NOTES

Contributors

W. D. Dickie
J. N. Agrios
W. A. Stevenson
S. M. Chumir
A. R. Thompson

LANDLORD AND TENANT—DISTRAINT FOR ARREARS OF RENT—FOLLOWING GOODS REMOVED FROM THE PREMISES —ENGLISH DISTRESS FOR RENT ACT, 1737.—Alberta, unlike most other Canadian Provinces, has no *Landlord and Tenant Act.* As a result resort must be had either to the common law or relevant British statutes still in force.

One of the major difficulties is that of distraining for arrears of rent when the tenant has left the premises demised. *The Seizure Act,* R.S.A. 1955, c. 307 makes no provision for following such goods, thus in this regard Alberta is still governed by the English *Distress for Rent Act,* 1737, II Geo. 2, c. 19, ss. 1,2,3 and 7, (In Re: *Royal Trust* vs. *Mills,* (1923) 1 W.W.R. 796).

Section (1) states that in case any tenant fraudulently or clandestinely conveys away or carries off or from the premises demised his, her or their goods or chattels to prevent the landlord from distraining the same for arrears of rent, the landlord or any person by him for that purpose lawfully authorized may within the space of thirty days next ensuing distrain such goods and chattels wherever the same shall be found as a distress for the arrears. *Parry* vs. *Duncan* (1831) 7 Bing. 243. is authority that "fraudulent removal" means that the goods were removed with a view to eluding distress. This would apply when the goods have been removed after sundown, on Sunday or at a time and in such manner as to indicate that the tenant was attempting to elude a distress. Since all seizures in Alberta must be made by the sheriff "fraudulent removal" may have even a broader meaning.

For added force section (3) of the *Distress for Rent Act* states that any tenant or lessee who fraudulently removes and conveys away his goods or chattels and any person who wilfully and knowingly assists any such tenant or lessee in so doing or concealing the same shall forfeit and pay to the landlord double the value of the goods so carried off or concealed, to be recovered by action.

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BREACH OF TRUST—EXCHANGE OF PARTIAL INTERESTS IN NATURAL GAS AND PETROLEUM PERMITS—AGREEMENT TO FARM OUT LAND BY ONE PARTY WITHOUT THE CONSENT OF THE OTHER.—In *Calvan Consolidated Oil, Gas Company Limited* vs. *Manning* (1959) S.C.R. 253, the Supreme Court of Canada held that there was an effective contract to exchange partial interests in natural gas and petroleum permits between the plaintiff M. E. Manning and the Calvan Consolidated Oil, Gas Company Limited. In a subsequent action before Chief Justice C. C. McLaurin of the Alberta Supreme Court,

Trial Division, the plaintiff alleged failure to comply with the contract and breach of trust on the part of the defendant Calvan and Imperial Oil Co. Ltd. in negotiating the purchase of land in Northeastern British Columbia. During the negotiations between the two defendant companies the plaintiff was not consulted although he was a 20% owner of a portion of the land involved.

It was held that by the transaction with Imperial Oil, Calvan provided for an enrichment of itself in which the plaintiff did not participate. Calvan was a trustee and must deal with property of a cestui que trust as he would prudently deal with his own. He must not make a profit or gain an advantage over the cestui que trust by use of his office as trustee. The contract should be looked at as one in which Calvan used joint property to receive a special advantage to itself which amounts to breach of trust.

Once a fiduciary relationship is made known to a third party and the third party has knowledge of and participates in the breach of trust, such third party is in default along with the primary trustee. Imperial Oil had specific notice of the interest of the plaintiff and paid the matter sufficient attention to obtain an indemnifying letter from Calvan. Accordingly Imperial Oil bears an equal responsibility for these instances of a disregard of the rights of a cestui que trust.

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INSURANCE—DRIVER'S POLICY—RESPONSIBILITY OF INSURANCE COMPANY FOR COSTS—SECTIONS 295, 297 AND 302 OF THE INSURANCE ACT.—One Penno was insured with a standard driver's policy with Allstate Insurance Company. He was involved in a motor vehicle accident the 7th day of November, 1958. Judgment was awarded against the said Penno for personal injuries to the plaintiff in the sum of $27,000.00 and costs which were taxed in the sum of $1,180.00.

