NOTES

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EXEMPTIONS—SEIZURE UNDER CHATTEL MORTGAGE—CLAIM TO EXEMPTION—ONUS OF PROOF—EXEMPTIONS ACT, R.S.A. 1955, c. 104, S. 4(1)

The rule laid down in the judgment of Buchanan, C.J.D.C., in *Re Seizures Act; Re Exemptions Act; Re Seizure of Rodi* (1959-60), 30 W.W.R. 229, to the effect that in an application for an order for removal and sale of chattels seized under execution, the onus of proving that the chattels are not exempt is on the creditor, has been regarded by many as applying also to seizures under chattel mortgages. That this is not the case is made clear by the judgment in *Re Seizures Act; Public School Employees Savings and Credit Union Ltd.* v. *Haluschak* (1964), 49 W.W.R. 504.

In the latter case a chattel mortgagee caused the sheriff to seize, under a mortgage, certain household furnishings. On an application by the mortgagee for an order directing the sale of the items of furniture, neither side produced satisfactory evidence as to their value. Counsel for the mortgagor relied on the 1959 judgment of Buchanan, C.J.D.C., and argued that the application should be dismissed, since the mortgagee, on whom the onus rested, had failed to prove that the goods in question were not exempt. His Honour Judge Cormack distinguished that case on the ground that its *ratio decidendi* dealt only with seizures under writs of execution, and held that the order should be granted. In such cases, he reasoned, there is an absolute exemption provided for in section 2 of the Exemptions Act, R.S.A. 1955, c. 104; whereas, under section 4 of the Exemptions Act, which applies to seizures under chattel mortgages, there is only a "right to claim" an exemption, and a mortgagor can only exercise this right by proving to the satisfaction of the Court that the goods are exempt.

This decision, it is submitted, is more in keeping with the principle that the onus of proof should rest on the party who has the facts particularily within his knowledge. Furthermore, although the Exemptions Act was designed to protect debtors from undue hardship, surely it does note create an undue hardship to require an execution debtor to claim and prove an exemption.

A second point was clarified by the judgment in the *Credit Union* case. It was argued on behalf of the mortgagee that where the aggregate value of his furniture exceeds $1,200.00 the debtor could not raise the exemption at all or, in other words, that he loses his whole exemption and not merely the value in excess of $1,200.00. The case relied upon to support this

contention was *Re Exemption and Seizures Act; Re General Steel Wares Ltd.* (1956-57), 20 W.W.R. 215, in which it was held that an automobile of a value in excess of $1,500.00 was not exempt within the meaning of section 2(f) of the Exemptions Act. This case was distinguished on the ground that section 2(f), dealing with automobiles, contained the words "not exceeding fifteen hundred dollars"; whereas, section 2(b), dealing with household furnishings, contained the words "to the value of one thousand, two hundred dollars". His Honour concluded that in cases where the aggregate value of the furniture forming the subject matter of the application exceeds $1,200.00, the first $1,200.00 worth of furniture is exempt.

An interesting question which arises from the judgment is whether the mortgagor must produce evidence to the effect that the household furnishings forming the subject matter of the mortgage, and seized thereunder, plus all his other furnishings, in total, do not exceed $1,200.00 in value in order to be entitled to an exemption with respect to the seized goods, or need merely prove that the items under seizure do not exceed $1,200.00 in value?

THE ALBERTA INSURANCE ACT, R.S.A. 1955, c. 159—STANDARD GARAGE POLICY S.P.E. No. 4A—ENDORSEMENT S.E.F. No. N-72-REVISED—WHETHER OWNER'S POLICY

An interesting question concerns the effect of attaching a Blanket Additional Interests Endorsement S.E.F. No. 72-N-Revised to a Standard Garage Automobile Policy S.P.E. No. 4A. The blanket endorsement reads:

> In consideration of the premium herein stated, it is hereby understood and agreed that paragraph (b) of Item 1 of the General Provisions of the Policy to which this endorsement is attached is amended to read as follows:
> (b) any person while personally driving with the consent of the Insured, any automobile owned by the Insured, provided however that such person is not insured by any other valid motor vehicle liability policy whether as a named insured or otherwise.

