MATRIMONIAL CAUSES

Matrimonial Causes Act section 37(1)—"harsh and oppressive . . . or contrary to the public interest" as ground for refusal of decree.

Section 28(m) of the Commonwealth Matrimonial Causes Act provides that a petition for dissolution of marriage may be based on the ground—

> "that the parties to the marriage have separated and thereafter have lived separately, and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."

The section is clear in its meaning and has not caused judicial concern in its interpretation. Regrettably section 37(1) which limits the scope of section 28(m) is as vague in its terms as the latter is precise. In the words of Nield J.:—

> "I suppose this is the most extraordinary sub-section that has ever been passed by any legislature in the world. Its meaning is vague and uncertain in the extreme. In my opinion it puts an obligation on the Court which should not be put on the Court. Its connotation is so doubtful and uncertain that I venture to think no ordinary member of the community would have any idea of what it might or could mean."[1]

The sub-section reads—

> "Where on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act . . ., the Court is satisfied that by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the Court shall refuse to make the decree sought."

As would be anticipated there have, in the first few years of its operation, been conflicting views judicially expressed as to the meaning to be given to various parts of the section.

In *Painter* v. *Painter*[2] the South Australian Full Court in the most authoritative pronouncement on the section to date, upheld a decision of Mayo J. who had closely analysed it. The only other Full Court to consider the section was that of Queensland.[3]

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1. *Taylor* v. *Taylor* (No. 2). 1961 2 F.L.R. 371, 372.
2. [1963] S.A.S.R. 24.
3. *Kearns* v. *Kearns* 4 F.L.R. 394.

The decision in *Painter's Case* has restored section 28(m) after decisions in New South Wales and Victoria had threatened to stultify it.

Taylor's Case[4] was the first reported case in which section 37(1) rose for judicial interpretation. The facts of the case supported the decision but unfortunately Nield J. seized the opportunity to pronounce upon the whole question of the ground specified in section 28(m). In that case the husband petitioner, had, both before and after the commencement of the separation, been guilty of adultery. Many of the acts of adultery had not been disclosed in his discretion statement. The respondent wife was found to be without fault in respect of the cause of separation and further, she remained willing, at all times to resume cohabitation with her husband. The wife, defending the action claimed that to grant a decree of dissolution would be "harsh and oppressive" within the meaning of section 37(1) because:—

(1) She was opposed to divorce on religious grounds,
(2) She was without fault in any form,
(3) She was at all ready times ready to reconcile with her husband,
(4) If the decree was granted she would bear the opprobrium of the community visited upon a divorced person.

Nield J. would have been on strong ground had he refused to exercise the discretion, given him by section 37(3) regarding the petitioner's adultery. Eight or ten acts of adultery had not been disclosed to the Court and there is copious authority that refusal to grant a decree under such circumstances is justified.[5] However, the learned Judge upheld the wife's contention that the grant of a decree would be "harsh and oppressive" holding that this would be so, by reason of the fact of the opposition to the decree by the wife, who was legally and morally blameless and willing to be reconciled with her husband.

His Honour supported his views by reference to the history of similar legislation in New Zealand, which initially, had given the Court an unfettered discretion to dissolve a marriage where the parties had been separated for three years. Sir John Salmond in *Lodder* v. *Lodder*[6] and *Mason* v. *Mason*[7] held that where a marriage had irremediably failed, public policy did not require the refusal of a decree of dissolution, notwithstanding the fact that the respondent was entirely blameless. As a result of these decisions of Salmond J. the New Zealand legislation was amended to impose an absolute bar where the decree was opposed by a blameless spouse. Nield J. thus assumed that the New Zealand legislature did not agree with Salmond J.'s interpretation of their intention. His Honour,

4. 2 F.L.R. 371.
5. *McRae* v. *McRae* (1906) V.L.R. 778.
Allen v. *Allen* [1942] S.A.S.R. 257.
Adams v. *Adams* (1928) V.L.R. 90.
Apted v. *Apted* (1930) P. 246.
Gillooly v. *Gillooly* (1950) 2 AER 1118.
6. (1921) N.Z.L.R. 876.
7. (1921) N.Z.L.R. 955.

if these references are to have any meaning, implies that because the New Zealand Parliament found it necessary to amend their legislation to determine the principle of public policy, the Commonwealth Parliament, although not imposing the limitation contained in the New Zealand amendment must have intended the same limitation to apply to the Australian Act. As the history of the New Zealand legislation is set out in the judgment of the High Court in *Pearlow* v. *Pearlow*[8] the Commonwealth Legislature must be taken to have been aware of it, as was pointed out in *Painter's Case* by the Full Court. The necessary inference follows that as no such limitation was inserted, none was intended.

In *Judd* v. *Judd*,[9] Monahan J. on somewhat similar facts came to a similar decision to that of Nield J. in *Taylor's Case*. The judgment in *Judd's Case* was handed down only two months after *Taylor's Case* and the latter case was not cited. Monahan J. also felt that the opposition of a blameless wife opposed to divorce on religious grounds was sufficient to characterise the effect of the decree as harsh and oppressive. The decision in that case can also be justified on the basis of adultery not disclosed to the Court.

The next decision was *Baily* v. *Baily*[10] in which Gibson J. distinguished *Taylor's Case* and handed down what, it is submitted, is the first real approach to the true intention disclosed in section 28(m). The petitioner was the husband, who had left his wife, and in earlier proceedings had petitioned for divorce on the ground of constructive desertion. The matter eventually reached the High Court, and the result was that a decree was refused. The High Court held that although the facts did not establish constructive desertion, nevertheless, the husband had just cause for leaving his wife. The husband's only complaint was that cohabitation with his wife was impossible because of a skin ailment causing her severe mental distress. As a result of the finding of the High Court neither husband nor wife could be found blameworthy in causing the separation. The wife filed an answer to the fresh petition under section 28(m) complaining that in the circumstances, the granting of a decree would be "harsh and oppressive". In granting a decree Gibson J. held that the Act clearly envisaged the dissolution of marriages where no blame or misconduct was imputable to the respondent and such being the case no stigma could attach to the respondent. He also held that despite the adultery of the petitioner since the commencement of the separation, his discretion should be favourably exercised.

With the law in this unsatisfactory position Mayo J. was called upon in *Painter* v. *Painter* to consider similar arguments to those raised in *Taylor's Case* and *Judd's Case*.

The facts before Mayo J. were as follow:—

After thirty years of marriage from which there had been no surviving offspring, Mr. Painter formed an attachment to his secretary. Intimate relations developed as a result of which the secretary

8. (1953) 90 C.L.R. 70.
9. 3 F.L.R. 207.
10. 3 F.L.R. 476.

became pregnant. Upon being informed, Mrs. Painter offered to have the child, when born, adopted to the marriage. This proposal was, however, not accepted and shortly afterwards the husband took up residence with the expectant mother. The couple had continued to cohabit, to the date of hearing of the petition, a period of twenty years, and there were then two children of the union, aged twenty and fifteen years respectively. The former secretary had by deed poll changed her name to Painter.

