ANNUAL SURVEY OF CANADIAN LAW
PART 2
CONTRACTS

*Ronald C. C. Cuming**

I. INTRODUCTION

The following survey of contract law focuses on legislation passed and interesting or important decisions reported during the period January 1, 1971 to June 1, 1972.[1] Canadian and Commonwealth courts continue to struggle with the practical issues arising out of contract formation in a mass consumption, consumer society on the one hand, and the apparent need to maintain the principle of freedom of contract on the other.[2] In addition, there are indications that courts are becoming more conscious of a third dimension to contract law—the problems of third parties who rely on the apparent validity of a contract between two other parties.[3] There is a growing realization that it is no longer acceptable for courts to apply rules adapted to deal with issues arising between two contracting parties to regulate the rights of a third party. As one might expect, Lord Denning continues to be the primary source of inspiration for the change necessary to deal with these major problem areas of contract law. A revolutionary is frequently more valuable to society because of his demand for change than for the specific proposals he puts forward.

II. FORMATION, EXISTENCE AND ENFORCEMENT

A. Public Offers: The Need for an Enforced "New Morality" in Advertising.

Occasionally, the judiciary is forced to deal with the issue of business morality (or, more accurately, the lack thereof) when giving decisions in cases involving the formation or contents of contracts between consumers and retailing companies. Largely because of the financial and dispositional barriers faced by most aggrieved consumers when they consider litigation, these occasions are all too infrequent.

One such occasion arose in *Ranger v. Herbert A. Watts Ltd.*[4] before

---

* B.A., 1962; LL.B., 1963, University of Saskatchewan; LL.M., 1967, Columbia University, New York. Visiting Professor of Law, Faculty of Law, University of British Columbia.

[1] Developments during the period June 1, 1972 to the date of publication relative to the cases discussed herein are noted in the footnotes.

[2] *See, e.g.*, discussion of "fundamentalism" cases *infra*.

[3] *See, e.g.*, discussion of Lewis v. Averay, [1971] 3 All E.R. 907 (C.A.).

[4] [1970] 2 Ont. 225, 10 D.L.R.3d 395 (High Ct.).

Mr. Justice Haines of the Ontario Supreme Court. The case involved the much-publicized Peter Jackson cigarette promotion campaign which involved full-page advertisements in newspapers representing that many purchasers of Peter Jackson cigarettes would find in their cigarette packages cash certificates "worth" large sums of money. In fact, however, these certificates could not be surrendered for cash. The fine print in the advertisement required the holder to "qualify under the rules appearing on the certificate." These rules required the holder to answer "a time-limited, skill-testing question." It is generally assumed by advertisers that this requirement takes a promotional scheme of this kind out of the category of an illegal lottery. [5] Unfortunately, in this case, the requirement was used to disqualify the plaintiff, a truck driver. [6]

Mr. Justice Haines ruled that notwithstanding the plaintiff's failure to complete the test successfully, the plaintiff was entitled to judgment for the full amount represented by the certificate. He concluded that since the test had been adminstered by telephone without advance notice to the plaintiff and at a time when he was incapacitated by fatigue and lack of glasses, in law no test had been given. The defendants refusal to administer the test under proper circumstances amounted to repudiation of the contract.

In concluding his judgment, Mr. Justice Haines felt compelled to make the following observations: [7]

> Before leaving this case may I say I wish to leave open for another Court, in the event this matter goes further, the question of whether Peter Jackson Tobacco Ltd. is liable for damages in tort for the manner in which they conducted their advertising campaign. I find the following facts. Peter Jackson Tobacco Ltd. through their advertising led the public to believe that a purchaser of their cigarettes upon finding a certificate would without more than presenting the certificate receive the cash award; that on the strength of this advertising the plaintiff purchased Peter Jackson cigarettes over a long period of time including the cigarettes in question; that the plaintiff had never heard of s. 179 of the *Criminal Code* nor had reason to believe Peter Jackson Tobacco Ltd. would raise s. 179 of the *Criminal Code* as a reason why it would not implement its advertising. It seems to me the time has arrived for an examination of our law upon the obligation of manufacturers and vendors of products to implement their undertaking given in the news media by nation-wide advertising. By such means they stimulate reliance upon the safety and the quality of their products; and in order to stimulate sales offer a host of prizes. To allow a producer to evade the fair implication of his advertising is to permit him to reap a rich harvest of profit without obligation to the purchaser. Should such a manufacturer or sales agency be permitted to create public confidence, promote their sales, and then plead that the criminal law precludes delivery of the premium? By newspaper, radio and television every home has become the display window of the manufacturer, and the stand of every pitchman. By

---

[5] Criminal Code of Canada, CAN. REV. STAT. c. 51, § 189 (1970).

[6] The skill-testing question involved some simple addition, multiplication and division. However, to a person of limited education, who is under the significant pressure of a time limit, the test would not be simple.

[7] 10 D.L.R.3d 395, at 404-05 (1970).

> extraordinary skill the printed and spoken word together with the accompanying art form and drama have become an alluring and attractive means of representation of quality and confidence. Honesty in advertising is a concept worthy of re-examination.

Apart from raising the issue of tortious liability of the defendant and an estoppel against relying on criminal law as a defence to performance of a contract, [8] the statement of Mr. Justice Haines can be viewed as a plea to reject the unwritten rule that sellers should be allowed to lie a little bit in their advertising. Strict reliance on the wording of advertisements should be rejected in favour of a closer examination of the expectations created in the minds of consumers by advertisements. [9]

Legislative measures adopted in Manitoba and Quebec during the surveyed period go part of the way toward ensuring that retail sellers become contractually responsible to customers for statements made in advertisements about the goods or services they sell. [10] While at common law it is possible for a court to find that a seller's statement made in an advertisement amounts to a term of the contract between the seller and a buyer induced by the statement to enter into the contract, [11] mere reliance by the buyer does not automatically ensure that he has a contractual remedy [12]—or, indeed, any remedy at all [13]—in the event that the subject-matter of the contract does not turn out to be as represented. The Manitoba scheme and the Quebec legislation simply deem statements made in the advertisements of a seller express warranties of sales contracts involving the subject-matter of the advertisements. [14]

---

[8] This decision was appealed to the Ontario Court of Appeal. See 20 D.L.R.3d 650. In affirming the lower court decision, Chief Justice Gale stated, at 651:

> It seemed perfectly obvious to us that the average member of the public concerned with such advertising and the offer of a cash award would be quite unaware of the lottery laws as they might be applicable to such scheme. It seemed unrealistic that the appellants who seek to induce persons to buy their products in this manner should be able to take refuge in such a defence.

