COMMERCIAL LAW

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The period under review is September 1967 to December 1968. With one or two minor exceptions, it has not been deemed advisable to review developments prior to or later than this period. It is hoped, however, that this and future reviews will form an integrated picture of developments in this area of the law.

I. SALES

1. *Implied Conditions and Warranties*

There has been a notable lack of interest in Canada in the question of revision of the law of sales. All the provinces remain content to continue with the basic 1893 English Sale of Goods Act although it is clear that the law is more and more out of touch with the realities of business practice. [1] What development has occurred has been judicial and this sporadic and uneven. The area of implied conditions of fitness and merchantability has provided fertile ground for the courts to develop the seller's responsibility to the buyer.

In *Polar Refrigeration Service Ltd. v. Moldenhauer* [2] the defendant, a hotel operator, found that the existing equipment in his hotel did not remove the smoke from the beer parlor adequately. He discussed the installation of new equipment with the representative of the plaintiff and was shown brochures describing the equipment eventually installed which indicated it would remove stale air.

The air conditioners sold by the plaintiff, described in the brochure as having the capacity to remove stale air, did not effectively remove the smoke from the beer parlor. It was held that the buyer had expressly made known to the seller the particular purpose for which the goods were required and that therefore, under the provisions of section 16(1) of the Sale of Goods Act [3] there was an implied condition that the goods should be fit for that purpose.

Perhaps more significantly, the court held, on the basis that the buyer had made known to the seller the requirement that the air conditioner should

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[1] *See* Paper Read to the Conference on Comparative Commercial Law, by A. R. Thompson, McGill University, September 3, 4 and 5, 1968.

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

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

remove stale air, that there was an implied term to the effect that the buyer should not lose his right of rejection upon the installation of the equipment. A somewhat puzzling feature of the case is that the court, after having determined that the capacity to expel the stale air was a condition under section 16, raised the question whether the breach entitled the defendant to treat the contract as repudiated or whether he was entitled to damages only. It was decided that the term went to the root of the contract and that it entitled the defendant to treat the breach as a repudiation. It would seem, however, that once a term is characterized as a condition under section 16 the defendant may treat the contract as repudiated upon breach unless he is precluded from doing so under section 13(3) when the contract of sale is not severable by reason of having accepted the goods or contracted for the purchase of specific goods in which property has passed.

Judicial willingness to extend the implied conditions of fitness for a particular purpose is confirmed by *Freeman v. Consolidated Motors Ltd.*[4] The plaintiff purchased from the defendant a second hand automobile which he later learned had a bent frame. The Manitoba Supreme Court held that the buyer, by asking for the automobile, had sufficiently made known the particular purpose for which it was required and that there was an implied condition under section 16(a) of the Sale of Goods Act[5] that the car was roadworthy. The decision was based upon the 1922 decision of *Marshall v. Ragan Motors Ltd.*[6] The potential dangers of a bent frame were held to render the car unroadworthy because, while it was possible to properly align the steering, a dangerous misalignment would not become known to the driver in normal driving conditions.

Once again the most interesting feature of the case was the remedy granted to the purchaser. The provisions of section 13(3) of the Manitoba Sale of Goods Act are the same as those in section 13 of the Saskatchewan act. The court held that the buyer had not lost his right to rescind the contract by lapse of time. There was, however, the more serious difficulty that the defendant had sold to a third party the automobile traded in on the car subject to this action. The court concluded that while rescission was therefore not possible, the plaintiff was entitled to return the car he had purchased and claim the value of the trade-in from the defendant. The plaintiff had not in his pleadings made a claim for damages.

The provision of section 13(3) seems to contemplate a claim for damages only for breach of condition when the property has passed to the purchaser and he has accepted the goods. It will be seen, therefore, that this case in allowing rejection not only after the property had passed in specific goods but when *restitutio in integrum* was impossible does nothing to resolve the confusion surrounding this section of the Sale of Goods Act. It does support the view that the courts are prepared to go some distance to reverse the prin-

[4] 69 D.L.R.2d 581 (Man. Q.B. 1968).
[5] MAN. REV. STAT. c. 233 (1954).
[6] 65 D.L.R. 742 (Sask. 1922).

ciple of *caveat emptor* in a relationship between the consumer and the trader. In *Freeman* the buyer did not take the precaution of having the car inspected by an expert although he knew he was buying a second hand automobile.