In these circumstances the husband petitioned for divorce under section 28(m). The wife defended the proceedings claiming, inter alia, that the granting of a decree would be harsh and oppressive. She stated that she was willing, in fact desirous, of having her husband return to her, that she was blameless in causing the separation, that she was opposed to divorce on religious grounds and that a decree would detrimentally affect her health. In granting a decree Mayo J. made the following points:—

1. Under section 37(1) it is the *grant* of the decree rather than its *consequences,* which require consideration and in so far as the conduct of the petitioner has caused unhappiness to the respondent this exists whether or not a decree is granted.
2. Although the language of the sub-section can be taken to introduce a subjective test as to the factors that would make a decree harsh and oppressive it does not follow that a decree should necessarily be refused where a respondent's temperament is peculiarly susceptible to disturbance.
3. Where section 37(1) applies there is no judicial discretion. (In this finding His Honour followed *Judd* v. *Judd* and *Taylor* v. *Taylor*).
4. The opposition of the respondent of itself is not a basis for the refusal of a decree.
5. The use of "harsh *and* oppressive" conjunctively indicates that the words are not used as synonyms. "Harsh" may be intended to relate to the immediate impact of a decree and oppressive to the continued adverse consequences. For a decree to be refused both limbs of the phrase must apply.
6. It is doubtful whether the religious beliefs of the respondent could ever be a basis for refusing a decree. In the present case there was insufficient proof of the religious devotion or active belief that would be necessary before such an objection could be sustained.
7. The inclusion of the words "any other reason" did not appear to add to the section as the conduct of the petitioner and "public interest" appeared to exhaust the field.
8. Limitations in the "public interest" cannot be defined, but include the encouragement of people to live in conformity with moral standards and to train their children accordingly, together with the discouragement of immorality and sexual promiscuity.
9. The "particular circumstances" may include adultery, desertion or any other matrimonial offence, however section 36 requires the Court to grant a decree although the separation was caused only by the conduct of the petitioner or by his desertion. Section 37(3) gives the Court a discretion with regard to a petitioner's

adultery. The Act therefore contemplates some further circumstance aggravating the desertion or adultery to justify refusal of a decree after the parties have been separated for five years.

10. The postulated decree in section 37(1) is contrary to public interest; nothing is said as to a decree in favour of such interest. Nevertheless the interests of illegitimate children, whose position is sought to be regularised following the granting of a decree, are not to be overlooked.

For the enumerated reasons His Honour held that section 37(1) had no application to the case before him and that he should exercise the discretion under section 37(3) in favour of the petitioner. He therefore granted a decree.

On appeal to the Full Court, the judgment of Mayo J. was upheld. Their Honours, Napier C.J., Chamberlain and Hogarth JJ. delivered a joint judgment. The Court held that the Act clearly contemplated that prima facie, whatever the cause of separation, a spouse was entitled to a dissolution of marriage after separation for five years. They refused to follow *Taylor's Case* or *Judd's Case* in so far as they held that the opposition of an innocent respondent was of necessity, sufficient to make a divorce harsh and oppressive. Their Honours assumed that when the legislation was enacted Parliament was aware of the precedents established in the six Australian States, and in view of *Pearlow* v. *Pearlow* that it was aware of the corresponding legislation in New Zealand. Reading the statute against this background Their Honours had no doubt that the intention expressed in Section 28(m) was to provide for the dissolution of marriages so irreparably broken down that the parties had lived apart continuously for five years, and to do so irrespective of consent, or of responsibility for the failure of the marriage. These considerations were of course subject to section 37(1) which provides for the exceptional case with unusual circumstances. Unless the respondent could show that she would be seriously and unjustly affected by a decree it could not be said that the decree was harsh and oppressive. The religious beliefs of the respondent on their own could not be a ground for refusing a decree although they could be a factor to be taken into account together with other circumstances. The Court could not assent to the view that a status of a deserted wife, was so much more desirable than that of a divorced woman and that to deprive her of the status of deserted wife would be harsh and oppressive.

Their Honours inclined to the view that proof that a decree would detrimentally affect the respondent's health might, taken in conjunction with other circumstances, afford grounds for refusing a decree. In the present case, they felt that as the trial Judge, having seen and heard the witnesses, had rejected the suggestion, they could attach little importance to it.

The decision of Mayo J. in *Painter's Case* has since been followed in *McDonald* v. *McDonald*[11] by Dovey J. in N.S.W., the judgment of the Full Court not then being available.

In another New South Wales decision,[12] Wallace J. while holding that precedents were of little value in a case revolving about section

11. 4 F.L.R. 76.
12. *Lanrock* v. *Lanrock* 4 F.L.R. 81.

37(1) approved *McDonald's Case* and proceeded along similar lines to those adopted in *Painter* v. *Painter*.

In *Kearns* v. *Kearns*[13] the Full Court of the Supreme Court of Queensland proceeded independently of other decisions on section 37(1), but arrived at principles closely approximating to those enunciated in the principal case.

It is hoped that the result is to be a uniform interpretation of Section 37(1) without the need for recourse to the High Court for an authoritative pronouncement. It is hoped that following *Painter's Case* a uniform interpretation of section 37(1) will prevail in which full scope will be given to the intention of the Federal Parliament in enabling hopelessly broken marriages to be painlessly ended. The case has done much to redirect the law into what is thought to have been its intended path and to have partially rectified the section's inauspicious start in the decisions in the Eastern States. Whatever guidance one's personal beliefs may offer, it must be accepted that the place for the determination of the political and social questions involved in legislation of this type is the parliament. This portion of the Act, being new to the Eastern States was long debated before finally being enacted. Perhaps the vagueness of section 37(1) was intended to provide it with an easier passage through parliament. Whatever considerations gave rise to the birth of the section it is submitted that it is not a proper judicial function to impose upon it, an interpretation flavoured by personal feelings of social or spiritual need. The judicial task is to give full effect to the spirit and intendment of the Act as a whole, according to the intention manifested therein and this it is submitted has been done in *Painter* v. *Painter*.

13. 4 F.L.R. 394.

MERCANTILE LAW

Unauthorized Disposition by Non-owner—Agency—Parol Evidence Rule—Hire Purchase Agreements Act

General Distributors Limited v. *Paramotors Limited*[1] was a case of much import for the used car-finance company trade in South Australia. On its outcome depended much of the value of finance companies' methods of securing their interests under variations of what is well known as the floor-plan system. Its importance is shown by the fact that Parliament saw fit to legislate to remove some of its undesirable consequences very soon after judgments were handed down. The legislation unfortunately, it will be submitted, failed to get at the real crux of the problem; and much of the undesirable effect of the case

1. [1962] S.A.S.R. 1.

remains. Involved in it was the perennial question of which of two "innocent" parties was to suffer on account of an unauthorized disposition of goods by another party lawfully in possession and subsequently against whom no satisfactory recovery could be made. Whether the principles involved are seen as an aspect of estoppel or not[2] it seems clear that they partake of the essential nature of estoppel. Denning L.J. (as he then was) said in *Central Newbury Car Auctions Limited* v. *Unity Finance Limited*[3]

> " . . . the basis of estoppel is that it would be unfair or unjust to allow a party to depart from a particular state of affairs which another has taken to be correct. But the law does not leave the question of fairness or justice at large."[4]

Whether the element of justice, at large or otherwise, was present in the *Paramotors* case will become clearer in due course.

The finance company was the owner of a Jaguar car, possession of which it allowed to a car dealer by the name of Beesley under what is well-known as the floor-plan system. The *formal* nature of the floor-plan system in the instant case was as follows. If Beesley wanted to obtain a particular vehicle to increase his stock he would request the plaintiff (in writing) to purchase it. He would then take it from the plaintiff as the bailee under a hire-purchase agreement and hold it as part of his stock-in-trade. When he found a purchaser for the vehicle, which indisputably was the purpose of his bailment, he was first to obtain the consent of the plaintiff before he proceeded in any way. The terms of the written agreement in this respect were as follows:

> " . . . I (Beesley) will not agree, attempt, offer or purport, to sell, pledge, charge, rent, let on hire, dispose of or otherwise part with the possession of the equipment . . . without your written consent first had and obtained. . . . "

Contrary to the strict terms of this agreement Beesley took the Jaguar in question to the premises of the defendant, also used car dealers, who bought it from him. The plaintiff brought an action against the defendant in the Local Court of Adelaide for damages for conversion and failed. It then appealed to the Supreme Court (Reed J.) and succeeded. On an appeal by the defendant, the Full Court (Napier C.J. and Mayo J. with Chamberlain J. dissenting) upheld Reed J.'s decision; and thus the plaintiff finance company succeeded in the end.

