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AGENCY—REAL ESTATE AGENTS—DUTY OF AGENT TO DISCLOSE FACTS TO PRINCIPAL—LIABILITY TO PRINCIPAL FOR PROFITS DERIVED FROM POSITION AS AGENT

In the unreported case of *Kellough and Haliburton Limited* v. *Stanley and Stanley and Kuchinski*, Mr. Justice S. Bruce Smith of the Trial Division of the Supreme Court of Alberta (as he then was) delivered a judgment showing the fiduciary duties a real estate agent owes to his employer, and to the client on whose behalf he is acting.

One Kuchinski wished to sell two lots, and agreed with Kellough and Haliburton Limited that they should attempt to sell them for him and the firm obtained from him options to sell at what seemed to be a reasonable price. Stanley, an employee of Kellough and Haliburton Limited discovered a purchaser who was willing to pay more for the land than either of his employers or Kuchinski had thought the land likely to fetch. Stanley kept this knowledge from both parties, and as a result his employers let the options given by Kuchinski lapse. In the meantime Stanley obtained from Kuchinski new options in Stanley's own favor, for the same lower selling price. Stanley then resigned from Kellough and Haliburton Limited and then sought to enforce the option against Kuchinski, in order to gain the entire commission for himself, and to make a profit on the resale to the purchaser he had found.

Mr. Justice Smith (now Chief Justice of Alberta) held that as Stanley had broken his fiduciary duty to Kuchinski as his agent for the purpose of the sale, by not telling him of the better offer, specific performance should be refused to Stanley. The same result was reached because the contract was not equal and fair. (*Walters* v. *Morgan* (Ch. 1861) 3 De G.F. J. 718, 723, 45 E.R. 1056, 1059, *per* Lord Campbell L.C.) Kuchinski would not have signed the option had he known the true facts, and so Stanley's action against him was dismissed completely.

The court further held that Stanley by taking the second option for himself violated his implied obligation toward his employers to observe good faith. He would have been a trustee of any interest he gained from Kuchinski, but as specific performance was refused he had no such interest. On the other hand, Stanley was still liable to his employers in damages for his use to their detriment of the information he obtained in the course of his employment. The company let the option lapse and so lost the commission they would have earned on the sale, and this amount was awarded them as damages against Stanley.

INSURANCE—DRIVER'S POLICY—RESPONSIBILITY OF INSURANCE COMPANY FOR COSTS—SECTIONS 295, 297 AND 302 OF THE INSURANCE ACT.

The Appellate Division of the Supreme Court of Alberta in *Walenstein* v. *Stevenson* 36 D.L.R. (2d) 51 reversed the unreported decision of Mr. Justice J. V. A. Milvain in Chambers, which was the subject of a note in (1962) 2 Alberta Law Review 154. The insured had a judgment of $27,000, and costs of $1,800 awarded against him, but his insurer was not notified of or aware of the suit until after judgment was awarded, and consequently did not defend the action as the plaintiff claimed under s. 302 of the Alberta Insurance Act R.S.A. 1955 c. 195, am. 1958 c. 315-6. The insurer, The Allstate Insurance Company denied liability for the costs, contending they were liable only for damages, to the extent of standard limits.

However, it was held by Chief Justice S. Bruce Smith, Mr. Justice Kane concurring, that the words of section 297(2), that the statutory limits "are exclusive of interest and costs," means they are in addition to, "or beside, or as well as", the costs. It appears the purpose of this subsection is only to provide that the amount of the costs taxed shall not be included as part of the $25,000 damages which the insurer is liable to pay the plaintiff under the provisions of section 302; the purpose was not to prevent the insurer from being liable for any costs at all in the case where the insured has defended the action himself and failed to notify the insurer of the suit. As Mr. Justice Porter stated:

> . . . an examination of the words of s.297 will make it clear at once that the function of that section is to define limits not coverage. It requires that any insurance policy shall provide at least $10,000 [now $25,000] coverage and that in determining that minimum, costs and interest will not be included.

