ANNUAL SURVEY OF CANADIAN LAW

PART 1

COMMERCIAL LAW

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I. SALES

Section 5 of the Ontario Sale of Goods Act[1] requires that a contract for the sale of goods of the value of forty dollars upwards is unenforceable unless evidenced in writing. In *J. Materne Design & Constr. Ltd. v. Gendel*,[2] the defendants ordered furniture but upon being dissatisfied with its finish refused to accept it. The trial judge held for the defendants and stated that but for section 5 he would have awarded judgement to the plaintiffs. The defendants had moved for a non-suit after the plaintiffs put in their case. The defendants in their statement of defence, referred to an "order" for furniture and the Court of Appeal held that this amounted to an acceptance within the terms of subsection 3 of section 5. Subsection 3 provides: "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods that recognizes a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not." The Appeal Court took the view that a formal acknowledgment of the existence of a contract was sufficient to amount to acceptance.

A. Conditions and Warranties

Consistent with a growing trend of legislative intervention on behalf of the consumer, the British Columbia Legislature amended the Sale of Goods Act by the insertion of section 21A.[3] The new section provides that the conditions and warranties in sections 18-21, that is, those conditions relating to undertakings as to title, description and fitness, may not be negatived nor diminished by agreement. An exception is made for used goods and the new provision applies only to retail sales as defined in the section. This section has not yet been the subject of judicial interpretation. Ontario enacted a similar amendment to the Consumer Protection Act.[4]

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[1] ONT. REV. STAT. c. 358 (1960), Ont. Rev. Stat. c. 421 (1970).

[2] 17 D.L.R.3d 268 (Ont. 1970).

[3] B.C. Stat. 1971 c. 52, § 1.

[4] The Consumer Protection Amendment Act, 1971, Can. Stat. c. 24, § 2.

The construction of the provisions of various Sale of Goods Acts' relation to conditions of fitness continue to receive interpretation favourable to purchasers. In *Evanchuk Transport v. Canadian Trailmobile Ltd.*[5] the plaintiff purchased a transport trailer from the defendant for a price of 17,517.50 dollars including finance charges. The trailer was defective in that it did not tow in proper alignment, with the result that tires wore rapidly and it lacked stability. Nevertheless, the plaintiff used the trailer for a distance of 104,000 miles before turning it back to the defendant. The defendant then credited the plaintiff with the sum of 12,194.10 dollars for the resale of the trailer and rebate of finance charges. The plaintiff claimed repayment of the capital loss suffered and the cost of tires (1,120.00 dollars).

The trial judge held that the plaintiff had lost the right to repudiate the contract and return the trailer by reason of the use of it and no appeal was taken from this part of his decision. The trial judge also awarded the plaintiff the cost of the tires and 500 dollars damages for lost time and inconvenience.

The Alberta Supreme Court, Appellate Division, allowed the plaintiff's appeal and held that the proper measure of damages was the cost of the trailer less the remaining value at the time the defendant took the return of it. In reaching this decision the court followed the earlier decisions of the Supreme Court of Canada in *Massey-Harris Co. v. Skelding*[6] and *Ford Motor Co. of Canada Ltd. v. Haley*.[7] In part the court said:[8]

> From these cases it appears to me that the measure of damages contemplated by § 53 of the Act is dependent upon the determination of a preliminary issue of fact. If the defect which is the cause of the unfitness for purpose can be remedied so that the goods are in fact thereby made reasonably fit from the purpose, the measure of damage is the cost of such repairs together with any loss directly and naturally resulting in the ordinary course of events from the breach of warranty. That is not the case here. On the other hand, if, as the evidence in the present case discloses, the defect cannot be so remedied, the consequence is that there is a complete failure in respect of the fulfillment of the warranty, and the damage then is *prima facie* the amount of the full purchase price. The seller may be able to show that the goods have some residual value, whether to the buyer or to someone else, by which the *prima facie* damages should be diminished, but the onus is on him to do so.

In his dissenting judgement Mr. Justice Cairns agreed with the trial judge that the trailer in question had not failed in respect of the warranty which was given as to its suitability for a particular purpose but it failed only in that the tires' wear was excessive. He thought that damages should therefore be assessed on the basis that there had not been a complete failure.

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[5] 21 D.L.R.3d 246 (Alta. 1971).