Broadly speaking there were two areas of dispute: Whether Beesley had authority to sell; and if he did not, whether the plaintiff was

2. *Eastern Distributirs* v. *Goldring* 1957 2 Q.B. 600; Goodhardt in 73 L.Q.R. 455.
3. [1957] 1 Q.B. 371.
4. Ibid. 380. See also *Thompson* v. *Palmer* (1933) 49 C.L.R. 507. 547 per Dixon J. and *Grundt* v. *Great Boulder Proprietary Gold Mines Limited* (1937) 59 C.L.R. 641 675 per Dixon J.

precluded from denying that he did. In respect of the first of these Reed J. and in the full court Napier C.J. (with whom Mayo J. concurred) refused to find such an authority. On analysis the two judgments in this respect can be seen to be based on a proposition of fact and variously on several propositions of law. The proposition of fact will be considered first.

1. *An independent authority as a matter of fact.*

The written agreement providing as it did that Beesley was to have no authority to sell constituted positive and strong evidence which called upon the defendant for rebuttal. The defendant attempted to do this by securing admissions from Beesley that he was accustomed to sell the floor-plan vehicles without consent and subsequently account to the plaintiff at "any old time", and from Brown, the plaintiff's representative, that he would expect Beesley to secure a buyer before gaining his company's consent although he refused to concede that Beesley was expected to close a deal before doing the same. Reed J. said:

> " . . . even on the assumption that the evidence in question is to be considered, no more is shown by it than that the parties from time to time disregarded terms of an agreement according to which they were bound to act in a particular manner and completed transactions without standing on their strict legal rights."[5]

whilst Napier C.J. said:

> " . . . his (Beesley's evidence goes no further than to show, that he did, from time to time, close a deal before getting a clearance of the vehicle from the plaintiff company. That would not, in my opinion, justify the finding of any agreement overriding the terms of the document . . . whatever Beesley's practice may have been, the plaintiff company could have stepped in at any time and insisted upon the right given to it by the terms of the proposal. . . . "[6]

It is difficult and often improper to criticize a finding of fact based upon weight of evidence when not in the position of having viewed the respective witnesses. But certain propositions may fairly be ventured.

It seems clear that that part of the agreement providing for the obtaining of consent before the closing of a transaction was something of a sham: and intended primarily *as a protection of the plaintiff's rights against third parties rather than an enunciation of its rights against Beesley.* Chamberlain J. (who in dissent, it is respectfully submitted, took the agreement for what it was worth) said:

> "The hire agreement contained terms, which to use the magistrate's expression were too 'draconian' as, if insisted on, to

5. [1962] S.A.S.R. 10.
6. Ibid. 16.

> frustrate the ordinary business of a salesman. I find it very hard to believe that every time Beesley found a customer ready and willing to pay cash for a car, which was subject to hire he would *have been expected* to hold up the transaction until he had paid the respondent and completed his own title. Clearly it would have been nonsense to expect him to pay the respondent out, as required by the written agreement, before even offering a car for sale. . . . The respondent's floor-plan finance would be farcical if the whole amount owing to it had to be paid off before this could be done. I have no doubt, therefore, that the implicit understanding was, as Beesley said it was, that he should deal with the cars in stock as his own, accounting to the respondent from time to time."[7]

Clearly such an arduous procedure as envisaged by the agreement would not have been an acceptable business proposition for Beesley: nor for the plaintiff (for it was of course in its interest that Beesley should sell as much stock as possible).[8] Thus is it not a fair inference that there was an implicit understanding that Beesley was generally to deal with the stock as his own and from time to time account to the plaintiff? Certainly as the learned Chief Justice said the plaintiff could at any time have stepped in and insisted on the strict terms of the agreement: but this does not necessarily exclude the finding of an authority to sell independent of the contract. Involved here however is the consideration of a proposition of law which is the concern of the next section.

2. *An independent authority as a matter of law.*

In a passage already quoted the Chief Justice said:[9]

> " . . . That would not in my opinon justify the finding of any *agreement* overriding the terms of the document. . . . Whatever Beesley's practice may have been the plaintiff company could have stepped in at any time and insisted upon the right given to it by the terms of the proposal."

The fallacy here it is respectfully submitted is that His Honour is looking for a contractual authority. The term "agreement" is ambiguous in this respect, but unless the last sentence is to be construed as quite beside the point "agreement" must be construed as contractual agreement. *Dowrick* has shown that as a matter of law agency can be independent of contract.[10] Although this has not been admitted by several of the older writers, the proposition's validity becomes almost self-evident when the relationship between a principal and a third party is being considered (as here) rather than that between a principal and an agent *inter-se*. Counsel for the defendant was not concerned to establish an agency enforceable *inter-se* between the plain-

7. Ibid. 20; the italics are the writer's.
8. As Brown conceded in cross-examination.
9. [1962] S.A.S.R. 16.
10. 17 M.L.R. 24.

tiff and Beesley, but simply an authority akin to a tacit permission. Certainly as the Chief Justice said the plaintiff could have stepped in at any time and insisted upon the strict terms of the agreement, for this would amount to a renunciation of the tacit permission. But the point is at no time did the plaintiff do this.

3. *The admissibility of evidence of an independent authority—the parol evidence rule.*

Reed J. considered that such evidence would be inadmissible. Referring to *Perpetual Trustee Co. Ltd.* v. *Bligh*[11] His Honour stated:

> " . . . a general authority to sell would be contrary to the terms of any hire purchase agreement entered into in the form of exhibit P1 and evidence to prove it would not be admissible. . . . "[12]

It can be noted in anticipation that the statement of Jordan C.J. in *Perpetual Trustee Co. Ltd.* v. *Bligh* the only authority referred to in this respect by Reed J. does not accord with the facts of the instant case nor with the proposition that His Honour draws. Jordan C.J.'s words were:

> "It is a well established general rule that in an action brought to *enforce a right or obligation the subject of an express provision of a document* intended by the parties to record and to constitute the whole of the transaction between them oral evidence is not receivable that . . . the right or obligation was other than as expressed in the document. . . . "[13]

Clearly Jordan C.J. had in mind the enforcement of a right which is itself the subject of the written agreement in question and not a right incidental to that written agreement: the latter being the case which Reed J. had to consider. The importance of this distinction will become clearer in due course.

Sir John Salmond has shown that originally the parol evidence rule was based on the somewhat crude Saxon tendency to set up an external or objective measure of evidence and test of proof—"to make the relation between evidence and proof a matter not of sound discretion but of strict law".[14] Whilst the legal system is now agile enough not to need strict categories of evidence to the same degree the rule still has its usefulness. But there are exceptions to it and the usefulness ceases when these are overlooked. One of these is adverted to by Chamberlain J.

> " . . . it is open to either of the parties to show that the written instrument does not set out the full *agreement* between them. In this case I think . . . (the hire purchase agreement) . . . was

11. (1941) 41 S.R. (N.S.W.) 33.
12. [1962] S.A.S.R. 10.
13. 41 S.R. (N.S.W.) 39: the italics are the writer's.
14. 6 L.Q.R. 75.