[9] Some progress in this direction has occurred in the public law area. *See for instance*, Combines Investigation Act, CAN. REV. STAT. c. 314, §§ 36 and 37 (1970) *and* R. v. Imperial Tobacco Prod. Ltd., 16 D.L.R.3d 470 (Alta. Sup. Ct.); *affirmed*, 22 D.L.R.3d 51 (Alta. C.A.).

[10] Manitoba: Consumer Protection Act, MAN. REV. STAT. c. C-200, § 58 (1970) as amended by Man. Stat. 1971, c. 36, § 8. (the § applies to statements made by a seller directly to a buyer). Quebec: Que. Stat. 1971, c. 74, §§ 60 and 63.

[11] *See, e.g.*, Dick Bentley Prod. Ltd. v. Harold Smith (Motors) Ltd., [1965] 2 All E.R. 65 (C.A.).

[12] *See, e.g.*, Oscar Chess Ltd. v. Williams, [1957] 1 All E.R. 325 (C.A. 1956).

[13] *See, e.g.*, King v. Foote, 28 D.L.R.2d 337 (Ont. High Ct. 1961); Hawrish v. Bank of Montreal, 66 W.W.R. (n.s.) 673 (Sup. Ct. 1969). *Compare* Mendelssohn v. Normand Ltd., [1969] 2 All E.R. 1214 (C.A.); Canadian Acceptance Corp. v. Mid-Town Motors Ltd., 72 W.W.R. (n.s.) 369 (Sask. D. Ct. 1970); Trans-Canada Steel Co. v. Kuzyk, 14 D.L.R.3d 729 (Man. Q.B. 1970). *See also* Cuming, *Annual Survey of Canadian Law: Contracts*, 5 OTTAWA L. REV. 141, at 149 (1971).

[14] Neither statute requires that the statements induce a buyer to enter the contract. Indeed, he need not even have seen the advertisement before the contract is entered into.

Legislation of this kind, while welcome, deals only with a small aspect of the problem of deceptive advertising. Both provisions apply only to statements made by sellers. [15] By far the greatest amount of consumer goods advertising in Canada is carried out by manufacturers. Since consumer goods are seldom sold directly by manufacturers to consumers, it is impossible to conclude that statements in an advertisement amount to express warranties in a sales contract. [16] While there is nothing in the law of contract to prevent a court from finding a direct contractual relationship between a manufacturer and a retail buyer arising from a public statement by the manufacturer, [17] legal counsel for aggrieved buyers have been surprisingly reluctant to rely on this approach in getting a remedy for their clients. [18] Legislative measures designed to create a contractual relationship between manufacturers and buyers in cases where a buyer is induced by advertisements to purchase a manufacturer's product from a retailer is apparently needed in all Canadian jurisdictions. [19]

B. Statute of Frauds—Good News and Bad News

The Ontario Court of Appeal in *J. Materne Design & Construction Ltd. v. Gendel* [20] in effect has dealt the *coup de grâce* to the Statute of Frauds provision of the Ontario Sale of Goods Act[21] as an independent defence to the enforcement of a contract for the sale of goods "of the value of $40 or upwards." [22] The case involved a classic Statute of Frauds fact pattern. The plaintiff brought action for the price of goods ordered by the defendant. The trial judge found that there was no breach of contract by the plaintiff in that the goods supplied to the defendant were in accordance with the contract specifications. The only issue before the Court of Appeal was the efficacy of a plea raising the Statute of Frauds as a defence to the action. The court concluded that the plea must fail because there had been accept-

---

[15] Section 60 of the Quebec Consumer Protection Act, *supra* note 10, is sufficiently broad to apply to any advertisement, regardless of its source. However, it is not clear that the section implies a contract obligation between the advertiser and a buyer.

[16] The buyer may be able to establish that the retailer has adopted the manufacturer's representations as his own. To date there is no indication that the courts in Canada would be receptive to this argument.

[17] *See*, Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256 (C.A.).

[18] The contract between the plaintiff and the cigarette company in the Ranger case *supra* was a collateral contract since the carton of cigarettes in which the certificate was found was purchased from a retailer.

[19] For other cases decided during the surveyed period dealing with contract formation, *see*, Block Bros. Realty Ltd. v. Occidental Hotel Ltd., 19 D.L.R.3d 194 (B.C. 1971); Brixham Inv. Ltd. v. Hansink, 18 D.L.R.3d 533 (Ont. 1971); Knowlton Realty Ltd. v. Wyder, 23 D.L.R.3d 69 (B.C. Sup. Ct. 1971); Arnold Nemetz Eng. Ltd. v. Tobien, [1971] 4 W.W.R. (n.s.) 373 (B.C.), Stewart v. Oscar Fech Constr. Ltd., [1972] 2 W.W.R. (n.s.) 280 (Alta. Sup. Ct.); Suttie v. Milliard, 24 D.L.R.3d 202 (B.C.); Tannenbaum v. Sears, [1972] Sup. Ct. 67; Diamond Dev. Ltd. v. Crown Assets Disposal Corp., [1972] 4 W.W.R. 731, 28 D.L.R.3d 207 (B.C.).

[20] 17 D.L.R.3d 268 (Ont. 1972).

[21] ONT. REV. STAT. c. 358, § 5(1) (1960).

