrary to "public policy" and, therefore, void or illegal. [30] In *Whitfield v. Canadian Marconi Co.*, [31] the court, however, refused to interfere with a contract where one might have expected it on a modern approach to public policy. In that instance there was a clause in a contract of employment placing Indian and Eskimo villages out-of-bounds to the employee working on a radar base in the north, and also prohibiting his fraternization or association with the native population except in special circumstances. It was held by the Quebec Court of Queen's Bench, Appeal Side, that this clause did not contravene any laws of public order or good morals within the meaning of article 13 of the Quebec Civil Code, nor infringe the employee's rights under the Canadian Bill of Rights. [32] A persistent nineteenth century reluctance of the courts to extend the established categories of agreements contrary to public policy would indicate a similar result in a common-law jurisdiction.

A similar "liberal" attitude may be seen in cases involving non-compliance with statute. [33] In *Sidmay Ltd. v. Wehttam Investments Ltd.*, [34] the defendant, an Ontario corporation registered as a mortgage broker but not as a loan corporation under the Loan and Trust Corporations Act, [35] lent money to the plaintiffs on the security of a real estate mortgage. The court held that, even were Wehttam acting in contravention of the statute, this would not render the mortgage illegal in view of the intent of the act as revealed by both its present language and historical antecedents. Mr. Justice Kelly stated that "this Court, unless compelled to do so by authori-

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[29] See Fridman, *supra* note 1, at 10.

[30] *E.g.*, Penalty clauses rejected in R.C.A. Victor v. Pallitier, 68 D.L.R.2d 13 (N.B. Sup. Ct. 1968) and Charterhouse Leasing Co. v. Sanmac Holdings Ltd., 10 Can. Bankr. Ann (n.s.) 125 (Alta. Sup. Ct. 1966); however, not in Crown contract: Dimensional Inv. Ltd. v. The Queen, [1968] Sup. Ct. 93, 64 D.L.R.2d 632. *Re* restraint of trade clause, *see* Prentice, *Solus Agreements—Two Recent Cases*, [1967] W. ONT. L. REV. 170, discussing the application in Canada of Esso Petroleum Co. v. Harpers' Garage (Stourport), Ltd., [1967] 1 All E.R. 699 (H.L.) and Petrofina (G.B.) Ltd. v. Martin, [1966] Ch. 146; and *see generally* Furmston, *Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267 (1966).

[31] 68 D.L.R.2d 251 (Que. B.R. 1968).

[32] Canadian Bill of Rights, Can. Stat. 1960 c. 44.

[33] One Hundred Simcoe St. Ltd. v. Frank Burger Contractors Ltd., [1968] 1 Ont. 452, 66 D.L.R.2d 602. *See also* on statutory illegality: Vanderhelm v. Best-Bifood Ltd., 65 D.L.R.2d 537 (B.C. Sup. Ct. 1967); Sukovieff v. Beaulieu, 60 W.W.R. (n.s.) 306, 61 D.L.R.2d 714 (B.C. Sup. Ct. 1967); and the new New Brunswick Lord's Day Act, N.B. Stat. 1967 c. 14.

[34] 61 D.L.R.2d 358 (Ont. 1967).

[35] ONT. REV. STAT. c. 222 (1960).

ties which are so clear and unambiguous that they defy distinction, should not arrive at a conclusion the effect of which will interfere with the rights and remedies accorded to parties by the ordinary law of contract, particularly when such interference will have such an impact upon a substantial area of the financial life of the community . . . ." [36] The judge also held that the plaintiffs would not be entitled to recover were the mortgage considered illegal, as the mortgagors were not the persons for whose protection the act was passed, but were rather experienced borrowers bargaining at arm's length and having received the performance due to them. Mr. Justice Kelly also suggested that the plaintiffs should in any case only be allowed to recover upon terms of repayment of principal and interest, on the authority of *Lodge v. National Union Investment Co.*, [37] a case which has been much doubted and, *semble*, was not followed by Mr. Justice Laskin in the present case. [38]

Even when the terms of the contract are unexceptionable the court may grant relief on the grounds that the contract was founded on the common mistake of the parties. This form of judicial intervention has been greatly extended with the development of the doctrine of equitable mistake. In *Ivanochko v. Sych*, [39] the appellant agreed to sell a house and chattels to the respondent for the sum of $20,000. Two years after the conveyance had been executed it was discovered that the agreed monthly payments were insufficient to pay the interest on the outstanding balance of the purchase price, and unless the instalments were increased the agreement would never be paid up. There was, however, no mistake as to the essential terms of the contract. Mr. Justice Woods, in granting rescission of the agreement, applied Lord Denning's statement in *Solle v. Butcher* that "[t]he contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to the facts or to their relative and respective rights, provided that the misapprehension was fundamental and the party seeking to set it aside was not himself at fault." [40]