> only part of the overall arrangement between the dealer and the financier. That overall arrangement included the understanding so long as the respondent permitted it to last that the dealer could sell its goods in effect as its agent."[15]

There is, however, another more basic ground on which the evidence is admissible not alluded to by any member of the court: this is not so much an exception to the parol evidence rule as a delimitation of it and it is of such utmost importance in principle and practice, that a close examination of it is appropriate here, in spite of the fact that the Full Court did not act on Reed J.'s statement.

Stephen state it thus:

> "Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove."[16]

The authority cited by Stephen is *R.* v. *Cheadle*.[17] There the question was whether a pauper was settled in the parish of Cheadle. A deed of conveyance to which A was a party was produced purporting to convey land to A for a valuable consideration. The parish was allowed to call parol evidence to prove that no consideration passed in contradiction of the written instrument. The court said:

> "Now the parties to the deed might be estopped by it from saying that this was not a purchase for a money consideration: but the parish officers, who are strangers to it, are not. If that were otherwise the greatet inconvenience and injustice might arise. . . . "[18]

Taylor[19] and Phipson[20] accept the *Cheadle* proposition as good law but Dr. Cross is a little more cautious. He cites *Mercantile Bank of Sydney* v. *Taylor*[21] as a case where the parol evidence rule was applied where "one of the parties to the proceedings was not a party to the writing".[22] This, however is very easily distinguishable from the *Cheadle*, and the instant situation in that the party seeking to introduce the parol evidence was in fact a party to the writing even though the other party to the action was not.[23] Dr. *Cross* further suggests that *Cheadle* could now be decided under *Frith* v. *Frith*[24] without any resort to its stated basis. With respect this seems doubtful since *Frith* v. *Frith* is expressly based on the proposition that evidence of *additional* consideration does not contradict the written instrument,

15. [1962] S.A.S.R. 22: the italics are the writer's.
16. Stephen *Digest of the Law of Evidence* (12th ed.) 121.
17. (1832) 3 B. Ad. 833.
18. Ibid. 838.
19. Taylor on Evidence (11th ed.) vol. II, p. 788.
20. Phipson on Evidence (9th ed.) 602.
21. [1893] A.C. 317.
22. *Op. cit.* 480.
23. Phipson loc. cit. suggests that logically such a situation should be no different from the *Cheadle* situation since there would still be a lack of mutuality.
24. [1960] A.C. 254.

whereas in *Cheadle* proof of *no* consideration was in fact a direct contradiction[25] and could be viewed in no other light. Be that as it may, *Frith* v. *Frith* should not be construed as detracting from the authority of *Cheadle.*

There have been very few cases in which *Cheadle* has been considered.

In *R.* v. *Wickham*[26] the court did not give a judgment but, allowed parol evidence to be admitted in contradiction by a stranger to the instrument: and it is noteworthy that counsel opposing the admission conceded that *Cheadle* stood for the above proposition.[27]

In *R.* v. *Billinghay* Coleridge J. stated that in *Cheadle* "the evidence was . . . given . . . to show what the actual consideration was".[28] If this is to be construed as limiting the case to a proposition in terms of consideration then, as has been submitted with respect to Dr. Cross's reference to *Frith* v. *Frith,* it is wrong and certainly not justified by the language of the court in *Cheadle.*

It may be remarked that the validity of the *Cheadle* proposition calls in question the nature of the parol evidence rule. If its nature is that of an enunciation of the respective values of certain categories of evidence then there is no logical reason for any exception in the case of a stranger. If on the other hand its nature is something of an estoppel then clearly such an exception is logically demanded. An examination in this light is not appropriate at this juncture however: but it has been suggested that the former of these is somewhat outmoded as a legal rationale.

Returning to the words of Jordan C.J. in *Perpetual Trustee Co. (Ltd.)* v. *Bligh* it can be seen that they are carefully phrased and allow for a case such as *Cheadle* or the instant one where the party seeking to adduce the parol evidence is a stranger and not concerned with the right or obligation in the agreement as such but only with a right incidental to it. If such a party is to be estopped from adducing such evidence, then the most absurd consequences could be envisaged.

4. *Estoppel—the "mere possession" rule.*

Once the court refused to find that Beesley had any authority to sell then the result was much of a foreone conclusion: for the only evidence of ostensible agency or ownership such as to raise an estoppel was the possession of the vehicle: and as Napier C.J. said:

> The general proposition which cannot be contested is that . . . the mere possession of the property of another without authority to deal with the thing in question otherwise than for purposes of safe custody . . . will not if the person in possession

25. There is of course a strong sense in which proof of additional consideration is not contradictory whereas proof of less or none is.
26. 2 Ad. & E. 517.
27. Ibid. 519.
28. 5 Ad. & E. 676, 682.

> takes upon himself to sell or pledge to a third party divest the owner of his rights as against the third party.[29]

Probably this is incontestible[30] but what is the basis of this "general proposition"?

The necessary elements of an estoppel in a case such as the present are negligence (including duty of care) and causation, i.e. a causative link between the negligence and the deception.[31] The "mere possession" rule cannot have its basis in the former of these since any negligence lies not in the possession but in the circumstances in which possession is precipitated. Thus in one situation it can be blatantly negligent and a severe breach of a duty of care to allow a person to have possession of one's goods with ostensible control over them: whilst in another situation no negligence or breach of duty need be involved. Thus the logical basis of the rule, it is submitted, if indeed it has such a basis, can only be found in the element of causation. In this light it can be stated more clearly. No matter what the degree of negligence in the precipitation of possession (*qua* anyone *via* a duty of care) if the end-product of this is nothing more than possession in the hands of another this will not be a sufficient causative element to create an estoppel: presumably because no reasonable man ought to be misled by this alone. Thus Napier C.J. says:

> "It is apparent that the defendant company was not misled by Beesley's possession of the car, but was misled by the false declaration that it was his sole property. . . . "[32]

On analysis this conclusion seems hard to justify. If there had been no element of possession but merely Beesley's "false declaration" is it likely that the defendant company would have gone through with the purchase? In any problem of causation the solution lies not in any single factor. Thus we may say that both the possession and the false declaration contributed to the deception. But surely of these the former was causally the more significant. However, whatever the fact of the matter was the court was bound by the "mere possession" principle since it seems to have assumed the status of a hard and fast proposition of law: the question of causation could not be treated as a question of fact but was prejudged as a question of law. And as in the test of criminal intent[33] an *a priori* test of causation seems unfortunate and entirely unnecessary.

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29. 1962 [S.A.S.R.] 17. The authorities cited by his honour are *Johnson* v. *Credit Lyonnais Co.* (1877) 3 C.P.D. 32, 36; *Central Unity Car Auctions Ltd.* v. *Unity Finance Limited* [1957] 1 Q.B. 371 398. Reed J. quoted extensively from the latter.
30. See *Farquarson Bros.* v. *King & Co.* [1902] A. C. 325: 1900-03 All E.R. Rep. 120 and *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] A.C. 287. Contra: *Commonwealth Trust* v. *Akotey* [1926] A.C. 72.
31. There are a number of cases including the present where the Courts analyse the questiin of causation without referring to it as such. (See for example *Farquarson Bros.* v. *King & Co.* 1900-03 All E.R. Rep 120 126 Lord Lindley.)
32. 1962 [S.A.S.R.] 17.
33. See *D.P.P.* v. *Smith* [1960] 3 W.L.R 546

A reference that the learned Chief Justice makes to *Motor Finance* v. *Brown*[34] provides an interesting insight into the question.

