[HIGH COURT OF AUSTRALIA.]

CURTIS . . . . . APPELLANT;
DEFENDANT,

AND

THE PERTH AND FREMANTLE BOTTLE EXCHANGE CO. LTD. . . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *April* 3, 6.

Griffith C.J., Barton, Isaacs and Rich JJ.

Bailment—Hiring agreement—Hiring of receptacles for goods—Sale of goods—Estoppel as to ownership of receptacles.

A person may lawfully hire out receptacles for goods on the condition that, having been used for the purpose of one sale of goods placed therein by the hirer, the person by whom they are hired out shall be entitled to repossession of them.

Where receptacles have been so hired out and goods contained in them are sold without the purchaser being made aware that the ownership of the receptacles is not intended to pass with that of the goods, as in the ordinary course of trade it would, the person by whom the receptacles are hired out will be estopped from setting up his title to them, and that estoppel will enure to the benefit of all the world, including persons who with notice of the original hiring subsequently acquire the receptacles.

Beer bottles were hired out by the plaintiffs to brewers on the terms that they should belong to the plaintiffs who, after they had been used for one sale of beer, should be entitled to recover possession of them. The bottles had blown in the glass the plaintiffs' trade mark, and the words "The property of" followed by the plaintiffs' name. Brewers having filled the bottles with beer sold the beer to retail dealers and gave them express notice that the bottles were the sole property of the plaintiffs. A similar notice was advertised in newspapers. Retail dealers sold the beer in the bottles without

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giving the purchaser any such notice. No evidence having been given that any person who bought beer in the bottles was induced to believe that he had bought the bottles also,

Held, that the plaintiffs were entitled to recover from the defendant, who knew the real facts, bottles which had been so hired out by them and had been acquired by him from purchasers from retail dealers, and to an injunction restraining him from purchasing, collecting, or dealing in similar bottles.

Decision of the Supreme Court of Western Australia: *Curtis* v. *Perth and Fremantle Bottle Exchange Co.*, 15 W.A.L.R., 42, affirmed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court by the Perth and Fremantle Bottle Exchange Co. Ltd. against Donald Curtis, in which the statement of claim was as follows :—

"1. The plaintiff the Perth and Fremantle Bottle Exchange Co. Ltd. is a company duly incorporated under the provisions of the *Companies Act* 1893 carrying on a bottle merchant's business at Perth and elsewhere in the State of Western Australia.

"2. The defendant Donald Curtis is a marine store dealer carrying on business at Perth aforesaid.

"3. In the course of its business the plaintiff Company has for some time past used and is still using certain bottles specially made for the plaintiff Company which bottles have moulded thereon the trade mark " consisting of " P. & F." over " B. E. Co." over " Ltd.," all within a diamond, " and the words 'The property of the Perth and Fremantle Bottle Exchange Co. Ltd.'

"4. The plaintiff Company has in the course of its business hired bailed leased authorized and permitted certain persons and corporations to use its said bottles for the purpose of holding ale or stout and other liquors (fermented and unfermented) under divers agreements in writing providing (*inter alia*) that the said bottles should remain the property of the plaintiff and should be used by such persons and corporations for one sale or disposal of liquor manufactured or vended by them and that immediately upon such bottles being emptied of the liquor which they contained any right of such persons or corporations or of any person or corporation claiming from through or under them or otherwise howsoever to use or retain such bottles should cease and determine and the plaintiff Company should be forthwith entitled

to take and recover and obtain possession of such bottles of which aforesaid course of business and conditions the defendant had notice.

"The defendant claims that he is entitled to purchase collect deal in and handle without the consent and against the will of the plaintiff Company bottles belonging to the plaintiff Company so hired bailed and leased as aforesaid and he has purported to purchase and has collected dealt in and handled large quantities of the said bottles and he also claims the right to retain possession of such bottles as against the plaintiff Company and to dispose of them by sale or otherwise as he thinks fit.

"6. The defendant has had and still has in his possession or control large numbers of the said bottles and the plaintiff Company fears that unless restrained by the injunction of the Court the defendant will sell and dispose of the said bottles now in his possession and will continue to purchase collect hold deal in and handle the said bottles of the plaintiff Company to the great loss and damage of the plaintiff Company and the detriment and destruction of its said business.

"The plaintiff Company claims:—

"(*a*) A declaration that the defendant is not entitled to purchase collect or in any way deal in or handle the said bottles without the consent of the plaintiff Company or to retain possession thereof against the plaintiff Company.

