NOTES

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CHATTEL MORTGAGES — INTERPLEADER — PRIORITIES OF CLAIMS TO FUNDS FROM SALE OF CHATTELS — CHATTEL MORTGAGEE WITH OTHER SECURITIES SUFFICIENT TO SATISFY INDEBTEDNESS — APPLICATION OF DOCTRINE OF MARSHALLING OR CONTROLLED ELECTION

A case of considerable interest to execution creditors is a recent decision, *Lang-Hodge* v. *Parkhill Bedding,* which arose on an Interpleader to determine various claims and priorities to funds in the hands of a Sheriff as the result of a seizure and sale of certain chattels under writ of execution.

One of the major claims was advanced by the Provincial Treasury Branch as chattel mortgagee of, *inter alia,* some of the goods which had been sold to produce the fund. The evidence established that the chattel mortgagee had a number of other securities to which it could have resorted, and the other securities were more than sufficient to satisfy its indebtedness.

The execution creditors were not secured and would receive little, if anything, if the chattel mortgagee successfully maintained its priority. In the circumstances the learned Judge invoked the equitable doctrine of marshalling or controlled election, and compelled the Treasury Branch to look to its other securities. The learned Judge said, "The judgment creditors, by their judgment, have a charge upon the estate of the debtor as mentioned herein, which qualifies them for the benefits of marshalling . . . The doctrine applies only where there is a claim which has advanced to a position of a charge or encumbrance against the fund which is encumbered or charged by a creditor having security elsewhere." The larned Judge cited *Aldrich* v. *Cooper,* (Ch. 1803) 8 Ves. Jun. 382, 394-95; 32 E.R. 402, 407; and *Webb* v. *Smith,* (C.A. 1885) 30 Ch.D. 192, 200. In the result the Treasury Branch was compelled to resort to its other security. In a case of marshalling, in the strictest sense, the Treasury Branch would be required to make its other securities available for the secured creditors. It is to be noted that the remedy is only available where the person who seeks to force his application has a charge or encumbrance on the property or fund.

This decision could be usefully applied in many other circumstances, and it is of interest because it is unusual to see the doctrine used when estates of deceased persons are not involved, although it is clear that the principle is not limited to such cases. *Williams on Executors and Administrators* 1004 (14th ed. 1960). The doctrine is sometimes called controlled

election, whereas marshalling is applied to the rule allowing the party with two or more funds available to him to choose as he pleases, but requiring him to bring in his other securities. The principle is often applied in mortgage applications.

CRIMINAL LAW — MOTION FOR DISMISSAL OF CHARGE AT CLOSE OF CROWN'S CASE — CONDITIONS JUSTIFYING DISMISSAL

Young counsel sometimes fail to asses their clients' position carefully at the end of the prosecutor's presentation of evidence in a criminal trial. As that is a crucial moment of the trial, counsel should not rush on to the next step without a most careful consideration and weighing of the evidence already adduced and its relation to the essential ingredients of the crime charged.

There are, of course, two possible avenues open, for counsel may either ask for a dismissal of the charge at the end of the Crown's case, or may proceed to call evidence for the defence. But there is only one instance in which he may properly ask for a dismissal and still retain his right to adduce evidence for the defence. As was laid down by the Supreme Court of Canada in *R.* v. *Morabito* (1949) 93 C.C.C. 251 and in *Feeley* v. *The Queen* [1953] 1 S.C.R. 354, a trial judge may withdraw a case from the trier of fact only on the ground that there was *no evidence* on which a properly instructed jury, acting reasonably, *might* have convicted the accused. That is to say, the Crown cannot be *non-suited* at the end of its case, unless it has failed to adduce, in relation to at least one of the essential ingredients of the crime charged, *any* evidence from which the trier of fact *might,* acting reasonably, have inferred the existence of that essential ingredient. Counsel for the defence cannot ask for a dismissal of the case on the ground that the Crown has failed to prove its case beyond all reasonable doubt without first electing (s. 558(1) of the Criminal Code) not to call evidence for the defence. The question of proof beyond reasonable doubt is a question of fact which cannot be withdrawn from the trier of fact (be it judge or jury). In summary, the two proper courses of action open to the accused at the end of the Crown's case are as follows:

1) Where his counsel believes that there was *no evidence* on which a properly instructed jury, acting reasonably, might have convicted the accused, he may ask for a dismissal on that ground, and still reserve the right to elect to call evidence in defence if dismissal is not granted;
2) but where counsel believes that the prosecution has adduced relevent evidence on all the essential ingredients of the crime, he *must* elect, under s.558 (1) of the Criminal Code either
   (a) to rest his case and ask for a dismissal of the charge on the ground of failure to prove the charge beyond all reasonable doubt, or
   (b) to call evidence in defence.