> "In the view that I take of the evidence it might well be that the plaintiff company would have been estopped from denying Beesley's authority to sell and deliver the car to a customer entering his showroom seeing it there and purchasing it in good faith. . . . But I cannot agree . . . that the sale . . . was made in the ordinary course of Beesley's business. . . . "[35]

The "showroom" element itself cannot logically be concerned with negligence *per se* since any initial negligent act remains quantitatively and qualitatively the same no matter what Beesley is subsequently to do.[36] It can, however, logically be concerned with causation in the sense that possession of a vehicle in a showroom would in the ordinary course of things be a more positive causative influence on a purchaser than possession on the Gawler Road for instance. Thus it would seem that in the Chief Justice's mind this "showroom" or "ordinary course of business" element is sufficient to take a case out of the sphere of application of the "mere possession" causation principle: and in certain circumstances an owner may be estopped from asserting his title against a third party who has taken the goods from a person with no authority over them and whose only evidence of a right to dispose of them is his possession of the goods so long as the disposition was in the ordinary course of business. This would seem to have the support of a majority of the High Court in the recent decision *Motor Credits (Hire Finance) Ltd.* v. *Pacific Motor Auctions Pty. Ltd.*[37]: but may not be entirely in accordance with authority since Devlin J. has said[38] and Walsh J. has agreed[39] that the Factors Acts "codify as well as amplify the common law": and thus the proposition may have to be limited to the situation where the person disposing of the goods is "a mercantile agent".

5. *Conclusion.*

The Hire-Purchase Agreements Amendment Act 1962 adds S46 to the Principal Act in the following terms:

46c. (1) Where a person who is engaged in the trade of selling or hiring goods (in this section referred to as "the trader") is in possession of goods with the knowledge and consent of the true owner there-

34 1928 [SA.S.R.] 153.
35. 1962 [S.A.S.R.] 17. Chamberlain J. thought that "while . . . the transaction may perhaps not have appeared to be in the ordinary course of Beesley's business it would have appeared a not unnatural incident in it" (*ibid.* 22).
36. The *possibility or probability* that Beesley might put the vehicle in his showroom can be of course logically an element of negligence. But this possibility or probability cannot itself logically be affected by the fact of whether he does or not.
37. 109 C.L.R. 87, 99, 103.
38. *Eastern Distributors* v. *Goldring* 1957 2 Q.B. 600, 609.
39. In the decision at first instance in the *Pacific Motor Auctions* case (supra Note 37) 1962 N.S.W.R. 1319, 1329. It is to be noted that McTiernan J. agreed entirely with Walsh J. 109 C.L.R. 92.

of and that owner is a money-lender licensed pursuant to the Money-lenders Act, 1940-1960:

(a) any hire-purchase agreement or agreement for letting those goods made by the trader acting in the ordinary course of his business shall be as valid as if the trader were expressly authorized by the true owner of the goods to enter into such agreement, and any payments made by the hirer to the trader shall be deemed to be made to the true owner until that owner gives to the hirer notice in writing that future payments shall be made to that owner; or

(b) where such goods are the subject of a hire-purchase agreement (or an agreement which would be a hire-purchase agreement but for the exception under paragraph (b) to the definition of "hire-purchase agreement" contined in section 2 of this Act) or unregistered Bill of Sale under which the trader or some other person is the hirer or grantor, any sale by the trader of such goods to a *bona fide* purchaser for value and without notice of the existence of such agreement or assurance shall be deemed to be a valid sale by the owner to the purchaser and any payment by the purchaser to the trader shall be deemed to be payment to the owner.

S. 46c (1) (a) is limited to dipositions by hire purchase or lease and depending upon the outcome of the conflict referred to above as to the effect of a disposition being in the ordinary course of business the anomalous situation could be reached where a person taking goods on hire purchase or lease is protected but a person buying those goods is not.

It is to be noted that S. 46c (1) (b) is directed only at floor-plan systems by way of unregistered bills of sale and hire-purchase agreements. Thus other floor plans can be devised to get round the Act.

For instance, one could be devised whereby the dealer would take the goods under a simple hiring agreement with similar terms to those in the present case. This would not be as satisfactory to the dealer as a hire-purchase agreement or bill of sale because his payments would not be credited to him. However, in view of this, the payment rate or eventual sale price could be adjusted and if the dealer had an efficient turnover of goods this would not matter anyway. Under such a system if the dealer made a sale in circumstances similar to the instant case then it would seem that the finance company relying on the strict terms of the "no-authority" clause would succeed: for it is unlikely that much more evidence of an authority to sell could be adduced than was adduced by the defendant in this case.

It seems a pity, then, that the Legislature did not go to the crux of the problem in the *Paramotors* case and attack, instead of only certain facets of the floor-plan system, the sham "no-authority" clause in the agreement which secured for the finance company the best of two worlds: that of business efficacy by virtue of it being ignored at the right time; and that of legal security by virtue of it being pleaded at the right time.

POTATO MARKETING ACT

Statutory Interpretation—Ultra Vires—Prohibition as distinct from Regulation

The case of *Atkins* v. *Golding,* a decision of Mayo J.[1] affirmed by the Full Court of the Supreme Court of South Australia,[2] had important practical repercussions which culminated in the amendment of the Potato Marketing Act 1948, in order to authorize the structure of potato marketing in the State which that decision held to be invalid.

The appellant was convicted of an offence under S21 (1) of the Potato Marketing Act, which prescribed penalties for any breach of the terms of that Act, or of orders made under its authority, the breach consisting of selling potatoes to a person other than the S.A. Potato Distribution Centre Ltd., contrary to Potato Marketing Order No. 1, Clause 2, which provides:

> "(a) No grower shall sell any potatoes grown by him except to the S.A. Potato Distribution Centre Ltd.,
>
> (b) Potatoes sold or for sale by the grower to the Centre shall be delivered at such times and places, and in such quantities, as shall from time to time be directed by the Centre, in accordance with instructions from time to time issued by the Board.

The appellant contended that Clause 2 was *ultra vires,* and alternatively that it was a prohibition and not a regulation of the sale of potatoes within the powers of the Board. This alternative submission is simply a further aspect of the first submission. In discussing these contentions, Mayo J. employed the customary technique for resolving problems of *ultra vires,* which involves analysis of the terms of the original grant, and an assessment of its scope by the process of statutory interpretation, followed by an examination of the exercise of the power, including its practical effects, to ascertain whether the particular exercise is authorized.

The Potato Marketing Act 1948 constituted the Potato Marketing Board as a body representative of both growers and merchants, with the capacity of selling personal property where it was no longer required by the Board,[3] and with powers of subordinate legislation enumerated by S. 20 (i) which provided that the Board could make orders:

1. 1963 S.A. Law Society Judgment Scheme, p. 276.
2. 1963 S.A. Law Society Judgment Scheme, p. 415.
3. S. 16 (b) and (c).

(a) Fixing the quantity of potatoes, or the proportion of his crop of potatoes, which a grower may sell or deliver at any place or time specified in the order;
(b) Otherwise regulating and controlling the sale and delivery of potatoes;
(c) Fixing maximum and minimum prices at which potatoes may be sold;
(d) Prescribing any matter necessary or convenient to be prescribed for ensuring compliance with, or enforcing an order made under this section.

