COMMERCIAL LAW

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I. SALES

1. *Conditions and Warranties*

The courts have continued to deal with cases under the Sale of Goods Act with an ever-decreasing emphasis on the doctrine of *caveat emptor.* Unfortunately, the lack of modern legislation [1] dealing with conditions and warranties in sales has forced the courts to twist the old law into new decisions. The inter-relation of the old and the new is far from clear and the difficulties that the courts are experiencing become most obvious when one considers the cases which deal with the doctrine of fundamental breach and exemption clauses.

In *Zack v. M. S. Kenworth Ltd.,* [2] the plaintiff bought a 1964 model Kenworth tractor which was represented to him as being new. The tractor in question had been driven some 4,500 miles when leased for commercial transportation. The Manitoba Court of Appeal held that there had been a breach of warranty for which the respondent could not escape liability. The court indicated that there was a breach of warranty under the Sale of Goods Act of Manitoba, but did not analyze how it came to the conclusion that the representation by the seller that the tractor was a new one became a term of the contract.

The Supreme Court of Prince Edward Island in *Gorman v. Ear Hearing Services Ltd.* [3] held that an eighty-four-year-old woman could recover the full price of a hearing aid and damages for disturbance and annoyance. A salesman had indicated that a hearing aid would improve her hearing and sold her an aid which enabled her to hear noises she could not hear before, but which were unintelligible. It was held that there was a breach of the implied condition of fitness for a particular purpose.

The British Columbia Sale of Goods Act, section 20, which implies a condition of fitness for a particular purpose, was successfully invoked in *Lakelse Dairy Products Ltd. v. General Dairy Machinery & Ltd.* [4] The plaintiff bought from the defendants a tanker for the transportation of milk in bulk for sale to the public and made this known to the seller. The tanker was defective and the milk became contaminated. The plaintiff suffered a

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[1] Sutton, *The Reform of the Law of Sales,* (pts. 1-2, 3-4), 7 ALTA. L. REV. 130-148, 173-189 (1969).

[2] 65 W.W.R. (n.s.) 570 (Man. 1968).

[3] 8 D.L.R.3d 765 (P.E.I. Sup. Ct. 1969).

[4] 72 W.W.R. (n.s.) 755 (B.C. Sup. Ct. 1970).

loss of business with a resulting loss in profits because the milk was badly flavoured. Mr. Justice Munroe of the British Columbia Supreme Court held that the plaintiff could recover damages. He found that the damages "directly and naturally resulting . . . from the breach of warranty" [5] included: the market value of the milk destroyed; cost of renting alternative equipment; repairs to the tanker; damages for loss of profits; and money lost upon resale of the tanker.

In the recent case of *Gibbons v. Trapp Motors Ltd.*, [6] the plaintiff bought a 1969 Firebird convertible in November 1968. Almost immediately after delivery, defects appeared and continued to appear with monotonous regularity. The car had more than thirty hours of repair time spent on it during the first ten months and at one stage was in the garage for ten days. Mr. Justice Gould stated that the plaintiff had "acquired a running fight with a chronically defective car" [7] and held that the accumulation of defects was such as to constitute a breach going to the root of the contract. Mr. Gibbons was therefore entitled to return the car and recover the purchase price less an allowance for his use of the car. It is interesting to note that the defendants had done all the repairs without delay and free of charge.

By treating the case as one of fundamental breach, the court was able to grant the plaintiff the relief of returning the goods. If the learned judge had held there had been a breach of the condition implied by section 20 of the British Columbia Act, he would have been faced with the problem that the plaintiff, having accepted the goods, [8] had lost his right to reject them.

The recent cases have begun to minimize the importance of, if not confuse, the questions of passing of property as well as what constitutes a fundamental breach and what is a mere breach of condition or warranty. Such cases as *Gibbons v. Trapp Motors Ltd.* [9] and others suggest that the remedy deemed appropriate dictates the characterization of a particular breach or term.

An important group of cases under this heading is the one dealing with contracts containing exemption clauses. [10] The cases exemplify a continuing trend away from the theory of freedom of contract to the modern desire to protect the consumer.