The British Columbia Supreme Court took a much narrower view of the scope of equitable mistake in *Schonekess v. Bach.* [41] In this case there was a sale by the defendants to the plaintiffs of a house and land referred to in the agreement only by the street address and in the conveyance as Lot 3, Plan 10751. It transpired that a carport and workshop, added to the house by the defendants, were only about one-half on the property conveyed. This was due to an honest miscalculation of the

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[36] 61 D.L.R.2d at 362.

[37] [1907] 1 Ch. 300.

[38] Other cases on quasi-contract: Sinclair Canadian Oil Co. v. Pacific Petroleum Ltd., 67 D.L.R.2d 519 (Alta. Sup. Ct. 1968); Alkok v. Grymek, [1968] Sup. Ct. 452, 67 D.L.R.2d 718, *re quantum meruit.*

[39] 60 D.L.R.2d 474 (Sask. 1967).

[40] [1950] 1 K.B. 671, at 693 (C.A.).

[41] 62 W.W.R. (n.s.) 673, 66 D.L.R.2d 415 (B.C. Sup. Ct. 1968).

boundaries of the lot by the defendants without reference having been made to a surveyor. After the mistake relating to the boundary was brought to the defendants' attention, they arranged to purchase the piece of land involved and tendered a deed to the plaintiffs. The latter rejected this and claimed rescission. The court held that the mistake was a matter of attribute only and did not go to the true substance of the matter. Mr. Justice Seaton indicated, however, that it would be unjust to allow the plaintiffs to obtain rescission when the real reasons were not the mistake pleaded, but that they had committed waste on the property in the intervening two years and had allowed foreclosure proceedings by a second mortgagee to become well advanced. [42] Had the defendants taken a less cooperative approach, the judge would have been inclined to give them the option of rescission or rectification. [43] The court also held that any misrepresentations were innocent and not fraudulent and since the contract was fully executed, no relief was possible under that heading.

The above case illustrates one of the limitations on the courts' power to upset a contract when a misrepresentation has induced one party to make it. [44] The Supreme Court of Canada in *Clark's Gamble of Canada Ltd. v. Grant Park Plaza Ltd.* [45] stressed that a representation of future intention which is not fulfilled, is no misrepresentation. In that case, the appellant conducted a large department store in premises leased to it by the respondent and intended for development as a shopping centre. This development was delayed by financial difficulties but, about two years after the commencement of the appellant's lease, the respondents wrote stating that the development would be resumed and it was learned that the scheme included the construction of a large department store to be leased to F. W. Woolworth & Co., who would operate a business in direct competition to that of the appellant. The latter, therefore, immediately commenced proceedings for, *inter alia*, an injunction, alleging an understanding that construction would be carried out approximately as shown on the layout in the original plans, which did not envisage a Woolco Store. Mr. Justice Spence held that the representations were mere representations of intentions to act in a certain way in the future, that nothing in the contract prevented the respondents from carrying out the proposal and that the appellant who had great experience in merchandising and leasing, could easily have drafted

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[42] *Id.* at 679-80, 66 D.L.R.2d at 421-22.

[43] *Id.* at 677-78, 66 D.L.R.2d at 420.

[44] The new English Misrepresentation Act, 1967, c. 7, enlarges the extent to which a contract may be upset for misrepresentation: *inter alia*, executed contracts may be rescinded, although the misrepresentation was not fraudulent; damages may be awarded for innocent misrepresentation in lieu of rescission at the court or arbitrator's discretion; *re* negligent misrepresentation, the burden of proof is reversed, and the "special relationship" required in *Hedley Byrne v. Heller* is no longer essential. Hedley Byrne & Co. v. Heller & Parners Ltd., [1964] A.C. 465, followed in Goad v. Canadian Imperial Bank of Commerce, [1968] 1 Ont. 579, 67 D.L.R.2d 189 (High Ct.).

[45] [1967] Sup. Ct. 614, 61 W.W.R. (n.s.) 472.

"a clear and exact covenant against leasing to a competing enterprise [46] if they had so desired. [47] Again, we note the courts' reluctance to grant relief to parties on an equal bargaining footing.