Paragraph (b) of Item 1 of the General Provisions of the Standard Garage Automobile policy S.P.E. No. 4A, before amendment, read:

> (b) Every partner, executive officer or employee of the Insured engaged in the business described in Item 1 and 2 of the application, and the spouse of each and the spouse of the Insured, while personally driving for pleasure purposes and with the consent of the Insured, any automobile owned by the Insured.

Assuming that Endorsement S.E.F. No. N-72-Revised operated by way of substitution for Item 1(b), and not in addition to same, what is the position as between two Insurance Companies, given the following set of facts. John Doe leaves his automobile for repairs with X Garage Co., which provides him with a temporary substitute automobile within the definition of same in Standard Automobile Policy S.P.E. No. 1. As a result of an accident while driving the substitute automobile, John Doe incurs liability to third persons. At all materials times John Doe is the owner of a Standard Garage Automobile Policy S.P.E. No. 4A with Endorsement S.E.F. N-72-Revised. The automobile in question is specifically mentioned in the garage policy. As between the Insurance Companies, who is liable and in what proportion?

Section 300 (2) of the Alberta Insurance Act[1] states:

> Insurance under a valid owner's policy is, as respects the liability, use or operation of the automobile specifically described in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle policy is excess insurance only.

It will be noted that the above section refers to the "automobile specifically described in the policy." Although the automobile driven by John Doe was a temporary substitute automobile covered by John Doe's insurance policy, it was not specifically described therein.

Is the garage policy with the endorsement an owner's policy? Section 278 (f) of the Alberta Insurance Act states that

> 'Owner's policy' means a motor vehicle liability policy insuring a person named therein in respect of the ownership, operation or use of any automobile owned by him and specifically described in the policy and, in respect of the ownership, operation or use of any other automobile that is within the definition thereof appearing in the policy.

Any garage policy may well come within this definition. However, regard must also be had to section 293 (1) of the Alberta Insurance Act:

> Every owner's policy shall insure the person named therein, and every other person who, with his consent, personally drives any automobile specifically described in the policy, against the liability imposed by law upon the insured named therein or upon any such other person for loss or damage.
> (a) arising from the ownership, use or operation of any such automobile within Canada, the continental United States of America or Alaska, or upon a vessel plying between ports thereof, and
> (b) resulting from
> (i) bodily injury to or death of any person
> (ii) damage to property, or
> (iii) both.

It is submitted that the above provision, which is loosely called the "omnibus clause," must be included in any policy before the same can be construed as an owner's policy. Endorsement S.E.F. No.-72-Revised, it may be argued, makes the garage policy an owner's policy. It is submitted, however, that the proviso on the endorsement denying coverage to a person who is insured by any other valid motor vehicle liability policy is sufficient to take the garage policy out of the category of an owner's policy; and that, therefore, the garage policy ceases to be first-loss insurance.

If that is true, then neither John Doe's insurance policy nor X Garage Company's garage policy is first-loss insurance. The garage policy insures X Garage Company, but does not insure John Doe, because he is insured under his own policy. Accordingly, if liability is shared *pro rata* between the two insurance companies, the X Garage Co. insurer has the right to seek indemnity from John Doe; and, since John Doe's insurer must indemnify him, in the result John Doe's insurer must provide indemnity for the third party claim.

1 R.S.A. 1955, c. 159.

CONFLICTS OF LAW—FOREIGN JUDGMENT FOR DIVORCE AND MAINTENANCE—DIVORCE GRANTED WITHOUT JURISDICTION —WHETHER JUDGMENT FOR MAINTENANCE ENFORCEABLE IN ALBERTA

In the recent case of *Donnelly* v. *Donnelly* (unreported) before the Honourable Chief Justic C. C. McLaurin, there arose the question of whether a plaintiff wife who had obtained a Colorado divorce and a judgment for maintenance could sue in Alberta on the judgment for maintenance. The plaintiff and defendant were married in Saskatchewan, and there was no doubt that, at the time the plaintiff's action was commenced in Colorado, the husband was not domiciled in that state. The defendant husband was born in Saskatchewan and lived in that province until July of 1961, when the entire family moved to Colorado. The move was made primarily because of employment opportunities with an investment company, and it was also thought that a change of environment would ease growing tensions between the couple. The defendant's employment opportunities did not turn out as planned and the home situation got worse; so, in November, 1961, the defendant returned to Saskatchewan. In February, 1962, the defendant moved to Alberta and was a resident of that province when the wife commenced her action in Colorado.