In this case the policy contained an express undertaking by the insurer to pay the insured's costs. In the light of this decision, does such a provision serve any purpose not already fulfilled by the Act?

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RECEIVERSHIP—CROWN EMPLOYEE—CONTRACT WITH THE CROWN—RULE OF PUBLIC POLICY

Will a receivership order be granted to restrain a person from receiving or otherwise dealing with any monies receivable by such person from the Federal Government?

The views in Alberta and Saskatchewan seem to differ on this point.

In *Boucher* v. *Viala* [1947] 2 W.W.R. 277, Hambridge D.C.J. of the Saskatchewan District Court directed the Sheriff to receive from the Crown the monies earned by the Defendant under his contract with the Postmaster General for the hauling and delivery of mail.

He accepted the statement of Boyd C. in *Kirk* v. *Burgess* (1888) 15 O.R. 608, 610:

> The question is not one of jurisdiction but of discretion, and if the Court sees that any good end will be served by appointing a receiver it will so order.

He further felt that the appointment of a receiver with regard to a debt owed by the Crown is not really an order against the Crown but

merely "operates as an injunction to restrain the Defendant from himself receiving the proceeds . . . "

At any rate the order was only given with respect to monies earned to date and not with respect to future earnings.

In the Alberta case of *Paramount Attractions and Sales Company Limited* v. *Lust* [1950] 1 W.W.R. 258, Sissons, D.C.J. disagreed with the *Boucher* case. He held that although there may be jurisdiction to grant such an order since it is not in fact an order against the Crown, the Court must also deal with the issue of public policy. It is a rule of public policy that salaries payable to the Crown out of national funds are not subject to attachment or other methods of execution.

In a recent Chambers application in Distict Court, His Honor Judge D. M. Gardiner considered this point. A judgment debt had been incurred for groceries and supplies. The defendant had a mail contract with the Postmaster General, and his affidavit showed he had a large family and all monies were needed to maintain the family.

Gardiner, D.C.J. held:

> It appears to me, however, that to take away any part of the Defendant's earnings, even though the monies asked to be dealt with are received under a contract would result in all probability in the Defendant having to seek "relief" money from the Government through its relief agencies.
>
> With respect I conclude that it would be against public policy to grant the order asked for, and consequently dismiss the application but without costs.

The question that arises is whether Judge Gardiner would have granted the application had the defendant been in less strained financial circumstances. The implication appears to be that receivership might be allowed against the Crown in a proper case despite the *Lust* case.

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CONSTITUTIONAL LAW—CROWN PREROGATIVE—RIGHT TO PRIORITY OF

In the unreported case of the *Burger Baron Co. Ltd., (In Liquidation)*, the issue turned on whether the A.G.T. was entitled to the benefit of the ancient Crown prerogative of priority of payment over the unsecured creditors on voluntary liquidation under the provisions of The Companies Act R.S.A. 1955 c. 53. A liquidator was appointed and made subject to the supervision of the Court. There were a number of unsecured trade and other creditors whose claims could not be paid in full out of the assets of the Company. The A.G.T. was one of these creditors and it asserted the right to prior payment on the basis that it was an agent of the Crown.

There can be no question that, under common law, the ancient prerogatives included the right to priority of payment. This has been established by a long line of cases, one of the better known being *In Re Cardston District U.F.A. Co-Op Association* [1925] 3 W.W.R. 651.

In effect the present case resolved itself to the single point of whether the prerogative right of the Crown had been "expressly or impliedly taken away by legislation". At this point the case of *Food Controller* v. *Cork* [1923] A.C. 647 becomes very relevant since it also arose out of the voluntary winding-up of a company which proved to be insolvent, and the rele-

vant sections in the English Companies Act and those of Alberta's Companies Act are almost identical.

