BILLS AND NOTES — WHETHER CLOSE RELATIONSHIP BETWEEN RETAILER AND FINANCE COMPANY SUCH THAT LATTER NOT ENTITLED TO CLAIM AS HOLDER IN DUE COURSE

Recent decisions[1] in the area of retail instalment sales financing compel a re-examination of *Federal Discount Corp. Ltd.* v. *St. Pierre*[2] as authority that the close business relationship between a finance company and a dealer is by itself sufficient to prevent the finance company from becoming a holder in due course of a promissory note.

In the typical situation, a consumer concludes a conditional sales contract with a dealer, and executes a promissory note payable to the dealer. The dealer thereupon assigns his interest in the conditional sales contract and endorses the promissory note to a finance company. In this typical agreement all warranties and conditions are excluded, and the buyer is made to agree that any assignee of the agreement will take it free from all equities existing between the seller and the buyer.[3] The promissory note, executed concurrently[4] by the buyer and often printed on the same piece of paper (separated only by a perforated line), is endorsed to the finance company with the intention that the company should hold the promissory note as a holder in due course.

A finance company is entitled to enforce payment of the full value of a note if it takes the note complete and regular on its face, in good faith, for value, and without notice at the time of negotiation of any defect in the title of the person who negotiated it.[5] The law states that, in a contest between a holder in due course and a retail buyer, the holder possesses the note free of equities, even in cases in which he is also an assignee of the conditional sales agreement (which is subject to equities)[6] to which the note was originally attached.

The interests of the consumer and the finance company are, of course, in conflict. It is in the interest of consumers that they should not be compelled to pay for goods which are faulty, or which have been misrepresented, or which the dealer fails to deliver. But against the protection of the consumer must be balanced the desireability of encouraging

1 *Rand Investment Ltd.* v. *Kwiatowski* (1963), 42 W.W.R. (N.S.) 108 (S.C. B.C.); *Citizens Finance Co. Ltd.* v. *Sanford*, [1964] 1 O.R. 573; *Prudential Finance Corporation Ltd.* v. *Kucheran* (1964), 45 D.L.R. (2d) 402 (Ont. C.A.); *Traders Finance Corporation Limited* v. *Edmonton Airport Hotel Co. Ltd.* (1964), 49 W.W.R. (N.S.) 56 (S.C. Alta.).

2 [1962] O.R. 310, 32 D.L.R. (2d) 86.

3 Recognized and enforced in *Monticello State Bank* v. *Killoran*, [1920] 3 W.W.R. 542, 16 Alta. L.R. 341 (Alta. App. Div.); *Union Acceptance Corp. Ltd.* v. *St. Amour*, [1957] O.W.N. 261, 8 D.L.R. (2d) 2.

4 The fact of concurrent execution and concurrent transfer of the contract and note is irrelevant to the rights of a holder of a note: *Bank of Nova Scotia* v. *Philpott*, [1930] 2 W.W.R. 128 (Sask. C.A.); *Aetna Factors Corp. Ltd.* v. *Breau* (1958), 15 D.L.R. (2d) 326, 41 M.P.R. 288; *Canyon Securities Ltd.* v. *McConnell* (1959), 17 D.L.R. (2d) 730 (S.C. B.C.).

5 A holder in due course is defined in the Bills of Exchange Act, R.S.C. 1952, c. 15, s. 56 (1):

s. 56 (1) A holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions, namely:

(a) That he became a holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

(b) That he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

6 *Killoran* v. *Monticello State Bank*, *ante*, n. 3; *Aetna Factors Corp. Ltd.* v. *Breau*, *ante*, n. 4; *Bank of Nova Scotia* v. *Philpott*, *ante*, n. 4.

and facilitating credit sales, which are so important to the maintenance of national prosperity. The problem, simply stated, is this: in what circumstances are rightful claims of ownership or defences to be cut short in order to protect the free flow of commercial paper?