The Allstate Insurance Company did not have notice, defend or participate in the action and were unaware of the proceedings until after the date of Judgment. The plaintiff claimed against the Insurance Company under section 302 (1) of the Alberta Insurance Act, R.S.A. 1955, c. 1959, s. 1, for the Judgment, interest and costs. The Company denied liability for the costs of the action.

Under section 302 (1) "any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy" may " have the insurance money payable under the policy applied in or towards satisfaction of his judgment . . .". Section 297 (1) sets up standard limits of insurance and section 297 (2) provides that "the limits specified in subsection (1) are exclusive of interest and costs." It was held by Mr. Justice J. V. H. Milvain in Alberta Supreme Court Chambers that by virture of section 295 the costs referred to were those that the Company was liable for under Section 295 (2), "the costs taxed against the insured in any civil action defended by the insurer". As the Company had not defended nor even had notice of the action they were not responsible for the costs.

OBTAINING DOCUMENTS IN THE POSSESSION OF A THIRD PARTY—RULE 249 OF THE RULES OF COURT—WHETHER AN ORDER MAY BE OBTAINED EX PARTE—Rule 249 (1) of the Alberta Rules of Court is a most useful but little-used rule. It states:

> "When a document is in the possession of a third party not a party to the action and it is alleged that any party has reason to believe that such document relates to the matter in issue, and the person in whose possession it is might be compelled to produce the same at the trial, the court may direct and give direction respecting the preparation of a certified copy thereof which may be used for all purposes in lieu of the original, saving all just exceptions."

Under this Rule a Judge may direct a third party to produce documents for the perusal of a party to an action, thereby making available to that party information which he would otherwise be unable to obtain. This procedure is similar to that of the English *Banker's Book Evidence Act*, 42 and 43 Vict., c. 11, whereby a party was enabled to inspect the books of the bank prior to the trial.

In a recent unreported decision in Supreme Court Chambers Mr. Justice Milvain held that an order under section 249 could be made ex parte. The rationale is similar to that of subpoenaing witnesses. Just as their evidence could be objected to at trial so could the admission of documents be objected to at that time. The intent of the rule was that a party should have available to him such documents and notice to the other party is not required. Indeed, the corresponding Ontario provision, Rule 349 and 350 of the Ontario Rules of Court, expressly provides that notice shall be given. The omission of this requirement in the Alberta Rules would indicate that such notice is not necessary.

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ILLEGAL POSSESSION OF LIQUOR—ALBERTA LIQUOR CONTROL ACT—CARRYING LOOSE BOTTLES OF BEER IN A VEHICLE—TRANSPORTING LIQUOR FROM RESIDENCE TO RESIDENCE.—In the partially reported decision of *Regina* vs. *Morrisson*, Judge Beaumont of the Alberta District Court decided several interesting points in regard to illegal possession of liquor. The first point is that it is not illegal for a person to convey loose bottles of beer in his car so long as they are capped. Section 40 (5) of the *Alberta Liquor Control Act*, R.S.A. 1958, c. 37, states;

> When liquor is contained in an unopened package or vessel and the seal, if any, on the package or vessel is unbroken, a person permitted by law to possess and consume liquor within the Province, who for a lawful purpose,
>
> (a) Purchased the liquor,
>
> (b) .....
>
> (c) .....
>
> may carry or convey that liquor to his residence or to any residence in which he is permitted by this Act to have and consume liquor.

It was held that an unopened bottle of beer was contained in an "unopened package or vessel" within the definition of "package" in section 2 (16);

> Package means a bottle, vessel or receptacle containing liquor or a container . . .

Indeed a person may purchase loose bottles of beer both at beer parlors and at the Government Liquor Store. Thus it was either within

the intendment of the statute that such bottles may legally be conveyed or else the government would be abetting a breach of the law. The fact that the loose bottles come from what was originally a sealed carton of beer cannot make it illegal to convey such bottles.

The second point decided was that this liquor could be conveyed from one residence to another in the middle of the night under section 40 (5). This was also the ruling in the Saskatchewan case *Regina* vs. *Nelson* (1958) 25 W.W.R. (NS) 199, where the court held;

> Neither the Act nor the regulations require that liquor be conveyed or carried directly or immediately to a place where it may legally be kept after purchase or the another place where it may legally be kept. In the case at bar, the beer was legally purchased, had first been conveyed to a place where it may legally be kept and some consumed, and later was conveyed to the residence of Christensen at Phippen. I don't think that the temporary stop at the dance hall taints the conveyance with illegallity.