"(*b*) An account of the number of the plaintiff Company's said bottles which the defendant has purported to purchase or which he has collected dealt in or handled or of which he has retained possession, and payment of the value thereof to the plaintiff Company.

"(*c*) Damages for conversion and illegal detention of the said bottles.

"(*d*) An order that the defendant do return to the plaintiff Company any of the said bottles in the defendant's possession.

"(*e*) An injunction restraining the defendant his servants and agents from purchasing collecting holding or in any way dealing in or handling the said bottles."

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The defendant, by his defence, *inter alia* denied that the bottles referred to in the 6th paragraph of the statement of claim or any of them were the property of the plaintiff Company.

The material facts are stated in the judgments hereunder.

The action was heard before *Parker* C.J. who made an order declaring that the property in the bottles the subject of the action remained in the plaintiff Company, and that the defendant was not entitled to purchase, collect or in any way deal in or handle the plaintiff Company's bottles let, hired or bailed by the plaintiff Company which bottles bore the marks referred to in the statement of claim; and ordering that the defendant should forthwith return to the plaintiff Company any of the said bottles in his possession; and restraining the defendant, his servants and agents from purchasing, collecting, holding or in any way dealing in or handling the said bottles.

From that judgment the defendant appealed to the Full Court by whom the appeal was dismissed: *Curtis* v. *Perth and Fremantle Bottle Exchange Co.* (1).

From that decision the defendant now appealed to the High Court.

Schutt and *Ham*, for the appellant. The transaction as to the branded bottles between the respondents and the brewers was not really intended to be a hiring, but was intended to be a sale. That is shown by the fact that the same price was paid on the purchase of unbranded bottles as on what is said to be a hiring of the branded bottles. Assuming that the transaction was in fact a hiring, the conduct of the respondents was such as to preclude them from saying that the property in the bottles did not pass to persons who bought the liquor in them for consumption. They left the bottles in the hands of publicans and grocers in such a way that the latter appeared to be the owners of the bottles, and that a person who bought liquor from them in the bottles would reasonably believe that he was buying the bottles. Under such circumstances the respondents were, as against persons buying for consumption, estopped from setting up their ownership of the bottles: *Ewart on Estoppel*, pp. 298, 299.

(1) 15 W.A.L.R., 42.

[RICH J. referred to *Cole* v. *North Western Bank* (1).]

The statement on the bottles, "The property of" the respondents, is ambiguous, as it might refer to the bottles and their contents, the latter of which were intended to be sold, and the statement cannot be interpreted as meaning that the bottles were not intended to be sold. If the purchaser has become entitled to the benefit of the estoppel it enures to the benefit of the whole world, including persons who subsequently acquired the bottles with knowledge of the original hiring: *Wilkes* v. *Spooner* (2); *In re Stapleford Colliery Co.*; *Barrow's Case* (3); *Pickering* v. *Busk* (4); *Ewart on Estoppel*, pp. 320, 321. [They also referred to *National Phonograph Co. of Australia Ltd.* v. *Menck* (5).]

Starke (with him *C. Gavan Duffy*), for the respondents. In order that estoppel should arise there must have been some representation by the respondents, and that representation must have been precise and unambiguous: *Low* v. *Bouverie* (6). Up to the time the bottles left the hands of the hotelkeepers and grocers the respondents' property in them was adequately protected. After that time there was no representation by the respondents which could be said to raise an estoppel. There is no evidence that anyone was deceived into believing that he bought the bottles when he bought the beer. The burden of proving that was upon the appellant. [He also referred to *In re Railway Time Tables Publishing Co.*; *Ex parte Sandys* (7); *In re London Celluloid Co.* (8).]

Schutt, in reply, referred to *White & Tudor's Leading Cases*, 8th ed., vol. II., p. 146.

Cur. adv. vult.

April 6.

GRIFFITH C.J. This is an action for the recovery of about 500 dozen beer bottles alleged to be the property of the plaintiffs, and for an injunction to prevent the defendant from purchasing, collecting or dealing in similar bottles. The plaintiff Company

(1) L.R. 10 C.P., 354, at pp. 362, 363.
(2) (1911) 2 K.B., 473, at pp. 483, 487.
(3) 14 Ch. D., 432.
(4) 15 East, 38.
(5) (1911) A.C., 336.
(6) (1891) 3 Ch., 82.
(7) 42 Ch. D., 98.
(8) 39 Ch. D., 190.