Misrepresentation is only one of the grounds upon which the court will intervene in contracts not "freely" concluded, *i.e.*, when there is some unconscionable element in the negotiations. The Canadian courts have recently revived the idea of "unconscionable transactions" long believed dead in England, to allow relief when the particular weakness of one party has been unconscientiously exploited by the other. [48] In *Knupp v. Bell*, [49] a senile woman with no business experience was induced to sell her lands to a neighbour at the grossly inadequate price of $35 per acre, without asking independent advice from competent members of her family. The court rejected claims by the said neighbour for specific performance or, in the alternative, for damages against the family for inducing breach of contract. Mr. Justice Woods stated that the courts had an inherent jurisdiction in equity to set aside unconscionable agreements which was quite independent of its power to grant relief in cases of duress or undue influence. [50] The doctrine did not extend, however, to the protection of the defendant in *Royal Bank of Canada v. Kiska*, [51] who signed a guarantee of his brother's indebtedness to the plaintiff bank in consideration of the latter's forbearance to sue said brother. The defendant had optimistically believed that the bank held sufficient collateral security to satisfy the debt; upon learning of his personal responsibility, he became upset and ate his own and the witness' signatures. A second guarantee was executed under seal and under the eyes of the police. The court held, however, that the first guarantee was enforceable, as one cannot eat one's legal obligations.

Fridman is rather in favour of "permitting such judicial supervision of contracts under statutory authority and with due statutory safeguards and limitations." [52] This is in fact what has been taking place in most of the Canadian provinces over the past few years. In 1960, Ontario passed the Unconscionable Transactions Relief Act [53] which allowed the courts, in the case of money-lending contracts, to reopen the transaction and set

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[46] *Id.* at 626, 61 W.W.R. (n.s.) 482.

[47] *See also* on misrepresentation: Sleen v. Auld, [1967] Sup. Ct. 88; Parna v. G. & S. Properties Ltd., [1968] 1 Ont. 628, 67 D.L.R.2d 279 (High Ct.); Hopkins v. Butts, 65 D.L.R.2d 711 (B.C. Sup. Ct. 1967).

[48] *E.g.*, Hnatuk v. Chretian, 31 W.W.R. (n.s.) 130 (B.C. Sup. Ct. 1960); Morrison v. Coast Fin., 54 W.W.R. (n.s.) 257 (B.C. 1965); but will not relieve a party from a foolish contract when the parties are on equal bargaining terms: Griesshammer v. Ungerer & Miami Studios, 14 D.L.R.2d 599 (Man. 1958).

[49] 67 D.L.R.2d 256 (Sask. 1968).

[50] *Id.* at 259.

[51] 63 D.L.R.2d 582 (Ont. 1967).

[52] *Supra* note 1, at 21.

[53] ONT. REV. STAT. c. 410 (1960). *See* Collins v. Forest Hill Inv. Co., [1967] 2 Ont. 351, 63 D.L.R.2d 492 (County Ct.).

aside or revise the contract, if it found the costs of the loan to be excessive or the transaction to be harsh or unconscionable. Similar legislation was passed by Newfoundland in 1962 [54] and by the other provinces in 1964, [55] with the exception of Saskatchewan, which followed suit, however, in 1967. [56] Interestingly enough, there have not been too many cases on this legislation as yet, but during the past year two cases serve to illustrate the diversity of the interpretation by the courts of the question of unconscionability.

In the Saskatchewan case of *Stepper v. Laurel Credit Plan Ltd.*, [57] the applicant borrowed the sum of $9,000 repayable over four months by monthly instalments. The loan was evidenced by a promissory note co-signed by the applicant's father and fully secured by an assignment of an Agreement for Sale and a life insurance policy. The loan was in fact paid off in five months, but the applicant was required to pay an interest charge of approximately sixty-one percent. About five weeks later, on April 1, 1967, the Saskatchewan Unconscionable Transactions Relief Act [58] came into operation and the applicant then applied for relief under its provisions. The respondent naturally argued that the transaction did not come within the act's purview, since the loan had been paid in full prior to its enactment. On this point the court held that it did have jurisdiction since the act contained provisions which empowered the court to consider any transaction in respect of money loaned, provided action was taken within two years of the date on which the debtor's obligation to repay terminated. The court then went on to hold the transaction to be harsh and unconscionable, not simply on the basis of interest charged but rather on that fact coupled with the very adequate security given by the applicant to the respondent.