[22] *Id.*

ance within the meaning of section 5(3) of the Sale of Goods Act.[23] The act of acceptance was found in the statement of defence in which the defendant admitted the existence of the contract. Coupled with the fact that the goods had to be delivered to the defendant, this acknowledgement fulfilled the requirements of section 5(3), thus avoiding the necessity of a written note or memorandum.[24]

The effect of the decision is to place a defendant in a case of this kind in the position of having to choose between compliance with the rule of pleading which requires that he admit in his pleadings such material allegations contained in the pleadings of the opposite party as are true,[25] and successfully pleading the Statute of Frauds. Henceforth, where the application of the Statute of Frauds is in issue, the plaintiff will be forced to prove every aspect of his case, even though the formalities of writing are the only real issue.

On the positive side, the decision follows in spirit the long line of cases in which courts have done everything short of ignoring the Statute of Frauds to prevent a defendant from successfully resisting performance of a contract because of the lack of a note or memorandum, particularly where the court has conclusive and otherwise admissible evidence available to it establishing that a binding contract has been made.[26]

C. Assignments—Caveat Acceptance Corporations

The "negotiability" of consumer chattel paper recently has been under attack from all sides. Statutory assaults on the once insulated position of the chattel paper purchaser[27] occurred in seven provinces during the surveyed period.[28]

This legislation was designed to substantially nullify the legal effect of cut-off clauses contained in retail instalment sales contracts purchased

---

[23] Section 5(3). 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.

[24] *See* § 5(1), *supra* note 21.

[25] *See*, Ont. R.P. 144.

[26] *See also*, Thompson v. Guaranty Trust Co. Ltd., [1971] 5 W.W.R. (n.s.) 142 (Sask. Q.B.). *rev'd*, by the Supreme Court of Canada in an as yet unreported decision, August 27, 1973. The existence of a parol contract was not in issue but where the Saskatchewan Court of Appeal had found insufficient acts of part performance, Spence J., in the Supreme Court held that:

> [t]here was not one part of the work in reference to that farm in which the appellant had not taken not only a prominent part but the leading part . . . and . . . the deceased had relied solely on the intelligent and arduous labour of the appellant. (Reasons for Judgment at 13).

See also Swan v. Public Trustee, [1972] 3 W.W.R. 696 (Alta. Sup. Ct.).

[27] *See*, Killoran v. Monticello State Bank, 61 Sup. Ct. 528 (1921). *See generally*, Cuming, *Consumer Credit Law*, in STUDIES IN CANADIAN BUSINESS LAW 140-43 (1971).

[28] Alberta: Alta. Stat. 1971 c. 18, §§ 3 and 4; British Columbia: B.C. Stat. 1971 c. 11. § 5; Nova Scotia: N.S. Stat. 1970-71 c. 32, § 1; Ontario: Ont. Stat. 1971 c. 24, § 1; Quebec: Que. Stat. 1971 Bill 45, § 19; Saskatchewan: Sask. Stat. 1972 Bill 11, § 1. Similar provisions were adopted in Manitoba prior to the Survey period, Consumer Protection Act, MAN. REV. STAT. c. C200, § 67 (1970).

by sales finance companies and banks.[29] Coupled with the amendments to the Bills of Exchange Act adopted by Parliament in 1970,[30] which deny true negotiability to negotiable instruments used in such transactions, the legislation requires a purchaser of retail chattel paper to guarantee the performance of the retailer's obligations arising out of the assigned contract.

As if managers of sales finance companies do not already have enough to worry about, the decision of the Manitoba Queen's Bench Court in *Commercial Credit Corp. v. Carroll Bros.*[31] adds to their problems. The case involved an action on a lien note agreement purchased by the plaintiff between the defendant, a farm company, and Grundmann, a farm implement dealer. For a period of five years prior to the date of the agreement, the plaintiff had purchased chattel paper arising out of sales made by Grundmann in his farm implement business. Grundmann, consequently, was supplied by the plaintiff with lien note contract forms which were to be used when a sale made by Grundmann was to be financed by the plaintiff.

The officers of the defendant corporation, the Carroll brothers, who knew Grundmann and who had purchased machinery from him on other occasions, were persuaded to sign in blank one of the form purchase contracts supplied by the plaintiff to Grundmann. They did this as a favour to Grundmann when Grundmann told them that unless he sold two tractors which he had on his lot, the Ford Motor Company would repossess them. Grundmann convinced the Carroll brothers to "buy" the two tractors on the understanding that Grundmann would make all the payments and would eventually sell the tractors to someone else. However, instead of inserting into the contract the description of the two tractors in his possession, Grundmann inserted without the Carroll brothers' knowledge, the description of two tractors which he had sold the previous month to the defendant for cash. Grundmann sold the lien note to the plaintiff.

In giving judgment for the defendant, Chief Justice Tritschler relied on a plea of *non est factum* and the conclusion that the agreement between Grundmann and the defendant was void because of fraud. On the *non est factum* issue, the court refused to follow the position taken by Lord Denning in *Gallie v. Lee,*[32] and purported to use the more traditional approach. In doing so, Chief Justice Tritschler found that the Carroll brothers had signed

---

[29] *See, e.g.*, Ont. Stat. 1971 c. 24, § 1 *adding* § 27(a) to Consumer Protection Act, Ont. Stat. 1966 c. 23, now § 42(a).

> (1) The assignee of any rights of a lender has no greater rights than and is subject to the same obligations, liabilities and duties as the assignor, and the provisions of this act apply equally to such assignee.
>
> (2) Notwithstanding subsection 1, a borrower shall not recover from, or be entitled to set off against, an assignee of the lender an amount greater than the balance owing on the contract at the time of the assignment, and, if there have been two or more assignments, the borrower shall not recover from an assignee who no longer holds the benefit of the contract an amount that exceeds the payments made by the borrower to that assignee.

[30] *Now see* Can. Stat. 1969-70 c. 48, § 188-92.

[31] 16 D.L.R.3d 201 (1971), *aff'd* 20 D.L.R.3d 507. The Manitoba Court of Appeal upheld the finding of *non est factum*.