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deal in beer bottles which they supply to brewing companies in Perth. Their bottles have blown on the glass a mark consisting of their initials in a diamond, and also the words "The property of the Perth and Fremantle Bottle Exchange Co. Ltd." The plaintiffs carry on business in this way:—They make agreements with brewing companies in Perth, "under which," to quote the language of *McMillan* A.C.J. (1), "they purport to hire the bottles to those customers on the terms that the bottles remain the property of the plaintiff Company, that they are only to be used for one filling, and that as soon as they are empty the plaintiffs are entitled to recover possession of them." There is no reason that I know of why persons supplying beer or any other commodity in receptacles should not stipulate that the receptacles should remain their property, or why persons supplying receptacles in which goods are to be delivered should not stipulate that the receptacles shall be hired and returned to them and not sold. The facts found by *Parker* C.J. are as follows:—"All companies or firms using these bottles sent out a cart note which contained a notice in these words, 'All bottles with its trade mark and brand moulded thereon . . . . are the sole property of the Perth and Fremantle Bottle Exchange Co. Ltd.' The Company does not sell any such bottles, but supplies them on hire to brewers and others for the purpose of being filled with ale or stout or other fermented or unfermented liquors, and of being used for one sale or disposition of liquor only. After the contents have been once used the Company is entitled to repossession of the bottles, which must forthwith, on demand, be delivered to such Company or its duly authorized agents. The bottles may not be destroyed, or damaged, or parted with, or in any way disposed of by those into whose possession they come, and may not be used by any person, corporation or company, except as aforesaid." The learned Chief Justice further found that all documents which dealt with the sale of beer or any other liquor which were contained in the bottles had that notice upon them, and that the Company advertised in the public press a notice to the same effect. He also found that the Company gave express notice to a number of persons, among them being the defendant, a notice to

(1) 15 W.A.L.R., 42, at p. 44.

the effect that those bottles containing their brand were not sold but only hired for use on one occasion only, and then reverted to and became the property of the Company, who became entitled to possession. He also found this fact, which is the foundation of the present appeal, "The hotelkeepers and the grocers had sold the contents of the bottles without any special mention to their customers of the fact that the bottles belonged to the Bottle Exchange Co. So far as I gather from the evidence which has been given before me, there was no difference in the mode of conducting sales by retail dealers to persons who purchased a dozen bottles or a single bottle from that which obtained prior to 1st December of last year, when undoubtedly the bottle passed to the customer."

The contention for the defendant upon which the appeal is founded is that the plaintiffs are estopped by their conduct in allowing retailers to deliver beer in the bottles from saying that they did not authorize those retailers to sell the bottles. If they are, then no doubt the estoppel will enure for the benefit of all the world, even including persons having notice of the agreement. I mean that, if a person had acquired a title resting upon such an estoppel, he would be free to dispose of the property so acquired to any one, even a person who knew of the prohibition or alienation made by the plaintiff Company.

The only question, therefore, in the case is whether this estoppel is established. The foundation of the estoppel in such cases is that purchasers are deceived to their prejudice. There was really no evidence in support of that contention. The plaintiffs took all possible means to make the public aware of the real facts, and not a single witness was called to say that he was unaware of the real facts either by express notice to him or through the press.

In my opinion the appeal entirely fails.

BARTON J. I am of the same opinion.

ISAACS J. read the following judgment:—As I view this case, it raises two questions, one of law, and one of fact. The question of law is of great and, indeed, increasing importance to the mercantile community, and to those who purchase from them.

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Parker C.J. founded his judgment on the one circumstance that by the terms of their contracts with the breweries the present respondents had not sold the bottles, but had expressly hired them, with a stipulation for resumption of possession when the bottles were emptied. His Honor found that the method of sale to retail customers was the same as it had been prior to 1st December 1912, when, as he said, "undoubtedly the bottle passed to the customer." But, said his Honor, the Company neither sold nor authorized any person to sell the bottles, and so its title was not divested.

It is clear that the learned Chief Justice thought estoppel had no relevance to such a case. In the Full Court (1) *McMillan* C.J. (then Acting Chief Justice) referred to the contention of Mr. *Pilkington* that notwithstanding the actual terms of the contracts "the plaintiffs knew that the hotelkeepers and the grocers would sell to the public, that they authorized what was in fact a sale by the retailers to the public, and that, therefore, they are not entitled to recover the bottles which have passed to the purchasers under these conditions."

That argument has two aspects. First, it would be supported if the contract were not really one of hiring but a sale; or, secondly, it might bring in estoppel.