[6] [1934] 3 D.L.R. 193, [1934] Sup. Ct. 431

[7] [1967] Sup. Ct. 437, 62 D.L.R.2d 329 (1967)

[8] *Supra* note 5, at 254.

An interesting case involving contract damages was *Freedhoff v. Pomalift Industries Ltd.*[9] in the Ontario High Court. The plaintiff had agreed to purchase from the defendants a ski lift which was to be installed by December 6, 1963 and was warranted by the defendants for a period of one year. The lift did not operate during that season because of late delivery and because the design and installation were defective. As a result the plaintiff lost his land which he had mortgaged for the purpose of purchasing the defendants' equipment and went out of business. Mr. Justice Stewart held that the damages recoverable were: (1) the amount paid in respect of the purchase price, (2) profits lost on operations for the 1963-64 season and (3) the loss of his land and chattels in the foreclosure. It was argued on behalf of the defendants that the loss of land and chattels resulted from the plaintiff's impecuniosity and was too remote to be allowed. Stewart said that in this case the impecuniosity was related directly and caused by the breach of contract. He said:[10]

> There must be a distinction made between impecuniosity extraneous of the tort or breach of contract when damages caused by it must be regarded as being too remote, and between impecuniosity traceable to the wrongful acts of the defendant, foreseeable and a likely consequence of the defendant's default. Taking a familiar example - if an owner, through poverty, cannot repair his car after an accident, the wrongdoing defendant will only be liable for such losss of use as is incurred during whatever period is reasonable for the repair of the vehicle. Obviously, the plaintiff's impecuniosity was not caused by, traceable to or in any way connected with the breach and, hence, any further damages under this head would be too remote.
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> Here, however, not only did the defendants by their breaches of contract cause the plaintiff to lose what he had spent in anticipation of profits, and, indeed, to preclude any profits at all, but, directly and foreseeably, their act created that very impecuniosity which prevented mitigation of damages, and from which flowed, with all the inevitability of a Greek tragedy, his loss of goods and land and the utter ruin of his enterprise.

II. Secured Transactions

A. Conditional Sales

1. Remedies

Where the seller of goods intends to look to the buyer for a deficiency upon resale, the former must comply strictly with the terms of the various provincial Conditional Sales Acts. In *Citadel Motors Ltd. v. Hartlen*[11] the plaintiffs were dealers who were guarantors of conditional sales entered into by the defendant and assigned to G.M.A.C.. Upon repossession of four cars the requisite notices were mailed to the defendant by G.M.A.C.. When the plaintiff had paid G.M.A.C. the due accounts, these and the notices were sent to it by G.M.A.C.. The cars were subsequently sold and

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[9] 13 D.L.R.3d 523 (Ont. High Ct. 1970).

[10] *Id.* at 533.

[11] 16 D.L.R.3d 433 (N.S. Sup. Ct. 1970).

the plaintiff sought the deficiency from the defendant. Among the defences raised was the plea that section 12 of the Nova Scotia Conditional Sales Act[12] which states that the goods shall not be resold until "after notice in writing of the intention to sell has been given to the buyer" required the seller to give notice of a particular sale. Mr. Justice Jones held that the words "intention to sell" meant notice of an intention rather than notice of a particular sale. Another point raised was that the plaintiff had done repairs during the twenty-day period during which the goods were held and during which the buyer might have redeemed them. It was held that the repairs were made consistently with the agreement and not contrary to the Act. The danger of this course of action would have become apparent had the buyer chosen to redeem the goods, for the seller must be in a position to permit redemption during that period. It was also argued that there was no proper assignment of the agreements from G.M.A.C. to the plaintiff. The court held that although there was no written assignment, there was sufficient evidence of an equitable assignment.

The restrictions on deficiency claims found in the legislation of Alberta and Saskatchewan continue to require interpretation. The Saskatchewan Limitation of Civil Rights Act[13] provides that a conditional seller is limited to his right of seizure but exempts from this restriction articles "thereafter affixed to realty and to which section 19 of the Conditional Sales Act applies." Section 19 states that where goods are affixed to land they remain subject to the rights of the seller as fully as they were before being affixed. In *Brunswick of Canada Ltd. v. Hunter*[14] pin-setting machines which had been affixed to leased premises were removed by the conditional buyer and the seller informed that he might seize them if he wished and instalments were no longer paid. The Saskatchewan Court of Appeal held that since section 19 of the Conditional Sales Act no longer applied to the goods, they having been detached quite properly, the exemption no longer applied and the seller was restricted to his right of repossession.