[32] [1969] 2 Ch. 17.

a document which, because of Grundmann's misrepresentation, was different in character or class from the one they intended to sign. This conclusion is somewhat puzzling since the court found that the Carroll brothers were quite aware that they were signing a contract to purchase tractors. [33]

When dealing with the alternative basis for the decision in favour of the defendant, Chief Justice Tritschler concluded that the defendant was not estopped from raising the mistake by the negligence of its officers. In applying the test of negligence enunciated in *Merchantile Credit v. Hamblin,* [34] the court concluded that, assuming there was a duty, the Carroll brothers were not negligent in trusting Grundmann with the signed contract forms since they had no reason to think he would act fraudulently. In any event, assuming negligence, Grundmann's fraud, not the negligence of the Carroll brothers, was the proximate cause of the plaintiff's loss.

This case accurately reflects the general reluctance on the part of courts in England and Canada to protect persons who have relied on the apparent validity of commercial documents, even in cases where defendants have unwittingly assisted a rogue in the perpetration of fraud by placing into his hands incomplete documents. [35] In at least two situations, however, this position has been modified in favour of a strict liability rule. Where the instrument relied upon is a bill of exchange [36] or a title deed which has been placed into the possession of an agent with limited authority to deal with it, [37] commercial convenience has dictated the need for protecting the person relying on the apparent validity of the instrument. [38] In view of the importance of sales financing in Canada, it would seem that a chattel paper purchaser should be preferred over a person signing a blank instalment sales form, particularly where, as in this case, such person is fully aware that

---

[33] *See supra* note 31, at 209. In dismissing the appeal the Manitoba Court of Appeal concluded that if Galley v. Lee is good law in Canada, the lower court decision could be supported on the grounds that the document argued was "fundamentally" or "totally" different from what the defendants believed they were signing.

[34] [1964] 3 All E.R. 592 (C.A.) per Lord Justice Pearce at 602:

> In order to establish an estoppel by negligence the plaintiffs have to show
> (i) that the defendant owed to them a duty to be careful,
> (ii) that in breach of that duty she was negligent,
> (iii) that her negligence was the proximate or real cause of the plaintiff's being induced to part with the 800 . . ."

[35] Since the House of Lords decision in Gallie v. Lee, [1971] A.C. 1004, a person relying on the validity of a document complete when signed by a defendant is likely to receive a greater degree of protection in cases where the defendant can establish that he did not intend to sign the document. However, this will not be the case in Canada until the Supreme Court overrules its decision in Prudential Trust Co. v. Cugnet, [1956] Sup. Ct. 914.

[36] Bills of Exchange Act, CAN. REV. STAT. C.B.-15, §§ 31 and 23 (1970).

[37] *See* Brocklesbesky v. Temperance Building Society, [1895] A.C. 173; Rimmer v. Webster, [1902] 2 Ch. 163; Fry v. Smellie, [1912] 3 K.B. 282.

[38] With respect to a bill of exchange, only a holder in due course is protected. *See supra* note 36. The Manitoba Court of Appeal concluded that the relationship of the plaintiff finance company to the dealer Grundmann was of such a nature that it is at least doubtful that the plaintiff's role was that of an innocent third party. *Supra* note 31.

the document he is signing contemplates assignment to a chattel paper purchaser.

D. Mistake as to Identity and as to the Validity of Ingram v. Little

Those who argue that law (particularly commercial law) is too important to be left in the hands of the judiciary to develop have always been able to point to the law of mistake as a good example of failure on the part of courts to establish a rational, consistent system of law in a difficult area. The recent decision of the English Court of Appeal in *Lewis v. Averay*[39] goes part of the way towards finally establishing rational, workable rules to deal with mistake of identity in contract formation. It should come as no surprise that this was accomplished largely because the court focussed on social and practical considerations in arriving at its conclusion, a practice which was largely ignored when this court faced the same issue a decade ago in the case of *Ingram v. Little.*[40]

The plaintiff, wishing to sell his car, advertised in a newspaper for a buyer. Rogue, as he has come to be known in all cases of this kind, saw the advertisement, contacted the plaintiff, and after a brief inspection of the vehicle declared his intention to purchase it at the plaintiff's asking price of £450. When the rogue attempted to pay the purchase price by cheque, the plaintiff politely made it clear to him that the cheque would have to be paid before the rogue could get possession of the car. The rogue, however, skillfully overcame the plaintiff's resistance by representing himself to be Richard Green, a well-known actor who played Robin Hood in a television series. The most important part of the rogue's scheme of deception was a special pass of admission to a movie studio bearing an official stamp. After seeing the pass, the plaintiff agreed to surrender possession of the car. The cheque, when presented to the drawee bank a few days later, was dishonoured. In the meantime, the rogue resold the vehicle to the defendant for £200.

With characteristic irreverence for precedents of which he disapproves, and with full appreciation of what he was doing,[41] Lord Denning summarily rejected the earlier Court of Appeal decision in *Ingram v. Little*[42] and the hitherto semi-respectable distinction between identity and attributes. He got directly to the core issue as he saw it:

> As I listened to the argument in this case, I felt it wrong that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinement. After all, he acted with complete circumspection and in entire good faith; whereas it was the seller who let the rogue have the goods and thus enabled him to commit the fraud.[43] I do not therefore accept the theory that a mistake as to

---

[39] [1971] 3 All E.R. 907 (C.A.).

[40] [1961] 1 Q.B. 31 (C.A. 1960).

[41] The Master of the Rolls began his judgment by noting that this case would "no doubt interest students and find its place in the text books." *Supra* note 39, at 908.

[42] *Supra* note 40.

[43] Lord Denning's concern for a *bona fide* purchaser does not always have the same degree of influence on his thinking. *See, e.g.*, Car & Universal Finance Co. v. Cald-

identity renders a contract void. [44]

He was consequently able to conclude that the rogue had a good title to pass to the defendant since the plaintiff had not avoided the initial transaction before the sale to the defendant took place.