The learned Judge disagreed with the first aspect, and as to the second, said (2):—"The position might be a very different one if an action of this kind were brought against a person who had bought beer in bottles without any notice of the real facts, because it might then be quite possible for the purchaser to rely on an estoppel. But no question of that kind can arise here, as the defendant was fully aware of the real facts of the case, and bought the bottles in question with his eyes open." Further on, his Honor says (2):—"In this case, in which the defendant had express notice, there is no answer to be found to their" (the Company's) "claim." *Burnside* J. took the same view, and said (2):—"I think the defendant became possessed of the bottles with the full knowledge of the circumstances under which the plaintiff Company parted with possession of them, and I do not think that he can rely upon any intermediate act of the grocers or the private

(1) 15 W.A.L.R., 42, at p. 45. (2) 15 W.A.L.R., 42, at p. 46.

purchasers of the beer to justify his title to the possession of them." *Rooth* J. felt a doubt as to whether the course of proceedings did not disentitle the Company from alleging that the ultimate purchasers of the beer did not obtain a title to them. His Honor was not prepared to dissent, and therefore reluctantly agreed. The difficulty of *Rooth* J. was, therefore, as to the right of the retail customers to dispute the Company's title ; the other learned Judges, holding that, even assuming the consumers had that right, the present appellant had not, and *Parker* C.J., in the Court of first instance, holding that previous sales in similar circumstances did pass the property to the consumers.

It is evident, therefore, that the Supreme Court of Western Australia has neither found as a fact, nor held in law, that the retail customers were not entitled as against the bottle Company ; and that remains to be determined by us. And further, the legal position of a purchaser with notice from a person having a right by estoppel to dispute the original owner's title was directly determined in the judgment appealed from. It is the soundness or unsoundness of the view taken in that judgment as to the legal position of an ultimate purchaser with notice, that constitutes the chief importance of this case, and this leads me to consider the authorities on the point.

Mr. *Schutt* in this appeal again presented Mr. *Pilkington's* contention in a very clear and forcible manner.

I will first deal with the branch in which he argued that the hiring stipulations were a sham, and that the bargain was really one of sale. Where parties enter into a bargain with one another whereby certain rights and obligations are created, they cannot by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where Courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance. A recent instance is *Weiner* v. *Harris* (1). In that case *Fletcher Moulton* L.J. said (2) :—" No phrase can enable a person to misdescribe a contract, . . . you must look at what the contract is and not at what the parties say it is. Of course in ascertaining the contract you must give weight to all the phrases

(1) (1910) 1 K.B., 285.

(2) (1910) 1 K.B., 285, at p. 292.

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in the letter, but it is upon the whole letter that you have to decide what the contract is." And the Lord Justice proceeds to give various examples of misdescription which the Court will disregard in view of the real character of the transaction.

In the present case, however, if you look at the actual terms of the written bargain it is not in substance a sale, but is exactly what it professes to be. The mere circumstance that the consideration for one class of bottles is the same as the selling price of the other class, cannot change the nature of the transaction. And there is no other evidence tending to show a different contract.

The case must depend, then, on the question of estoppel. The doctrine of estoppel has been applied both by Courts of common law and Courts of equity. The different classes of rights respectively dealt with in those Courts, involving at times simultaneous consideration of other rules, tend to obscure the inherent nature of estoppel itself. It is necessary to bear in mind the warning given by Lord *Macnaghten* in *George Whitechurch Ltd.* v. *Cavanagh* (1), to attend to principles rather than cling to rules. The equitable doctrine is stated by Lord *Selborne* L.C. in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (2), that persons making representations of a certain nature shall so far as the powers of a Court of equity extend be treated as if the representations were true, and shall be compelled to make them good.

In *Barrow's Case* (3) the principle was applied by the Court of Appeal so as to protect purchasers of shares from persons who were in a position to claim the benefit of the doctrine in respect of those shares, even though the subsequent purchasers had notice.

There the rule was laid down that the mere fact of notice by the sub-purchasers made no difference—they not being within recognized exceptions. As a general principle that view is not shaken in any subsequent case, and is good law. But this is not a case of equitable right. It is one concerning legal title. Now, estoppel said Lord *Herschell* in *Bloomenthal* v. *Ford* (4) "is a

(1) (1902) A.C., 117, at p. 130.
(2) L.R. 6 H.L., 352, at p. 360.
(3) 14 Ch. D., 432.
(4) (1897) A.C., 156, at p. 167.

common law doctrine, and needs no assistance from the equitable doctrine of *bonâ fide* purchasers for value without notice. And more than that, I think there is a tendency perhaps to mislead—to draw the consideration away from the true questions at issue—when we begin to talk of 'purchasers for value without notice.' It is not to my mind a question of notice at all."