An application of the Ontario Sale of Goods Act section implying a condition of quality and fitness for a particular purpose [7] and which seems more consistent with the object of the section is to be found in *Canada Building Materials Ltd. v. Meadows.* [8] The plaintiff required a product to protect from corrosion, steel transfer cars used in the manufacture of cement blocks. The manufacturing process occurred in alkaline corrosive conditions under steam pressure at temperatures of 365° F. An employee of the plaintiff tested the defendant's product for some months and was ready to order but noticed in the defendant's brochure that the product was not recommended in moist conditions at temperatures exceeding 140° F. The plaintiff then telephoned the defendant's salesman who recommended an additional coat of another product. This process along with the defendant's product proved completely unsatisfactory as a protector from corrosion. The plaintiff succeeded in an action for damages. Mr. Justice Lacourciere relied upon *Cammell Laird & Co. v. Manganese Bronze & Brass Co.* [9] for authority for the view that the plaintiff's reliance on the seller need not be complete but merely substantial. This was necessitated by the fact that the plaintiff had carried out his own tests on the defendant's material.

The defendant's sales literature stated that it gave no warranty other than that the materials were of good quality and that there was no guarantee of particular methods of use or application or performance under special conditions. This exclusion was held to be ineffectual for the reason that it was contained in the general unread sales literature and was not specifically directed to breach of conditions.

The period under review saw the Alberta Supreme Court and the Supreme Court of Canada apply the implied condition under the Sale of Goods Act where a question of privity of contract was involved in *Traders Finance Corp.* v. *Haley.* [10] Haley was induced by an employee of the Ford Motor Company to purchase three heavy gravel hauling trucks on the representation that they would be superior in performance to International trucks which were being used on a job by other contractors. He was also influenced by a magazine advertisement describing the long wearing qualities of the Ford trucks. Upon Haley's decision to buy the trucks, they were delivered to a dealer in Banff who transferred them to one Fix who had originally suggested Fords to Haley. The trucks were transferred to the Banff dealer because of Ford's requirement that they be sold through a dealer and because Fix had not yet obtained a dealership. Fix sold the trucks by a conditional sales agreement to Haley and payment was made to Ford by the finance company.

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[7] ONT. REV. STAT. c. 358, § 15(1) (1960).
[8] [1968] 1 Ont. 469 (High Ct.).
[9] [1934] A.C. 402.
[10] 57 D.L.R.2d 15 (Alta. 1966), *aff'd*, [1967] Sup. Ct. 437.

The trucks proved to be inadequate for the work and a great deal of time was spent having them repaired. Haley claimed damages from the Ford Motor Company.

It was argued on behalf of Ford that it was not the seller of the goods. In his decision, Mr. Justice Johnson stated: "Where, as here, a purchaser goes to a manufacturer, makes known the purpose for which he requires equipment, is told that specific pieces of equipment shown to him would do the required job, then notwithstanding who may be the parties to the ultimate agreement of sale, the manufacturer is, in my opinion, the seller within the Sale of Goods Act." [11]

This bold disregard of the doctrine of privity of contract is not without precedent, [12] but somewhat remarkable in view of the fact that the court felt that liability would have been established in the absence of the implied warranties in the Sale of Goods Act. The court concluded that the statements made to Haley by the representative of the Ford Motor Company would have been interpreted by a bystander as a warranty. This then was a separate contract, the consideration for which was Haley's entry into a contract with Fix to purchase Ford trucks. The result achieved here raises interesting implications for manufacturers and, one assumes, for distributers and wholesalers.

On the matter of damages the court held that the onus was on Ford to show that the trucks retained some value, and in the absence of satisfaction thereof the damages should amount to the whole purchase price. The evidence did not show that the earnings produced by the trucks while they were operating was greater than the losses incurred while they were idle.

The appeal to the Supreme Court of Canada was unanimously dismissed. The appellants did not question the existence of a warranty and the Supreme Court agreed with the lower court on the matter of damages after reviewing the transcripts of the evidence given at the trial.