In *Francis v. Trans-Canada Trailer Sales Ltd.*, [11] the plaintiff bought a used 1966 trailer from the defendant company. Before the sale, he had been told by the defendant's manager that the trailer had only been used for three months and that it carried the same warranty as a new trailer which the plaintiff understood to mean was for one year's full coverage. The sales

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[5] B.C. REV. STAT. c. 344, § 57(2) (1960).
[6] 9 D.L.R.3d 742 (B.C. Sup. Ct. 1970).
[7] *Id.* at 745.
[8] For the rules relating to passing of property and acceptance *see* B.C. REV. STAT. c. 344, § 17 (1960).
[9] 9 D.L.R.3d 742 (B.C. Sup. Ct. 1970).
[10] Fridman, *The Effect of Exclusion Clauses*, 7 ALTA. L. REV. 281 (1969).
[11] 69 W.W.R. (n.s.) 748 (Sask. 1969).

agreement contained several terms and conditions excluding all warranties other than those contained in the contract itself. The Saskatchewan Court of Appeal held that a clause in a conditional sales agreement will be strictly construed against the person relying on it [12] and where the collateral agreement is consideration for entering the sale agreement, the exclusion clause cannot prevail against it. The ordinary man could not understand from reading the contract that the warranty of newness could be excluded. [13] The plaintiff recovered damages.

The court's use of collateral warranty in this case is another method of attacking exclusion clauses without the necessity of relying on a doctrine of fundamental breach. It is clear from this case that it is almost impossible to exclude an oral collateral warranty by a subsequent written contract unless they are clearly inconsistent. The problem is usually one of proof although the collateral agreement can be established by parol evidence. [14]

The more common means of bypassing an exclusion clause is the doctrine of fundamental breach. An illustrative case is *R. G. McLean Ltd. v. Canadian Vickers Ltd.* [15] The plaintiffs purchased a printing press from a subsidiary of Canadian Vickers under a standard form contract which included an express warranty for free replacement of defective parts. This warranty was in substitution for all other expressed conditions arising under the Sale of Goods Act of England which was to govern the contract. The press did not work satisfactorily and despite the efforts of both parties to repair it, the plaintiffs sued for damages for breach of warranty of fitness of a particular purpose. Mr. Justice Wilson of the Ontario High Court of Justice held, after a long discussion [16] of the *Suisse Atlantique* [17] case, that the failure to supply a press capable of the quality of printing anticipated by the parties was sufficiently serious to disentitle the defendants from reliance on the exemption clause. The plaintiff could therefore bring an action for breach of warranty for the loss directly and naturally resulting, which included losses while the machine was being repaired and time spent in supervision of repairs.

Where a plaintiff bought a car relying on the seller-defendants' skill and judgment under an agreement containing warranties as to replacement of defective parts and excluding all others, he was able to repudiate the contract where there had been a fundamental breach. [18] He had the car for eight months and returned it to the defendants seventeen times for repairs. The contract was rescinded and the plaintiff was entitled to recover the whole of

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[12] Following Eisler v. Canadian Fairbanks Co., 3 W.W.R. 753 (Sask. Sup. Ct. 1912).

[13] See Carr, *Oral Statements and Written Contracts, Francis v. Trans-Canada Trailer Sales Ltd.*, 28 THE ADVOCATE 141 (1970).

[14] Francis v. Trans-Canada Trailer Sales Ltd., 69 W.W.R. (n.s.) 748 (Sask. 1969).

[15] [1969] 2 Ont. 249 (High Ct.).

[16] *Id.* at 257-60.

[17] Suisse Atlantique Société D'Armement Maritime v. Rotterdamsche Kalen Centrale, [1967] 1 A.C. 361.

[18] Lightburn v. Belmont Sales Ltd., 69 W.W.R. (n.s.) 734 (B.C. Sup. Ct. 1969).

the purchase price. Mr. Justice Ruttan did not make any allowance for the depreciation of the vehicle nor for the use which the plaintiff had of it. One of the reasons he gave was the financing costs the plaintiff was paying. However, the financing had been arranged separately by the plaintiff and it is difficult to see why this factor should have affected the sum repayable by the defendant.

