Undoubtedly the most important development in Canadian tort law during 1965 was the publication, by Professor Allen M. Linden of Osgoode Hall Law School, of *The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents*. This was the first significant attempt in Canada to examine the nature of the financial losses suffered by victims of automobile accidents and the extent to which these losses are compensated, both by legal processes, and by extra-legal sources, such as hospitalization, medical and accident insurance, workmen's compensation, disability pensions, welfare schemes, etc. It was based on detailed personal interviews of 590 accident victims (or their survivors)—a representative sample of all those killed or injured in automobile accidents in the County of York (including Metropolitan Toronto) in 1961. The study was commissioned by the Ontario government in order to discover whether, as many assert, improvements are needed in the method of compensating automobile accident victims. Its findings support the view that changes are needed, "although most people do not lose a great deal of money as a result of an automobile accident, there are substantial numbers who lose enormous amounts . . ."[32]

It is hoped that the Ontario legislature will come to the aid of those who suffer these crippling losses. In addition to meeting the immediate problem, such legislation might help to make the other Canadian legislatures aware of the huge job of law reform in the field of torts that they must face sooner or later.

R. D. GIBSON*

COMMERCIAL LAW - SALE OF GOODS

The case of *Weller* v. *Fyfe*[1] is notable chiefly for the dissenting judgment of Schroeder, J. A. It also reveals, incidentally, some of the absurdities of s. 16 of the Sale of Goods Act.[2] Essentially, the case turns on questions of fact, namely, whether the plaintiff had relied on the seller's skill and judgment, and whether he had "accepted" the goods by retaining them after the lapse of a reasonable time. There was no real dispute that the goods—a tree stump cutting machine—were neither fit for their purpose nor of merchantable quality.

The plaintiff had thus established a breach of the implied condition under s. 16(b), and most of court's time was taken up in deciding whether he had not also made out a case under s. 16(a). One cannot help feeling that such a duplication of remedies was the last thing that

32. Chapter VII, p. 5.

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1. (1964) 46 DLR 2d. 531 (Ont. CA).

2. RSM, 1954, c.233. The corresponding provision in Ontario is s. 15, RSO, 1960, c.358.

Chalmers intended, and it is a pity that the courts have not seen fit to limit s. 16(a) to the case where the buyer intends the goods for some special purpose which is *not* their normal or ordinary use, and has relied on the seller's assertion[3] that the goods are suitable for that special purpose. However, things have not turned out that way: s. 16(a) has been consistently interpreted as covering the case of *faulty* goods, which do not serve the ordinary purpose for which any buyer would be expected to use them, as well as the case of goods, faulty or not, which are *unsuitable* for the buyer's special purpose.[4]

The point with regard to "acceptance" is more interesting. Following complaints by the buyer, and repeated breakdowns of the machine, the seller and the manufacturer devoted a great deal of time and effort to attempts to make the machine function properly, and it was only after some three months of stop-go-stop working that the seller finally gave up hope and purported to reject the goods. Schroeder, J. A., considered[5] that the situation fell within the line of cases such as *Alabastine Co., Paris, Ltd.* v. *Canada Producer & Gas Engine Co.*[6] and *Schofield* v. *Emerson Brantingham Implement Co.*,[7] where it was held that the conduct of the sellers in making repeated efforts to repair the goods showed acquiescence on the sellers' part in the buyers' prolonging the "trial" of the machine, with the result that the buyers had not accepted the goods.

It is submitted that this view is preferable to that of the majority of the court. McGillivray, J. A., with whom Gale, J. A., agreed, relied strongly on the fact that the buyer was aware of all the major defects almost from the start, and thought that the attempts at repairs could not be "taken as evidence that the property had not passed."[8] This is no doubt true, but beside the point. Unless it is a conditional sale—which this was not—the property will pass at the latest on delivery to the buyer. "Acceptance" by lapse of time is something that will normally occur after the property has passed, and the "trial" theory is simply expressing the conclusion that the buyer may undo the transaction, by virtue of a resolutive condition implied from the circumstances of the case.

* * * *

The doctrine of fundamental breach, by whatever name called, continues to flourish. In *F. & B. Transport Ltd.* v. *White Truck Sales*

3. Implied from the fact that he supplies the goods with knowledge of the buyer's purpose, in circumstances which show that the buyer is relying on the seller's skill and judgment.
4. It is not always realized that these two aspects of s. 16(a) raise somewhat different issues. In an "unsuitability" case it is difficult for the seller to rely on the proviso: see *Baldry* v. *Marshall* [1925] KB 260; but there are a number of cases on "defective" goods where the proviso has been successfully invoked, e.g., *Sumner, Permain & Co.* v. *Webb* [1922] K.B. 55.
5. 46 D.L.R. 2d. 531, at pp. 545-547.
6. (1914) 17 D.L.R. 813 (Ont. CA).
7. (1918) 43 DLR 509 (SC Can.).
8. 46 D.L.R. 2d. 531, at pp. 549-550.