The facts of the case under consideration were as follows. Mrs. St. Pierre's attention was attracted by a newspaper advertisement placed by one Pritchard, who was a salesman of Fair Isle Knitting (Ontario) Limited (hereafter referred to as Fair Isle) and Yarncraft Industries Limited (hereafter referred to as Yarncraft). The purport of the advertisement was such as to lead a person reading it to believe that the hand knitting machine advertised for sale could be paid for out of the money earned from the sale of knitting done on it.[7] Mrs. St. Pierre and her husband agreed to buy a knitting machine from Fair Isle, and executed a conditional sales contract and a promissory note in favour of Fair Isle. This sale agreement was co-ordinated with an agreement with Yarncraft, which was to supply yarn and to market knitted goods made on the machine. The selling campaign conducted by Fair Isle entailed the use of a series of elaborate documents which confused the salesman who was trained in their use and even those responsible for their drafting.[8] Fair Isle and Yarncraft had identical shareholders and officers, and occupied the same office space. The conditional sales contract and promissory note were duly transferred to the plaintiff finance company under a pre-existing arrangement for the purchase of notes and conditional sales contracts entered into in respect of the sale and purchase of the home knitting machines. On receipt of the note, the plaintiff sent notice of the assignment and an account book indicating that payments were to be made directly to the plaintiff and that "payments must be made when due regardless of the amount earned from knitting."[9] Mrs. St. Pierre received one payment for some goods knitted by her, but was not paid for subsequent deliveries. She, therefore, stopped making payments. After some weeks, the plaintiff advised Mrs. St. Pierre by letter than a sum had been paid to her account by Yarncraft. The letter also called to her attention arrears of over fifty dollars on her sales contract. No sum had in fact been paid. At the trial, an officer of the plaintiff company explained that the false statement was made to induce Mrs. St. Pierre to pay on the expectation that Yarncraft would continue paying for the goods knitted by her.[10] On this Appeal[11] the plaintiff contended that it was a holder in due course of the note sued upon.

Kelly, J.A., after canvassing the history and nature of bills of exchange, stated that "the transfer which is alleged to have given such a special character to the bill of exchange should be subject to more than a casual examination and that the true nature of the transaction be discovered."[12] He then noted that the courts have quite properly refused to extend the doctrine of constructive notice to negotiable instruments,

7 *Ante*, n. 2, at 331-312 (O.R.), 87-88 (D.L.R.).
8 *Id.* at 325 (O.R.), 101 (D.L.R.).
9 *Id.* at 316 (O.R.), 97 (D.L.R.).
10 *Id.* at 318-319 (O.R.), 94-95 (D.L.R.).
11 The trial judge of the Ninth Division Court of the County of Wentworth dismissed the plaintiff Company's claim that it was a holder in due course of the promissory note.
12 *Ante*, n. 2, at 321 (O.R.), 97 (D.L.R.).

and cited *London Joint Stock Bank* v. *Simmonds*[13] as authority for this proposition.

It is well settled that, although constructive notice has been ruled out as inapplicable to negotiable instruments, the courts have often found in the behaviour of plaintiffs grounds for finding that notice must have existed—e.g., where the holder has blinded himself by deliberately refraining from making a reasonable inquiry.[14] The test to be applied is that stated by Lord Herschell in *London Joint Stock Bank* v. *Simmonds*, namely:

> If there be anything which excites the suspicions that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.[15]

Where the defendant in an action on a promissory note raises the issue of good faith, the question to be answered in every case is a question of fact. Did the taker acquire the instrument in good faith or bad faith?[16] As the question of good faith, being a question of fact, can only be determined in the light of all the relevant facts, it follows that the court is entitled to enquire into the circumstances under which the plaintiff came into possession of the note, and to govern itself according to those circumstances.[17]

Kelly, J.A., after giving careful attention to the traditional material relating to constructive notice, went on to examine the relationship between the plaintiff and its transferor (Fair Isle). He made the following observation:

> With the growth of the sale of household and personal goods on the extended payment plan, the promissory note, the conditional sales contract and the finance company have become inseparable parts of the procedure whereby the merchant realizes immediately cash from the extended obligation of the purchaser from him. The very existence of the seller's business depends on his ability to convert into cash these obligations and the finance company, standing ready and willing to buy them, has become not only an essential part of retail selling on the time payment plan but is in effect a department of the seller's business, exercising a measure of control over the seller's sales by the requirements laid down with regard to the negotiable paper proposed to the purchased.
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> In the course of this development an attempt has been made to project into the field of household law and law merchant originally designed for dealing between merchants.[18] The fiction[19] has been permitted to flourish that the finance company is a foreign and independent agency.[20]

His Lordship, after examining the closeness of the business relationship that existed between the plaintiff and the officers of Fair Isle concluded that the plaintiff had notice of the dealer's scheme of business.[21] However, he did not rely on the plaintiffs scheme of business to deny

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13 [1892] A.C. 201. At page 221, Lord Herschell stated: "One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." Approved: *Union Investment Co.* v. *Wells* (1908), 39 S.C.R. 625 reversing 5 W.L.R. 409.

14 *Jones* v. *Gordon*, [1876-7] 2 App. Cas. 616; *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, 61 L.J. Ch. 723; *Benjamin* v. *Weinberg*, [1956] S.C.R. 553; *Interior Finance Ltd.* v. *Nichols* (1958), 26 W.W.R. 609 (B.C. C.A.).

15 *Ante*, n. 13, at 221.

16 See *Union Investment Co.* v. *Wells*, *ante*, n. 13, at 648, per Duff, J.

17 *Relland Motors Ltd.* v. *Foy* (1959), 29 W.W.R. 407 (Sask. C.A.); *Modern Motor Service* v. *Kaucher* (1956), 19 W.W.R. (N.S.) 448; *Traders Finance Corporation* v. *Edmonton Airport Hotel Co.* (1964), 49 W.W.R. 56 (S.C. Alta.).

18 See Gilmore, *The Commercial Doctrine of Good Faith Purchase* (1953-54), 63 Yale L.J. 1057, 1101.

19 *Buffalo Industrial Bank* v. *De Marzio* (1937), 296 N.Y. Supp. 783, 785-86, per Summers, J., reversed on default of appearance (1937), 6 N.Y. Supp. (2d) 568, 785-86 per Summers, J.

20 [1962] O.R. 310, 321-22; 32 D.L.R. (2d) 86, 97-98.

21 *Id.* at 322 (O.R.), 98 (D.L.R.).

the plaintiff the status of a holder in due course; nor did he draw inferences as to the officer's state of mind from the false statement in the letter written to Mrs. St. Pierre. He chose to found his judgment solely upon the broader basis of the close relationship between the dealer and the plaintiff. This in itself was sufficient, he said, to prevent the plaintiff from becoming a holder in due course:

> There appears to be no Canadian cases which have held that the business relationship between a dealer and a finance company is an element to be considered in deciding a finance company's claim to be a holder in due course; the question has been dealt with by American Courts in this manner and I would adopt the reasoning of the judges who decided these cases: *Buffalo Industrial Bank* v. *De Marzio,* (1937) 296 N.Y. Supp. 783; *Commercial Credit Co.* v. *T. F. Chelds,* (1940) 128 A.L.R. 726; *Taylor et ux* v. *Atlas Security Co.,* (1923), 249 S.W. 746.[22]

It is submitted that reliance upon this "close relationship" doctrine was unnecessary, as the facts of the case indicate that the plaintiff did not take the note in good faith. Indeed, Kelly, J.A., would seem to imply as much when he states:

> Even granting that the plaintiff did not have actual notice of facts the knowledge of which would have prevented it from becoming a holder in due course, the transfer of the note to it by Fair Isle fell short of being the type of business transaction between the two parties, dealing with respect to the note in complete good faith . . . .[23]

In order to determine whether Kelly, J.A., was justified in relying upon the "close participation" test enunciated in the American cases, it will be necessary to examine the concept of "good faith purchase"; and, more particularly, to ask if the test for "good faith" is subjective or objective. As the question of good faith is a question of fact,[24] the problem becomes one of whether the courts will demand evidence that shows the holder had actual notice or knowledge of such facts that his taking of the instrument amounted to bad faith (subjective test), or merely evidence which indicates that the holder failed to exercise the caution of a reasonable man (objective test).