It is hoped that young counsel will keep these points in mind in assessing their clients' position at the crucial stage of the trial, and will

take care in plotting their course of action. In such matters time is not of the essence, and if necessary, counsel should not hesitate to ask for a brief adjournment. It is certain that the presiding judge or magistrate will grant the needed time.

DIVORCE ACTION UNDEFENDED — PAYMENT OF COSTS BY DEFENDANT WIFE — COLLUSION — THE LAW IN ALBERTA AND IN OTHER WESTERN PROVINCES — THE PRACTICE FOLLOWED IN ALBERTA COURTS

The decision of the Appellate Division of the Supreme Court of Alberta in the case of *Shaw* v. *Shaw* [1944] 2 W.W.R. 243 has created a problem in the eyes of the legal theorist which seems to have been overcome by the practice generally followed by the Trial Division of the Supreme Court. Simply stated, the facts in the *Shaw* case were that the wife agreed to pay the costs of a divorce action if her husband would commence such proceedings against her. The grounds for the divorce (adultery) had existed long before this agreement and there were no collusive arrangements in this respect. These facts were presented openly to the Trial Division of the Supreme Court which promptly dismissed the action. The Appellate Division dismissed the subsequent appeal stating that such action on the part of the respondent—wife in agreeing to pay her husband's costs amounted to collusion.

The decision met with rather strong criticism in other provinces' superior courts; and, in the Manitoba case of *Dutko* v. *Dutko* [1946] 3 W.W.R. 295, 330, it was flatly stated that *Shaw* v. *Shaw* ". . . ignores the trend of English decisions . . . and is contrary to most of the leading cases in Canada".

The essence of the difference in judicial outlook lies in the fact that the other courts regard collusion as a corrupt agreement between the parties for the purpose of enabling one of them to obtain a divorce either

1) by committing a matrimonial offence by arrangement, or

2) by fabricating evidence of an offence not committed, or

3) by falsifying or suppressing evidence material to a valid defence,

thereby misleading the Court. It is clear that the courts will not consider the mere fact that a respondent has failed (for reasons of his own) to defend the petition as being indicative of an attempt to falsify or suppress material facts: *Churchward* v. *Churchward* [1958] P. 7, 20. It is difficult to understand how an agreement by one of the parties to pay the costs, to enable the other to bring divorce proceedings for what would otherwise be a good action can by itself be any more misleading to the divorce court than is the fact, taken alone, that no defence to the petition is presented. Whether the respondent be the husband or the wife, the fact of an agreement as to payment of costs, when openly disclosed to the court and where the commission of adultery by the respondent is clearly made out, is innocuous.

Unfortunately, it would seem that the die has been cast in Alberta. Although two subsequent cases have come to a result opposite to that in *Shaw*, that case is, theoretically at least, still the law of this province.

In *Armstrong* v. *Armstrong* (1951) 2 W.W.R. (N.S.) 332, the Appellate Division of the Supreme Court of Alberta granted a decree *nisi* even though one of the parties had agreed to transfer property to the other in return for the bringing of a petition for divorce. But in that case, it was the husband, and not the wife, who had agreed to grant financial consideration for the bringing of a petition. Then in *Bell* v. *Bell* (S.C. Alta. 1957) 21 W.W.R. (N.S.) 126, Wilson J. stated that after considering the *Shaw* and *Armstrong* cases, he preferred to follow the latter, and granted a decree *nisi*. However, the facts in *Bell* paralleled not the *Armstrong* case, but the *Shaw* case, for in *Bell* it was the wife who, as respondent, had agreed to pay the costs. It would appear, in view of the binding effect (under the *stare decisis* doctrine) of the Appellate Division's decision in *Shaw*, that *Bell* v. *Bell* was wrongly decided. Thus, given (1) that *Shaw* v. *Shaw* is binding on the Appellate Division and the Trial Division of the Supreme Court of Alberta, and (2) that *Armstrong* v. *Armstrong* is clearly distinguishable from the Shaw case on its facts, then it would be fair to conclude that, despite *Bell* v. *Bell*, whenever a respondent husband agrees to pay the costs so that his wife may commence a divorce suit against him, the action is barred on the grounds of collusion.

Since such an arrangement is not uncommon, how does the Trial Division circumvent the binding effect of *Shaw* v. *Shaw*? Apparently most justices simply ignore the decision. It would seem that there has been a recognition of the fact that the *rationale* behind the *Shaw* decision is questionable, although the case is binding. Thus, whenever the situation presented in that case arises (and barristers are prompt to disclose any such arrangement to the Court) most justices of the Trial Division apparently continue as though *Shaw* v. *Shaw* no longer existed. So for all practical purposes, it does not.