A bowling machine also featured in *Brunswick of Canada Ltd. v. Mountain View Bowl Ltd.*[15] Section 19 of the Alberta Conditional Sales Act[16] requires the conditional seller to elect between his right to seize goods or to sue for the purchase price. The plaintiff had effected a seizure but an extension of time was negotiated and for some three years both parties had assumed the seizure was released. The plaintiff, it was held, was entitled to now bring an action for the price since, in negotiating the extension of time, the defendant had waived the statutory right to require an election.

2. Registration

The dangers inherent in dealing with chattels even under a system of

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[12] N.S. REV. STAT. c. 48 (1967).

[13] SASK. REV. STAT. c. 103 (1965).

[14] 14 D.L.R.3d 769 (Sask. 1970).

[15] [1972] 1W.W.R. (n.s.) 524 (Alta. Sup. Ct. 1971)

[16] ALTA. REV. STAT. c. 54, § 19 (1955), *amended by* Alta. Stat. 1965 c. 15, § 3.

security registration are illustrated by *Kozak v. Ford Motor Credit Co. of Canada and J & D's Used Cars Ltd.*[17] Dominion Motors sold a car to one Deitsch under a conditional sales agreement which was assigned to Ford and duly registered. Some months later Deitsch sold the car to J & D's Used Cars who later sold it to Kozak. When Deitsch failed to make instalment payments, the automobile was seized and Kozak brought an action against J & D's and Ford. The action against Ford was dismissed, the Court of Appeal of Saskatchewan agreeing with the trial judge that section 3 of the Factors Act[18] and section 26 of the Sale of Goods Act[19] did not apply to conditional sales agreements. The reasons for this conclusion were that the Conditional Sales Act contains implied conditions and warranties almost duplicating those found in the Sale of Goods Act and also contains section 10 providing for sale by the buyer where there is express or implied consent to resell by the conditional seller. Mr. Justice Hall (with whom Mr. Justice Maguire concurred) stated that had the legislature intended that the Sale of Goods Act should apply to conditional sales agreements, these sections would have been unnecessary.

The court also purported to apply *Newtons of Wembley Ltd. v. Williams*[20] requiring that for the application of the Sale of Goods Act the sale must be by a mercantile agent in the ordinary course of business and neither Deitsch nor J & D Motors sold the car as a mercantile agent.

Finally, the court stated that if the other grounds were wrong, then registration under the Conditional Sales Act constituted constructive notice of the interest of Ford. Earlier cases such as *Joseph v. Lyons*[21] indicating that registration does not constitute constructive notice were distinguished as providing that rule only in respect of equitable interests. Hall said:[22]

> It appears from this definition, and from reading the cases above quoted, that the term "constructive notice" is applied only with respect to equitable interests and not to a legal interest, which the respondent Ford Motor Credit Co. Ltd. has here. It is, therefore, not necessary to decide whether, in Saskatchewan today, with a central registry for conditional sales and bills of sale, and where it is widely known that almost all automobiles are sold under conditional sale agreements, the extension of the doctrine of constructive notice to commercial transactions would be desirable. Under present conditions, it would seem that if registration were not held to be notice, in the words of Lindley, L.J., "we should be doing further mischief and paralyzing the trade of the country."

In *Wolf v. Hudson*[23], the Alberta Supreme Court held that a conditional sales agreement entered between the parties some months after a contract for the sale of goods had passed property in the goods to the buyer was an invalid attempt to secure a loan upon an interest in the goods so as to make

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[17] [1971] 3 W.W.R. (n.s.) 1 (Sask.), 18 D.L.R.3d 735.

[18] SASK. REV. STAT. c. 386 (1965).

[19] SASK REV. STAT. c. 388 (1965).

[20] [1965] 1 Q.B. 560 (C.A. 1964), [1964] 3 All E.R. 532.

[21] 15 Q.B.D. 280 (C.A. 1884).

[22] *Supra* note 17, at 15-16, 18 D.L.R.3d at 748.

[23] [1971] 5 W.W.R. (n.s.) 741 (Alta. Sup. Ct.).

the seller a secured creditor in the bankruptcy of the purchaser. The court referred to such cases as *Traders Finance Corp. v. Halas, Stan Reynolds Auto Sales Ltd.*[24] and *Baxter v. Friendly Credit Corp.*[25] as authority for the view that it would look to the substance of the transaction and that such "instant conditional sales agreements" should be treated as chattel mortgages and required to be registered under the relevant Bills of Sale Act.