The foregoing outline of cases amply illustrates the confusion caused by judicial efforts to provide consumers with a remedy for shoddy goods.

In *Western Tractor Ltd. v. Dyck*, [19] there was a unanimous decision of the Saskatchewan Court of Appeal that a fundamental breach had occurred where the defendant bought a tractor from the plaintiff for use in land clearing. At first it worked well, but then had to be repaired approximately seventeen times during its first year of operation by the plaintiff. The plaintiff sued for money owing for repairs and the defendant counter-claimed for breach of warranty. The contract contained a clause excluding liability for all warranties express or implied except the ones included in the contract to replace defective parts for a period of 1500 hours of operation. The tractor ran in total approximately 1700 hours. While there was some difference of emphasis, the judgment of Mr. Justice Brownridge, in which he held that even if the tractor had worked for 1700 hours and then failed to work properly this would amount to a fundamental breach, is sound. The learned judge [20] indicated that the 1500 hour warranty did not exclude the statutory warranty of reasonable fitness. By relying upon the statutory warranty, however, he seems to be elevating it to the position where it cannot be removed by an exemption clause.

In *Barber v. Inland Truck Sales Ltd.*, [21] the plaintiff bought a used Autocar dump truck from the defendant and used it for hauling gravel. The brakes failed and it needed numerous other repairs. The plaintiff eventually repudiated the contract. There was, needless to say, a clause excluding any warranty expressed, implied or statutory, and which specifically excluded any warranty of fitness for a particular purpose. Mr. Justice Munroe held that the defendant was in breach of a fundamental term in not providing a truck of workable character. The plaintiff had not accepted his situation and was therefore entitled to rescind the contract. The court apparently did not feel a lesser standard was required for second-hand vehicles. [22]

We note therefore that the courts are little troubled by exemption clauses and there are now sufficient cases in which relief against these clauses has been granted by following the path of fundamental breach that authority is easy to find.

II. Conditional Sales

The application of the Conditional Sales Act of Ontario [23] was con-

[19] 70 W.W.R. (n.s.) 215 (Sask. 1969).
[20] *Id.* at 223-24.
[21] 11 D.L.R.3d 469 (B.C. Sup. Ct. 1970).
[22] *Cf.* Bartlett v. Sidney Marcus Ltd., [1965] 1 W.L.R. 1013 (C.A.).
[23] Ont. Rev. Stat. c. 61 (1960).

sidered in *C.A.C. Leasing Co. v. Calce*,[24] where it was held that the lease of a cash register under an agreement which excluded any right of the defendant to acquire title was not covered by the act.

As discussed in the previous survey on this subject,[25] the Supreme Court of British Columbia in *La Salle Recreations Ltd. v. Canadian Camdex Ltd.*[26] held that wall-to-wall carpeting which was installed by the method of hooking it over pins at its outer edges so that it could be easily removed, did not become an integral part of the realty and therefore did not require registration. However, the British Columbia Court of Appeal[27] allowed an appeal from the judgment, holding the carpets were fixtures.

The test the court used was set out by Mr. Justice McFarlane as follows: "[T]he question is whether the goods were affixed to the building, though slightly, for the better use of the goods as goods, or for the better use of the building as a hotel building."[28] The court felt that the carpeting was for the better use of the building. It seems that "permanence" as this term is used in the act, is a question of the use to which the goods are to be put. The carpet might have been replaced within three to five years, which is not long in the life of the building, but may be the useful life of the carpet.

In a later case, *Industrial Acceptance Corp. v. Firestone Tire & Rubber Co. of Canada*,[29] the Appellate Division of the Alberta Supreme Court used a similar test to determine whether the doctrine of accession applied to tires bought under a conditional sales contract so as to deprive the vendor of the tires of his security. The test applied was whether the utility of the principal chattel would be destroyed by the removal of the tires. The question was answered in the negative and the position now is that the vendor of tires under a conditional sales agreement runs the risk of a claim by a conditional vendor of the vehicle. Thus the conditional vendor of a relatively small article is placed in a relatively disadvantageous position vis-à-vis the holder of security in a larger article to which they are attached.