In the British Columbia case of *Miller v. Lavoie*, [59] however, the defendant was buying, under an agreement for sale, a parcel of land for which the price was $6,500, payable at the rate of fifty dollars per month, with interest at the rate of seven percent per annum. His equity in the land was approximately $300. He began to build a house on the land and had poured concrete footings and built framing to a value of $3,500 at the time of this action. Wishing to pay off the Agreement for Sale, the defendant, whose credit-rating was very poor, borrowed $6,500 from the plaintiffs on

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[54] Nfld. Stat. 1962, No. 38.

[55] Man. Stat. 1964 c. 13; Contracts Relief Act, B.C. Stat. 1964 c. 11; N.S. Stat. 1964 c. 12; art. 10400 added to QUE. CIV. CODE in 1964. Alta. Stat. 1964 c. 99. N.B. Stat. 1964 c. 35; P.E.I. Stat. 1964 c. 35.

[56] Sask. Stat. 1967 c. 86.

[57] 63 W.W.R. (n.s.) 168 (Sask. Dist. Ct. 1968).

[58] Sask. Stat. 1967 c. 86.

[59] 63 W.W.R. (n.s.) 359 (B.C. Sup. Ct. 1966).

the security of the land and unfinished building at an interest rate of thirty percent per annum. Mr. Justice Wilson, in refusing relief, found the rate of interest not excessive within the meaning of the act, in view of the risk involved and the security offered. He felt that the intent of the act was to protect "unsophisticated and defenceless persons against the actions of conscienceless persons who seek to take advantage of them," [60] and went on to add that "the courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes wide open, merely because his contract is an act of folly." [61] One notices here the nineteenth century laissez-faire attitude in the interpretation of twentieth century protective legislation. These acts universally provide that one of the major factors to be considered by the court in determining the unconscionability of a transaction is the risk which the creditor is undertaking. While the defendant's personal credit-rating in this particular case may have been poor, the security he was offering in the first mortgage on the land and partly finished house was more than adequate. In fact, it appears from the latter part of the judgment that with such a mortgage the plaintiff was able to recover the full amount of his loan, together with his high interest (amounting to nearly $500 in three months) in priority to holders of any mechanics' liens.

During the past year four provinces, namely, British Columbia, Nova Scotia, New Brunswick and Prince Edward Island, have followed the example of other provinces [62] in passing acts for the protection of consumers. [63] Two provinces have passed, this year, separate legislation requiring fair disclosure of credit costs to prospective borrowers. [64] It is too early yet to tell whether the courts will give this legislation a liberal or restricted interpretation.

IV. Termination of Contract

Under this heading Fridman devoted nearly all his attention to the question of frustration of contract. While it is not the purpose of this particular review to criticize Fridman's premises, it does seem that in this area at least the Canadian courts have moved remarkably slowly in recent years in controlling freedom of contract. Rather, the tendency seems to have been to give the doctrine of frustration a narrow interpretation and to hold to the principle (advocated by Fridman) of *pacta sunt servanda.*

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[60] *Id.* at 365.

[61] *Id.* at 365.

[62] *E.g.*, Act Respecting Direct Sellers, Sask. Rev. Stat. c. 331 (1965); Act Respecting Consumer Credit, Man. Stat. 1965 c. 15; Consumer Protection Act, Ont. Stat. 1966 c. 23; and see discussion in Binavince & Chiarelli, *Recent Developments in Canadian Law: Contract*, 1 Ottawa L. Rev. 148-154 (1966).

[63] Consumer Protection Act, B.C. Stat. 1967 c. 14; Consumer Protection Act, N.S. Rev. Stat. c. 53 (1967); Direct Sellers Act, N.B. Stat. 1967 c. 8; Fair Disclosure of Cost of Credit and Protection of Buyers of Consumer Goods Act, P.E.I. Stat. 1967 c. 16.

[64] Cost of Credit Disclosure Act, Sask. Stat. 1967 c. 85; Cost of Credit Disclosure Act, N.B. Stat. 1967, c. 6.