3. Miscellaneous

The doctrine of accession to chattels was considered by the Supreme Court of Canada in *Firestone Tire & Rubber Co. of Canada v. Industrial Acceptance Corp.*[26] The Supreme Court decided in favour of the conditional seller of tires over the conditional seller of the vehicle to which they were attached. Mr. Justice Laskin said:

> In my opinion, whatever be the rationale of the doctrine of accession in taking effect in the foregoing situations, it ought not to be applied to the present case where removable and identifiable accessory chattels are claimed by the holder of an original title thereto, retained as security for their value, against the prior security title holder of the principal chattel.
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> There is no justification for a conclusion in this case that would give the respondent a windfall against a third party who has reserved title. I know of no policy of commercial dealing in chattels of the kind in question here that would warrant subordination of the claim of their title holder to that of another who has given no value for them.[26a]

B. Chattel Mortgages

1. Registration

Chattel mortgages continue to be attacked on the basis that they do not meet the technical execution requirements of the various statutes and these attacks continue to meet with varying degrees of success. In *Re Buschman & Leoville Savings & Credit Union Ltd.*,[27] Mr. Justice Disbery of the Saskatchewan Court of Queen's Bench held that a chattel mortgage which was registered without an accompanying affidavit of bona fides was void as against a security subsequently taken under section 88 of the Bank Act.[28] In *Re Scott Wheaton Ltd.*[29], the New Brunswick Supreme Court, Appeal Division held that section 24 of the Bills of Sale Act[30] requiring that every affidavit made under the Act must state that the deponent is aware of all circumstances connected with the bill of sale did not apply to the grantor's affidavit of execution where the grantor was a corporation. On the other

[24] 20 W.W.R. (n.s.) 512 (Alta. Sup. Ct 1956)

[25] [1952] 2 D.L.R. 865 (B.C. Sup Ct.)

[26] 17 D.L.R.3d 299 (1970). For a summary of the decision in the Alberta Supreme Court, Appellate Division *see* Jahnke, *Annual Survey of Canadian Law - Commercial Law*, 4 OTTAWA L. REV. 486, at 490 (1971).

[26a] 17 D.L.R.3d at 231.

[27] 13 D.L.R.3d 240 (Sask. Q.B. 1970)

[28] Can. Stat. 1966-67 c. 87.

[29] 14 D.L.R.3d 455 (N.B. 1970).

[30] N.B. REV. STAT. c. 18 (1952).

hand, in *Re Perrier-Roy-Therrien Ltd.*[31] it was held that a chattel mortgage given by a corporation and executed on its behalf by two signing officers was void as against the trustee in bankruptcy where only one of the signatures was attested to in the affidavit of execution.

In *Re Panneton*,[32] the question arose whether a chattel mortgage which incorrectly described the location of mortgaged chattels was invalid by reason of a failure to comply with section 13 of the Ontario Bills of Sale and Chattel Mortgages Act.[33] Mr. Justice Houlden held that this error did not invalidate the chattel mortgage for it was quite possible to identify the chattels without reference to their particular location. He indicated that in the case of a mortgage which described goods as "all goods and chattels of the mortgagor contained in such and such premises" the location of the goods would be of considerable importance and if it were wrong the chattel mortgage might be null and void.

The result of an error in characterising a transaction properly for the purposes of registration are illustrated by *Humfrey v. Hickey*.[34] In that case a company engaged in the production of rockwall gave a chattel mortgage on certain goods and chattels and included in the mortgage after-acquired property. Mr. Justice Kirby of the Alberta Supreme Court held that the effect of the mortgage was to create a floating charge required to be registered by section 99 of the Alberta Companies Act. Section 99 provides that every mortgage created by a company as a floating charge on its undertaking or property shall be registered. The court made note of the fact that the mortgage would include any rockwall produced by the company in the future. It is implicit in the judgment that this charge on the rockwall which must revolve was instrumental in the determination that the nature of the instrument was a floating charge. Because the mortgage was not registered under the companies Act it was void as against an execution creditor.