CRIMINAL LAW — CRIMINAL CODE, S. 223: IMPAIRED DRIVING — PHYSICAL TESTS FOR INTOXICATION APPLIED BY POLICE — EXTENT OF TESTS REQUIRED TO PROVE IMPAIRMENT BEYOND ALL REASONABLE DOUBT

What evidence will constitute proof beyond all reasonable doubt that the driving ability of a person accused under section 223 of the Criminal Code was impaired by alcohol? It would appear, from the decision of His Honour Chief Judge Buchanan in the unreported case of *R.* v. *Dartnell*, that evidence of a general outward appearance of drunkenness, plus evidence of inability on the accused's part to perform satisfactorily two of the simple physical tests commonly administered by the police to suspected driving infractors, is not enough to constitute adequate proof.

In that case, the police officers who arrested the accused testified that, when detained, the accused's breath smelled of liquor, his eyes were "glassy", his face was flushed, and he was unsteady on his feet. They gave evidence that, when asked to walk a distance of fifteen feet, the accused staggered and bumped against one of them, and that, when asked to stand on one foot, he was unable to do so. There was no evidence of anything irregular or unusual in his actual driving.

Buchanan, C.J.D.C., in holding that the evidence adduced as to impairment was not adequate to prove the Crown's case, stated that,

> . . . The very greatest care must be taken that the drinker is fairly dealt with and that the tests are ample enough, adequate enough, to form a basis for a decision on the part of the court.

He referred to the long list of tests sometimes employed by the police, such as asking the accused driver to stand on one foot or to stand on tiptoes with eyes closed, and said,

> I think that it is wise that the police should use as many tests as possible. On this occasion the standing-on-one-foot test was made, . . . a doubtful test, because many people have no sense of balance at all, and, drunk or sober, impaired or otherwise, never can stand on one foot. The walking test was made; the appellant didn't pass; the defence in that regard was that . . . the appellant . . . had no rubbers on at the time, that winter, icy conditions prevailed, and hence the appellant's inability to negotiate the icy sidewalk.

He concluded that it was regrettable

> . . . that the police did not give the appellant far more extensive tests than they did. There were no tests, at least no evidence of any tests, at the police station after the appellant had been placed under arrest. I recommend to the police that these tests should be much more extensive in number and variety.

WILLS — EFFECT OF DISCLAIMER BY LIFE TENANT — ACCELERATION OR POSTPONEMENT OF DISTRIBUTION — VESTED REMAINDER INTEREST SUBJECT TO DIVESTMENT

A life interest given by will may be interrupted prior to the death of the life tenant by, *inter alia,* either a disclaimer (as in *Re Bogstie Estate* (1963) 42 W.W.R. 702), or by election (*Re Thorvaldson Estate* (1951) 1 W.W.R. (N.S.) 499), or by the gift of the life estate being void by operation of law (*Jull* v. *Jacobs* (1876) 3 Ch. D. 703, where the life tenant was one of the attesting witnesses). What is the result? Three answers are possible:

1. Is there a complete acceleration of the remainder, i.e., is the effect the same as though the life tenant had actually died, so that the remainderman is then found to have absolute vested interests, which are then indefeasible; or

2. Is there only a partial acceleration, so that the property is held upon trust for the remaindermen, who have a vested interest in possession immediately upon the determination of the prior life estate, subject to being divested should the remaindermen die before the date of death of the life tenant; or

3. Is there an intestacy as to the income for the remainder of the lifetime of the tenant?

These questions arose for determination in the recent case of *Re Bogstie Estate, supra,* where the testator's will, dated June 23, 1952, provided that the entire interest in one-third of his estate plus a life estate in the remaining two-thirds should pass to the widow; and that, upon the widow's death, the two-thirds should pass in equal shares to the testator's children. The time of vesting of the shares in the children was stated to be "at my death". However, a further clause provided that if any child of the testator should predecease the testator or his wife,

leaving issue, then the child's share should pass to the issue in equal shares, and, failing issue, to the surviving children equally. There was no residuary clause.

The Testator died December 28, 1953, survived by his widow and seven children, all of whom were living on March 30, 1963, when the widow by deed of disclaimer disclaimed her interest in the life estate only. The executors applied by originating notice of motion for the opinion, advice and direction of the Court under the Trustee Act for the answer to the above questions.

McLaurin C.J.T.D., following *Re Taylor* (Ch.D.) [1957] 1 W.L.R. 1043, [1957] 3 All E.R. 56 adopted the second of the solutions given above. He found that the vested remainder shares of the children were defeasible in the event the children should die before the widow. In the result, he held that distribution must be postponed until the widow's death; and that the effect of the disclaimer was to give a life estate from the date of the disclaimer until the widow's death to the children of the testator, such life estate subject to being divested, and vested in their issue or the surviving children if any such child should predecease the widow.