In *Parrish & Heimbecker Ltd. v. Gooding Lumber Ltd.*, [65] the defendant contracted with the plaintiffs, who were Toronto corn merchants, to sell and deliver a certain quantity of corn to shipping points in the Parkhill area. It was the defendant's intention, which was known to the plaintiffs, to purchase the necessary corn from Parkhill farms when the crop matured. As a result of a local drought the defendant was unable to obtain the necessary quantity of corn. The majority of the Ontario Court of Appeal held the defendant liable in damages since it was not a term of the contract that the corn should come from any particular source. Mr. Justice MacKay in his judgment refused to allow the written terms of the contract to be varied by any oral understanding that there may have been between the parties as to the place of origin of the corn. It was Mr. Justice Laskin, in his dissenting judgment, who was at pains to point out that "the original attitude of the Common Law that a contract duty is absolute has been considerably modified over the past hundred years as we have come to recognize the mutual assumptions by parties that underlie their commercial relations cannot be ignored and that, in the enforcement of a contract, allowance must be made if a failure of those assumptions supervenes, without fault of the contracting parties, after the contract has been made." [66] While one sympathizes with the point of view expressed by Mr. Justice Laskin, it must be noted that both Canadian and English courts have given a very narrow interpretation to the principle of a basic assumption which might affect the carrying out of the strict terms of the contract. This can perhaps best be seen in the House of Lord's decisions in the various Suez Canal cases [67] in the past decade, where discharge by frustration has been consistently refused. Thus it seems that Canadian frustration cases at least will not be decided on the basis of the court's idea of the "just and reasonable solution." [68]

Fridman's threefold division naturally does not encompass the questions of remedies for breach of contract and assignments. No annual survey of the law of contract, however, would be complete without a reference to developments in these two areas.

V. Remedies for Breach of Contract

In *Finelli v. Dee*, [69] the plaintiffs contracted in writing to pave the driveway of the defendants' house for an agreed price. Subsequently, the

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[65] 67 D.L.R.2d 495 (Ont. 1968).

[66] *Id.* at 498.

[67] *E.g.*, Tsakiroglou & Co. v. Noblee & Thorl G.M.B.H., [1961] 2 All E.R. 179 (H.L.). Ocean Tramp Tankers Co. v. V/O Sovfracht, [1964] 1 All E.R. 161 (C.A.).

[68] Suggested by Lord Denning in British Movietone News Ltd. v. London & District Cinemas Ltd., [1951] 1 K.B. 190, at 201 (C.A.).

[69] [1968] 1 Ont. 676, 67 D.L.R.2d 393. *See also* Chapman v. Ginter, 68 D.L.R.2d 425 (Sup. Ct. 1968): to obtain damages, election to accept wrongful repudiation must be communicated to repudiator; here, not so communicated and agreement later mutually abandoned.

defendants telephoned the plaintiff's office cancelling the contract and the plaintiffs' sales manager, who received the call, agreed it would be cancelled. Later on, while the defendants were away from home, the plaintiffs carried out the contract and sued for the price of the work done. In the Ontario Court of Appeal, the question was raised whether the cancellation of the contract amounted to rescission or merely a wrongful repudiation by the defendants. If there was rescission, Mr. Justice Laskin pointed out that there would be no basis on which an action to enforce the provision as to price could be founded. If, however, the cancellation amounted to repudiation, he was faced by the English House of Lords' decision in *White & Carter (Councils) Ltd. v. McGregor*, [70] where the majority of that Court held that a repudiation by one party to a contract did not preclude the innocent party from carrying out the contract and suing for the price, at least where this could be done without the assent or co-operation of the party in breach. While Mr. Justice Laskin was, of course, not bound by the House of Lords' decision, he was clearly unhappy with the majority view of the Court and tenuously distinguished the case before him by pointing out that the plaintiffs could not carry out this particular contract without the assent or co-operation of the party in breach. In his view, the plaintiffs were obliged to inform the defendants that they were prepared to do the work called for and proposed to do it on a certain day. Hence, whether the cancellation amounted to rescission or merely to repudiation, the plaintiffs were not entitled to recover the contract price.

The question of repudiation of a contract was also in issue in the case of *Polar Refrigeration Services Ltd. v. Moldenhauer.* [71] Here the defendant, owner of a beer parlour at Hawarden, Saskatchewan, made known to the plaintiffs, sellers of fans and air-conditioning equipment, that he required some equipment capable of keeping his parlour clear of smoke. The judge found that the contract was made, therefore, with the implied condition under the Saskatchewan Sale of Goods Act [72] that the equipment would be reasonably fit for the desired purpose. The units in question were installed by the plaintiffs early in May, 1966, but they did not exhaust the smoke as expected. The defendant at once got in touch with the plaintiffs. Negotiations followed between the parties and there was some discussion about the installation of supplementary equipment. However, the plaintiffs were unwilling to make any concession to the defendant as to the price of the equipment installed, and finally commenced action late in August, 1966. In finding for the defendant it is interesting to note that Mr. Justice Tucker got around the difficult problem caused by the fact that the equipment had been on the defendant's premises for nearly four months and, therefore,

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[70] [1961] 3 All E.R. 1178, [1962] A.C. 413.