In England, by the eighteenth century, when the law merchant had been absorbed into the common law, the attention of the king's courts was concentrated upon working out the principle attributes of negotiability with the object of encouraging the free circulation of goods and commercial paper. The key concept, the right of the good-faith purchaser to hold free of defences and equities, was the concern of the day. The courts set about to define "good faith" for this purpose. The leading case of *Lawson* v. *Weston*[25] concerned the test of "good faith" for a holder in due course of a negotiable instrument. There, Lord Kenyon ruled that the holder need not make a diligent inquiry when he takes the instrument, for to require such an inquiry would be at once to paralyze the circulation of all the paper in the country. Introduced was the subjective test of actual good faith, the test of "the white heart and the empty head."[26] In 1824, in *Gill* v. *Cubbit,*[27] the subjective test was discarded for an objective test that required the holder to exercise the prudence and caution of a reasonable man. This "suspicious circum-

22 *Id.* at 324 (O.R.), 100 (D.L.R.).
23 *Id.* at 324 (O.R.), 100 (D.L.R.).
24 *Ante,* n. 16.
25 (1801), Esp. 56, 170 E.R. 640 (K.B.).
26 Note, (1940), 53 Harv. L. Rev. 1200 .
27 (1824), 3 B. & C. 466, 107 E.R. 806.

stance" (objective) test was laid to rest in England only twelve years later by *Goodman* v. *Harvey*,[28] which decided that carelessness or negligence is not enough by itself to impute bad fatih. In *Jones* v. *Gordon*,[29] the House of Lords established the principle that any behavior short of dishonesty in not suspecting something wrong and checking into it—whether such behavior is careless, negligent or foolish—is not enough to override the presumption of good faith. This presumption is given effect to in the Bills of Exchange Act.[30]

It is significant that Kelly, J.A., did not rely on English or Canadian cases when holding that the "close connection" between the finance company and the dealer was sufficient to deny the finance company the position of a holder in due course.[31]

At this stage, it may prove useful to analyze the American position as to "good faith purchase." By the end of the nineteenth century most of the American states had adopted a subjective test for good faith purchase.[32] In the main American case, *Rice* v. *Barrington*,[33] the New Jersey Court of Errors and Appeals equated bad faith with fraud. It was held that suspicious circumstances alone are not enough to put a transferee upon inquiry; it must be shown that the transferee was acting fraudulently or dishonestly.[34]

It should be noted that section 3-302 (1) (b) of the Uniform Commercial Code (U.C.C.), as originally drafted,[35] required that the holder observe the reasonable commercial standards of the business in which he was engaged. In hearings on the U.C.C. before the New York Revision Commission, this provision was attacked by representatives of New York City banks as a regression to the "objective" standard of good faith announced in *Gill* v. *Cubbit*.[36] As a result of these objections, the "reasonable commercial standards" provision was omitted in later versions of the

28 (1836), 4 Ad. & E. 870, 111 E.R. 1011.

29 [1876-7] 2 A.C. 616.

30 Bills of Exchange Act, R.S.C. 1962, c 15. s. 3:
> A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

31 *Ante*, n. 22.

32 In *Goodman* v. *Simonds* (1857), 61 U.S. 934, the Supreme Court of the United States decided to follow *Goodman* v. *Harvey* and expressly repudiated *Gill* v. *Cubbit*.

33 (1908), 75 N.J.L. 806, 70 A. 169.

34 Also, see *Joseph* v. *Lesnevich* (1959), 56 N.J. Super. 340, 153 A. (2d) 349; *Driscoll* v. *Burlington-Bristol Bridge Co.* (1952), 8 N.J. 433, 86 A. (2d) 201.

35 See the 1962 Official Draft of the Uniform Commercial Code (U.C.C.) § 3-302 (1) b.

36 *Ante*, n. 27.