The line of decisions inferring an implied warranty of fitness was reinforced, albeit at the district court level, in *Algoma Truck & Tractor Sales Ltd. v. Bert's Auto Sales Ltd.*[13] The defendant upon being questioned informed the plaintiff that a reconditioned G.M. 671 cylinder head for an air compressor had "a guarantee" on it. The plaintiff ordered the head. Mr. Justice Vannini held that as the warranty was verbal, it did not extend beyond the warranties implied by section 15(1) and (2) of the Ontario Sale of Goods Act [14] that the head would be reasonably fit for the purpose for which it was required. The head was cracked in a large number of places and had leaked badly. The plaintiff recovered his loss of profits and the rental of the compressor. It is of some interest that in this case and the *Freeman* case the courts were prepared to infer warranties without any discussion of

[11] 57 D.L.R.2d 15, at 18.

[12] *See* Western Processing Ltd. v. Hamilton Constr. Co., 51 W.W.R. (n.s.) 354 (Man. 1965).

[13] [1968] 2 Ont. 153 (Dist. Ct.).

[14] ONT. REV. STAT. c. 358 (1960).

the fact that these were second hand goods in respect of which one might expect some reluctance to infer these warranties.

II. SECURED TRANSACTIONS [15]

1. *Good Faith and Notice*

Any illusion that problems relating to notice under the various Factors Acts, Bills of Sales and Conditional Sales Acts are settled is dispelled by the *Green Belt Holdings Ltd. v. Holowachuk.* [16] The judge in this case was required to make a difficult decision because of a paucity of facts. The applicant was the mortgagee of a car under mortgage from one Dorosko. The mortgage was properly registered under the Alberta Bills of Sale Act. [17] The respondent purchased the car from a used car dealer without searching the registry. The mortgagee had no knowledge that the car was in the dealer's hands and the circumstances of the sale to the respondent were not known.

The court held for the applicant on the ground that the registration of the mortgage constituted "actual and statutory" notice to all the world, and particularly to the respondent, of the existence of the mortgage. [18]

In the light of numerous cases indicating that registration under the Bills of Sale Act is not constructive notice, one might have expected the court to deal with the matter somewhat differently. It might fairly have required the respondent to show the consent of the owner and a sale in the ordinary course of business. To gain the benefit of the Factors Act, he would then show lack of actual notice and the criteria mentioned above. The court distinguished such cases as *Vowles v. Island Finance Ltd.* [19] and *Campbell & Co. v. Steele* [20] on the ground that the question involved in them was whether the financing agency had given an implied authority to a dealer to resell cars which were the subject of registered encumbrances. The interpretation put on the act practically emasculates the Factors Act provisions,

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[15] The Legislature of the Province of Ontario at its 1967 session enacted the Personal Property Security Act, Ont. Stat. 1967 c. 73 which brings all personal property security devices under one statute. The act is based upon art. 9 of the United States Uniform Commercial Code and will go into provisional effect January 1, 1970 and become fully effective January 1, 1973.

[16] 60 W.W.R. (n.s.) 332 (Alta. Dist. Ct. 1967).

[17] ALTA. REV. STAT. c. 23 (1955).

[18] ALTA REV. STAT. c. 106, § 3(1) (1955):

> [W]here a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, a sale, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent is as valid, subject to the provisions of this Act, as if he were expressly authorized by the owner of the goods to make the same, if the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

[19] 55 B.C. 362, [1940] 3 W.W.R. 177.

[20] 39 Ont. W.N. 317 (High Ct. 1930).

for it can no longer assist the innocent third party purchaser where a chattel mortgage has been registered.

This case must be taken then as having further muddied the already murky waters surrounding the relationship between the Factors Act and the Bills of Sale Act. It is the more regrettable as the case might well have been disposed of upon other grounds.

In *Consolidated Motors Ltd. v. Wagner*,[21] where a Winnipeg used car dealer was authorized by a finance company to go to Toronto to repossess a car which was the subject of a conditional sale agreement discounted by the dealer with the finance company, the dealer repossessed the car and drove it to Regina where he sold it to the defendant. At trial, it was held that the sale came within the Saskatchewan Factors Act.[22] He relied on the presumption set up by section 3(4) that the car was in the possession of the dealer with the consent of the owner.