This so far supports the doctrine enunciated in *Barrow's Case* (1). The law of estoppel, as stated by Lord *Shand*, speaking for the Judicial Committee in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2), is that it mainly regards "the position of the person who was induced to act; and the principle . . . . is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." Now, it was argued by Mr. *Starke*, and it is implied in the judgments of the Supreme Court—except that of *Rooth* J.—that as the appellant here had notice, he was not induced to act within the meaning of that rule. The fallacy of that position is this, that the inducement to act applies only to the immediate party. Once his rights are established by the estoppel, they enure to the benefit of his privies. In *Richards* v. *Johnston* (3) *Martin* B. says, as to certain statements, "the party is estopped from disputing their truth with respect to that person and those claiming under him and that transaction; but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies and not strangers." This was reaffirmed by Lord *Esher* M.R. in *Richards* v. *Jenkins* (4). In the Indian case already referred to (5), the Privy Council so applied the rule. Ahmed was a person who by his conduct was estopped from asserting his title against a mortgagee of property, and persons claiming under him were held also estopped against a purchaser from the mortgagee. At p. 215, this passage appears:—"And their Lordships

(1) 14 Ch. D., 432.
(2) L.R. 19 Ind. App., 203, at p. 215.
(3) 4 H. & N., 660, at p. 664.
(4) 18 Q.B.D., 451, at pp. 456, 457.
(5) L.R. 19 Ind. App., 203.

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must further observe that, as the mortgage was effectual as a valid title to Kalimuddin, the lender, under which, in default of payment of the money lent, he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the hiba" (the deed under which the mortgagor Ahmed's mother claimed), "and that it had been originally invalid." To refuse the full benefit of the estoppel title to the purchaser would obviously detract from its value to the party first entitled to it by denying to ownership the right of alienation.

It is apparent, therefore, that if it could be shown here that the consumers had a right by estoppel against the bottle Company, Curtis as privy to them could also successfully rely on it notwithstanding notice of a title which as between his vendors and the Company had passed away from the Company. That necessitates inquiry, and for the first time, as to the consumers' rights.

It is no doubt well established law (see *George Whitechurch Ltd.* v. *Cavanagh* (1)) that estoppel must be established by evidence precise and unambiguous, in the sense that the language or conduct relied on must be such as will be reasonably understood in a particular sense by the person affected. But it is trite law also that "if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority": *Pickering* v. *Busk* (2).

Beyond question the Bottle Company contemplated as part of the use to which these bottles should be put, that they, containing beer, should be handed on to retail dealers for the purpose of being handed to customers in the ordinary course of business, that part of that business should be the sale of the contents, and that some right short of ownership and terminating only with consumption of the contents should pass to the purchaser in respect of the bottle. If no notice to the contrary were conveyed to a purchaser in the ordinary course of trade, I should say that notwithstanding the actual secret limitations of authority the

(1) (1902) A.C., 117, at p. 145.

(2) 15 East, 38, at p. 43.

property in the bottle also would be presumed to pass to him. The ostensible authority would be taken to be the real authority. So it comes to this: Was there a sufficient intimation to the purchaser that, notwithstanding the ordinary presumption of trade over the counter, the bottle itself was not to be sold, because it was not the property of the retailer to sell? I have had some doubt on account of the comparative indistinctness and want of conspicuousness of the notice at the foot of the bottle, and the absence of a statement that the notice is limited to the bottle. But, remembering that the onus of the issue lies on the appellant, on the whole I think he has not discharged it. The notice is there; the trade mark, prominent enough, is also there; the public advertisements notifying the actual positions were numerous; the matter was likely to be known in Perth, and particularly in the limited area assigned for the branded bottles; and no case of deception was proved, although witnesses likely to know of deception if it had occurred were called.

I agree, therefore, in the result that, upon the evidence in this case, no estoppel has been established in favour of the retail customers; and, that being so, the actual title of the Company must be given effect to, and the appeal dismissed.

RICH J. I also agree that the appeal should be dismissed. The evidence does not establish any case of estoppel against the respondent Company which would preclude them from setting up their proprietary title.

Appeal dismissed with costs.

Solicitors, for the appellant, *Lawson & Jardine* for *James & Darbyshire*, Perth.

Solicitors, for the respondents, *Pavey, Wilson & Cohen* for *Gawler, Hardwick & Forman*, Perth.

B. L.