Registration continues to create difficulties[30] for conditional vendors. In *Guardian Motors Ltd. v. Canadian Acceptance Corp.*,[31] the plaintiff bought a car from a person who had recently resided in Quebec. The plaintiff began enquiries through his bank and these revealed no encumbrances. He did not contact the seller's insurer from whom he could have learned that the car was subject to a conditional sales agreement. He was nevertheless held to be a *bona fide* purchaser against whom the reservation of title was void unless it could be shown that the provisions of the act has been complied with.

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[24] [1969] 2 Ont. 707.
[25] Jahnke, *Annual Survey of Canadian Law: Commercial Law*, 3 Ottawa L. Rev. 508-16 (1969).
[26] 70 D.L.R.2d 268 (B.C. Sup. Ct. 1968).
[27] 68 W.W.R. (n.s.) 339 (B.C. 1969).
[28] *Id.* at 346.
[29] 70 W.W.R. (n.s.) 547 (Alta. 1969).
[30] See Lee, *Perfection by Registration*, 47 CAN. B. REV. 420 (1969).
[31] 72 W.W.R. (n.s.) 222 (B.C. Sup. Ct. 1969).

A document had been filed which was intended to comply with section 4 of the Conditional Sales Act of British Columbia.[33] However, Mr. Justice Seaton held that this document did not comply with the act for two reasons. The first was that the copy was in French whereas the original was in English and therefore the copy did not qualify under the act. The second more substantial reason was that the serial number in the copy and original was different. In the original, the model number was given as 8Y84N and the serial number as 110373, but on the copy the model number was shown as "Landau" and the serial number as 8Y84N110373. The latter, which was agreed by counsel, was the proper serial number. The court held that the copy was clearly not the same as the original and failed to qualify because of the incorrect serial number.

In a more recent case, *Active Petroleum Products Ltd. v. Duggan*,[34] the British Columbia Court of Appeal held that the Bills of Sales Act required strict compliance to effect valid registration. In this case the vehicle plate showed B6135 over the word "model" and the number "3463" over the word "serial." The document had shown B6135-3463 as the serial number and the court held that only the number 3463 was the correct serial number and therefore there had been no valid registration. Mr. Justice Bull giving the judgment of the court, said that the serial number to be included in the instrument was that allocated to the vehicle and appearing thereon. He refuted the inference that could be taken from *Ostler v. Industrial Acceptance Corp.*[35] that other numbers, which helped to identify the chattel, may be included. Neither the Court of Appeal nor the Supreme Court for that matter appear to have been particularly interested in the question whether a person searching the registry would be misled by the addition of numbers other than the serial number.

Strict application of the notice requirements in the Conditional Sales Act has also been given by the courts. In *Industrial Acceptance Corp. v. Shiels*,[36] the British Columbia Court of Appeal considered the application of section 14 of the Conditional Sales Act.[36] Shiels bought, under a conditional sales contract, a Caterpillar Traxcavator from the Finning Tractor Co. Ltd. and executed a promissory note which was assigned to the plaintiffs with Shiels' consent. About a year later the equipment was transferred to P. & H. Log Transport Ltd., the second defendant, with the consent of the plaintiffs. P. & H. then fell into arrears and the plaintiffs repossessed the equipment and it was sold by them. There was a deficiency of over 13,000 dollars which the plaintiffs sought to recover from the defendants. The defence was that the notice of intention to sell was deficient. The court agreed that there had not been the necessary strict compliance with the statute because the notice had not been sent to both Shiels and P. & H. Log Transport. In order

[33] B.C. Stat. 1961 c. 9.
[34] 72 W.W.R. (n.s.) 486 (B.C. 1970).
[35] 45 W.W.R. (n.s.) 673 (B.C. Sup. Ct. 1963).
[36] 71 W.W.R. (n.s.) 641 (B.C. Sup. Ct. 1969).
[36] B.C. Stat. 1961 c. 9.

to comply with section 14, the plaintiffs would have had to address an individual notice of intention to both Shiels and P. & H. Log Transport.