Lord Justice Phillimore was able to decide in favour of the defendant and to repudiate *Ingram v. Little* through the more conventional method of isolating the decision because of its "very special and unusual facts. [45] He declared the self-evident truth that the decision in *Phillips v. Brooks Ltd.* [46] had been good law for over fifty years. [47] Lord Justice Megaw attacked the "test" laid down in *Ingram v. Little* as being logically and practically unsound. [48] However, after striking his first blow, the learned judge retreats from the front and decides to negotiate a solution. He concludes that, assuming the test is indeed valid, it has no application on the facts before him since the evidence made it clear that the plaintiff did not regard this identity of the rogue as a matter of vital importance.

III. The Terms and Contents of Contracts

A. Exclusion Clauses—The Categories of Contra Proferentum are Never Closed

Faced with the obvious need to protect the legally uninformed consumer who signs standard form contracts containing widely drafted exclusion of liability clauses, it is not surprising to find courts adopting novel approaches to interpretation of such clauses. In *Hollier v. Rambler Motors Ltd.* [49] the English Court of Appeal maintained the fine tradition of creativity which in recent years has flourished at the hands of socially conscious members of the judiciary. [50]

The plaintiff brought his car to the defendant's garage for repair. While it was in the garage a fire broke out and the vehicle as a result was substantially damaged. There was no written contract covering the bailment of the car to the defendant on this occasion. However, it was argued by the

---

well, [1965] 1 Q.B. 525 (C.A. 1963). On this issue, *see* Law Reform Committee, Twelfth Report (Transfer of Title to Chattels), April, 1966, *Cmnd* 2958.

[44] *Supra* note 39, at 911. What is a "theory" to the Master of the Rolls is a rule of law in some Canadian jurisdictions. *See* Diamond v. B.C. Thoroughbred Breeders' Society, 52 W.W.R.(n.s.) 385 (B.C. Sup. Ct. 1965); Regina v. Ontario Flue-Cured Tobacco Growers' Marketing Bd., 51 D.L.R.2d 7 (B.C.C.A. 1965).

[45] *Supra* note 39, at 912.

[46] [1919] 2 K.B. 243.

[47] *Supra* note 39, at 912.

[48] *Supra* note 39, at 912-13. The test which he speaks of is stated in the headnote to the case in the following way: "where a person physically present and negotiating to buy a chatel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how ought the promisee to have interpreted the promise . . . ." *See* [1961] 1 Q.B. 31 (1960).

[49] [1972] 1 All E.R. 399 (C.A. 1971).

[50] Judicial creativity does not involve, however, the destruction of the fundamental rules of contract.

defendant that the terms, including an exclusion of liability clause, contained in form contracts signed by the plaintiff on at least two other occasions when his car was being repaired by the defendant should be implied in this transaction. The clause on which the defendant relied provided: "The Company is not responsible for damage caused by fire to customer's carr on the premises." While all three members of the court concluded that the clause could not be implied in the oral agreement, they did not confine their observation to this issue. They dealt also with the interpretation to be placed on the clause, assuming it were part of the contract.

On this issue, the defendant pointed out that even though the clause did not specifically refer to liability for negligence, it should be interpreted as protecting the defendant for its negligence in not taking steps to have safe electrical wiring in the garage. Since negligence could be the only basis of liability the clause must relate to it.

The Court rejected the defendant's argument on its merits. They concluded that it was still a matter of interpretation of each clause. The fact that the defendant could be liable in negligence only was of assistance to its case, but it did not necessarily lead to the conclusion that the defendant was exempted.

In taking this position, the learned judges found it necessary to explain the decision of the Court in *Rutter v. Palmer*[51] and *Alderslade v. Hendon Laundry Ltd.*,[52] which generally have been accepted as establishing in law the principle on which the defendant based its case.[53] Lord Salmon observed that the acceptance of the principle "would make the law entirely artificial by ignoring that the rules of construction are merely our guides and not our masters."[54] He concluded that the exclusion clauses under consideration in both of these cases were broadly and clearly enough worded to exclude liability for negligence. The court noted that the clause on which the defendant relied could be interpreted as excluding liability for negligence or as a statement of fact in the nature of a warning.[55] Accordingly, it was able to apply the well-established rule of interpretation that where a clause is capable of two constructions, one which will make it applicable where there was no negligence and the other which would make it applicable where there was negligence, the former interpretation would be adopted by a court, unless

---

[51] [1922] 2 K.B. 87 (C.A.).

[52] [1945] K.B. 189, at 192 (C.A.) in particular. The court repudiated the statement of Lord Green M.R., in the *Alderslade* case. "The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject matter." In addition the Court concluded that the decisions in Fagan v. Green Edwards Ltd., [1926] 1 K.B. 50 (1925) were wrong.

[53] *See*, TREITEL, THE LAW OF CONTRACTS 180-81 (3d ed. 1970).

[54] *Supra* note 49 at 406.

[55] In placing this interpretation on the clause, the Court followed the suggestion of Lord Denning contained in Olley v. Marlborough Court Ltd., [1949] 1 K.B. 532, at 550 (C.A. 1948).

special circumstances can be established to show that the clause was intended by the parties to exclude liability for negligence.