In purported exercise of these powers, the Board issued the challenged measure. Since the Act contained no provision dealing directly with the identity of a purchaser as a subject of the Board's control, Clause 2 could only be valid if it were ascribable to the power conferred by S. 20 (1) (b). As Mayo J. pointed out, the position of this term in the clause inevitably suggests that its scope is qualified by the previous words and confined to similar matters. It is in fact treated as being *ejusdem generis* with S. 20 (1) (a), and interpreted as authorizing no more than the regulation and control of the contents of sales agreements, those essential incidentals of a transaction which His Honour discussed extensively at the beginning of his judgment. Since the identity of a purchaser cannot accurately be described as a "term or condition" of a contract,[4] it would appear that this is not a part of the subject-matter for regulation and control, a view reinforced by recourse to previous decisions on the meaning and extent of this phrase in authorizing delegated legislation.

The theoretical extent of the term has been defined in previous cases,[5] although actual decision on the validity of any particular measure as a regulation may be difficult, since the distinction which must be drawn between regulation and prohibition is a subtle one, essentially a matter of degree. All regulation involves some measure of prohibition; but where the effect of the prohibition is to preclude the subject-matter of regulation from coming into existence will it be invalid. The authoritative statement of the rule in this context is contained in the judgment of Dixon J. (as he then was) in *Swanhill Corporation* v. *Bradbury*.[6]

"Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it altogether, or subject to a dis-

4. The decision in *R.* v. *L.C.C.* (1915) 2 K.B. 466 is not an authority contra, since the statute in question conferred a discretion as to identity of "fit persons".
5. See *Corporation Brick Co. Pty. Ltd.* v. *City of Hawthorn* (1909) 9 C.L.R. 301; *Municipal Corporation of the City of Toronto* v. *Virgo* (1896) A.C. 88; *A.-G. for Ontario* v. *A.-G. for the Dominion* (1896) A.C. 348; *Swanhill Corporation* v. *Bradbury* (1937) 56 C.L.R. 746.
6. Supra, p. 762.

cretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance, and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or conduct to be regulated."

Since this is a prima facie presumption derived from consideration of the meaning of the word, its operation may be displaced where the nature of the subject requires, e.g. where the activity is not one to be encouraged.[7] Its application to the present case, however, is clear. Dixon J. was discussing a situation in which the power to regulate an activity was exercised as if it authorised prohibition of the whole of the activity, subject to a discretion to allow its commencement: this exercise was invalid because the freedom to embark on the activity can not be circumscribed, although the actual conduct of the activity may be subjected to regulation necessarily involving some degree of prohibition. The essential distinction between an invalid prohibition and a prohibitory measure which is also regulatory lies in the point at which the prohibition is applied; where the power is properly exercised only certain aspects of the activity are prohibited and not the activity itself. In *Atkins* v. *Golding*, in purported exercise of a power to regulate the terms and conditions of a contract, the making of a contract with any person was prohibited subject to permission to sell to one company which, as His Honour demonstrated, had a discretion as to whether or not it would buy. A refusal to buy in any one instance would have constituted an effective prohibition, extending to the inception of the sequence of events which could properly be regulated, and for that reason the whole clause was held to be invalid.

Order 1 (2) (b) does not supplement the defects of Clause 2 (a), and would not appear to be a valid regulation in its own right. Since it does not compel the Potato Distribution centre to buy all potatoes offered to it, the objections to Clause 2 (a), on the ground that the centre had a discretion as to whether or not it would buy, are still open. In effect the centre was in the position of a monopolist with wide discretionary powers; this practical result of the Board's measures was held to be beyond the contemplation of the Act.

His Honour raised the further objection that, since the Board's authority extended only to the seller and not to one in the position of the buyer, it had no power to issue instructions to the Centre, which had, therefore, an unfettered discretion. It is submitted that this point may be misconceived, since the whole of a transaction which has been initiated is subject to the regulation of its terms, and buyer and seller are equally required to conform with the conditions imposed; effective regulation might be achieved by communication of instruc-

7. Per Dixon J. in *Swanhill v. Bradbury*, supra.

tions to buyer as well as seller. It would appear further that S. 20 (1) (d) is a possible source of power to instruct a buyer. The practice of instructing the seller by orders transmitted through the Company as buyer, is, however, of doubtful propriety.

One further matter raised in argument relating to the validity of Clause 2 (b), but not considered necessary for decision, was the question of whether this order constituted an invalid subdelegation of legislative power, rather than a granting of administrative discretion, to the Distribution Centre. Mayo J. obviated consideration of this by pointing out that the Board itself had no statutory capacity to engage in the direct marketing of potatoes, and could not, therefore, invest any other body with such a power. In spite of the recent amending legislation empowering the Board directly to engage in the marketing of potatoes, this problem may arise in the future. In such an event, questions relating to the structure of the Board's nominee, and its dependence on the instructions of the Board would become relevant.

Submissions in the appeal before the Full Court were confined to the validity of Clause 2 (a), on which the majority agreed with the reasoning of Mayo J. Napier C.J. construed the act as contemplating a system of orderly marketing in which growers were free to sell to any person, although the details of these transactions might be subject to regulation. His Honour found the existence of provisions for the licensing of wholesale merchants[8] inconsistent with the monopoly established by the Board:

> "I can see nothing in the language of the section which authorizes an order prohibiting sale to anyone, but *a fortiori* to anyone but a monopolist who is under no compulsion to buy."

Hogarth J. concurred in this reasoning, adding the convincing observation that where the legislature intends to confer monopolistic and compulsive powers on a board, its intention to do so is clearly expressed, and significant safeguards are provided against the abuse of such a power, as in the Honey Marketing Act 1947, and the Barley Marketing Act 1949.

Travers J., however, was prepared to construe the Act in the widest terms, as authorizing any measure deemed suitable by the Board in the interests of the industry which it represented. His liberal interpretation of the scope of the legislation was largely founded on practical considerations, e.g. the fact that the Centre had never refused to buy, and under the circumstances such a refusal was never likely to occur. It is submitted that this does not affect the inherent potential for such a prohibition in the form of the Order which renders it invalid. His Honour also adopted the reasoning of the Special Magistrate to the effect that, since the business of growing potatoes for sale was not restricted, the prohibition was not invalid, if such a prohibition

8. *Atkins* v. *Golding*, Full Court decision, supra 418.

existed. This argument fails to recognize that the subject matter of the power is the regulation of sales of potatoes, not the growing of potatoes for sale. Ths broad dissenting judgment does, however, serve to throw into relief the severity of the majority views.

Although the practical consequences of the decision have been nullified by the amending legislation, the case remains a useful illustration of the possible divergence in the approaches of different judges to the construction of the same measure, and the narrow approach to questions of ultra vires which is currently favoured.

POLICE OFFENCES ACT

Loitering

The South Australian Supreme Court has in two recent decisions, *Wilson* v. *O'Sullivan*[1] and *Mills* v. *Brebner*,[2] further clarified the meaning of s. 18 of the Police Offences Act, 1953-1962. This section is mainly used by the police in controlling the activities of homosexuals prone to frequenting public places, "peeping-tom" offenders, suspected milk can thieves and other nocturnal nuisances. The section reads as follows:

> "Any person who lies or loiters in any public place and who, upon request by a member of the police force, does not give a satisfactory reason for so lying or loitering shall be guilty of an offence."[3]

Both *Wilson* v. *O'Sullivan* and *Mills* v. *Brebner*, although unconnected, arise from similar factual situations. The appellant in each case was spoken to by police while in the vicinity of a public lavatory in the East Parklands. Their reasons for being there failed to satisfy the police and each was arrested and charged with a violation of s. 18 of the Police Offences Act.