In *Re Mar-Lise Industries Ltd.*,[37] the question arose whether the Industrial Development Bank was governed by the provisions of the Bills of Sale Act of Ontario requiring a renewal statement to be filed or whether it was exempt by the provisions of section 26 of the same act which provided that the renewal provisions of the act did not apply when a mortgage was given to the Crown. The Ontario Court of Appeal held that the Industrial Development Bank, an agency of the Crown, was governed by the provisions of the Industrial Development Bank Act.[38] The majority held that the act gave the corporation the right and power, with respect to securities taken by it, that a private individual would have and that therefore the bank was subject to the limitations and restrictions applying to an individual. Thus, the bank lost its security to subsequent creditors who gave value after the expiration of the time for registration of a renewal statement.

III. Bills of Exchange

1. *Holder in Due Course*

Promissory Notes

The courts continue to deal in an *ad hoc* manner with problems of promissory notes and the purchase money-lender.[39] In *Range v. Belvedere Finance Corp.*,[40] the Supreme Court of Canada considered an appeal from the Quebec Court of Appeal. Mr. Range had agreed to buy a fur coat under a conditional sales contract and signed a form prepared by U.L.C., a finance company, and had delivered some postdated cheques. The coat was not delivered and the then bankrupt seller transferred the cheques, conditional sales contract and promissory note to U.L.C. U.L.C. cashed some of the cheques, although they had learned that the coat had not been delivered. Mr. Range stopped payment on the remaining cheques. U.L.C. then became bankrupt and the claim was sold to Belvedere who knew of the default and non-delivery. The transfer was approved by the Imperial Bank which had taken the notes originally as collateral security for a loan to U.L.C. and without knowledge of the non-delivery of the coat.

The Supreme Court of Canada in a judgment read by Mr. Justice Pigeon held that as the seller had transferred the sale documents before actually delivering the coat, he would be guilty of fraud and that U.L.C. had failed to satisfy the onus on it to show good faith and therefore they could not claim to be a holder in due course. On the other hand, since the Bank had taken

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[37] 12 Can. Bankr. Ann. (n.s.) 150 (Ont. 1968).

[38] Can. Rev. Stat. c. 151 (1952).

[39] See Zeigel, *Range v. Corporation de Finance Belvedere*, 48 Can. B. Rev. 309 (1970), and Crawford, *Consumer Instalment Financing Since Federal Discount Ltd. v. St. Pierre*, 19 U. Toronto L.J. 353 (1969).

[40] 5 D.L.R.3d 257 (Sup. Ct. 1969).

the notes as collateral security in good faith, for value and without notice, Belvedere Finance Company could also claim the status of a holder in due course under section 57 of the Bills of Exchange Act [41] if the instrument was a valid bill of exchange. However, it was held that the instrument was not "an unconditional promise to pay" within section 176(1) of the Bills of Exchange Act because at the time of the transfer, it was still attached to the conditional sales agreement and could not be read independently. The court held that *Killoran v. The Monticello State Bank* [42] did not apply because in the case at bar there was no cut-off clause. Therefore since Belvedere could not claim to be a holder in due course, it could be met by the defences of non-delivery and total failure of consideration. Because Mr. Justice Pigeon emphasized the fact that the note and the conditional sale were not severed and because of the lack of a cut-off clause, the case does not provide much guidance on the question as to when an assignee of a conditional sales agreement and promissory note may be regarded as a holder in due course.

In the case of *Trans-Canada Credit Corp. v. Zaluski & Niagara Peninsula Compact Agency*, [43] the maker of a promissory note was held liable to pay. A Niagara salesman called on the Zaluski family and convinced them to partake in a money-making scheme whereby Mrs. Zaluski would recommend vacuum cleaners to her friends and would receive credits for doing so. Mr. and Mrs. Zaluski signed a contract of purchase and a promissory note which were in turn negotiated and assigned to the plaintiff. Mr. Justice Leach held that there was no relationship between the plaintiff and Niagara so as to effect the plaintiff with the equities attaching to the contract between Niagara and the Zaluskis, with the result that the plaintiff could sue as a holder in due course of the note. It was, however, also held that the Zaluskis had an action for fraudulent misrepresentation against Niagara and they thereupon succeeded in the amount of the judgment against themselves.