It would appear, from a review of the earlier cases by Upjohn J. in the *Taylor* case, that the matter is principally one of construction of the will in question in each case. That learned Justice asid (at p. 58 All E.R.):

> It is, I think, made clear by the observations of Chitty, J., in *Re Townsend's Estate* v. *Townsend* (1886) 34 Ch.D. 357 that if at the time of the determination of the prior estate, whether it be by disclaimer, or because the person to whom the will purports to give it witnessed the will or for any other reason, the gifts following on that estate are still contingent, it cannot be seen whether they will take effect. Income cannot be accumulated pending the contingency, for, by giving away the life estate, the testator has evinced an intention against accumulation, and therefore necessarily the income must remain undisposed of, at all events until the contingency following on the life interest happens.

In the *Taylor* case, as in *Bogstie Estate,* the gift to the remaindermen was initially vested in interest at the testator's death but, from the wording of the will, was clearly liable to be divested upon the happening of certain events. For example, if the remaindermen died in the lifetime of the life tenant leaving issue, then such issue would take at the date of death of the life tenant; and if one of the remaindermen died without leaving issue, his interest in the remainder would pass to the surving children. Thus, the vested gift of the remainder was to such a class or to such persons as could not be ascertained until the arrival of a future time—the time specified in the will, which was the date of the death of the life tenant. The case was therefore distinguishable from those cases in which all of the persons who take the vested interest in the remainder are ascertainable at the date of death of the testator (i.e., where there are absolute vested remainders). It is only in the latter case that the principle of acceleration can be applied in the event of the prior determination of the life estate by disclaimer or otherwise.

It is true that, where a proper case for acceleration arises, the effect of the acceleration "may and does sometimes alter the constitution of a class of beneficiaries from what it would have been if the gift had not been accelerated". *Re Davies Estate* [1957] 3 All E.R. 52, 54. Nevertheless, the *rationale* of the cases where acceleration was applied is that

the gift of the remainder vests in interest absolutely on the death of the testator. Acceleration cannot be applied where, as in the *Bogstie* and *Taylor* cases, the remainder vested at the date of death, but was capable of being divested on the happening of certain events prior to the date of death of the legatee of the life estate.

The test in all cases must be, what is the true construction of the will, such construction to be made without doing violence to the language of the testator. "The principle of acceleration . . . does not permit one to misconstrue the Will in order to give effect to the doctrine . . ." The *Taylor* case, *supra,* at 1048.

Therefore the practitioner, when drafting wills granting a life estate, should use words which clearly convey the testator's intentions with respect to the remainder in the event of the failure or determination of the life estate prior to the death of the life tenant.

CONTRACTS — REAL PROPERTY — OPTIONS OF UNDETERMINED DURATION — RULE AGAINST PERPETUITIES

A recent Saskatchewan decision, *Yates Investment Co.* v. *Willoughby,* (Sask. Q.B. 1964) 46 W.W.R. 499, casts a shadow on the validity of many options for the purchase of land. The option in question there contained no time limit for its exercise, and so was held by the court to be exercisable beyond lives in being and twenty-one years, and therefore void *ab initio.* Unfortunately, however, although the court referred to Morris and Leach, *The Rule Against Perpetuities* (2d ed. 1962), the exceptions to the rule as it applies to options were ignored.

In the first place, it has been held in Saskatchewan that an option of unstated duration is to be interpreted as being binding only for a reasonable time, not for all eternity. *McAlester Can. Oil Co.* v. *Petroleum Eng. Co.* (Sask. C.A. 1958) 25 W.W.R. 26, following a *dictum* of Idington J. in *Davidson* v. *Norstrant* (1921) 61 S.C.R. 493, 504. It is doubtful that this reasonable time would exceed lives in being and twenty-one years.

Secondly, Morris and Leach state at pages 221-22 that not only does the Rule have no application to suits for damages for breach of contract (as opposed to specific performance), but that it has no application whatever to either type of suit against the giver of the original option, even at the instance of the grantee's assignee. This latter rule was expressly affirmed by the Supreme Court of Canada in *Prudential Trust Co.* v. *Forseth* [1960] S.C.R. 210, 225-26, which was also a Saskatchewan case. The *rationale* for the latter two exceptions is that the Rule Against Perpetuities is not a rule of contract law, but a rule of property law. Therefore, it applies to the equitable estate in land created by the right to specific performance of an option for the sale of the land, but it has no effect whatever on the purely contractual rights created by the option.

Therefore, the *Yates* case appears to be a somewhat unreliable authority. In any event, such problems may easily be avoided in drafting future options by limiting the time of exercise of options to purchase to lives in being and twenty-one years, or some shorter period.