2. *Priorities*

In *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd.*[23] the competitors were the seller, a landlord, and debenture holders. In February, 1968, Embassy Motors Ltd. bought under a conditional sale agreement four cars from J.R. Auto Brokers and gave as payment a cheque which was returned for lack of sufficient funds. The conditional sale agreement was not registered. Ten days later the defendant's landlord seized the cars as some 17,500 dollars in rent was owing to him. The other defendants were debenture holders under a floating charge dated October, 1963 and crystallized on March 1, 1968. It was held that the plaintiff conditional seller was entitled to possession against the defendant. It was argued on behalf of the landlord and the debenture holders that section 2(3) of the Ontario Conditional Sales Act[24] includes creditors whether secured or unsecured and whether they become creditors prior to or subsequent to the conditional sales agreement.

The landlord's claim was defeated because the Landlord and Tenant Act, section 30(2),[25] gives the lessor a right to distrain only on the goods of the tenant. The only interest of Embassy Motors was the right to acquire the car on payment of the price. There was, therefore, no interest in Embassy Motors which the landlord might distrain upon.

It was now necessary to determine the position of the debenture holders. The court, upon determining that a debenture was a "mortgage" under the Bills of Sale Act[26] and that the Conditional Sales Act and the Bills of Sale

[21] 63 D.L.R.2d 266 (Sask. Q.B. 1967).

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

[23] [1968] 2 Ont. 532 (High Ct.).

[24] ONT. REV. STAT. c. 61, § 2(3) (1960). That § reads as follows: "Where the delivery is made to a person for the purpose of resale by him in the course of business, such provision is also, as against his creditors, invalid and he shall be deemed to be the owner of the goods unless this Act has been complied with."

[25] ONT. REV. STAT. c. 260 (1960).

[26] ONT. REV. STAT. c. 34, § 1(b) (1960).

Act were statutes *in pari materia,* held that "subsequent mortgagee" in section 2 of the Conditional Sales Act included the holder of a debenture in the nature of a floating charge. The court relied upon *Liquid Carbonic Co. v. Rowntree*[27] where a mortgagee under a mortgage with an "after-acquired" property clause entered into prior to a conditional sales agreement was held not be a subsequent mortgagee. Some importance was attached to the fact that the money secured by the debentures was advanced at the same time it was entered into.

The court adverted to the purposes of section 2 as follows:

> The section was enacted to afford protection to subsequent purchasers and mortgagees who have engaged in transactions with conditional purchasers and who have acted in reliance upon the conditional purchaser's apparent ownership, when no conditional sale agreement had been registered so as to put the subsequent purchaser or mortgagee on notice of the conditional purchaser's lack of legal title in the chattel or chattels. That being the case, I think little turns on the distinction raised by counsel as to the difference in nature of the floating charge security before and after crystallization. That is not the important question. The crux of the matter is whether the debenture holders relied on the apparent ownership of Embassy Motors Ltd. in the motor vehicles, in taking a floating charge as security for the advancement of moneys. I think the term "subsequent mortgagees" applies only to those who have acted subsequently in reliance upon such apparent ownership.[28]

There seems little doubt that a different result would have followed if the debenture holders had advanced funds subsequent to the conditional sale agreement, even if this were done in pursuance of a floating charge entered into previously. As to the meaning of the word "creditors," while the Ontario act does not refer to them as "subsequent," the court held the same reasoning to be applicable. The act protects only those who become creditors after the conditional sales agreement was entered into.

In *Montreal Trust Co. v. Goldaire Rentals Ltd.*[29] it was held that a mortgagee who had registered his mortgage on real property before the installation of a fixture by a conditional seller was not a subsequent mortgagee in order to gain priority for advances made before installation and registration of the conditional sales agreement. The mortgagee was entitled to priority in respect of advances made after installation but before registration of notice of the conditional sale by reason of section 14(4) of the Ontario Conditional Sales Act[30] which provides specifically for such a situation.