In *Tri-State Finance Co. v. Clargo & Ottawa Domestic Provisioners Ltd.*, [44] the defendant was persuaded to sign a contract for a service called "Life Time Blue Ribbon Membership," which was to supply provisions of a high quality and low price. The defendant signed a contract and promissory note which were assigned to Tri-State. Mr. Justice Gould held that the contract did not comply with section 16 of the Consumer Protection Act, [45] as it did not give a sufficient description of the services to identify them with certainty. The forms were supplied by Tri-State and were intended for use in conditional sales of automobiles and Gould therefore held that Tri-State was more than negligent in supplying the forms and could not be said to be acting "in good faith." The contractual provision, which specifically provided that Tri-State should enjoy the status of a holder in due course, was of no assistance to the plaintiff.

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[41] CAN. REV. STAT. c. 15 (1952).
[42] 61 Sup. Ct. 528 (1921).
[43] [1969] 2 Ont. 496 (Div. Ct.).
[44] 11 D.L.R.3d 51 (Ont. Div. Ct. 1969).
[45] Ont. Stat. 1966 c. 23.

The line which divides a holder who is merely negligent from one who has acted in bad faith is illustrated by the case of *Avco Ltd. v. Bradley.*[46] The defendant purchased furniture under a conditional sales agreement and a promissory note which were later assigned to the plaintiff. The seller did not provide with the assignment a statement containing certain information required by the Ontario Consumer Protection Act.[47] It was held that Avco Ltd. was merely negligent in not demanding a copy and was therefore still a holder in due course of the note. It is significant that Avco had not taken part in the negotiations nor had it provided the form of contract.

As of November 1, 1970 the position of the institutions financing consumer purchases is clarified somewhat by the enactment of an amendment to the Bills of Exchange Act which requires promissory notes which are taken in respect of consumer sales to bear the stamp "consumer note" and in respect of which the endorsee does not enjoy the status of a holder in due course. The amendment should also go some distance toward removing possible conflict between the various provincial Consumer Protection Acts and the federal law.

IV. Miscellaneous

The obligation of a bank to make an investigation of a customer who opens an account was considered in *Toronto-Dominion Bank v. Canadian Acceptance Corp.*[48] The plaintiff received over a single two-day period nine cheques for over 20,000 dollars deposited to a new account which previously had only a balance of 20 dollars. On the second day there was a withdrawal of 7,000 dollars. The cheques were payable to "Beaubien Autorama Enr'g." The bank's manager asked his assistant to check that all was in order. He did so by telephoning the defendant company and speaking to a person who described himself as the manager and who assured him that all was in order. In fact, the cheques were part of a fraudulent scheme unknown to the defendants whereby the customers of the plaintiff had obtained these cheques from the defendant by fraud. The Quebec Court of Appeal held that the bank was a holder in due course because the bank manager had acted in good faith although he may have been "blundering and careless."

The court at first instance had taken the view that the bank should have made some enquiries when the account was opened without introduction. In fact, the partnership of "Beaubien Autorama Enr'g." had been dissolved the day the account was opened and one of the partners had a substantial criminal record. Although the manager drove past the customer's place of business, no further enquiries were made.

It seems clear that the obligation of banks to make enquiries and not to be negligent in opening accounts of new customers is somewhat less in

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[46] [1969] 1 Ont. 240 (Div. Ct.).
[47] Ont. Stat. 1966 c. 23.
[48] 7 D.L.R.3d 728 (Que. 1969).

Canada than in England where in the recent case of *Marfani v. Midland Bank* [49] the high standard of care demanded of a bank in opening accounts was stressed.

The choice of remedies open to a bank which becomes a holder in due course of a cheque deposited by the customer was considered in *Huron & Erie Mortgage Co. v. Rumig* [50] by the Ontario Court of Appeal. The defendant drew a cheque for 4,000 dollars on his account at the Toronto-Dominion Bank payable to one Shomsky. Shomsky endorsed it and deposited it in his account with the plaintiff corporation who credited his account on June 7. Shomsky was to deliver some securities to the defendant and when he failed to do so, Rumig stopped payment of the cheque on June 8 and the cheque was returned to the plaintiff on June 10. The plaintiff, claiming to be a holder in due course, sought to recover from the defendant and was successful.