In terms of its influence on the development of contract law, the *Hollier* case is likely to be very important, not only for its rejection of the principle in *Alderslade v. Hendon Laundry Ltd.*, but also because it introduces into English contract law the "ordinary literate man" rule of interpretation.[56] According to Lord Salmon, a court when dealing with a clause purporting to exclude liability for negligence, should give to the clause the meaning and scope that it would appear to any ordinary literate and sensible person as having. The justification for this approach is that defendants should not be allowed "to shelter behind language which might lull the customer into a false sense of security by letting him think . . . that he would have redress against the person with whom he was dealing for damages which he, the customer, might suffer by the negligence of that person."[57] While this approach to exclusion clauses may be viewed as being applicable only to clauses dealing with negligence,[58] it is likely that it will soon be widely used in connection with other kinds of exclusion clauses which purport to deny to a party to a contract rights or remedies which he, as a reasonable person, might otherwise expect to be connected with the contract. The approach has obvious appeal. It is merely an extension of the objective test of contract formation,[59] and, as such it does not conflict with the basic principle of freedom of contract.[60]

B. Fundamentalism—Will Canadian Law be Saved?

In *R. G. McLean Ltd. v. Canadian Vickers Ltd.*,[61] the Ontario Court of Appeal became the fourth provincial appellate court to adopt and apply the concept of "fundamental breach."[62] Unfortunately, the decision in the case contributes very little toward an understanding of the nature and scope

---

[56] This approach to exclusion clauses has been established law in the province of Saskatchewan for sixty years. See Eisler v. Canadian Fairbanks Co., 3 W.W.R. 753 (Sask. C.A. 1912); Francis v. Trans-Canada Trailer Sales Ltd., 669 W.W.R.(n.s.) 748 (Sask. C.A. 1969). With its adoption by the English Court of Appeal, it has become "respectable" and will likely be followed by courts in other Canadian jurisdictions.

[57] *Supra* note 49, at 404.

[58] Those wishing to check broader use of this approach can legitimately point out that it is merely a minor extension of the well-established rule that a clause excluding liability for negligence must be clearly worded. *See* TREITEL, LAW OF CONTRACTS 179-81 (3d ed. 1971).

[59] *See* CHESHIRE & FIFOOT, THE LAW OF CONTRACT 21 (8th ed. 1969).

[60] For other examples of the use of contra proferentum, see H. B. Contracting Ltd. v. Northland Shipping Ltd., 16 D.L.R.3d 566 (B.C. 1971); Thornton v. Shoe Lane Parking, Ltd., [1971] 1 All E.R. 686 (C.A. 1970).

[61] [1971] 1 Ont. 207 (C.A.).

[62] *See also* Western Processing Cold Storage Ltd. v. Hamilton Constn. Ltd., 51 D.L.R.2d 245 (Man. 1965); Canadian-Dominion Leasing Corp. v. Suburban Superdrug Ltd., 56 D.L.R.2d 43 (Alta. 1966); Western Tractor Ltd. v. Dyck, 70 W.W.R.(n.s.) 215 (Sask. 1969). The fifth recognition came with Blackwood Hodge Atlantic Ltd. v. Kelly, 3 N.S.2d 49 (N.S. 1972).

of legal fundamentalism.[63] Unlike most other Canadian cases in which fundamentalism was applied, this case did not involve an unsophisticated consumer in conflict with a business enterprise.[64] The dispute in this case arose out of the conditional sale of a two-colour printing press by the defendant, a large international business corporation, to the plaintiff, a commercial printing company. The maching was delivered but it never worked properly, even though both the plaintiff and the defendant expended a large amount of effort and money in attempting to identify and remedy the defects in it. Eventually, the defendant agreed to take back the press and return the buyer's purchase price. However, the buyer refused the offer, pointing out that it had already incurred significant expense in connection with the machine.

In an action against the defendant for damages for breach of the contract, it was concluded by the court that there had been a fundamental breach by the defendant, and, consequently, the plaintiff had a right to accept the repudiation, to treat the contract as being at an end and to sue the other party for such damages as it had sustained. The court found, however, that the plaintiff did not elect to do so. In the opinion of the court, this was a significant feature of the case since it dictated the approach to be used when dealing with the exclusion clause in the contract. The clause, *inter alia*, purported to limit the defendant's liability under the contract to replacement of defective parts. The clause stated in part: "In no event shall we be liable for any direct or indirect loss or damage (whether special, consequential or otherwise) or any other claims except as provided for in these conditions."[65] The effect of the failure to elect to terminate the contract was stated by Mr. Justice Arnup:

> The judgments in the *Suisse Atlantique* case, *supra*, further make it clear that, if the innocent party does not accept the repudiation, then the contract continues in force and the problem becomes one of construction of the contract itself. Most of the cases, as this one does, involve a consideration of an "exclusion clause", as clauses such as cl. 12, quoted above, have been termed. Notwithstanding some earlier judgments which seemed to hold that such an exclusion clause, by application of a rule of substantive law, should be treated as nullified where there had been a fundamental breach of the contract, the House of Lords came to the conclusion that where the repudiation has not been accepted by the innocent party, all of the clauses of the contract, including the "exclusion clause" must be considered. However, as it was put by Lord Reid in the *Suisse Atlantique* case, *supra*, at

---

[63] There are some striking similarities between legal and religious fundamentalism. With respect to both doctrines believers must reject evolution, and be satisfied with belief rather than reason. Further, the justification for the existence of both doctrines is the need to make men's hearts pure.

[64] *See e.g.* Western Tractor Ltd. v. Dyck, Lightburn v. Belmont Sales Ltd., 69 W.W.R.(n.s.) 734 (B.C. Sup. Ct. 1969); Barker v. Inland Truck Sales Ltd., 11 D.L.R. 3d 469 (B.C. Sup. Ct. 1970); Freedhoff v. Pomalift Industries, 13 D.L.R.2d 523 (Ont. High Ct. 1970); Tricco v. Hynes, [1971] 2 Nfld. & P.E.I.R. 53 (Nfld); Beldessi v. Island Equipment Ltd., 29 D.L.R. 3d 213 (B.C. 1970).

[65] *See supra* note 61, at 209.

> p. 398, it may be possible to construe the exclusion clause as never having been intended to apply to a situation that neither party had in contemplation *i.e.*, a breach so fundamental as to go to the root of the contract. [66]

The Court concluded that in order to give "business efficacy" to the clause it must be interpreted as applying to identifiable defects due to faulty workmanship or use of defective materials which could be rectified, and which do not prevent performance of the contract as contemplated by the parties. Consequently, it did not apply to the breach which had occurred.