The plaintiff brought the action in Colorado in September, 1962, claiming a divorce, maintenance for the five children of the marriage, and costs. The defendant was forwarded a copy of the process at Edmonton by mail, and was also served with process in Alberta by the Sheriff's Bailiff. In an endeavor to salvage a crumbling family relationship, the defendant went to Denver in March, 1963, and within 24 hours was personally served there with a copy of the plaintiff's claim. The defendant consulted no local attorney and made no appearance whatsoever in the proceedings. The Colorado Court granted the divorce; and, after a two week adjournment, gave the plaintiff judgment against the defendant in the amount of $2,136.50, the amount that the court found was required by a support agreement entered into by the parties in November, 1961.

The plaintiff commenced an action in Alberta on that Colorado judgment, and Chief Justice McLaurin dismissed her action. It was held that, since the defendant was not domiciled in Colorado at the time of the action, the foreign court had no jurisdiction to dissolve the marriage; and, accordingly, the Colorado divorce was invalid in Alberta. It followed that the judgment for maintenance, being ancillary to the decree of divorce, was also invalid, and the action failed. The reasoning followed was to the effect that the court ordered maintenance only because it had ordered a divorce. There was only one action before the court, and that was an action for dissolution of the marriage. The claim for maintenance was only ancillary to the primary claim; and, if the decree for dissolution of marriage was made without jurisdiction, the order for maintenance fell with that decree.[1]

1 *Papadopoulos* v. *Papadopoulos*, [1930] P. 55; *Simons* v. *Simons*, [1939] 1 K.B. 490; *Casavallo* v. *Casavallo* (1911-12), 1 W.W.R. 212 (S.C. Alta.).

It must be remembered that the plaintiff wife could not bring herself within any of the remedial statutes relating to this area because the state of Colorado is neither a reciprocating state within our Reciprocal Enforcement of Maintenance Orders Act[2] nor a reciprocating jurisdiction within our Reciprocal Enforcement of Judgments Act.[3] The only course open to her in Alberta was to sue on the foreign judgment.

An interesting point raised by Chief Justic McLaurin in his case concerned the effect of the defendant being personally served within the state of Colorado. In *Casavallo* v. *Casavallo*, Scott J., stated that

> It appears to be clear that, notwithstanding the fact that the defendant was a British subject and not residing in the state of Washington, if the Court referred to had jurisdiction over the subject matter of the action, it also had personal jurisdiction over him by reason of the fact that he was personally served with process in this action within its territorial jurisdiction.[4]

In that case, the subject matter of the action was divorce; and, since the defendant was not domiciled in the state of Washington, the foreign court had no jurisdiction over the subject matter. Accordingly, the matter of personal service within its territorial jurisdiction was not relevant.

In *Donnelly* v. *Donnelly*, what would have been the situation, had the wife sued in contract on the maintenance agreement? Chief Justice McLaurin was not certain that personal service within the foreign court's territorial jurisdiction would grant the foreign court personal jurisdiction over the defendant. Although that seems to have been the view of Scott, J., in *Casavallo* and of Falconbridge,[5] yet it could be argued that personal service of process within the territorial jurisdiction is not of itself enough to give the foreign court such personal jurisdiction over the defendant as our courts will enforce.