The Alberta Companies Act provides:

247 (1) In a winding-up there shall be paid in priority to all other debts,

(a) all Provincial or municipal taxes and rates assessed on or due by the company . . .

(b) all wages or salary of any clerk or servant in respect of services rendered to the company . . .

(c) all wages of any workman or labourer . . . not exceeding . . .

(d) unless the company is being wound up voluntarily merely for the purpose of reconstruction . . . the amount of any assessment under the Workmen's Compensation Act.

The *Food Controller Case* arose on the following fact pattern; during the First World War, the Food Controller, an agent of the Crown, appointed a company as agent to sell on commission frozen rabbits imported by the Food Controller from Australia. The company sold the rabbits and received the purchase price which it was bound to pay over to the Food Controller less its commissions and expenses. The company, however, became insolvent and went into voluntary liquidation still owing a substantial sum of money to the Food Controller. The Food Controller claimed priority over the other unsecured creditors on the ground that the amount owed to him was a Crown debt and entitled to priority. On appeal to the House of Lords, priority of payment was denied on the basis that the above sections of the Companies Act fully set forth the applicable priorities and, by implication, negatived any priority not set forth therein.

In the Alberta decision, Mr. Justice Farthing applied the *Food Controller Case* to the claim of the A.G.T. and held that, even if the A.G.T. had been an agent of the Crown, it would not be entitled to priority over other unsecured creditors since it could not fit itself within one of the categories of priority set forth in The Companies Act.

It is interesting to note, however, that section B of the Interpretation Act (Alberta) 1958 c. 32 provides that no enactment affects Crown prerogatives unless "it is expressly stated therein that Her Majesty is bound thereby". The Privy Council held in *In re Silver Bros.* [1932] A.C. 514 that a provision that certain charges should rank first "notwithstanding . . . any other statute or law" was not sufficiently express to exclude the (provincial) Crown's prerogative to rank first. The law of England is, however different in this respect, for there the common law rule has been preserved that the Crown may be bound by necessary implication. (24 Halsbury's Statutes 166.)

A very full review of the law in this area is found in *R.* v. *Hamilton* (Man. Q.B. 1963) 37 D.L.R. (2d) 545.

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EVIDENCE—CONFESSIONS—ADMISSIBILITY OF STATEMENT MADE IN ANSWER TO ONE CHARGE, IN A TRIAL FOR A *DIFFERENT* CHARGE—STARE DECISIS—WHETHER DECISION OF HIGHEST COURT IN OTHER PROVINCE MUST BE FOLLOWED

The accused, Dancy, was charged under the "joyriding" section of the Criminal Code (s. 281, taking an auto without the owner's consent), and made a statement in answer. The Crown then decided to charge him

with theft (ss. 269, 280), and the statement was offered as a confession at the preliminary inquiry.

Although it was contended on the basis of *R.* v. *Dick* (#1) (Ont. C.A.) [1947] O.R. 105, 124 and *R.* v. *Deagle* (Alta. A.D.) [1947] 1 W.W.R. 657 that the statement was inadmissible because elicited by an entirely different charge, His Worship Magistrate R. S. McKay admitted the statement. Although the *Deagle* case was a decision of the Appellate Division of the Supreme Court of Alberta, the barred Magistrate felt it was inconsistent with the Supreme Court of Canada's decision in *Prosko* v. *R.* (1922) C.C.C. 199. Crown counsel also relied upon *Boudreau* v. *R.* [1949] S.C.R. 262.

In reaching the decision in the *Deagle* case the Alberta Appellate Division referred only to the first *Dick* appeal, and not the second (Ont. C.A. 1947) 89 C.C.C. 312, 344 in which Robertson C.J.O. indicated that the point here in question is as but *obiter* in the first Dick decision. The Alberta Appellate Division also felt themselves bound to follow the first *Dick* decision but in *R.* v. *Brown* (#2) (1963) 41 W.W.R. 129, 124-5 the Alberta Appellate Division, sitting as Court of Appeal for the Northwest Territories, disagreed with that rule, and refused to follow cases from three other provinces, two of which were court of appeal decisions.