One can have little quarrel with the decision to the extent it involves the conclusion that as a matter of contractual interpretation, the exclusion clause did not contemplate the kind of breach which occurred. However, there is a danger that the case may be viewed by other Canadian courts as introducing into Canadian law a substantive law of fundamentalism identical to that reintroduced in England by the English Court of Appeal in *Harbutt's Plasticine v. Wayne Tank Co.*, [67] and *Farnsworth Finance Facilities, Ltd. v. Attryde.* [68]

In the course of giving judgment, Mr. Justice Arnup made the following observation:

> The next question is: assuming a fundamental breach had occurred, what were the rights of the plaintiff? The law on the subject of "fundamental breach" was reviewed in each of the judgments in the House of Lords in *Suisse Atlantique Société D'Armement Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361. Not all of the learned law Lords expressed the matter in the same way, and undoubtedly difficulties will arise in future cases in endeavouring to apply to particular circumstances the various statements and principles there enunciated. However, it is clear from that case that, when a fundamental breach has occurred, and the innocent party has learned of it, he then has a right to accept the repudiation evidenced by the acts which constitute the fundamental breach, to treat the contract as at an end and to sue the other party to the contract for such damages as he may have sustained. It was conceded before us that in any event "the damages are at large", and this is undoubtedly so. [69]

It is obvious from this statement that Mr. Justice Arnup has readily accepted the proposition that, while there is a fundamental breach which has been accepted by the innocent party as grounds for treating the contract as repudiated by the other party, an exclusion clause which purports to cut down or limit the liability of the party in breach must be ignored, regardless of its wording or apparent scope. [70] This approach necessarily involves a substantive rule of law that an exclusion clause cannot be effectively used in contracts to exonerate a party from liability for performance falling sustan-

---

[66] *Id.* at 211.

[67] [1970] 1 All E.R. 225 (C.A. 1969). For a critical examination of the implications of this decision, *see* 86 L.Q. REV. 513 (1970); Coote, *The Effect of Discharge by Breach on Exception Clauses*, CAMB. L.J. 221 (1970).

[68] [1970] 2 All E.R. 774 (C.A. 1970).

[69] *Supra* note 60, at 210-11.

[70] *Supra* note 67, at 234-35 (Denning, M.R.).

tially below that contemplated by the contract apart from the exclusion clause. [71]

Canadian courts which continue to follow slavishly English decisions dealing with the common law of contract would do well to take note that there are those among the English judiciary who refuse to be converted to legal fundamentalism. In *Kenyon, Son & Craven Ltd. v. Baxter Hoare Ltd.*, [72] Mr. Justice Donaldson of the Queen's Bench Division refused to adopt the facile approach to exclusion clauses suggested by the English Court of Appeal. The basic issue before the court was the efficacy of an exclusion clause in protecting the defendant, a warehousing company, from liability for damage caused by rats to the plaintiff's warehouse. The exclusion clause in the bailment contract between the plaintiff and the defendant provided that the defendant was not to be liable for loss or damage to goods unless caused by wilful neglect of the defendant or its servants. It was argued by the plaintiff that the clause could not protect the defendant from liability because the defendant had committed a fundamental breach of the contract of bailment. The plaintiff relied on the Court of Appeal decisions in *Harbutt's Plasticine, Ltd. v. Wayne Tank Co.*, [73] and *Farnsworth Financial Facilities, Ltd. v. Attryde* [74] to support its position. Mr. Justice Donaldson concluded that even if it were assumed that there was a fundamental breach and that it had been accepted by the plaintiff as terminating the contract, the defendant was entitled to rely on the exclusion clause. The learned judge distinguished the *Harbutt's* and *Farnsworth* cases as ones involving breaches tantamount to "deviation," or, in other words, performance wholly outside the scope of the contract. As such, these cases fell within the first category of fundamental breach described by Lord Wilberforce in *Suisse Atlantique Société D'Armement Maritime S.A. v. N.Y. Rotterdamsche Kolen Centrale.* [75] A breach of this kind, according to Lord Wilberforce, precludes the guilty party from relying on an exculpatory clause. [76] Mr. Justice Donaldson concluded, however, that the fact of the case before him did not disclose a breach of this magnitude. Accordingly, the case fell within Lord Wilberforce's second category, and it was the duty of the court to examine the exclusion clause to see if it excused the defendant. In reaching the conclusion that the defendant was protected, the court did not confine its inquiry to the wording of the clause. Mr. Justice Donaldson pointed out that "here, of course, the parties are, or should be assumed to be, of equal bargaining power and the storage rates may be expected, whatever the facts may be, to have taken account of the protection afforded the defendant." [77]

---

[71] See also Waddams, Comment, [1971] CAN. B. REV. 578, for a further discussion of *McLean* and other cases involving exemption clauses and consumer protection.

[72] [1971] 2 All E.R. 708 (Q.B. 1970). For an excellent analysis of this decision *see*, Leigh-Jones & Pickering, *Fundamental Breach: The Aftermath of Harbutt's Plasticine*, 87 L.Q.R. 515 (1971).

[73] *Supra* note 65.

[74] *Supra* note 67.

[75] [1967] A.C. 361, at 431 (1966).

[76] *Id.*

[77] *Supra* note 71, at 720.

While a constructionist may attack the decision on the grounds that it recognizes that there were some breaches liability for which cannot be excluded, Mr. Justice Donaldson must be excused for this inconsistency because he was required to give some recognition to the Court of Appeal ruling in the *Harbutt's* and *Farnsworth* decisions.[78] What should be noted is that the decision in the *Kenyon* case goes a long way towards rejecting the conclusion that the existence of a "fundamental breach" which has been accepted by the innocent party as repudiation precludes the court from viewing an exclusion or exemption clause as part of the definition of the "guilty" parties obligations under the contract. In other words, the case reaffirms the ruling in *Suisse Atlantique* that the scope or effect of exclusion and exemption clauses is a matter of contractual interpretation.[79]

IV. Remedies for Breach of Contract

A. Damages—when is Breach of a Condition not a Breach of a Condition?

In *Evanchuk Transport Ltd. v. Canadian Trailmobile Ltd.*,[80] the appellate division of the Alberta Supreme Court was faced with the problem of assessing damages recoverable for breach of the implied condition of suitability in the Alberta Sale of Goods Act.[81] The dispute before the court arose out of the conditional sale of a house trailer by the defendant to the plaintiff. The plaintiff took possession of the mobile home and used it on twenty-six trips between Calgary and California during which it travelled 110,000 miles. The court accepted evidence establishing that, because of structural defects, the trailer ruined tires and eventually became unroadworthy. As a result of events which took place prior to trial, the court was able to proceed on the footing that the contract price of $17,517.00 had been fully paid by the plaintiff and that the trailer han an aggregate residual value of $12,194.10 which had been received by the plaintiff. The plaintiff claimed repayment of the capital loss suffered as a result of the breach plus the costs of the tires.