Manitoba Ltd.[9] the plaintiff purchased a truck, relying on the seller's statement that it was a 1958 model. The written conditional sales contract contained the clause:

> Purchaser acknowledges that this agreement constitutes the entire contract and that there are no representations, warranties or conditions . . . other than herein contained. Without limiting the generality of the foregoing Purchaser agrees that there is no warranty as to the "year model" even if stated herein.

The truck was, in fact, a 1956 model, fitted with a 1958 cab. Immediately upon discovering this, after delivery and after the expenditure by the defendant at plaintiff's request of some $4,000 on reconditioning and extras, the plaintiff purported to rescind the agreement.

On the basis that the plaintiff was seeking to rescind for innocent[10] misrepresentation, outside the terms of the contract, which is how the court appears to have disposed of the case, the defendant had several powerful answers. In the first place, the contract was executed;[11] secondly, the contract was in writing and expressed to be the entire agreement between the parties;[12] thirdly, there was an express disclaimer of responsibility for the truth of any statement as to the "year model".

The court, in a judgment delivered by Miller, C. J. M., swept aside these arguments. Neither the execution of the contract, nor the terms of the exclusion clause, availed the defendant because "the plaintiff did not get what it had bargained for". Fundamental breach, like fraud, is an exception to all rules. The result would clearly have been the same if the plaintiff had established that the "year model" was part of the description of the goods within s. 15 of the Sale of Goods Act, though it is somewhat surprising to find that the courts have hitherto usually avoided coming to this conclusion.[13]

Pippy v. *R.C.A. Victor Co. Ltd.*[14] is another addition to a growing list of authorities where the buyer has been held to have established that the goods he received, though literally within the contract description, were so defective as not to be what he had bargained for. Normally the defective condition of the goods does not amount to a fundamental breach, and the seller's obligation to supply goods of the right quality, implied in s. 16 of the Sale of Goods Act, is quite distinct from the obligation to supply goods of the contract description, implied in s. 15.[15] There is, however, an increasing readiness on the part of the courts to insist that a contract for the sale of a machine means a machine the

9. (1965) 49 D.L.R. 2d. 670 (Man. CA).
10. Fraud was alleged, but in the view which the court took, it was unnecessary to decide whether it was proved or not.
11. *i.e.*, the so-called Rule in *Seddon's Case*.
12. *cf. Case Threshing Machine* v. *Milten* (1919) 49 D.L.R. 30 (S.C. Can.).
13. *e.g., Oscar Chess Ltd.* v. *Williams* [1957] 1 W.L.R. 370 (CA); *Woods* v. *Borstel* (1962) 34 D.L.R. 2d. 68 (Alta.). In both these cases, however, the seller was not a dealer, a fact which may be expected to have influenced the decision. Contrast *O'Flaherty* v. *McKinlay* [1953] 2 D.L.R. 514 (Nfld. Sup. Ct.).
14. (1965) 49 D.L.R. 2d. 523 (N.S.).
15. See especially the judgment of Upjohn, L. J., in *Ashley Industrial Trust Ltd.* v. *Grimley* [1963] 2 All E.R. 33, at pp. 46-47.

performance of which will not fall substantially below what the buyer in the circumstances was entitled to expect. It is not necessary for the buyer to show that the machine will not function *at all*, though this was, naturally, the starting point in this development of the law.[16]

* * * *

Sec. 28 of the Sale of Goods Act has been the subject of two important new rulings. The Judicial Committee of the Privy Council, in *Pacific Motor Auctions Pty. Ltd.* v. *Motor Credits (Hire Finance) Ltd.*,[17] after a careful consideration of the policy behind s. 28(1),[18] rejected the interpretation put on the words "continues . . . in possession of the goods" in *Staffs Motor Guarantee Ltd.* v. *British Wagon Co.*[19] by Mackinnon, J., and accepted without question by the Court of Appeal in *Eastern Distributors* v. *Goldring.*[20]