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CHAMBERS APPLICATION—RULE 643—ONE-HALF HOUR WAITING PERIOD BEFORE SETTING DOWN APPLICATION—RULE 640—POWER OF COURT TO WAIVE PERIOD—NULLITY OF ORDER—The Supreme Court of Alberta, Appellate Division, in the unreported September, 1958 decision of the *Huron and Erie Corporation* vs. *Elsie Fundytus and Nick Fundytus* dealt with rules 640 and 643 of the Rules of Court.

This was an appeal from an Order for sale granted in a mortgage foreclosure action on the basis that the applicant had made his application and received his order prior to allowing half an hour to expire following the time the application was set down. Rule 643 states:

> An attendance on a motion in Chambers or on appointment before a master or other officer for half an hour next immediately following the time of the return thereof shall, in the absence of the opposite party, be deemed a sufficient attendance.

The Court of Appeal, sitting as a five-man court, in a unanimous oral Judgment held that by virtue of Rule 643 counsel was entitled to be present and to be heard on the motion and if an application was made prior to the thirty minute period as provided the Order was a nullity and should be set aside.

It was further held that although Rule 640 provides:

> The Court or a judge may enlarge or abridge the time appointed by these Rules or any Rules relating to time or fixed by any order for doing any act or taking any proceedings upon such terms as may be just; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed,

this does not apply where the effect of the abridging of time is to deprive a party of his right to be heard.

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SEIZURES ACT—SECTION 25—EFFECTING SEIZURE—ALTERNATIVE METHODS—PROCEDURES RELATING TO PRIVATE SALE—In the case of *J. W. Wright Construction Ltd.* vs. *Canada Acceptance Corporation, Union Tractor Ltd.*, (unreported), Mr. Justice J. V. H. Milvain, in an oral Judgment, regarding whether the seizure in the

within proceedings was a valid and lawful seizure, discussed Section 25 (1) of the *Seizures Act*, R.S.A. 1955, c. 302. This section provides:

> To effect the seizure of goods or chattels under any writ of execution or under any distress, the person duly authorized to effect the seizure;
> (a) Shall serve upon the debtor, and if there is more than one debtor, upon each one of them, or upon some adult member of his household,
> (b) Shall attach to the goods to be seized or some or all of them, or,
> (c) Shall post up in some conspicuous place upon the premises upon which the goods or some part of them are at the time of seizure,

a notice of Seizure in Form A in Schedule A, and a form of notice objecting to the removal and sale of the goods seized in Form B in Schedule A.

The plaintiff argued that to effect a proper seizure requires the doing of one mandatory thing, that of serving the debtor under part (a), and an alternative of either attaching seizure papers to the article seized or the posting of seizure papers on the premises. This argument was rejected and it was held that section 25 (1) provides three alternative methods: (a) service made directly on the person or; (b) notice to be attached to the goods seized or; (c) notice to be affixed to some conspicuous place on the premises. Thus, having regard to the original 1942 statute, these procedures are dealt with on a disjunctive basis and each alone is sufficient.

On the question of obligations of a creditor in a private sale, Mr. Justice Milvain held;

> I am satisfied that the law does not place an impossible burden upon a creditor selling repossessed goods, of being something in the nature of a trustee, but that the obligation resting upon such a creditor is satisfied providing he acts in good faith, providing he acts bona fide, and providing he takes reasonable steps to assure that the sale is made under such circumstances as to bring in a reasonable price. He is not required to do all of the things that an owner of goods would do if he were selling them himself. He is required to act reasonably under the circumstances.

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THE GUARANTEES ACKNOWLEDGMENT ACT — GUARANTEE GIVEN ON A SALE OF AN INTEREST IN GOODS—GUARANTEE BY NON-CORPORATE SELLER ON HIS ASSIGNMENT TO A FINANCE COMPANY OF A CONDITIONAL SALES CONTRACT—WHETHER A GUARANTEE EVIDENCE IN WRITING COMES WITHIN THE ACT—*The Guarantee Acknowledgment Act*, R.S.A. 1955, c. 136 provides that a guarantee has no effect unless a notary public certifies that the guarantor executed the guarantee with an awareness of its contents and understood its nature. There are exceptions which exclude the necessity of a notarial certificate in the cases *inter alia* of "a bill of exchange, cheque or promissory note" and "a guarantee given on the sale of any interest in the land or on the sale of any interest in goods or chattels". Two recent decisions indicate that the Alberta Appellate Division will construe the statute strictly against the validity of the guarantee notwithstanding that the statute is highly restrictive of a common law right.