In *Matter* v. *Public Trustee*,[6] the Appellate Division of the Supreme Court of Alberta upheld McLaurin, J., (as he then was) in his dimissal of an action against a judgment debtor because the latter did not come within any of the catagories which must exist in order to render a foreign judgment enforceable. The learned trial judge followed *Emanuel* v. *Symon*,[7] where Buckley, L.J., stated:

> In actions *in personam* there are five cases in which the Courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; (5) where he has contracted to submit himself to the forum in which the judgment was obtained.[8]

It will be noted that personally serving the defendant within the territorial jurisdiction is not one of the five situations listed. It could perhaps fall into catagory number (4), that is, where the defendant voluntarily appeared; but it is submitted that a voluntary appearance is much more than merely being served within the territorial jurisdiction. It is submitted that a voluntary appearance refers to an appearance in

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2 (Alta.) 1958, c. 42.
3 (Alta.) 1958, c. 33.
4 *Ante*, n. 1, at 215.
5 *Essays on the Conflict of Laws* 613 (2nd ed. 1954).
6 (1952), 5 W.W.R. (N.S.) 29.
7 [1908] 1 K.B. 302 (C.A.).
8 *Id.* at 309.

the proceedings either by way of entering pleadings, or engaging counsel, or appearing in person at the proceedings and presenting one's case.

It would therefore appear that it is still open to argument that a foreign judgment will not be enforced in Alberta even where the foreign court had jurisdiction over the subject matter, in cases in which the defendant did not submit himself to the jurisdiction of the foreign court, even though he was personally served within its territorial jurisdiction.

CLAY AND MARL LEASES—SEARCHING TITLE THERETO—CLAY and MARL ACT, (ALTA. 1961), C. 14.

The Clay and Marl Act was passed by the Alberta Legislature in 1961 to declare and confirm that clay and marl belong to the surface rights owner and that such had always been the case. Prior to the passing of this Act, clay and marl in some cases had been treated, by the Crown at least, as a mineral, and the Crown had granted leases covering the production of clay and marl from lands in which there was a reservation of mines and minerals to the Crown.[1]

The Clay and Marl Act covers both Crown leases of clay and marl, under which the Crown owns the mineral rights, and private clay and marl leases, under which private individuals own the mineral rights. The Act, by sections 5 and 6, validates and protects such past and current leases, and purports to protect the Crown and individual clay and marl lessors and lessees from liability to an action for damages by a surface rights owner.

Since it is not the practice to caveat the Crown's mineral interest when leases are obtained from the Crown, the Crown clay and marl leases prior to the Clay and Marl Act were not caveated. But, since the Clay and Marl Act declared clay and marl to be part of the surface rights, it follows that, when the Crown owns the mineral rights, a surface owner's title could become subject to a caveat by a clay and marl lessee who holds from the Crown. The writer knows of one such Crown lease where, for one reason or another, the lessee has not yet caveated the surface title. Since there well could be other such cases, it is the purpose of this note to point out this possible pitfall to the unwary. One simply cannot rely solely on the register to determine all of the claims against a surface title.

Some of the existing Crown clay and marl leases still have 20 to 25 years to run. They have been validated by section 5 of the Clay and Marl Act, and some of them cover areas of the Province in which the clay and marl deposits may not yet have been actively worked. These leases carry a nominal annual rental, but no "produce or forfeit" provision, and so may be let dormant by the lessee for most or all of the lease term. When mineral rights for a parcel of land are reserved to the Crown, a cautious solicitor, in addition to his search at the Land Titles office, must, therefore,

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1 There may be instances in Alberta where individuals who owned the mineral rights have granted clay and marl leases, but the writer has not researched this aspect of the problem created by the Clay and Marl Act. It is submitted, however, that in such circumstances a trap similar to that hidden under Crown leases could exist for an unwary purchaser or solicitor.

search the Crown mineral leases at the Mines and Minerals Department for a possible current Crown clay and marl lease that is not caveated against the surface title before he can safely advise a prospective purchaser of the surface rights.

Even where mineral rights in a parcel are reserved to someone other than the Crown, it would seem to be a wise course to search the mineral title and register to see if an existing clay and marl lease has been granted by the mineral rights owner prior to the Clay and Marl Act. If so, it could well be that such lease was caveated against the mineral title or interest, but not yet against the surface title. This warning, of course, would apply anywhere in Alberta where the surface rights and the mineral rights have been severed, but it especially applies in the Edmonton area where at least one such case now exists in fact.[2]

2 As to payment of royalties collected under a Crown lease see the *Clay and Marl Crown Leases Act*, introduced at the 1965 session of the Legislature. Note, also, in this general area, *Re Imperial Cement Ltd.* (1964), 45 D.L.R. (2d) 104.