In any event, the facts here seem closer to those of *R.* v. *Clark* [1951] O.R. 791, in which the Ontario Court of Appeal distinguished the *Dick* case and said it had no application where the statement was made in response to a serious charge not dissimilar to that eventually proceeded with.

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TORTS—MOTOR VEHICLES—DRIVER UNDER THE INFLUENCE —KNOWLEDGE OF PASSENGER—VOLENTI NON FIT INJURIA— CONTRIBUTORY NEGLIGENCE—EXTENT TO WHICH THESE DEFENCES OPEN TO DRIVER AS AGAINST VOLUNTARY PASSENGER

Where the Plaintiff is injured in an accident after voluntarily accepting a ride in a motor vehicle knowing that the driver is under the influence of alcohol, the extent to which the driver may rely on the doctrine of *volenti non fit injuria* raised a somewhat perplexing question in the various Courts across Canada. The Supreme Court of Canada finally came to direct grips with the problem in the case of *Stein* v. *Lehnert* (1962) 40 W.W.R. 616, stating that "there has been divergence of opinion among the learned Judges of the Courts below" on this issue.

For purposes of the Appeal, it was assumed that the Plaintiff was aware of the fact that the Defendant was under the influence "to such an extent as to increase the chance of collision resulting from his negligence". Moreover, the Plaintiff knew from past experience that the Defendant habitually drove too fast, that he would disregard protests, this his driving made the Plaintiff sick and that there was always fear of an accident when he drove. Nevertheless, the Defendent urged the Plaintiff to go with him on this occasion "and she lacked the resolution to refuse". She was injured in the ensuing accident. The defences of *volenti* and contributory negligence were raised against the Plaintiff's claim for damages.

Mr. Justice Cartwright, in giving the judgment of the majority of the Court, stated in part:

> There is a most useful discussion as to when the Defence of *volenti non fit injuria* is admitted in Glanville Williams, *Joint Torts and Contributory Negligence* (1951) . . .
>
> '. . . the scope of the Defence has been progressively curtailed since the end of the last century . . . the defence of *volens* does not apply where as a result of a mental process the Plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the Plaintiff gave up his right of action for negligence.'
>
> On the facts of the case at bar the Plaintiff, although apprehensive that the Defendant would drive negligently and that an accident might result, decided to take a chance and go with him . . . she thereby incurred the physical risk. In my opinion, there is nothing to warrant a finding that she decided to waive her right of action should she be injured or that she communicated any such decision to the Defendant. (at 621-622)

Consequently, it was held that the Defence of *volenti* was inapplicable. The reasoning of the *Stein* case complemented the earlier Supreme Court decision of *Seymour* v. *Maloney* [1956] S.C.R. 322, but before the later case was decided, there was some confusion between the *Seymour* case and *Miller* v. *Decker* [1957] S.C.R. 624 which applied the doctrine of *volenti*. *Stein* finally distinguished the two previous decisions. In *Miller*, the Defendant-driver, the Plaintiff-passenger and another went "drinking" together and it was held that under those circumstances the inference was clear that the three were acting together in a common purpose and that the drinking of each was an encouragement to the same act in the others.

> Being fully aware of the most likely consequences of this indulgence, each voluntarily committed himself to the special dangers which they then entered upon. (at 630).

On the facts of the *Stein* case, the Court took cognizance of the contributory negligence issue and apportioned the damages 75%-25% in favour of the Plaintiff. But more important was the handling of the *volenti* issue, for it is now spelled out in very clear terms that it is most difficult indeed for a driver to rely on this defence where he is impaired to some degree by alcohol, even though the Plaintiff-passenger has knowledge of this fact prior to accepting a ride which eventually leads to unfortunate results.