2. Remedies

The duties imposed on the chattel mortgagee who seizes goods are not particularly onerous nor are the consequences of breach particularly serious. This is illustrated by *Aubut v. Grand Falls Milling Co.*,[35] where the chattel mortgagee seized several pieces of equipment and sold some of the mortgaged goods without giving the mortgagor proper notice and also improperly made use of some of the goods while they were under seizure. The trial judge held that the mortgage was discharged and ordered the return of those chattels still in the hands of the mortgagee. He also awarded the mortgagor damages for lost profits during the period the goods were seized and general damages for wrongful detention of the goods.

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[31] 14 D.L.R.3d 149 (Ont. Sup. Ct. 1970).

[32] 19 D.L.R.3d 646 (Ont. Sup. Ct. 1971).

[33] ONT. REV. STAT. c. 34 (1960), *repealed and substituted by* Ont. Stat. 1967 c. 8, § 1.

[34] 19 D.L.R.3d 320 (Alta. Sup. Ct. 1971).

[35] 19 D.L.R.3d 360 (N.B. 1971).

The appeal was allowed by the New Brunswick Supreme Court, Appeal Division for the reason that the improper acts of the mortgagee did not render the seizure invalid nor did the sale of the goods without notice discharge the debt. The mortgagor could not have an action for wrongful detention of the goods unless he made tender of the amount owing. In the result the court held that the mortgagor was entitled to at least nominal damages for the unauthorised sale of the equipment and he was entitled to damages resulting from the unauthorised use of some of the chattels. The mortgagee, on the other hand, was entitled to judgment for the amount of the debt owing less a set-off for the damages.

3. Assignment of Book Accounts

The position of the trustee in bankruptcy vis-a-vis secured interest was considered in *Re Jago Plumbing & Heating Supplies Ltd.*[36] The case arose out of an assignment of book accounts from Jago to the Canadian Imperial Bank of Commerce in 1967. By virtue of section 19 of the Ontario Assignment of Book Debts Act,[37] the registration expired on April 1, 1971. A renewal statement was not filed. On April 5, 1971, Jago made an assignment in bankruptcy. An application was made to the judge of the county court and an order was made extending the time for registration of the renewal statement to June 16, 1971. The renewal statement was filed on June 15.

Section 19, subsection 4 of the Ontario Act provides:

> Where a renewal statement is not registered within the time prescribed by this section, a judge of a county or district court on application may, upon such terms and conditions and with such notice, if any, as he may order, extend the time for registration but, in the event that it later appears that any such registration within the period so extended has prejudiced the rights that any person acquired before the registration, such registration shall be presumed not to have been done in conformity with this Act for the purpose of determining the rights that such person acquired before the registration.

The court held that the trustee had "acquired" vested rights in the receivables as a result of the assignment in bankruptcy and to take these away would be to prejudice his position.

III. Bills and Notes

A. Holder in Due Course

The question of the position of an endorsee of instalment notes continues to be considered by the courts. In *Trans Canada Steel Products Ltd. v. Kuzyk; Cracklen Steel Ltd.*,[38] the plaintiffs were endorsees on a promissory note arising out of the sale of steel farm buildings sold through the plaintiffs' agent Cracklen. The defence was that the amounts claimed had been paid to Cracklen, the original payee of the notes. The plaintiffs' response

[36] 22 D.L.R.3d 647 (Ont. Sup. Ct. 1971).

[37] Ont. Rev. Stat. c. 33 (1970).

[38] 14 D.L.R.3d 729 (Man. Q.B. 1970).

was that such payment had been made after notice of endorsement of the note. In the result the Manitoba Supreme Court held that the plaintiffs had constituted Cracklen their agent for receipt of payments under the note. The court was influenced in reaching this decision by the fact that the plaintiffs had sent the notice of endorsement to the defendant only a considerable period of time after it had become disenchanted with Cracklen and knew that Cracklen was in some financial difficulty.

A small part of the amount payable on the note had been paid neither to Cracklen nor the plaintiffs and in respect of this amount the court held that the defendant was entitled to set it off against Cracklen for breach of the contract to erect the building in question. The plaintiffs' claim for this amount was also dismissed on the basis of *Federal Discount Corp. v. St. Pierre*[39] and the series of cases which have followed and discussed that decision.