[71] 61 D.L.R.2d 462 (Sask. Q.B. 1967).

[72] SASK. REV. STAT. c. 388, § 16 (1965).

under the provisions of the above act, [73] the plaintiffs were claiming that the right to repudiate had been lost. The judge characterized the implied undertaking as to effectiveness as a condition precedent which had the effect of not only preventing the property in the equipment from passing with the making of the contract or upon delivery and installation, but also provided a basis on which the buyer could reject the equipment when it failed to perform as required. He went on to hold that the buyer's use of the equipment was not an act of approval of the goods adopting the contract and the four months' delay was reasonably explicable by reference to the parties' attempts to negotiate a settlement.

In view of the devious reasoning which was necessary to reach the required result in the above case, it is interesting to compare the decision of the Supreme Court of Canada in *Ford Motor Co. of Canada v. Haley.* [74] In that case the buyer had purchased three new Ford trucks and had been given a warranty that the trucks would be satisfactory for hauling gravel. The buyer was able to establish the complete failure of two of the trucks to comply with this express warranty as to effectiveness for his particular purpose and claimed damages in the amount of the price therefor. Mr. Justice Hall, in delivering the judgment of the Court, held that the onus is upon the seller or other persons liable upon the warranty to establish the value in use (if any) of the goods to the buyer, and as they had failed to establish this, the buyer was entitled to recover the purchase price of the trucks involved. It is noteworthy, therefore, that in effect the purchaser's remedy was equivalent to repudiation of the contract without his being subject to all the difficulties in *Polar Refrigeration Services Ltd. v. Moldenhauer.* [75]

Contracts of employment during the past year have provided two interesting cases on the measure of damages and a third on the equitable remedy of injunction. In *Hornak v. Paterson,* [76] the defendants were a trade union of which the plaintiff was a member in good standing. The breach of contract lay in the defendant's failure to notify the plaintiff of work available for him in the construction of the Portage Mountain dam in British Columbia. As a result of the breach, the plaintiff lost employment for a period from October 18 to November, 1963, with the Portage Mountain Construction and it was agreed that the damages in this regard amounted to $258.25. The plaintiff, however, contended his loss was much greater than this, arguing that if he had worked on the Portage Mountain construction in the Fall of 1963, it was probable that he would have been engaged later on by some other contractor or contractors who were also engaged in building this particular dam. He was a competent

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[73] *Id.*, § 13(3).

[74] [1967] Sup. Ct. 437, 62 D.L.R.2d 329.

[75] [1961] 3 All E.R. 1178, [1962] A.C. 413.

[76] 62 D.L.R.2d 289 (B.C. Sup. Ct. 1967).

journeyman ironworker, with experience as a foreman, and might have been later requisitioned by name and become a "key man." The plaintiff put his loss higher than a mere chance of re-employment, and stated that he had lost an opportunity which carried with it a distinct probability of future employment. Mr. Justice Aikins of the British Columbia Supreme Court, however, stated that before damages could be awarded for the loss of a chance (as was the case in *Chaplin v. Hicks*), [77] "the existence of the chance lost must be established in accordance with the usual requirement in a civil case, that is, on the balance of the probabilities. The proof is insufficient if it is left as a matter of conjecture whether there was a loss of chance or not." [78] On the evidence presented the judge held that there was no more than a supposition that if the plaintiff had worked on the project in late 1963, some chance would have arisen for future employment on the project. The damages awarded were, therefore, limited to the sum of $258.25.

Woods v. Miramichi Hospital [79] started with the failure of an employee, through no fault of her own, to appear for work on a particular day. When she did return to work she quarrelled with the administrator of the defendant hospital and defied him to dismiss her, because she belonged to the local union. She was then abruptly dismissed. The New Brunswick Supreme Court, Appeal Division, agreed with the finding of the trial judge that there was no justification for the dismissal without notice. The real problem centred around the amount of damages to be awarded, since this was a contract for hiring for an indefinite period. Mr. Justice West, in delivering the judgment of the court, stated that in such a contract "a reasonable notice of dismissal should be given. What amounts to a reasonable notice depends upon the nature of the hiring and upon the periods of payment of the salary." [80] In this case he was of the opinion that new employment should not be difficult to obtain and since the period of payment was by the month, a month's salary was sufficient damages. [81]

Kapp v. B.C. Lions Football Club [82] provided an unusual situation of a plaintiff employee seeking an injunction as a method of specifically enforcing a contract with his employers. [83] The plaintiff, a professional

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[77] [1911] 2 K.B. 786 (C.A.).