The earlier view was that if the seller of goods remains in possession of them by reason of a separate agreement of bailment subsequent to the sale, as for example, where the buyer agrees to let the goods on hire, or hire-purchase, to the seller, a resale by the seller to a third party is not protected by s. 28. Lord Pearce, delivering the advice of the Judicial Committee, concluded that the words "continues in possession" were intended to refer to "the continuity of physical possession regardless of any private transactions between the seller and the purchaser which might alter the legal title under which the possession was held."[21]

This is a welcome decision, although, strictly speaking, the view expressed is an *obiter dictum*, as on the facts it was held that there was no separate bailment.[22] Less welcome is the decision of the Court of Appeal in England in the case of *Newtons of Wembley Ltd.* v. *Williams.*[23] There, for the first time, it seems, in a reported case, the question had to be faced whether the closing words of s. 28(2)[24] . . . "*as if* the person[25] making the delivery or transfer *were a mercantile agent* in possession of the goods or documents of title with the consent of the owner . . ."[26] are to be taken literally.

A mercantile agent, in possession of goods or documents of title with the consent of the owner, is enabled to pass a good title by a sale

16. See *Karsales (Harrow) Ltd.* v. *Wallis* [1956] All E.R. 866 (CA). Among the more recent examples reference may be had to *Yeoman Credit Ltd.* v. *Apps.* [1962] 2 QB 508 (CA), *Charterhouse Credit Ltd.* v. *Tolly* [1963] QB 683 (CA); *Rafuse Motors Ltd.* v. *Mardo Construction Ltd.* (1963) 41 D.L.R. 2d. 340 (NS) and *Knowles* v. *Anchorage Holdings Ltd.* (1964) 43 D.L.R. 2d. 300 (BC).

17. [1965] A.C. 867.

18. Or rather the equivalent section of the Sale of Goods Act of N.S.W.

19. [1934] 2 K.B. 305.

20. [1957] 2 Q.B. 600.

21. [1965] A.C. 867, at p. 888.

22. *Id.*, at p. 889.

23. [1965] 1 QB 560.

24. In fact, the court was concerned with s. 9 of the Factors Act, 1889, which is, for this purpose, identical with s. 28(2) of the Manitoba Sale of Goods Act, and with s. 25(2) of the English Sale of Goods Act.

25. *i.e.*, the buyer in possession of the goods or of the documents of title with the consent of the seller.

26. Italics supplied.

or other disposition to a third party taking in good faith for valuable consideration and without notice of the agent's want of authority, *provided the disposition is made by the agent "when acting in the ordinary course of business of a mercantile agent."*[27] The generally accepted view was that the requirement of following the "ordinary course of business" could not be applied to a buyer in possession who did not happen to have a business,[28] and this, it is submitted, is sound in principle, for to insist on this requirement in all cases would impose a wholly fortuitous restriction on the extent of the protection afforded to third parties who have relied on the buyer's possession as evidence of his title, and to that extent would defeat the object of the section.

The Court of Appeal has decided otherwise. Sellers, L. J., pointed out the difference in wording between s. 28(1) and s. 28(2), and relied on the fact that s. 28(2) is taking away a right which the owner had at common law. For these reasons he was not prepared to "enlarge the sub-section more than the words clearly permitted and required."[29] Pearson, L. J.,[30] stated substantially the same reasons for following a literal interpretation, at somewhat greater length, though he admitted to having had doubts.[31] On the facts of the case it was held that the buyer had followed the ordinary course of business—the sale took place in a back street of London, which was recognized as being the site of an unofficial "market" for cash sales of used cars—and the third party was protected.

It is to be hoped that, should the question come before a Canadian Court, the court will give full weight to the arguments against applying the idea of an "ordinary course of business" to a person who does not have a business, before deciding to follow *Newtons of Wembley Ltd.* v. *Williams.*

A. D. HUGHES*

WILLS AND TRUSTS

I

Statutory Enactments

1. Wills Act 1964 c. 57 (R.S.M. 1954 c. 293 repealed and re-enacted).

The provisions relating to the wills of members of the forces, sailors, etc., are amended to enable a certificate given by the appropriate service authority to be accepted as to service. S. 6(2), (3), and s. 90(2) thus, removing the difficulties of deciding whether a testator was actually in military service, etc.

27. Factors Act, R.S.M. 1954, c. 80, sec. 3(1) (italics supplied).
28. See Atiyah, *Sale of Goods*, 2nd. ed. p. 143.
29. [1965] Q.B. 560, at pp. 574-575.
30. *Id.*, at pp. 577-580. Diplock, L. J., concurred with the other two judgments.
31. Especially at pp. 578-579.

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