The principles enunciated in the *St. Pierre* case were applied and enlarged upon in *Beneficial Finance Co. of Canada v. Kulig*.[40] In that case the plaintiff endorsee of an instalment note sued the defendant who was induced to sign the note representing payment for the purchase of a supply of materials for sign painting on the representation that payment could be made from the proceeds of completed signs. Since a large number of such transactions were concluded in the same area, it was clear that no market for the completed signs existed so as to enable the defendant to pay the note from the proceeds of sales. The knowledge by the plaintiff that the payee of the note was selling a large quantity of materials in the immediate vicinity was such as should have aroused its suspicions and called forward further investigation rather than encouragement of the financing of such transactions. While County Court Judge Matheson indicated that there was a total failure of consideration between the defendant and the dealer, he did not indicate in what particulars this failure consisted.

B. Cheques

1. Countermand

The technical nature of the stop order is illustrated by *Shapera v. Toronto-Dominion Bank*.[41] The plaintiff issued a cheque dated January 26 and asked the payee not to present it for some period of time. On February 20 he completed a stop order form at the defendant bank and on the stop order described the cheque as drawn on January 27. The cheque was certified on April 30. The plaintiff failed in his action against the defendant bank because of the mis-description of the cheque. It was pointed out that the bank would face substantial risks if it refused to honour a cheque other than the one precisely described in the stop order on the surmise that it was in fact the cheque the customer intended to stop. To fail to honour the

[39] 32 D.L.R.2d 86 (Ont. 1962).
[40] 13 D.L.R.3d 134 (Ont. Co. Ct. 1970).
[41] 17 D.L.R.3d 122 (Man. Q.B. 1970).

drawer's cheque if the bank were mistaken in its surmise would cause substantial damage to the drawer's credit. The Manitoba Court of Queen's Bench took the view that even if the bank had acted without authority, it would be entitled to relief on equitable grounds. Mr. Chief Justice Tritschler said: "There are equitable doctrines under which a person who pays the debt of another without authority may be allowed the advantage of the payment. This equity may be extended, if the circumstances justify, to a banker who pays a cheque without authority if it is shown that the payment discharged a legal liability of the customer."[42]

The *Shapera* case was referred to in *Royal Bank of Canada v. Huber*[43] in which the plaintiff was claiming return of monies paid to the defendant on cheques which had been stopped. The plaintiff bank failed in this action for the Saskatchewan Court of Appeal held that the bank while it acted under a mistaken fact, had suffered no loss because no demand had been made by the drawer for reinstatement of its account. The court referred to the *Shapera* decision in reaching the conclusion that the reason the drawer had not called upon the bank to reinstate its account was that the drawer would be met with the defence that the bank would be entitled to equitable relief in that the funds had been paid to meet a legal obligation of the drawer. The cheques in this case represented payments to the payee for salary. The drawer, therefore, who claims a bank has paid without authority a cheque subject to a stop order may find himself in the position of having to establish a substantive defence to a claim which the payee might have made had the cheque been dishonoured.

2. Forgery

Since the last *Review* survey was published, the case of *Arrow Transfer Co. v. The Royal Bank of Canada* has found its way into the British Columbia Court of Appeal and the Supreme Court of Canada.[44] The Supreme Court of Canada decision is as yet unreported.[45] Since the appeals were dismissed in both courts, it is proposed to deal here only with the decision of the Supreme Court of Canada.

It will be recalled that the case involved a large number of forged cheques drawn on Arrow's account by its fraudulent accountant and presented either directly to the Royal Bank for payment or through the Bank of Montreal. Mr. Justice Martland held that the verification agreement provided the drawee, the Royal Bank of Canada, with a complete defence. The agreement referred to "debits wrongly made" and the payment of forged cheques represented such debits.

On the claim against the Bank of Montreal, he agreed with Mr. Justice Laskin and Mr. Justice Robertson of the British Columbia Court of Appeal.

[42] *Id.* at 127.

[43] 23 D.L.R.3d 209 (Sask. 1971).

[44] 19 D.L.R.3d 420 (B.C. 1971).

[45] For a summary of the decision of the Supreme Court of British Columbia *see* Jahnke, *Annual Survey of Canadian Law: Commerical Law*, 4 OTTAWA L. REV. 486, at 496 (1971).

Laskin no doubt realizing the broad implications of the practice of banks in requiring customers to sign this type of agreement, was somewhat more circumspect in his approach to the verification agreement than the other judges who considered it. He stated that the verification agreement represented only part of the obligations of bank and customer. He indicated that "if the bank is to rely on a verification contract it must be able to point to words in the contract that leave no doubt of the scope of the protection which it claims."[46] This view is supported by section 49(1) of the Bills of Exchange Act.