In *Goodyear Tire and Rubber Co. Ltd.* vs. *Knight*[1] the plaintiff had sold goods to a company on credit and further credit sales were con-

1(1960), 33 W.W.R. 287 (Alta. C.A.).

templated when the defendants, as the persons principally interested in the buyer company, gave the plaintiff a written guarantee up to $2,500.00 of the existing and further indebtedness of the company to the plaintiff. The court held that this guarantee was not given on a sale of goods and was invalid for want of notarial certification. The implication is that the exception in the case of a sale of land or of goods and chattels will be strictly construed and will be limited to a guarantee given contemporaneously with the sale and confined to the price of that sale. In *Crown Lumber Co. Ltd.* vs. *Engel*[2] the court reiterated its decision in the Goodyear case. It further construed the statute strictly against the validity of the guarantee by holding that a written undertaking was struck down by the Act as a guarantee notwithstanding that the wording of the undertaking was to "indemnify and save harmless". The court held that the undertaking, regarded in substance, was one of guarantee and not of indemnity when measured according to classic standards. Chief Justice Smith remarked that "for the purposes of the case at bar, I fail to see any difference in the effect and meaning of s. 4 of the *Statutes of Fraud* and s. 2(a) of the *Guarantees Acknowledgment Act* as to what a guarantee is."

This strict approach of the court seems entirely consistent with the legislative purpose of providing protection to the individual who may sign a guarantee without full appreciation of its legal effect. It leads to a consideration of the validity of a guarantee given by a non-corporate seller[3] on his assignment to a finance company of instalment payments under a conditional sales contract. Such a guarantee, which is to be found on the back of most printed forms of conditional sale contracts, will probably fail for want of notarial certification because it will not classify as an exception. It is not an exception as a "bill of exchange, cheque or promissory note" because, while a note is made by the buyer for the price and endorsement by the seller to the finance company, the guarantee contained in the assignment is not part of the note, and a strict construction of the exception will require that the guarantee be part of the note by way of an accommodation making or endorsement of the note.[4] It is not an exception as a guarantee made on the sale of a chattel because a strict construction will restrict this exception to a guarantee of payment of the sale price to the seller and the seller could hardly make this guarantee to himself. When the seller gives the guarantee to the finance company, he is not giving a guarantee of payment of the sale price but rather a guarantee of payment of the discount price of the conditional sale contract.

Chief Justice Smith likens the guarantee covered by the statute to the *Statutes of Fraud* guarantee only "for the purposes of the case at bar". This qualification suggests that the court has noticed what appears to be a defect in the definition of "guarantee". The statute defines "guarantee" to mean ". . . a deed or other instrument in writing whereby a person . . . enters into an obligation to answer for the act or default or omission on the part of any other person whatsoever . . .". This de-

[2](1961), 36 W.W.R. 128 (Alta. C.A.).

[3]A guarantee given by a corporation is excepted from the operation of the Act.

[4]This conclusion does not mean that the dealer will entirely escape liability to the finance company. He may still be liable as endorser of the buyer's note.

finition clearly restricts the guarantee affected by the Act to a written guarantee and adds to the formality of writing the formality of notarial certification. But the Statutes of Frauds invalidated a parol guarantee only if not *evidenced in writing* signed by the guarantor. In result it appears that a parol guarantee evidenced in writing so as to satisfy the *Statutes of Fraud* requirements is not affected by the Act and is enforceable in Alberta without notarial certification. For example, if the defendant in the *Goodyear Case* had given an oral guarantee in terms of the written guarantee in that case and then had written and signed a letter to the plaintiff referring to the oral guarantee and denying liability under it, then the oral guarantee would be enforceable because neither the Statute of Frauds nor the Guarantee's Acknowledgment Act would apply to invalidate it. The wording of the definition so as to exclude the parol guarantee seems clearly an oversight on the part of the draftsman of the Act.