U.C.C.; and the present Uniform Negotiable Instruments Law (N.I.L.) language was restored.[37]

It is submitted that by either test the inquiry goes to a state of mind; when one uses a subjective standard it is necessary to look to actual ignorance or lack of suspicion, and when applying an objective standard one looks to the ignorance or lack of suspicion to be expected of a reasonable man under the same circumstances. It is further submitted that the manifest legislative intent in Canada[38] and in the United States[39] is best served by the application of a subjective test for good faith.

A survey of the cases reveals that this area of the law in the United States is in utter conflict, with opposing conclusions being reached by the Courts on substantially identical sets of facts.

The leading case of *Commercial Credit Co.* v. *Childs*[40] is typical of the cases using the "close connection" or "active participation" doctrine. In this case, the note was attached to the contract, both were executed at the same time, and on the back of each was a printed assignment to the finance company. The assignment to the plaintiff occurred on the same day as the sale, and was part of a prior arrangement between the plaintiff and dealer for assignment of chattel paper created in the course of the dealer's business. The Supreme Court of Arkansas held that the finance company was so closely connected with the transaction that it could not maintain that it was a holder in due course, and that for all intents and purposes the finance company was a party to the instrument from the beginning.

The "subjective" approach to the problem is typified by the case of

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37 § 52 of the Uniform Negotiable Instruments Law (N.I.L.) and § 3-302 (1) (b) of the Uniform Commercial Code (U.C.C.) provide that:

A holder in due course is a holder who has taken the instrument under the following conditions:

(a) That he took in good faith and for value

(b) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 56 of the Uniform Negotiable Instruments Law (S.I.L.) sets out the requirements of notice as follows:

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to good faith.

The similiarily of § 56 and s. 56(1) of the Bills of Exchange Act, *ante*, n. 5, should be noted. I suggest both sections infer a subjective test.

§ 1-201 (19) of the Uniform Commercial Code provides as follows:

'Good faith' means honesty in fact in the conduct or transaction concerned.

§ 1-201 (25) provides that:

A person has notice of a fact when

(a) he had actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he had reason to know it exists.

§ 1-201(25)(c) would appear to suggest that an objective test for notice is to be applied. See Sora Mentschekoff (1964), 27 Modern L. Rev.; *contra*: *Universal CIT Credit Corp.* v. *Ingel* (1964), 196 N.E. (2d) 847, criticized in Note (1964), Boston College Ind. & Co. L. Rev. 90.

38 *Ante*, n. 5.

39 *Ante*, n. 37.

40 (1940), 128 A.L.R. 726; (1940), 137 S.W. (2d) 260. See *Commercial Credit Corp.* v. *Orange County Machine Works* (1950), 214 P. (2d) 819; *Mutual Finance Co.* v. *Martin* (1963), 63 So. (2d) 649; *Westfield Credit Corp.* v. *Fellers* (1962), 74 N.J. Super. 575, 181 A. (2d) 809; *International Harvester Co.* v. *Carruth* (1945), 23 So. (2d) 476; *Buffalo Industrial Bank* v. *De Marzio* (1937), 296 N.Y. Supp. 783 (here an agency relationship was found to exist). For a more exhaustive list of cases, see Forrest W. Barnes, Note (1963), 4 Boston Law Review 452; Note (1955), 33 N.C.L. Rev. 608; Note (1956), 34 N.C.L. Rev. 496; I. R. Feltham and K. Feltham, *Retail Installment Sales Financing* (1962), 40 Can. B. Rev. 461.

White System of New Orleans v. *Hall.*[41] Here, again, the finance company furnished forms and instalment tables and agreed in advance to purchase the notes as soon as the sale was completed. The Supreme Court of Louisiana, in finding that the finance company was a holder in due course, stated:

> The basis of those ['close connection'] decisions is a feeling by the judiciary that, by using the Negotiable Instruments Law [N.I.L.] as a shield, the finance company is given an unfair advantage over the consumer buyer. There is undoubtedly some justification for this view, but steps to equalize their positions and regulate instalment credit sales should be taken by the Legislature, and not by this court in view of the clear provisions of the Negotiable Instruments Law.[42]