He said that the limits of wrongful debit covered by the verification agreement include arithmetic errors, milking of the account by an employee of the bank, failure to credit sums, and wrongful attribution of debits. The question involved in this case was what had the bank protected itself against. Neither forgery nor fraud were expressed. He said:

> I find it strange that a bank which seeks by contract to throw the risk of all forged drawer signatures upon its customer should be so reticent about referring expressly to such an eventuality. It is not as if its verification form lacks subject matter without it. The verification form, as a matter of words, encompasses the situation which arose in *Union Bank of Canada v. Wood.* Beyond this or related situations, it surely is, to say the least, "ambiguous" (to use the term applied by Duff, J. in the *Stewart* case) in any suggested application to forgery or fraud. There is every reason to construe it *contra proferentem*, and I would therefore conclude that its words do not provide protection against the forgery of the drawer's signature.
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> The construction that I would put on the verification agreement is consistent with the approach to contractual limitations of liability in other kinds of relationships, such as bailee and bailor, carrier and consignor, retailer and purchaser. Risks that are by contract to be passed by a party, upon whom they would otherwise rest, to the other party to the relationship must be brought home expressly if they are to be effective; at least this is so when the limitation would still have subject matter if unexpressed risks be found to be outside its general language.[47]

There is, therefore, considerable scope left for further judicial consideration of cases of this nature.

In respect of the claim against the Royal Bank of Canada, Laskin concluded that there is a duty on the customer to examine statements in the following terms:

> I do not think it is too late to fasten upon bank customers in this country a duty to examine bank statements with reasonable care and to report account discrepancies within a reasonable time....
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> This principle would be consistent with the duty of which I speak, a duty that would not, however, be as draconian as that which the bank has sought to fasten upon the appellant under the verification agreement.[48]

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[46] Arrow Transfer Co. v. Royal Bank of Canada, as yet unreported. Judgment pronounced March 30, 1972.

[47] *Id.*

[48] *Id.*

Arrow Transfer was precluded from claiming against the Royal Bank because of its own negligence in employing a person of doubtful character and permitting him to control accounts without checks.

On the claim for conversion or money had and received, Laskin concluded that the collecting bank is not liable in conversion in the case of a forged drawer's signature unless it had some knowledge of the circumstances. He said:

> There is in this case no tenable claim for money had and received if there is no recovery for conversion. Although the former is not tied to conversion - it may, for example, arise where there has been a failure of consideration - the basis of the claim here for money had and received is the allegedly tortious conduct of the collecting bank, and the claim would arise upon a waiver of the tort. What, then is the tort, with ensuing damage, which the collecting bank has committed against the appellant? It has not deprived the appellant of the fruits of bills of exchange to which the appellant was entitled. It has not knowingly assisted in perpetrating a fraud through which the appellant suffered a loss. It was not fixed with notice of the forgeries, or any of them, at a time when the forger's accounts with it were still on the credit side, so as to support a claim to follow the money.
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> ...I look upon the present case as one where, as between the appellant and the collecting bank, the loss suffered as a result of the forgeries must lie where it has fallen.[49]

In the learned judge's view, the doctrine of *Price v. Neal*[50] would apply in favour of the Bank of Montreal were the latter a holder for value. No mention was made of *Morison v. London County & Westminster Bank, Ltd.*[51]

C. *Miscellaneous*

In *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.*,[52] one Fienberg, who owned J.D.F. Builders signed a note drawn "we" promise to pay. The name "J.D.F. Builders Ltd." was stamped on the note by the payee and it was sent to Fienberg. Fienberg did not plead that he was not personally liable on the note but it was argued that J.D.F. Builders was not liable. Mr. Justice Donohue of the Ontario High Court, held the company was liable as follows:

> In the case at bar I am satisfied that the intention was to create a joint liability. The use of the pronoun "we" in the promissory note supports this view. I see no difficulty in the point that Pearl [payee] placed the company stamp on the note. It was there when Fienberg received the note and I would hold that he had adopted this for the company. Then Fienberg signed the note, he being president of the company. He did not of course indicate in what capacity he was signing. In my view, there is nothing inconsistent in holding that his one signature was sufficient to bind him personally and to commit the company as well.[53]

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[49] *Id.*

[50] 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

[51] [1914] 3 K.B. 356 (C.A.), [1914] 83 L.J.K.B. (n s) 1202 (C A.).

