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.