[78] *Supra* note 76, at 298.

[79] 67 D.L.R.2d 757 (N.B. Sup. Ct. 1967).

[80] *Id.* at 760.

[81] Other cases on damages: Brown & Root Ltd. v. Chimo Shipping Ltd., [1967] Sup. Ct. 642, 63 D.L.R.2d 1, breach must cause damage. And on measure of damages: Prince Rupert Sawmills Ltd. v. M.C. Logging Ltd., 65 D.L.R.2d 300 (B.C. 1967); Andre Knight Ltd. v. Presement, 63 D.L.R.2d 314 (Ont. 1967); Whitehead v. G.B. Cameron Ltd., 63 D.L.R.2d 180 (N.S. Sup. Ct. 1967); Dolly Varden Minis Ltd. (N.P.L.) v. Sunshine Exploration Ltd., 64 D.L.R.2d 283 (B.C. Sup. Ct. 1967); Highway Properties v. Kelly, Douglas & Co., 60 W.W.R. (n.s.) 193 (B.C. Sup. Ct. 1967); Tahsis Co. v. Vancouver Tug Boat, 60 W.W.R. (n.s.) 65 (B.C. 1967).

[82] 61 W.W.R. (n.s.) 31 (B.C. Sup. Ct. 1967).

[83] *Cf.* Page One Records v. Britton [1968] 1 W.L.R. 157, [1967] 3 All E.R. 822 (Ch.).

football player, was contractually bound to play for the defendant club and no other club from the start of the 1966 season until its termination in 1967, with an option for that club to renew the contract for a further season. On February 10, 1967, the plaintiff entered into a contract with an American football club for the 1968 season. He did not inform the defendants of this contract but later merely told them he did not propose to renew his contract with them. The president of the defendant club, however, learned of this new contract from the president of the American football league. In April 1967, the latter wrote to the plaintiff stating that his contract with the American club had been disapproved. In June, 1967, the defendant club suspended the plaintiff until June 1, 1968, on account of his activities and negotiations with the American club and requested the Canadian Football League to place his name on the list of suspended players. The plaintiff was accordingly now seeking an interlocutory injunction to restrain the defendant club from suspending him, reporting him to the Canadian Football League, or otherwise interfering with his right to contract advantageously for his future. Mr. Justice Dryer, of the British Columbia Supreme Court, in his judgment, pointed out that what was really being sought was not an interlocutory injunction to preserve conditions as they were, but a mandatory injunction to re-create conditions which existed prior to the suspension complained of. He felt that this would, in fact, amount to specific performance of a personal service contract against which the courts of equity had set their faces. In dismissing the motion, he stated: "To grant the injunction, therefore, would be to do obliquely what the Courts will not do directly." [84] Apparently the British Columbia Supreme Court is not prepared to extend the so-called "anomaly" of *Lumley v. Wagner*. [85]

VI. ASSIGNMENT [86]

The question of the necessity for consideration in an equitable assignment has often been referred to as the department of utter confusion. In *Sanderson v. Halstead*, [87] the plaintiff's fiancee wished to change the beneficiary of her life insurance policies from the defendant, her mother, to her own estate. Under a Quebec marriage contract providing for mutual rights

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[84] *Supra* note 82, at 42.

[85] 1 De G.M. & G. 604, 21 L.J. Ch. 898, 42 Eng. Rep. 687 (1852). Other cases on injunctions: Dobell v. Cowichan, 61 W.W.R. (n.s.) 594, (B.C. Sup. Ct. 1967); Pasen v. Dominion Herb Distribs. Inc., 67 D.L.R.2d 405 (Ont. High Ct. 1968). On the problem of limitations, *see* Act to Amend the Limitations of Actions Act, Man. Stat. 1966-67 c. 32. Long v. W. Propeller Co., 63 W.W.R. (n.s.) 146 (Man. 1968); Rittinger Constr. Ltd. v. Clark Roofing, 65 D.L.R.2d 158 (Sask. Q.B. 1967). Laches: Croft v. Tress, 61 W.W.R. (n.s.) 201 (B.C. Sup. Ct. 1967).