Policy considerations, such as the inequality in the bargaining position of the finance company, and the buyer, and the ability of the finance company to more readily bear the risk of loss, have been the basis of many decisions. This is revealed by the reasoning of Drew, J., of the Supreme Court of Florida in *Mutual Finance Co.* v. *Martin,*[43] where that learned judge made the following observation:

> It may be that our holding here will require some changes in business methods and will impose a greater burden on finance companies. We think the buyer—Mr. & Mrs. General Public—should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealers' insolvency than the buyer and in a far better position to protect his interest against unscrupulous and insolvent dealers.[44]

The cases illustrate that the American Courts have come to use "closely connected," "active participation," and similar terms in describing varying degrees of actual participation by the finance company in the original transaction. In so doing, some of the courts have failed to examine the facts to determine whether there was "actual notice" or "bad faith" as required by statute.

That Canadian Courts are aware of the inequality in the position of the finance company and the consumer is seen in the case of *Rand Investments Ltd.* v. *Wallberg.*[45] There, the defendant purchased a refrigerator under a conditional sales contract containing a printed assignment thereof from the vendor to the plaintiff finance company. The refrigerator being unsatisfactory, the defendant exchanged it for a cheaper model under a new agreement; but the plaintiff was not notified of the new agreement. The defendants refused to pay the plaintiff the difference in price between the two refrigerators. Clearehue, Cty.Ct.J., in holding[46] that the plaintiff was entitled to succeed on the promissory note for the larger sum, observed:

> I do not think the present condition of the law does full justice as there is no doubt whatsoever that the finance companies are parties to the sale of goods under conditional-sale agreements and should be responsible for the acts of the selling company who in too many cases are without assets and completely unreliable and only can operate through being financed by the finance companies.[47]

41 (1961), 219 La. 440, 53 So. (2d) 227. Other cases holding that the course of dealings between the finance company and the dealer did not prevent the finance company from being a holder in due course are *Clark* v. *Associated Discount Corp.* (1955), 89 S.E. 208; *Wilson Bros. Sand and Gravel Co.* v. *Cheyenne National Bank* (1963), 389 P. (2d) 681; *Implement Credit Corp.* v. *Elsenger* (1954), 268 Wis. 143, 66 N.W. (2d) 657; *Schuck* v. *Murdock Acceptance Corp.* (1952), 220 Ark. 56, 247 S.W. (2d) 1; *C.I.T. Corp.* v. *Emmons* (1940), 197 So. 662; *General Motors Acceptance Corporation* v. *Swain* (1937), 176 So. 636.

42 53 So. (2d) 227, 230.

43 *Ante*, n. 40.

44 *Id.*, at 653, approved in *Westfield Credit* v. *Fellers*, *ante*, n. 40, at 815.

45 (1961), 34 W.W.R. (N.S.) 412 (B.C.).

46 Clearhue, Cty.Ct.J., felt himself bound to follow the traditional line of cases referred to *ante*, n. 6.

47 *Ante*, n. 45, at 417.

In *Rand Investments Ltd.* v. *Kwiatwokski*,[48] the plaintiff brought an action on a promissory note as holder in due course from Home Craft Contractors Ltd. (hereafter referred to as Home Craft). Prior to that action, the defendants had obtained a default judgment against Home Craft rescinding the contract on the basis of the fraudulent and wilful misrepresentations of the defendants. Munroe, J., noted that the plaintiff had furnished Home Craft with the necessary printed forms and that it was arranged in advance that assignments would be made to the plaintiff. He also noted that the plaintiff knew the *modus operandi* of Home Craft. Although Munroe, J., expressly adopted the "close connection" reasoning of Kelly, J.A., in the *St. Pierre* case; it is clear that he found actual bad faith on the plaintiff's part such as fell within Lord Herschell's test as set out in the *Simmonds* case.[49]

In *Citizens Finance Co.* v. *Sanford*,[50] Morand, J., noted that the plaintiff supplied all the necessary forms and was financing all, or nearly all, of the motor vehicles sold; that it was, in addition, conducting the credit survey on the purchases; and that it had opened up an office which would not have been opened had it not been for the volume of business received from th assignor. His Lordship relied on the "close connection" test, as set out in the *St. Pierre* case, and denied the plaintiff the status of a holder in due course. He did not mention anywhere in his judgment that the plaintiff had acted in "bad faith," and so seems to give approval to Mr. Justice Kelly's reasoning in the *St. Pierre* case.