The majority of the Ontario Court of Appeal held that the plaintiff was a holder in due course and could recover from the drawer. Mr. Justice Laskin said that although the Bills of Exchange Act [51] does not set out an order of recourse against the endorser and the drawer, the court should decide which of the two innocent parties should suffer and since the trust corporation had the opportunity to move against Shomsky, the endorser, and would have merely made an accounting entry to recover the amount of the cheque, it should be required to do so rather than be permitted to allow Shomsky to draw on his account after the cheque had been dishonoured and then, as holder in due course, proceed against the drawer.

V. Forgery

Two cases dealing with the important question of forgery have been decided recently. In *Ontario Woodsworth Memorial Foundation v. Grozbord* [52] the director of a Foundation was also its solicitor and had acted for it in the sale of certain land. The purchaser paid by certified cheque on which the director forged the signature of one of his co-directors and put it into his own trust account at the Bank of Nova Scotia and misappropriated the money. The Bank of Nova Scotia collected on the cheque. The foundation learned of the forgery but remained inactive for several months, during which time the director left the jurisdiction. After signing a confirmatory deed, the foundation eventually brought action against the two banks, the purchaser and the solicitor. The Supreme Court of Canada held that the purchaser had substantially performed the agreement by the tender of a certified cheque and was therefore discharged from further liability. The silence from March to May of the foundation had seriously impaired the banks' ability to recover

[49] [1968] 2 All E.R. 573 (C.A.).
[50] [1970] 2 Ont. 204.
[51] Can. Rev. Stat. c. 15 (1952).
[52] 4 D.L.R.3d 194 (Sup. Ct. 1969).

from the solicitor. They were therefore estopped from denying the validity of the signature.

More recently, the British Columbia Supreme Court has considered the case of *Arrow Transfer Co. v. Royal Bank of Canada.*[53] Seear, the plaintiff's accountant, had access to the plaintiff's cheque forms and over a period of years forged cheques drawn on the Royal Bank in the sum of 165,109 dollars. Some cheques were presented directly to the Royal Bank while others were negotiated through other banks, including the Bank of Montreal. Arrow Transfer upon discovery of the fraud, sought to recover from the Royal Bank for debiting its account without authority or for conversion or negligence. The plaintiff also sought to recover from the Bank of Montreal on the grounds of conversion or money had and received.

There was a verification agreement between the plaintiff and the Royal Bank which placed upon the plaintiff the responsibility of verifying the correctness of the statements furnished by the Bank to the customer within thirty days, after which time the correctness was to be conclusively presumed. Mr. Justice Seaton held that the verification of agreement was a complete defence to the plaintiff's claim against the Royal Bank of Canada. The agreement to continue service by the bank was sufficient consideration for the plaintiff's agreement to verify its account. Nor was the learned judge prepared to set aside the transactions on the basis of an equitable jurisdiction to open a stated account. He was influenced by the fact that the plaintiff was in a much better position to guard against the loss than the bank.

The claim against the Bank of Montreal involved the question whether in a case where the signature of the drawer and the endorsements were all forged, the plaintiff had an action for conversion or money had and received. Mr. Justice Seaton had to decide whether to apply the doctrine of strict liability for conversion set out in *Morison v. London County & Westminister Bank Ltd.*,[54] which held that any person who deals with a bill in a manner inconsistent with the title of the owner is guilty of the tort of conversion, or the doctrine in *Price v. Neal.*[55] In *Price v. Neal* it was held that the drawee of a bill whose signature was forged and who nevertheless paid out monies on the basis thereof could not recover from the holder of the bill who had given value for it and received the money innocently. Mr. Justice Seaton applied the rule in *Price v. Neal* to the case of the forgery of the drawer's signature where money was paid out by his Bank. He was influenced again by the fact that the plaintiff was in a better position to discover the forgery than was the defendant Bank of Montreal.[56]

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[53] 72 W.W.R. (n.s.) 19 (B.C. Sup. Ct. 1969).
[54] [1914] 3 K.B. 356, 83 L.J.K.B. (n.s.) 1202 (C.A.).
[55] 3 Burr. 1354, 97 Eng. Rep. 871 (1762).
[56] This case is under appeal.