In *R.A. Angus Alberta Ltd. v. Union Tractor Ltd.,*[31] it was held that the holder of a lien registered under the Garagemen's Lien Act[32] enjoyed the same priority over the holder of a previously registered conditional sale

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[27] 54 Ont. L.R. 75, [1924] 1 D.L.R. 1092 (1923).
[28] *Supra* note 23, at 540-41.
[29] [1967] 1 Ont. 40 (High Ct. 1966).
[30] ONT. REV. STAT. c. 61 (1960).
[31] 61 W.W.R. (n.s.) 603 (Alta. Dist. Ct. 1967).
[32] ALTA REV. STAT. c. 128 (1955).

agreement as is enjoyed by the holder of a common-law possessory lien. The act was deemed to have as its purpose the establishment of a lien of equal strength to the common-law lien.

3. *Remedies*

During the period under review the courts have continued to interpret the statutory requirements restricting the remedies of the vendor strictly in favour of the purchaser. In *Delta Acceptance Corp. v. Wagner*,[33] it was held that the Saskatchewan Limitation of Civil Rights Act,[34] section 18 of which provides that a vendor who reserves a lien for the purchase price shall be restricted to his lien and right of possession, prevented the vendor from bringing an action in conversion against a third party who purchased and resold a chattel in ignorance of the vendor's lien. The vendor could only rely on his right to repossess. And in *Consumer Gas Co. v. Atkins*[35] the Ontario Court of Appeal dismissed a claim for a deficiency where the goods sold were misdescribed. The description in the notice of resale was consistent with the original contract of sale but different goods had been in fact delivered by mutual consent of the buyer and seller.

The Manitoba Court of Appeal in *Greater Winnipeg Gas Co. v. Petersen*[36] has reiterated the principle that the conditional vendor who reserves the right to repossess, resell and claim a deficiency does not thereby preclude himself from bringing an ordinary action for the price. The seller's right to the price is fundamental, and a clear intention must be expressed to make this right subject to the performance of a condition such as repossession and resale.

III. Miscellaneous

An interesting case of the effect of failure to register out-of-province conditional sales arose in *Steiner v. Laurentide Financial Corp.*[37] The appellant was a bona fide mortgagee in British Columbia of a car purchased under a conditional sale agreement in Alberta. The respondent conditional seller seized the chattel in British Columbia and removed it to Alberta. In an action for damages for conversion it was held that once the appellant had shown that no registration had occurred in British Columbia when he took the mortgage, the onus of showing that, either registration in British Columbia had occurred within twenty-one days of their learning or removal into British Columbia or that the time for re-registration had not expired at the time the chattel was seized was on the respondents. This they failed to prove and the action was successful.

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[33] 63 D.L.R.2d 365 (Sask. Q.B. 1967).
[34] Sask. Rev. Stat. c. 103 (1965).
[35] [1968] 2 Ont. 494.
[36] 69 D.L.R.2d 7 (Man. 1968).
[37] 59 W.W.R. (n.s.) 435 (B.C. 1967).

In *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* [38] it was held that wall-to-wall carpeting installed by a new tackless method and easily removable did not become an integral part of the realty. The conditional sale agreement was therefore effective to reserve title in vendor as against a subsequent purchaser without registration in the land registry office as is permitted under section 12 of the Conditional Sales Act. [39]

The position of the dealer who assigns a conditional sale agreement as well as a chattel mortgage taken as security for the purchase price and also endorses a promissory note to a finance company was considered in *Traders Finance Corp. v. Halverson.* [40] The plaintiff finance company failed to register the chattel mortgage, which security was thereby lost, and brought an action against the defendant as endorser. It was held that the defendant's position was analogous to that of a surety, and the plaintiff, because his negligent failure to register had operated to prejudice the defendant's position, could only recover the balance owing after deducting the value of the lost chattel mortgage.