The court noted that under section 53 of the Sale of Goods Act[82] if the defect is one which could be remedied, the measure of damages is the cost of repair together with any other loss directly and naturally resulting

---

[78] *See also* Mayfair Photographic Ltd. v. Baxter Hoare, [1972] 1 Lloyd's Rep. 410, at 416 (Q.B. Div.), where McKenna J. says:

> There is good authority for holding that clauses excluding a limiting liability do not apply to losses suffered during a deviation. If it had been necessary for me to apply the decision of the Court of Appeal in *Harbutt's "Plasticine"* . . . . I should have had great difficulty in discovering a *ratio decidendi* which could be reconciled with the decision of the House of Lords in *Suisse Atlantique* . . . .

[79] For other fundamentalism decisions, *see* Freedhoff v. Pomalift Industries Ltd., [1971] 2 Ont. 773; Williams & Wilson Ltd. v. O.K. Parking Stations Ltd., 17 D.L.R.3d 243 (Ont. County Ct. 1970).

[80] 21 D.L.R.3d 246 (Alta. 1971).

[81] Alta. Rev. Stat. c. 295, § 17(2) (1955).

[82] *Id.*

in the ordinary course of events from the breach. But where the defect cannot be remedied, on the authority of the Supreme Court decisions in *Ford Motor Co. v. Haley* [83] and *Massey Harris Co. v. Skelding*.[84] the damages suffered by the buyer are *prima facie* the full purchase price less any residual in the goods which the seller can show exists. On the crucial finding of fact as to the magnitude of the breach, the court rejected the trial court conclusion, and ruled that the defect in the trailer could not be remedied by mere repairs. Accordingly, the plaintiff's damages were $5,323.40, the difference between the purchase price and the residual value of the trailer immediately prior to the date of the trial.

Mr. Justice Cairns dissented from the majority position primarily because he, like the trial court judge, could not accept the conclusion that a housetrailer which had been used as much as this one was totally unsuitable for the purposes of a housetrailer. The learned judge pointed out that in the *Ford Motor* and *Massey-Harris* cases the Supreme Court concluded that the vehicles which were the subject-matter of the buyers' complaints failed completely to be suitable for the buyer's particular purposes.

The effect of the judgment was to give to the plaintiff free (although not trouble-free) use of the trailer for a very long period of time at the defendant's expense. By using the value of the trailer at the end of the period of use by the plaintiff, the court forced the defendant to bear the cost of depreciation of the trailer between the date of delivery and the date of valuation. However, this resulted from the conclusion that the onus was on the seller to establish the merchantable value of the trailer at the date of delivery. The only evidence before the court as to the value of the trailer was the retail value to the plaintiff after it had been used by him for several months. Accordingly, it was perfectly acceptable for the court to use this valuation as the basis for assessing the plaintiff's damages.

A more important feature of the decision was the conclusion that the onus of proving the merchantable value of the trailer shifted to the seller only because there was a major breach of the condition of suitability. In principle this onus should always shift to the seller once it is established that there is a breach of a condition, regardless of the magnitude of the breach. A breach of a promissory contractual condition, in law, is always a major breach of contract.[85] Even though the breach of a condition must be treated as a breach of warranty to the extent that the buyer cannot reject the goods, it does not lose its legal identity as a condition for other purposes.[86] Surely the practical justification for the rule in the *Ford Motor* [87] and *Massey-Harris* [88] cases is that the breach of a condition results

---

[83] [1967] Sup. Ct. 437.

[84] [1934] Sup. Ct. 431.

[85] *See* CHESHIRE & FIFOOT, THE LAW OF CONTRACT 131-33 (7th ed. 1969).

[86] *See* Wallis, Son & Wells v. Pratt & Haynes, [1911] A.C.394; P. ATIYAH, THE SALE OF GOODS 300-01 (4th ed. Pitman 1971).

[87] *Supra* note 81.

[88] *Supra* note 82.

in a major performance deficiency which, until otherwise established by the seller, denies the buyer of all or substantially all he was entitled to get under the contract. Since this is the legal result of breach of the implied promissory conditions of the Sale of Goods Act, (even a breach resulting from a minor deficiency in performance), [89] the same presumption should apply to all breaches of such conditions. To conclude otherwise, would introduce fine distinctions between various degrees of breach, and distinctions between statutory implied conditions and non-statutory express conditions, thus introducing unnecessary uncertainties in litigation. [90]

[89] *See e.g.* Intern'l Business Machines Co. v. Shcherban, [1925] 1 D.L.R. 864 (Sask.).

[90] For other cases dealing with damages, *see*, Fraser Valley Frosted Foods Ltd. v. Seabrook Farms Frozen Foods Ltd., 15 D.L.R.3d 459 (1970); Freedhoff v. Pomalift Industries Ltd., [1971] 2 Ont. 773; R. G. McLean Ltd. v. Canadian Vickers Ltd., [1971] 1 Ont. 207 (1970); Golden West Seeds Ltd. v. Sunnyside Greenhouses Ltd., [1973] 3 W.W.R. 288 (Sup. Ct.). *See also*, Kreway v. Renfrew Chrysler Plymouth Ltd., [1973] 1 W.W.R. 447, *applying Sunnyside.*