[86] Two cases on whether rights of action assignable: Prince Albert v. Underwood, McLellan & Associates, 65 D.L.R.2d 12 (Sask. 1967); *quaere*: whether right of action for breach of contract against supervising engineer assignable to surety indemnifying principal contractor? Union Gas Co. v. Brown, 67 D.L.R.2d 44 (Ont. High Ct. 1968), bare right of action for unliquidated damages in tort not assignable, though probably not champertous in the circumstances.

[87] 67 D.L.R.2d 567 (Ont. High Ct. 1968).

of succession, her intended husband would receive the proceeds if he survived her. A few weeks after the marriage, the mother signed release forms, but these signatures were not witnessed, nor were the date and place of signature or policy number inserted. Shortly afterwards, the insured was killed in a car accident, and the insurer paid the proceeds to her mother. The plaintiff brought an action against the mother as personal representative of the deceased. Mr. Justice Parker discussed the problem of consideration in an equitable assignment: an equitable assignment of an equitable chose in action need not be supported by consideration if the assignor has made every effort to transfer the fund; "similarly . . . an equitable assignment of an existing legal chose in action is enforceable despite the absence of consideration," [88] following *Holt v. Heatherfield Trust Ltd.*, [89] a case which has been criticized on the grounds that the only way in which an assignor can now make "every effort" to transfer a legal chose is to comply with the statutory machinery; [90] an equitable assignment of a future chose, however, must be supported by consideration. In the instant case, the claim under the insurance policy was a future legal chose in action, the assignment of which thus required consideration, which was not present. In any case, the transferor had not made every effort to perfect the gift, or to constitute herself trustee, as the forms had been invalidly executed.

Another drawback of equitable assignments of legal choses in action is the procedural necessity of the joinder of assignor as co-plaintiff or co-defendant in a suit by the assignee. In almost every province, statutes have now made choses in action assignable at law, thus enabling the assignee to sue in his own name provided that the statutory requirements have been fulfilled. However, in *Uxbridge Food & Freezer Provisioners v. Ford Motor Co. of Canada*, [91] one of the provisions of the Ontario statute [92] was not fulfilled. One Muller assigned twenty-five percent of his wages to the plaintiff as security for payment for food supplied by the latter. Muller had also made two prior wage assignments. The plaintiff attempted to enforce his assignment against the defendant, Muller's employer. The court held that an assignment of part of a chose in action was not an "absolute assignment" as required by the Ontario statute, nor "an assignment of a chose in action" within rule 89 of the Rules of Practice, and, therefore, the assignee could not sue in his own name. [93] Otherwise, "the

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[88] *Id.* at 573.

[89] [1942] 2 K.B. 1, consideration may have been present in this case.

[90] In Ontario contained in The Conveyancing and Law of Property Act, ONT. REV. STAT. c. 66, 54 (1960).

[91] 10 Can. Bankr. Ann. (n.s.) 195 (Ont. Div. Ct. 1965).

[92] *Supra* note 90.

[93] *Quaere*: whether The Law of Property Act, MAN. REV. STAT. c. 138 (1954), and Choses in Action Act, SASK. REV. STAT. c. 395 (1965), envisage assignments of part of a chose in action?

possessor of a chose in action [could] issue a kind of currency as it were, by dividing up his right into little bits and distributing them amongst his friends, and giving each of them a chance to worry and annoy the debtor."[94]

The converse situation arose in *Sardara Singh v. Industrial Mortgage & Finance Corp.*[95] The plaintiff had assigned the whole debt due to him from the defendant for lumber supplied, to the Bank of Montreal, who duly notified the defendant. This assignment was technically an absolute assignment under the statute[96] and, therefore, on the authority of *Hughes v. Pump House Hotel Co.*,[97] the action should have been brought in the name of the bank. The court held, however, that the plaintiff remained the person primarily interested in the payment of the indebtedness, as reducing his own indebtedness to the bank; furthermore, he alone could answer the defendant's dispute note and counterclaim. The *Hughes* case might have been distinguished on this second point, but the court went further in disapproving the English case, holding that the statute, in enabling the assignee to sue in his own name, merely conferred a privilege rather than an invariable obligation.

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[94] Beatty v. Best, 61 Sup. Ct. 576, at 581 (1921).

[95] 61 W.W.R. (n.s.) 338 (B.C. County Ct. 1967).

[96] Laws Declaratory Act, B.C. REV. STAT. c. 213, § 2(25) (1960).

[97] [1902] 2 K.B. 190 (C.A.).