IV. Bills of Exchange

1. *Holder in Due Course—Good Faith*

Cases involving the question whether the purchase money lender who takes an assignment of a conditional sale agreement and a promissory note is entitled to the rights of a holder in due course continue to be decided on their particular facts. In *Traders Finance Corp. v. Norray Distributing Ltd.* [41] the plaintiff prepared the conditional sales agreement in question, schedule of machinery, and the promissory note whereby the purchasers agreed to buy fifty coin operated automobile vacuum cleaners. It also was consulted when a new agreement substituting a different party was executed. The plaintiff also inserted a clause excluding conditions and warranties and one acknowledging receipt by the purchaser of the machines in good order before they were delivered. The machines proved to be so completely unsatisfactory that the court was prepared to hold that there was a breach of contract sufficiently serious that it went to the root of the contract and prevented the seller from relying on the exemption clause.

The court also held that in the circumstances the plaintiff could not be said to be acting in good faith. The case of *Killoran v. Monticello State Bank* [42] was held inapplicable because nowhere in that judgment was any indication given of the circumstances surrounding the negotiation of the notes. Chief Justice Tritchler expressed anxiety that the Bills of Exchange Act [43]

[38] 70 D.L.R.2d 268 (B.C. Sup. Ct. 1968).
[39] B.C. Stat. 1961 c. 9.
[40] 65 D.L.R.2d 393 (B.C. Sup. Ct. 1967).
[41] 60 W.W.R. (n.s.) 129, 62 D.L.R.2d 466 (Man. Q.B. 1967).
[42] 61 Sup. Ct. 528 (1921).
[43] Can. Rev. Stat. c. 15 (1952).

should not become "a sort of amulet which protects the most incautious acquirer of a bill of exchange against the possibility of loss." [44] The involvement of the plaintiff with the transferor was such that he could not be said to have taken the transfer in complete good faith.

The results in these cases seem to be influenced not only by the relationship of the financing agency and the seller but by the methods which the seller uses in making his sale. In *Interprovincial Building Credits Ltd. v. Soltys*, [45] the defendant farmer was told by two salesmen that they wished to erect a display building of steel on his farm for a price of 4,600 dollars. It was agreed that the vendor should erect the building and the plaintiff was asked to sign a contract and a separate promissory note. Although it was agreed that the defendant should pay within six months without interest, the note was completed by the vendor for the amount of 5,412 dollars. The building was erected in an unsatisfactory manner in that it leaked and the doors did not operate. The note was endorsed by the seller to the manufacturer of the steel building and by them to the plaintiff.

Mr. Justice Dickson held that the seller's title in the note was defective and that the plaintiff at the time of taking the note knew that the defendant's obligation to pay the note was qualified by an understanding as to the erection of the building. The plaintiff, therefore, had notice of the defect in title. The court was also prepared to hold that the plaintiff and the seller were engaged in a joint business venture and therefore the cases of *Federal Discount Corp. v. St. Pierre* [46] and *Traders Finance Corp. v. Norray Distributing Ltd.* [47] applied. The forms of promissory note, credit applications and interest rates charged were supplied by the plaintiff. The sellers were also required to conform to the plaintiffs credit standards.

On the other hand, in *Levenhurst Investment Ltd.* v. *Oakfield Country Club* [48] although the holder of a note was a company closely related to the assigning company by virtue of having the same officers, the Nova Scotia Supreme Court held that there was no lack of good faith to deprive the plaintiff of the status of a holder in due course. The plaintiff took a note by endorsement from the Pryor Construction Company. The note was renewed on several occasions, and when the maker was in financial difficulty an officer of the plaintiff attended meetings of the creditors. The court accepted the evidence that the plaintiff had no knowledge at the time it took the note that there were complaints about the quality of construction by Pryor. The *St. Pierre* case was distinguished on the ground that there both companies were engaged in the same business. Other cases following *St. Pierre* were distinguished by certain elements of fraud inducing the various defendants to sign a note and contract of which the holder of the note was aware. In the instant case, there was no evidence that an action against

[44] 60 W.W.R. (n.s.) at 140, 62 D.L.R.2d at 478.
[45] 64 D.L.R.2d 194 (Man. Q.B. 1967).
[46] 32 D.L.R.2d 86 (Ont. 1962).
[47] 60 W.W.R. (n.s.) 129, 62 D.L.R.2d 466 (Man. Q.B. 1967).
[48] 68 D.L.R.2d 79 (N.S. Sup. Ct. 1968).