In *Prudential Finance Corp.* v. *Kucheran*,[51] in an action by the plaintiff on a promissory note, the defendants claimed that the vendors' sales agent had orally represented that they were entitled to rescind the contract and return the goods if not satisfied therewith. The Court held the plaintiff to be a holder in due course, as the defendant had been given notice in the clear and express terms of the contract that the note was to be assigned to the plaintiff and that the plaintiff was not to be affected by any equities which might exist between them and the vendor.[52] Schroeder, J.A., when invited to apply the *St. Pierre* case stated:

> There is no evidence on the record establishing such a close and intimate relationship between the vendor and the plaintiff *as to fix the plaintiff with knowledge* of the alleged collateral agreement made between the salesman and the defendants and to preclude the plaintiff from claiming as a holder in due course . . . . I would observe that the learned trial judge did not make any finding which would call for the application of the principle applied in that case (*St. Pierre*) on its *peculiar* facts.[53]

His Lordship appeared to apply a subjective test to determine what constituted a good-faith purchase.

In *Traders Finance Corporation* v. *Edmonton Airport Co.*[54] Riley, J., cited *Benjamin* v. *Weinberg*[55] and *Jones* v. *Gordon*,[56] as setting out the

48 (1963), 43 W.W.R. (N.S.) 108 (B.C.).

49 [1892] A.C. 201.

50 [1964] 1 O.R. 573.

51 (1964), 45 D.L.R. (2d) 402 (Ont. C.A.).

52 Applied in *Union Acceptance Corp. Ltd.* v. *St. Amour*, [1957] O.W.W. 261, 8 D.L.R. (2d) 2.

53 *Ante*, n. 52, at 405 [emphasis added].

54 (1964), 49 W.W.R. (N.S.) 56.

55 [1956] S.C.R. 553.

56 [1876-77] 2 App. Cas. 616.

test for notice. He then stated:

> While there is much in counsel's detailed examination of the evidence to excite suspicion, and while the conduct of Fleming Padlar [the vendor] was certainly not above reproach . . . , I am of the opinion that the plaintiff is a holder in due course of the note and I accept the evidence of the plaintiff's witness, Mitchell, that nothing was known about any discussions that were going on between Fleming Pedlar and the defendants.[57]

Riley, J., was invited to apply the *St. Pierre* case but made no mention of it other than in passing.[58] He chose, instead, to follow the traditional view as expressed in *Benjamin* v. *Weinberg*;[59] and looked to the evidence to determine whether the facts were such that the plaintiff had actual bad faith.

In conclusion, it is suggested that the *St. Pierre* case has been limited to its factual situation by these subsequent decisions, and that the "close connection" doctrine as laid down by Kelly, J.A., is not in accordance with the manifest legislative intent as set out in the Bills of Exchange Act.[60] A "close connection" between the finance company and the dealer is not in itself sufficient to prevent the finance company from becoming a holder in due course; it must be established by evidence that the finance company acquired the instrument with "actual notice" or "bad faith," as required by the Bills of Exchange Act.[61] If it is thought necessary to increase the protection afforded the consumer by identifying the seller and the finance company, it is submitted that legislation is the only sound solution.[62] Nothing but uncertainty can arise out of an encroachment upon statutory provisions by judicial decisions.

ARNOLD McMILLAN*

57 *Ante*, n. 54, at 63.

58 *Id.* at 61.

59 *Ante*, n. 56.

60 *Ante*, n. 5.

61 *Ibid.*

62 For problems relating to legislative reform in Canada, see Feltham, *Retail Instalment Sales Financing* (1962), 40 Can. B. Rev. 461, 484-85; Harris, *Canadian Reactions to the Uniform Commercial Code* (1962), 11 Amer. J. Comp. L. 302.

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