The appellant Wilson was convicted in a summary hearing before a Special Magistrate who found it unnecessary to make a finding as to whether the explanation given to the Court was satisfactory, as *that* explanation was not made to the constable. In the second case the appellant Mills was also convicted although the Special Magistrate added that the explanation given in Court was satisfactory. The Special Magistrate considered the offence to be made out by the appellant's failure to give to the constable at the time an explanation which the Court considered was satisfactory to him. On both appeals the convictions were quashed and the judgments handed down do much to remove ambiguities apparent within section 18.

1. [1962] S.A.S.R. 194.
2. [1962] S.A.S.R. 209.
3. Penalty: £25 or three months imprisonment.

Before noting the effect of these decisions upon section 18 it is necessary to consider what elements constitute the offence and see how these elements have been interpreted in previous decisions. The section encompasses three elements each of which is necessary before the offence is complete. There should be (1) some person lying or loitering in a public place, (2) to whom a request is made by a police officer requiring an explanation for so lying or loitering, and (3) the failure to give a satisfactory reason to the police officer.

I. *Loitering in a Public Place.*[4]

Although the word "loitering" has been given judicial interpretation as it appears in the Lottery and Gaming Act,[5] that interpretation was not adopted in *Wilson* v. *O'Sullivan* where, instead, Travers J. agreed with the Special Magistrate in the summary hearing. "Loiter" in the Police Offences Act means:

> "to remain in a restricted but not necessarily defined area without any apparent or legitimate reason."[6]

II. *Request by a Police Officer for an Explanation.*[7]

This requirement has received judicial consideration in several cases.[8] The request made by the police officer must be concomitant in point of time with the lying or loitering, and occur as part of the one action, allowing time for immediate pursuit of a possible offender who runs away before being spoken to by the police. The explanation is required to be given to the police officer and not to the Court.[9]

III. *Failure to give a Satisfactory Reason for so Loitering.*

It is upon this aspect of the offence that the cases, the subject of this note, are most enlightening.

> "What s. 18 of the Police Offences Act requires the defendant to do is 'to give a satisfactory reason'. It does not require him to give all his satisfactory reasons, assuming he has more than one, nor does it require him to explain where he came from or where he intended going after leaving that area. In some circumstances those things might well be given as part of his "reason", but the Act does not require them. All that he is required by the Act to do is give *"a* satisfactory reason" for the acts alleged to constitute loitering."[10]

The final arbiter as to whether the reason given to the police officer was satisfactory is the Court, which must inquire into the facts and make a determination in the light of all the evidence.[11]

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4. "Public place" is defined in section 4 of the Act.
5. Section 63: *Johns* v. *Berry* [1934] S.A.S.R. 111; *Millikan* v. *Rosey* [1957] S.A.S.R. 97.
6. [1962] S.A.S.R. 194, 199. See also *Hagan* v. *Ridley* (1948) 50 W.A.L.R. 112, 124.
7. This appears to be a qualification upon the statement by Travers J. in *Wilson* v. *O'Sullivan* at 196 that "in the absence of a satisfactory reason, every loitering in any public place is an offence".
8. *Ryan* v. *Dinan* [1954] S.A.S.R. 67. *O'Sullivan* v. *Hormann* [1956] S.A.S.R. 198.
9. *Wilson* v. *O'Sullivan* [1962] S.A.S.R. 194, 199.
10. Id. at 199.
11. *Mills* v. *Brebner* [1962] S.A.S.R. 209, 212. *Ryan* v. *Dinan* [1954] S.A.S.R. 67, 69. See also *Defina* v. *Kenny* (1946) 72 C.L.R. 164, 168: per Latham C.J.

> "The 'reason' is required to be given to the constable and the Court is required to make a finding as to its reasonableness."[12]

How, then, may the word "satisfactory" be defined? Hogarth J. in *Mills* v. *Brebner* makes the following definition:

> . . . the section is satisfied if a person in the position of the appellant gives a reason which is in fact true and lawful, even though it does not convince the constable who puts the question, and even if that constable is acting reasonably in remaining unconvinced. . . . I consider, furthermore, that a reason, to be 'satisfactory', must be not only true and lawful, but sufficiently particularized to have some real meaning . . . what is sufficiently particular in each case will be a question of fact. It is not necessary, however, that when a sufficiently particular answer has been given, the person asked should have to produce convincing arguments to support the reason given, even if he is aware of those arguments at the time."[13]

It is now clear that a conviction for a breach of section 18 of the Police Offences Act will not automatically follow merely because the reason given fails to satisfy the arresting officer, if that reason is both true and lawful and sufficiently particularized to have some real meaning.

12. *Wilson v. O'Sullivan* [1962] S.A.S.R. 194, 201.
13. [1962] S.A.S.R. 209, 213.

LACHES

Delay After Issue of Writ

A formidable body of case law has developed around the equitable doctrine of laches in its application to suits for specific performance but the unusual facts of the recent High Court case of *Lamshed* v. *Lamshed*[1] presented a problem rarely considered by the courts.

The respondents claimed that the appellant was in breach of an alleged contract for the sale by the appellant of a grazing property situated at Cunliffe in South Australia. The agreement was dated 25th September, 1956, and the appellant formally repudiated the agreement as a binding contract by two letters of 27th November, 1956. On 5th April, 1957 the respondents issued a writ claiming specific performance of the agreement and damages. The pleadings were completed by 1st August, 1957, but it was not until 26th March, 1962 that the action was set down for trial. In the meantime the appellant had agreed on 11th February, 1962, to sell the property to a third party.[2]

1. (1963) 37 A.L.J.R. 301.
2. The third party placed a caveat on the title on 24th January, 1962, and on 31st January, 1962, the respondents followed with another caveat. The appellant warned this second caveat and on 23rd March, 1962, the Master extended the time for removal of the caveat conditionally upon the respondents setting the action down for hearing.

Thus there was a lapse of about four years and eight months from the time when the action could have been set down to the actual setting down. The appellant denied the existence of a binding contract on grounds which are not relevant to our present purposes and pleaded further that even if there was a binding contract, nevertheless the respondents were estopped by laches and by acquiescence in the rejection by the appellant of the contract from enforcing the contract of sale.

The trial Judge (Hogarth J.) found that the respondents had proved their contract and that no ground had been made out to deprive them of an order for specific performance.[3] The High Court did not disturb the finding that there was in fact a binding contract but a majority of the High Court set aside the judgment of the trial Judge in so far as it declared that the agreement ought to be specifically performed and carried into execution.

The appellant did not contend that there was undue delay in commencing the action but he argued that the respondents did not *prosecute* their claim with due diligence and that this delay after the issue of the writ barred the right of the respondents to specific performance. In answer to this argument the respondents submitted that the equitable doctrine of laches had no application where delay occurred after the issue of the writ.

Although the question of delay is frequently considered by the courts, counsel on both sides were unable to cite to the trial Judge one case in which delay after the issue of the writ had operated to bar the right of specific performance. However, counsel for the appellant cited two leading authorities in support of the proposition.