[52] 22 D.L.R.3d 532 (Ont. High Ct. 1971).

[53] *Id.* at 534.

The applicability of the Bills of Exchange Act[54] to Bank of Canada notes was considered in *Bank of Montreal v. Bay Bus Terminal (North Bay) Ltd.*[55] The action arose out of a loss by fire of 23,307.00 dollars in five dollar Bank of Canada notes while these were being transported from North Bay to Temiskaming. Action was also brought against the Bank of Canada seeking re-issue of the lost notes.

The plaintiff succeeded against the Bank of Canada as the Ontario High Court held that these were promissory notes even though they were also legal tender. The notes were convertible into gold and were therefore demand notes.

In the result, sections 156 and 157 of the Bills of Exchange Act applied to them and the Bank of Canada was ordered to re-issue duplicate notes.

Transfer of a note without endorsement was considered in *Aldercrest Developments Ltd. v. Hamilton Co-Axial Ltd.*[56] In that case, Hamilton Co-Axial's note was made payable to one Elmore, who transferred it to Aldercrest without endorsement to secure a personal obligation. Aldercrest gave no notice to Hamilton and later for valuable consideration Elmore gave Hamilton a general release of all obligations wide enough to include the note. Elmore later sold Hamilton Co-Axial and subsequently a demand for payment was made. The action was dismissed. Mr. Justice Jessup, who read the judgment of the Ontario Court of Appeal, said:

> I conclude on the basis of such English authority as there is, of the persuasive very early American judgments and of the opinions of the text writers, as well as on principle, that at common law the transferee without endorsement of a promissory note or other instrument capable of being negotiated in accordance with the law merchant and which was payable to order, acquired only the title of the transferor and, until he gave notice of the transfer to the maker, the transferee was subject to subsequently arising equities between the maker and the transferor; he was simply the equitable assignee of a legal chose in action although equity would compel his transferor to endorse the instrument. The reason was the general rule of law that no one can transfer a better title than he himself possesses and that an assignee of a chose was subjected to all equities affecting his assignor at least if they were connected with or arose out of the subject-matter of the assignment. In order to give negotiable instruments the efficacy of currency the law merchant admitted an exception to the general rules but only in the case of instruments which were endorsed or were payable to bearer. A transferee for valuable consideration who subsequently and without notice of intervening equities obtained his transferor's endorsement, acquired the status of a holder in due course under the law merchant.[57]

The accommodation endorser is a surety of the maker and for this reason the holder of such a note must act prudently in dealing with the note and security. In *Laurentide Financial Corp. Ltd. v. Ernst Transport Ltd. and Ernst*,[58] Ernst Transport made a chattel mortgage on a truck in

[54] CAN. REV. STAT. c. 15 (1952), now CAN. RFV. STAT. c. B-5 (1970).

[55] 24 D.L.R.3d 13 (Ont. High Ct. 1971).

[56] 13 D.L.R.3d 425 (Ont. 1970).

[57] *Id.* at 426.

[58] [1971] 1 W.W.R. (n.s.) 373 (B.C. Sup. Ct.).

favour of Laurentide. It also gave a note which was signed by Mr. G. Ernst as endorser. Mr. Ernst's defence was that the note had been pledged to the National Trust Company; alternatively that the plaintiff Laurentide negligently disposed of the security. The second ground of defence was dismissed on the basis that the mortgagee had acted prudently in the disposition of the security. In the pledge of the notes to the National Trust Company, Laurentide endorsed the note "Pay to the order of National Trust." Later, and before this action was brought, the note was endorsed "Pay to the order of Laurentide."

The defendant Ernst argued that he was prejudiced by this pledge and relied on *Gordon v. Hebblewhite*.[59] The plaintiff, however, recovered. Chief Justice Wilson held that the pledge of the note and the chattel mortgage to National Trust did not prejudice Ernst because if National Trust sought to recover on the note it would be required to account for all sums recovered under the mortgage. While it was true that the hypothecation would cover all debts of Laurentide, in the result the surety would only be responsible to National Trust for the same sum he would have been liable to pay to Laurentide.

[59] [1927] Sup. Ct. 29. [1927] 1 D.L.R 817