Pryor for faulty construction would be futile.

A similar result was reached in *Imperial Oil Ltd. v. Fortier.*[49] The plaintiff brought action as holder against the maker of a note who defended on the grounds that a furnace which he purchased was defective. The plaintiff had supplied the dealer with the forms pre-printed with the plaintiff's name containing a form of assignment, a clause exempting the plaintiff from liability for the proper functioning, and installation of the furnace. The purchaser also agreed to purchase all his fuel from the plaintiff until his debt was paid. On appeal, it was held, with one dissent, that there was nothing immoral about this last mentioned arrangement and that the clauses described above were logical since the plaintiff assumed the risk of default under the conditional sales. The mere fact of the plaintiff's awareness of the obligation undertaken by the endorser under the sales contract did not prevent it from becoming a holder in due course.

The court emphasized the fact that the defendant had signed an acknowledgement that the furnace had been properly installed to his satisfaction. The trial judge, on this question, had disregarded this statement for the reason that it was signed in summer before a proper test of the furnace could take place. We have seen that in *Traders Finance v. Norray Distributing* such a statement was disregarded where the merchandise had not yet been received. Mr. Justice Owen, in his dissent, stated that the case fell squarely within the principle laid down in *St. Pierre.*

The diversity of the decisions reviewed indicates that there is as yet no clear line of authorities laying down the circumstances in which a consumer financing agency will be deprived of the status of a holder in due course. In at least one province, legislation provides that the holder of a note shall be deemed to have notice of the terms of the contract between the original seller and buyer although whether such a provision will affect decisions is problematical.[50]

2. *Cheques*

The effect of certification of a cheque by the drawer at the request of the payee was considered in *Broadhead v. Royal Bank of Canada.*[51] One Avery, the president of McAulay Brothers Ltd., caused the company to write a cheque in favour of Barnett and Politi Ltd., of which he was the general manager, drawn upon the defendant bank. He caused the cheque to be certified and a few hours later, before the cheque was presented and paid, McAulay Brothers Ltd. made an assignment in bankruptcy. The Ontario Supreme Court came to the important conclusion that the cheque was certified at the instance of the payee, and the drawer was discharged. The bank was therefore entitled, upon certification, to debit the drawer's account with

[49] 70 D.L.R.2d 290 (Que. 1967).

[50] *See, e.g.,* An Act to Amend The Unconscionable Transactions Relief Act, Man. Stat. 1965 c. 87, § 2.

[51] [1968] 2 Ont. 717 (High Ct.).

the amount of the cheque. The conclusion mentioned above was important because in *Gaden v. Newfoundland Savings Bank* [52] it was held that a cheque certified before delivery is subject as regards a subsequent negotiation to all the rules applicable to uncertified cheques. The bank had, at the time of certification, transferred the amount of the cheque to an "Outstanding Certified Cheque Account," but this would not appear to be important.

The effect of a condition attached to a cheque was considered in *Mattinson v. Piercey Supplies Ltd.* [53] The plaintiff agreed with the Brownell Construction Co. that the latter should build a twelve unit apartment building. Brownell asked the plaintiff to pay part of the price to the defendant supplier to establish credit. The plaintiff drew a cheque in the sum of 24,000 dollars payable to the defendant and Brownell marked "Apt. House Acct." Brownell endorsed it to the defendant and told them it could be applied to any account. It was applied to Brownell's other debts which left only 147 dollars for the plaintiff's account. Credit was soon terminated, and the plaintiff sued the defendant for the return of the 24,000 dollars. The plaintiff failed because the defendant had no notice of the condition attached to the cheque and was not affected by the failure of Brownell to communicate this condition to the defendants. As the cheque was drawn in favour of both Brownell and Piercey, the latter could not be held to be a holder in due course. [54]

[52] [1899] A.C. 281 (P.C.).

[53] 69 D.L.R.2d 665 (N.S. Sup. Ct. 1968).

[54] *See* J. FALCONBRIDGE, ON BANKING AND BILLS OF EXCHANGE 527 (7th ed. A. W. Rogers 1969).