Lord Justice Fry recognized the applicability of the defence of laches in such cases when he stated:

"But it is now clearly established that the delay of either party . . . in not diligently prosecuting his action when instituted, may constitute such laches as will disentitle him to the aid of the Court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract."[4]

The question is also discussed in Halsbury's Laws of England where it is stated:

"Delay by a party in performing his part of the contract, or in commencing *or prosecuting* the enforcement of his rights, may constitute such laches or acquiesence as will debar him from obtaining specific performance."[5]

Both authorities deal with the question in passing and both cite the case of *Moore* v. *Blake*[6] in support of their proposition. That case will be discussed in more detail at a later stage. It concerned a suit for specific performance of an agreement to grant a lease. The plaintiff commenced proceedings in 1782 and although the defendants filed an answer to the bill nothing further was done in

3. [1963] S.A.S.R. 154.
4. Fry on Specific Performance (6th Ed., 1921), 514.
5. Halsbury's Laws of England, 3rd Ed., Volume 36, p. 324.
6. 4 Dow 321; 3 E.R. 1147. The decision of Lord Manners reported in (1808) 1 Ball & Beatty 62 was reversed by the House of Lords.

the suit until 1801. In the final result of the case it was held that delay was not a defence on the facts before the Court, but the above-mentioned authorities cited the case because of the statement made by Lord Eldon when he came to discuss the issue of delay.

"Then we are to consider whether there is anything to bar the relief upon the authority of those cases—not of the cases which justify a dismissal on the ground of not commencing a suit in due time—but of *those cases which justify a dismissal on the ground that, though begun in due time it has not been prosecuted with due diligence.*"[7]

Hogarth J. accepted the proposition that in certain cases a plaintiff could be barred from equitable relief if he did not prosecute his claim with all the diligence which was reasonable in the circumstances, but he considered that "different considerations may well apply after the issue of a writ."[8]

His Honour stated that he would have had no hesitation in deciding against the respondents if they had delayed *issuing their writ* for the period under consideration, but as this was a case of delay after the issue of the writ it gave rise to the application of the "different considerations" referred to by His Honour.

If the cases are to be placed in different categories what then is the test to be applied in the cases where delay occurs after the issue of the writ? In His Honour's opinion the requirement as to due diligence in such a case would be satisfied if the following conditions were fulfilled:—

1. The plaintiff took the action to a stage where it was possible for the defendant himself to enter it for trial or apply to have it dismissed for want of prosecution.

2. The plaintiff had a sufficient reason for not proceeding further with his action over the relevant period, and

3. The defendant did not suffer any prejudice as a result of the delay.

Applying this test His Honour was unable to find actionable delay on the respondent's part. The first requirement had been satisfied when no reply was filed within seven days of the defence and the pleadings were thereby deemed closed.[9] Secondly, His Honour held that the respondents had sufficient reason for not proceeding. The parties were related and His Honour accepted the evidence that the respondents did not wish to bring the matter into open Court if that could be avoided. Furthermore the respondents had been advised that land prices in the area would fall and they believed that the appellant would "come good" if he found it difficult to sell to another purchaser at the same price as he had agreed to sell to the respondents. Finally the trial judge considered that the defendant had not suffered any prejudice as a result of the delay and His Honour's views on this point are discussed below where they are compared with the views of Kitto J.

On appeal to the High Court Kitto J., in a judgment in which Windeyer J. concurred, held that there was a binding contract but

7. 3 E.R. 1147 at 1151.
8. [1963] S.A.S.R. 154 at 168.
9. Rules of Court O. 23 r. 4.

that the delay in prosecuting the action operated as a bar to a decree of specific performance. McTiernan J. dissented from the majority view of laches and agreed in all respects with Hogarth J.'s judgment on that point.

Kitto J. accepted the appellant's contention that delay after action brought could afford a defence to a suit for specific performance. The defence was held not to apply in the case of *Moore* v. *Blake* because the defendant could have applied to dismiss the action for want of prosecution. But the facts of that case were very special. The agreement for the grant of the lease which the plaintiff claimed should be specifically performed was subject to the payment of a judgment debt owed by the plaintiff to the defendant. The landlord could refuse to execute the lease for as long as the debt remained unpaid and he was thus in the position of a mortgagee of the promised lease. Delay by the plaintiff in prosecuting the suit constituted delay in paying the mortgage debt and the defendant should have moved to dismiss the suit for want of prosecution *as a means of foreclosure.* But the importance of the case lies in the recognition by the Court that in the proper case delay after the issue of the writ may justify a dismissal of the suit.

But did the facts of the present case give rise to the application of the doctrine of laches? Kitto J. dealt briefly with the general principles involved in the doctrine. It was well settled that the degree of promptness required depended upon the circumstances of the particular case and it was dangerous to rely too heavily upon precedents when considering the period of delay sufficient to constitute the defence of laches. Furthermore mere delay was not enough and the defence would not be successful unless the delay was prejudicial to the defendant or a third party or was such as to constitute an abandonment of the contract by the plaintiff. But His Honour considered that this case went further than the bare fact of delay. The appellant had denied that he was bound by the contract and this placed the case in the category of "the typical case" for refusing specific performance by reason of a delay of even a few months. The case of *Fitzgerald* v. *Masters*[10] stressed the importance of promptness in such cases.

"It is natural and reasonable that this should be required of (the purchaser) for the vendor is not to be placed indefinitely in the position of not knowing whether he can safely deal with the property in question on the footing that the contract has ceased to exist."[11]

The basis for the conflicting views of the majority of the High Court on the one hand and Hogarth J. on the other is to be found in the differing approaches to the question of the appellant's uncertainty. The trial Judge could find no prejudice if the uncertainty could be terminated by the appellant himself. The pleadings had been closed and it was open to the appellant to apply to have the action struck out for want of prosecution or to set the matter down for trial.

"Where the plaintiff has a sufficient reason for not proceeding further with his action over a period, and, during that period, the defendant

10. (1956) 95 C.L.R. 420.

11. Ibid, at p. 433.

has the right to enter the action for trial if he wishes to do so, I consider that the plaintiff will not be debarred from his remedy unless the defendant is shown to be likely to suffer some prejudice as a result of the delay."[12]

While the trial judge conceded that delay after action brought could operate as a defence he seems to have qualified the principle to such an extent that it would be rare for a case to arise where His Honour would apply the principle. Certainly if the plaintiff had personal reasons for not prosecuting the action it is difficult to imagine a single instance which, on the trial Judge's reasoning, would attract the defence of laches.

Kitto J. considered that the ability of the appellant to end his uncertainty was a circumstance to be considered, but he was of the opinion that this factor was not decisive. His Honour referred to the quandary in which the appellant was placed.

"He might not let a sleeping dog lie or take the risk of waking it. . . . While by taking the offensive he might put an end to the uncertainty, he might lose the case. Perhaps better to let the litigation die of inanition."[13] His Honour stated that the quandary was the result of the respondent's inaction and the decision of the trial Judge meant that the respondents could have prolonged the position of uncertainty for many more months and then brought the matter into Court when it suited them.

Furthermore in this atmosphere of uncertainty the appellant had purported to transfer the land to a third party. Kitto J. agreed with the trial Judge in holding that a defendant could not put an end to the remedy of specific performance simply by entering into an agreement for sale with a third party who then placed a caveat on the title. But His Honour considered that the purported sale to the third party was a further circumstance distinguishing the case from one of mere delay.

"It is a case in which third parties, not shown to be in any way at fault and not being warned by any caveat on the title, have acquired interests which will be defeated if a decree for specific performance should now be made."[14]

In view of the sparsity of authority dealing with delay after the issue of a writ it is not likely that the precise point of law raised by the case will be the subject of frequent judicial consideration. However, the decision emphasises the obligations of a petitioner seeking equitable relief and stresses the right of the Court to say at any time

"vigilantibus, non dormientibus, iura subveniunt."

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12. [1963] S.A.S.R. 154 at 168.
13. (1963) 37 A.L.J.R. 301 at 306.
14. Ibid, at p. 307.